# The OCC Proposes Two Standards for the True Lender Question

July 22, 2020

As Acting Comptroller Brian Brooks promised in his **Statement on Becoming Acting Comptroller**, the OCC **proposed** a rule on July 20, 2020, setting forth standards for determining the true lender of a loan made in the context of a partnership between a national bank or federal savings association (**bank**) and a third party, such as a FinTech marketplace lender. Under this proposal, 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 expects that working together with the recently codified valid-when-made rule (**12 C.F.R. § 7.4001 and § 160.110**), this proposal would provide greater clarity to banks regarding their lending activities. The OCC invites comments on the proposal through September 3, 2020, especially on the appropriateness of the scope of lending arrangements covered by these proposed standards.

## True Lender Question

In the absence of a federal law specifically addressing the true lender question — which entity truly makes a loan in a bank's lending partnership — or a uniform supervisory or regulatory standard, courts are left to determine when a bank is making a loan versus when its third-party partner makes the loan. Courts have applied different approaches,[1] which have introduced "divergent standards" creating legal uncertainty about the legal framework that applies to loans made as part of a bank's lending partnership. Various market participants have expressed their concerns that such 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.

## Two Standards under the Proposed Rule

To address the legal uncertainty, the OCC seeks to amend 12 C.F.R. Part 7 and set forth simple standards, while explicitly rejecting a fact-intensive balancing test, such as the predominant economic interest test, which it believes is subjective and "unnecessarily complex and unpredictable." The OCC proposes to determine that a bank makes a loan in a lending partnership with a third party whenever the bank, as of the date of origination:

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

The OCC views the fact that a bank is named in a loan agreement as the lender as of the date of origination as conclusive evidence of the bank's exercise of its authority to make loans under federal law[2] and its election to be subject to the applicable federal banking laws and regulations, including but not limited to consumer protection laws. The OCC has added the second standard on funding of a loan to ensure that the proposed rule captures a circumstance where a bank is not named as the lender in the loan agreement but still has a predominant economic interest in the loan by funding it (e.g., through table funding arrangements).

[1] As examples, the OCC cited *Beechum v. Navient Solutions, Inc.* (No. EDCV 15-8239-JGB-KKx, 2016 WL 5340454 (C.D. Cal. Sept. 20, 2016)) and *CFPB v. CashCall, Inc.* (No. CV 15-7522-JFW, 2016 WL 4820635 (C.D. Cal. Aug. 31, 2016)).

[2] *See* 12 U.S.C. § 24, 12 U.S.C. § 371 and 12 U.S.C. § 1464(c).

Under the OCC's proposal, the true lender is determined as of the date of 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.

## Supervisory Consequences of Bank as Lender

Under the current supervisory framework, the OCC's prudential oversight applies differently depending on who the true lender is. When a bank makes a loan via a partnership with a third-party marketplace lender, 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. Banks are expected to ensure that their lending practice is in compliance with relevant consumer protection laws and federal fair lending laws, and is not predatory, unfair or deceptive. On the other hand, if the third-party marketplace lender partner makes the loan, the OCC does not directly supervise the lending activity as it is not the prudential regulator of the marketplace lender. The OCC's oversight is indirect through its supervision of the bank's third-party risk management, including the bank's policies and procedures that ensure adherence to its risk appetite and tolerances, as well as appropriate ongoing monitoring of the third party's relevant lending activities.

Given the nature and broadness of the two proposed standards, more loans would likely be deemed as made by a bank in the context of the lending partnership under the OCC's proposed rule than under multifactor balancing tests under case law.

## Different Stakeholder Views

Banks and FinTech marketplace lenders will surely welcome the simplicity of the proposed rule and its ability to bring clarity to an increasingly confused situation in the state courts. On the other hand, consumer advocacy groups and some state banking regulators will criticize the proposal on the theory that it will harm consumers by encouraging predatory lending.[3] It is to be hoped that common ground will be found.


If you have any questions regarding the matters covered in this publication, please contact any of the lawyers listed below or your usual Davis Polk contact.

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[3] *See e.g.,* statements by the **National Consumer Law Center**, **Center for Responsible Lending**, **National Community Reinvestment Coalition** and **Conference of State Bank Supervisors**.