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OCC's Final 'True Lender' Rule Should Boost Bank Lending

By **Eamonn Moran, Susan DiCicco and David Monteiro** (October 30, 2020, 5:19 PM EDT)

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The Office of the Comptroller of the Currency's Oct. 27 issuance of a final rule that determines when a national bank or federal savings association makes a loan and is the "true lender" in the context of a partnership between a bank and a third party, such as a marketplace lender, is a significant regulatory development that warrants the close attention of the national banking community and those who do business with national banks and federal savings associations.

While partnerships with state-chartered banks will not be affected unless and until the Federal Deposit Insurance Corp. engages in a comparable rulemaking, which it has not done, the OCC's rule, if upheld in the courts and through any Congressional Review Act process, has the potential to provide material clarity to the legal landscape for bank lenders and nonbank partners.

On the one hand, the rule should encourage banks to engage in new lending relationships or to expand their existing lending relationships. But on the other hand, banks, fintech firms, and nonbank lenders and servicers operating under a bank partnership model should continue to exercise diligence as they structure their programs.

Banks and those nonbank institutions they partner with should be particularly mindful of the OCC's supervisory expectations — banks remain fully responsible for consumer legal and regulatory compliance, as well as risk management responsibilities, in their relationships with nonbank partners.

Key Changes From the Proposed Rule

The final rule adopts the OCC's regulatory text largely as proposed. Several commenters noted that, under the proposed rule, two banks could be the true lender — e.g., if at origination, one bank is named as the lender on the loan agreement and another bank funds the loan.

In response to this comment, the OCC amended the rule to provide that where one bank is named as the lender in the loan agreement and another bank funds the loan, the bank named as the lender in the loan agreement is the bank that has originated the loan and is the true lender.

The OCC believes that this approach will provide additional clarity and allow stakeholders, including borrowers, to easily identify the bank that makes the loan.

Although some commenters recommended that the OCC adopt a test that requires the true lender to have a predominant economic interest in the loan and provide additional safe harbor requirements to enhance consumer protections (e.g., interest rate caps), the OCC opted not to do so in the final rule.

The OCC also rejected another commenter's recommendation that the OCC consider the safe harbor established in the recent settlement between the Colorado attorney general and several financial institutions and fintech lenders, stating that the OCC believes that its approach "achieves the goal of legal certainty while providing the necessary safeguards."

The OCC recognizes the concerns raised that this rulemaking may facilitate inappropriate "rent a charter" lending schemes. These are arrangements in which a bank receives a fee to rent its charter and unique legal status to a third party in order to enable the third party to evade state and local laws, including some state consumer protection laws, and to allow the bank to disclaim any compliance responsibility for the loans.

In response, the OCC stated:

> These arrangements have absolutely no place in the federal banking system and are addressed by this rulemaking, which holds banks accountable for all loans they make, including those made in the context of marketplace lending partnerships or other loan sale arrangements.

In particular, the OCC, as it did in the proposed rule, emphasized the robust supervisory framework that applies to any loan made by a bank and to all third-party relationships to which banks are a party, and issued a note of caution: If a bank fails to satisfy its obligations under this supervisory framework, the OCC — or the Consumer Financial Protection Bureau, depending on the structure of the bank and the activities it conducts — will use all the tools at its disposal, including its enforcement authority.

Takeaways

If upheld in the courts, the final rule has the potential to provide material clarity to the legal landscape for bank lenders, which have faced divergent and inconsistent results in the courts resulting in substantial legal uncertainty for banks and those doing business with banks. The final rule will operate together with the OCC's recently finalized Madden rule to provide greater clarity to banks regarding their lending activities.

This new legal certainty about whether a loan is made by a bank, and what rules apply as a result, should encourage banks to engage in new lending relationships or to expand their existing lending relationships.

The final rule applies only to national banks and federal savings associations. Partnerships with both member and nonmember state-chartered banks will not be affected unless and until the FDIC engages in a comparable rulemaking, which it has not done. It remains to be seen whether and in what form the FDIC may propose its own true lender rule.

This rulemaking may not resolve all legal certainty for every marketplace loan, even those involving national banks and federal savings associations. Although the OCC "is confident that its final rule

provides a clear and simple test for determining who is the true lender," the agency recognizes that, on occasion, there may be additional circumstances that make its application unclear. In those circumstances, banks with questions should contact the OCC.

Banks that partner with nonbanks to originate loans under this framework should pay close attention to the OCC's expectations about their level of involvement in the lending process. One consequence of a clear-cut rule establishing when a particular loan will be attributed to a bank is that the OCC expects banks to be fully responsible for consumer legal and regulatory compliance, including with respect to underwriting and fair lending.

Banks also are expected to have in place adequate and appropriate loan documentation practices, internal controls, information systems and internal audit systems. By the same token, the OCC makes clear that the final rule does not relieve OCC-regulated banks of their legal and risk management responsibilities in their relationships with nonbank partners, including those responsibilities detailed under the OCC's supervisory guidance on bank relationships with third-party lenders and service providers.

Similarly, nonbank partners need to remain mindful of these requirements in their dealings with OCC-regulated banks on lending-related activities and programs.

The likelihood of a court challenge to the OCC's authority to adopt such a rule from one or more state attorneys general, state regulators and other groups with standing to challenge this new rule would appear to be significant. In turn, the level of deference that courts may afford to this rulemaking remains to be seen and involves core questions of administrative law.

Although the OCC has managed to issue a final rule before the November election, it is not clear whether a new administration would be supportive of such regulatory changes, and there may also be opposition by state regulatory authorities and in Congress.

Therefore, banks, fintech firms and nonbank lenders and servicers operating under a bank partnership model should continue to exercise diligence as they structure their programs, and nonbank lenders should stay abreast of related state law requirements, including loan brokering and debt collector licensing requirements.

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