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The OCC Finalizes a Rule to Answer the True Lender Question

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The Office of the Comptroller of the Currency (**OCC**) has finalized a rule (**Final Rule**) establishing a bright-line test for determining the true lender of a loan. The Final Rule is intended to address the now-common lending arrangements involving a partnership between a national bank or federal savings association (**bank**) and a third party, such as a fintech marketplace lender. Under this Final Rule, a bank makes a loan if, as of the date of origination, the bank (1) is named as the lender in the loan agreement or (2) funds the loan.

The OCC adopted the Final Rule almost as proposed, except that it added a clarification that if a bank named as the lender in a loan agreement differs from the bank that funds the loan, the former is the true lender. Although the Final Rule applies only to national banks and federal savings associations, it is expected to influence state courts and state banking authorities.

The rule will become effective 60 days from its publication in the *Federal Register*, which is close enough to the election that Acting Comptroller Brooks would be well aware that it could be overturned by a Congressional Review Act vote depending upon the election results.

True Lender Question

As discussed in detail in our earlier **blog post** and **white paper**, before the Final Rule, there was no federal law that specifically clarified which entity makes a loan for purposes of determining the laws that apply to the loan. Courts have applied different approaches, and divergent standards in case law created legal uncertainty about the legal framework that applies to loans, particularly those made under arrangements involving banks and non-bank partners (**lending relationships**). There was a concern that this uncertainty could impair the availability of affordable credit by discouraging banks and third parties from entering into lending partnerships and by disrupting competition and innovation.

New Bright-Line Test under the Final Rule

The Final Rule, amending 12 C.F.R. Part 7, is designed to provide legal certainty for banks in making loans under lending partnerships with non-banks. The Final Rule states that a bank makes a loan whenever the bank, as of the date of origination:

- Is named as the lender in the loan agreement; or
- Funds the loan.

The Final Rule clarifies that if, as of the date of origination, one bank is named as the lender in the loan agreement and another bank funds that loan, the bank named as the lender in the loan agreement is the bank that makes the loan.

Under the Final Rule, therefore, whether a bank makes a loan is determined as of the date when the loan is originated, and that determination would last throughout the life of the loan regardless of whether the bank were to subsequently transfer the loan.

Different Stakeholder Views and Remaining Questions

The OCC made it clear that it understands many stakeholders have a concern that the rulemaking will facilitate inappropriate "rent-a-charter" lending schemes and thereby enabling nonbank lenders to engage in predatory or otherwise abusive lending practices. In response, the OCC emphasized that its robust supervisory framework applies to *any* loan made by a bank. When a bank makes a loan under a lending partnership, the OCC, as the prudential regulator of the bank, directly oversees the bank's lending activity as part of its routine supervision of the bank, which requires the bank to have prudent underwriting standards and loan documentation policies and procedures. If a bank fails to satisfy its obligations under this supervisory framework, the OCC can exercise its enforcement authority.

The Final Rule is controversial among consumer advocates. Various state attorney generals have filed litigation challenging the OCC's (and the FDIC's) final rule on the valid-when-made doctrine, which muddies the waters for the Final Rule. The Final Rule may suffer the same fate as the OCC's valid-when-made rule especially given that the OCC received approximately 4,000 comments on the **proposal** to the Final Rule and the vast majority of them were from *individuals* expressing opposition to the proposal. Some members of Congress, including Sen. Sherrod Brown, and

consumer advocacy groups[1] have already expressed their intent to seek ways to overturn the Final Rule, including using "every legislative tool available,"[2] which is a clear threat to use the Congressional Review Act procedures. The result of the upcoming election may also be an influencing factor.

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[1] *See e.g.*, a statement by the **National Consumer Law Center**.

[2] Sen. Sherrod Brown's **statement** on October 27, 2020.