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OCC Finalizes Bright-Line “True Lender” Rule

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On October 27, the Office of the Comptroller of the Currency (OCC) issued its final rule on how to determine when a national bank or federal savings association (referred to collectively as a national bank) is the “true lender” in the context of a partnership between a national bank and a third party. The final rule follows the OCC’s proposed rulemaking on July 22 with little deviation, establishing that when a national bank makes a loan, it is the true lender if, as of the date of origination, it (1) is named as the lender in the loan agreement or (2) funds the loan. The final rule provided additional clarification (addressing an issue raised in our alert on the proposed rulemaking) that in the event that one national bank is named as the lender in the loan agreement for a loan and another bank funds the loan, then, in that case, the national bank that is named as the lender in the loan agreement makes the loan and is considered the true lender.

The OCC received over 4,000 comment letters. The vast majority of comment letters opposed the rule but a significant amount of the letters opposed were stock, short form letters signed by different individuals reiterating the same positions. Other commentators included banks, nonbank lenders, trade groups, and government representatives. The main thrust against the rule was that it would increase rent-a-charter schemes and increase predatory lending and disproportionally impact marginalized communities. Those supporting the rule argued that the rule’s bright-line test would allow national banks to more confidently enter these third-party lender partnerships and provide underserved communities credit alternatives to pawn shops and payday lenders. Supportive commentators also noted that the rule would support safety and soundness by facilitating loan sales. In support of its final rule, the OCC reiterated its previous stance that the onerous “compliance obligations associated with the origination of that loan, [negates] concern regarding harmful rent-a-charter arrangements,” and it recognized the need for clear rules to foster partnerships between banks and third-party lenders to increase access to credit and keep banks competitive in the ever-evolving financial sector.

While the final rule is certainly a welcomed development for providing a bright-line test for the often difficult determination of who is the lender in circumstances when national banks partner with fintech companies to offer innovative credit alternatives, the FDIC’s failure to follow suit is regretful; many of the bank-fintech partnerships involve state-chartered banks, and therefore will not have the advantage of the clarification provided by the rule. Further, it is possible that the final rule may be challenged under the Congressional Review Act.

The rule will take effect 60 days after the publication in the *Federal Register.*

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