OCC Issues Final Rule on True Lender

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The Office of the Comptroller of the Currency (OCC) issued a **final rule** last week to establish a "simple, bright-line test" to determine when a national bank or federal savings association is the true lender. Under the rule, a bank is the true lender and makes a loan if, as of the date of origination, it (1) is named as the lender in the loan agreement or (2) funds the loan. Further, the final rule amended the initial proposed rule and added 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 that is named as the lender in the loan agreement is deemed to have made the loan. If it is ultimately effective, the rule should resolve legal uncertainty regarding the status of loans originated by national banks regardless of subsequent events or the channels through which loan applications are received. The final rule is effective on December 29, 2020.

In the notice, the OCC responded to some of the approximately 4,000 comments it received. Of note, the OCC discussed its authority to interpret rules that authorize banks to lend, 12 U.S.C. 24, 37, and 1464(c). The OCC also emphasized that its rule was entitled to deference – likely an attempt to dissuade a potential legal challenge similar to those brought against the OCC and FDIC in connection with their valid when made rulemakings. Moreover, the OCC stated that the rule's bright-line test and the OCC's robust supervisory framework for all loans made by a bank address concerns that the rule enables "rent-a-charter" schemes that seek to evade state usury limits.

Despite these comments, the OCC is still likely to see a legal challenge relating to the rule. The New York Attorney General, on behalf of 24 states, submitted a **comment** objecting to the OCC's then-proposed rule citing "rent-a-charter" concerns. As referenced above, the Attorneys General for California, Illinois, and New York filed a **complaint** in the Northern District of California against the OCC in connection with its valid when made rule, after making a similar **comment** in opposition during the rulemaking notice and comment process for that rule. If past is prologue, these Attorneys General are likely to move forward with a litigation challenge with respect to this rule shortly after it takes effect.

Please reach out to one of the authors or any member of McGlinchey's Consumer Financial Services Compliance team for help or questions.

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