

## OCC Proposes Rule To Settle 'True Lender' Question

By **Philip Rosenstein**

*Law360 (July 20, 2020, 10:58 PM EDT)* -- The Office of the Comptroller of the Currency proposed a rule Monday to clarify that a bank is the "true lender" of a loan if that institution is named on the loan document at the date of origination or if it funds the loan, as the agency seeks to address ambiguity amid the proliferation of bank partnerships in lending.

In the proposed rule, the OCC aims to address the "increasing uncertainty" in the legal framework that governs lending partnerships between banks or federal savings associations and third parties.

The notice of proposed rulemaking explains that while banks are authorized under federal law to transfer loans to third parties and assign loan contracts, the statutes do not address, nor do previous regulatory actions clarify, "which entity makes a loan and, therefore, what legal framework applies, when the loan is originated as part of a lending relationship between a bank and third party."

"The Office of the Comptroller of the Currency is proposing a regulation to determine 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," the rule's summary read. "Under this proposal, a bank makes a loan if, as of the date of origination, it is named as the lender in the loan agreement or funds the loan."

The notice outlines the different standards created by courts on the true lender question. On one hand, courts have ruled that "the form of the transaction alone resolves this issue," and on the other, courts have taken into consideration a variety of fact-intensive tests. Those tests might include the length of time a lender holds a loan prior to selling it off or whether there are guarantees of minimum payments from the third party, among others.

Among the cases the notice cited are *Beechum v. Navient Solutions Inc.*, where the court held that it would only look at the "face of the transactions," and *CFPB v. CashCall*, where the court examined "which party or entity has the predominant economic interest in the transaction."

"The OCC's proposal is a clear and very straightforward way of resolving the true lender issue," Karen Solomon, former acting senior deputy comptroller and chief counsel at the OCC and current senior of counsel at Covington & Burling LLP, told Law360.

According to the OCC's notice, the "rule would enable banks to fully exercise the lending authority

granted to them under Federal law and allow stakeholders to reliably and consistently identify key aspects of the legal framework applicable to a loan." The notice also highlighted concerns that continued uncertainty on the true lender issue could discourage bank partnerships, stem innovation and limit competition, "all of which may restrict access to affordable credit."

This proposed rule comes on the heels of the OCC and the Federal Deposit Insurance Corp. finalizing rules to address the related "valid when made" doctrine. The OCC **issued its final rule** in May, stating that interest rates established on bank-originated debt remain valid even after the debt is transferred to a nonbank partner. In its final rule on the valid when made doctrine, the office made it clear that it was not addressing the true lender question, despite commentators having asked for it to be included.

The FDIC board approved its own valid when made rule in June, clarifying that loans originated by state-chartered banks remain valid throughout the lifetime of the loan.

The uncertainties addressed by these rules follow from the 2015 Second Circuit decision in *Madden v. Midland Funding* that called the validity of maintaining interest rates post-transfer into question, as it cast doubt on the enforceability of some interest rates charged on loans that nonbanks acquire from bank originators.

Consumer groups released statements criticizing Monday's proposed rule, saying it would be a boon to "rent-a-bank" schemes and predatory lenders by allowing nonbanks to benefit unlawfully from exemptions national banks have from state usury laws.

Lauren Saunders, associate director at the National Consumer Law Center, told Law360 that the proposal is "outrageous" and beyond the OCC's authority. She said that the promulgation of such a rule addressing the true lender question would eviscerate state interest rate caps, and that the questions presented by true lender concerns should be left to the courts to decide.

"The OCC's 'true lender' proposal would turn state usury laws into a 'dead letter,' in the words of the U.S. Supreme Court, and eviscerate power that states have had since the time of the American Revolution to protect people from high interest rates and predatory lending," Saunders said in a statement.

Lisa Stifler, director of state policy at the Center for Responsible Lending, told Law360 in a statement, "The last thing we need now are more predatory, high-interest loans, but that is what this proposal would facilitate."

"It is unfortunate that the OCC is putting its stamp of approval on fraudulent schemes, whereby lenders 'rent a bank' to charge rates in violation of state interest cap laws," she added. "The OCC should rescind this proposal and instead focus on stopping these scams."

The agency is seeking comments on the rule through Sept. 3.

Covington's Solomon said the OCC makes clear in its notice that if a bank is designated the loan originator, it will be responsible for complying with a robust framework of consumer protection laws and safety and soundness standards.

In Monday's notice, the OCC outlines various consumer protection requirements that banks originating loans must comply with, including the Dodd-Frank Act and the Federal Trade Commission Act.

"The OCC has also taken significant steps to eliminate predatory, unfair, or deceptive practices in the Federal banking system," the notice said, adding that the agency requires banks that engage in lending to account for a borrower's ability to repay loans. The notice said the OCC has further "cautioned banks about lending activities that may be considered predatory, unfair, or deceptive."

"Establishing a bright-line standard will encourage and facilitate bank lending partnerships with fintech companies," Solomon added.

--Editing by Breda Lund.