

October 05, 2017

The Honorable Mark Warner
United States Senate
Washington, D.C. 20510

The Honorable Patrick Toomey
United States Senate
Washington, D.C. 20510

The Honorable Patrick McHenry
U.S. House of Representatives
Washington, D.C. 20515

The Honorable Gregory Meeks
U.S. House of Representatives
Washington, D.C. 20515

Dear Senators Warner and Toomey and Representatives McHenry and Meeks:

On behalf of the undersigned organizations representing U.S. small businesses and the small business lending industry, including community banks, commercial banks and financial technology companies, we thank you for introducing the Protecting Consumers' Access to Credit Act of 2017 (S. 1642 and H.R. 3299), bipartisan and bicameral legislation that would provide greater certainty and liquidity in commercial credit markets and thereby have a positive impact on access to credit for both consumers and small businesses.

The Protecting Consumers' Access to Credit Act would codify the "valid-when-made" doctrine, a longstanding legal principle, reaffirmed in 2016 by the U.S. Solicitor General, that if a loan is valid when it is made with respect to its interest rate, then it does not become invalid or unenforceable when assigned to another party. This bedrock common law principle has been a cornerstone of U.S. banking law for over 100 years. It provides critical legal certainty necessary for the effective and efficient functioning of the credit markets, thereby benefiting both individuals and small businesses.

This doctrine was recently indirectly undermined by the Second Circuit's decision in *Madden v. Midland Funding, LLC*. By calling into question the "valid-when-made" doctrine, the decision has injected uncertainty into the secondary markets for consumer and commercial credit, resulting in increased costs and decreased competition. Banks depend on the ability to sell or assign the loans they originate to provide liquidity to support their lending operations and to foster their safety and soundness.

However, after the *Midland* decision, potential purchasers of loans and interests in loan securitizations could face the risk that a loan that was valid at origination might be ruled invalid after assignment. This increased risk is likely to make purchasers less willing, if not entirely unwilling, to buy loans or interests in certain securitizations of loans that may turn out to be subject to additional state usury limits. If certain loans cannot be resold by banks, or if the ability to do so was substantially curtailed, banks would be forced to reduce the amount of credit they extend, and the price of credit would rise, increasing costs for borrowers.

According to a study featured in the Columbia Business School Research Paper Series entitled “How Does Legal Enforceability Affect Consumer Lending? Evidence from a Natural Experiment,” the decision has already had a negative impact on the availability of credit to certain segments of borrowers¹ and may harm financial services providers that rely on the availability and post-sale validity of loans originated by federal and state-chartered depository institutions.

The bill’s reaffirmation of the “valid-when-made” principle also could serve to encourage innovative partnerships between banks and financial technology companies that purchase bank loans or interests in securitizations of such loans, further expanding access to credit for U.S. small businesses and consumers.

Thank you for your support for issues impacting access to capital for small businesses, and we look forward to working with you on this legislation.

Sincerely,

National Federation of Independent Business
National Small Business Association
Small Business Entrepreneurship Council
Innovative Lending Platform Association
Marketplace Lending Association
Financial Innovation Now
Independent Community Bankers of America
American Bankers Association
The Consumer Bankers Association
The Clearing House
U.S. Chamber of Commerce

¹ http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2780215