



Financial Services & Products ADVISORY ■

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OCC's Final "True Lender" Rule Takes Effect

by *[Stephen Ornstein](#)*

On October 27, 2020, the Office of the Comptroller of the Currency (OCC) issued a noteworthy final rulemaking that sets forth when a national bank or federal savings association originates a loan and is deemed the "true lender" in the context of a partnership between a bank and a nonbank third party, known commonly as marketplace lending arrangements. Under the rule, the OCC considers the bank the true lender if it: (1) is named as the lender in the loan agreement; or (2) funds the loan. The rule clarifies, however, that under these arrangements, the bank retains the compliance, underwriting, and credit risk obligations associated with the origination of such loans. The rule becomes effective on December 29, 2020.

Background

Marketplace lending arrangements involve a partnership between a bank and a nonbank third party to offer consumers or small businesses, as the case may be, a variety of often nontraditional consumer and business loan products that are marketed and originated through innovative technologies. The advantage of these products is that consumers and small businesses are able to access credit quickly, in certain cases from their smartphones, without the laborious underwriting and approval procedures associated with traditional brick-and-mortar lending. The bank partner, which is the named originator in the lending documents, is able to export the often very favorable interest rate of the state where it is located without regard to state usury and fee limits and is, in most instances, exempt from state loan originator/servicer licensing requirements by virtue of being a bank.

Scrutiny of Marketplace Lending Arrangements

Marketplace lending arrangements have faced scrutiny from governmental regulators and courts over the past several years, and some have been derided as "rent-a-charter" schemes under which the nonbank partner essentially offers the particular loan products with minimal input from the bank partner to, among other things, evade state usury and fee limitations and licensing requirements that would ordinarily apply to the nonbank partner.

The OCC Rulemaking

In the rule, however, the OCC observed that marketplace lending arrangements expand credit opportunities beyond the reach of the customary lending traditionally offered by banks. The OCC recognized some of the challenges raised about such arrangements and issued the rule to provide "legal certainty" regarding these partnerships and

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to encourage banks to enter into them. Under the rule, a bank makes a loan when, as of origination, the bank (1) is named as the lender in the loan agreement; or (2) funds the loan.

To dispel any notion that the rule will facilitate rent-a-charter arrangements, the OCC clarifies that when making loans under these marketplace arrangements, banks are responsible for:

establishing and maintaining prudent credit underwriting practices that: (1) are commensurate with the types of loans the bank will make and consider the terms and conditions under which they will be made; (2) consider the nature of the markets in which the loans will be made; (3) provide for consideration, prior to credit commitment, of the borrower's overall financial condition and resources, the financial responsibility of any guarantor, the nature and value of any underlying collateral, and the borrower's character and willingness to repay as agreed; (4) establish a system of independent, ongoing credit review and appropriate communication to management and to the board of directors; (5) take adequate account of concentration of credit risk; and (6) are appropriate to the size of the institution and the nature and scope of its activities.

Lenders' Compliance Obligations

Notably, the OCC also tasks banks with the responsibility to (1) undertake comprehensive loan documentation practices; (2) adopt internal risk management controls; and (3) ensure compliance with all laws applicable to the marketplace lending programs offered. Further, the OCC warns banks to ensure that they adequately supervise their third-party partners and that the loans offered under such arrangements do not contain predatory, unfair, or deceptive or abusive features.

Takeaways

The OCC rulemaking is a significant victory for marketplace lending arrangements and provides needed guidance for ensuring that these partnerships comply with applicable law. The OCC rule, like the recent OCC and FDIC rulemakings affirming the "valid-when-made" doctrine, has been harshly criticized by certain state regulators and consumer groups for circumventing state usury, licensing, and consumer protection laws. Further, this OCC rulemaking may be amended or withdrawn by the incoming Biden Administration, especially since the current OCC director serves in an acting capacity and could be replaced by a more consumer-oriented leader.

Consistent with the OCC rule, we recommend that parties in marketplace lending arrangements heed the following to ensure that the bank is deemed the "true lender":

- The bank must play the primary role in underwriting and making credit decisions.
- The bank must play a major role in creating, branding, and marketing the program; these tasks may not be performed exclusively by the nonbank partner.
- The bank needs to make the required disclosures to the consumer in its name.
- The consumer should be aware that it's receiving a loan from the bank, not the nonbank partner.
- The bank should hold the predominant economic interest in the transaction through an examination of the totality of the circumstances.
- At a minimum, the nonbank partner should be licensed under applicable state law to buy the loans from the bank and to service the loans.

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