True Lender Update: States vs. OCC; No FDIC Rule; Possible State True Lender Rules?

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In recent months, we've provided several updates on "True Lender" and "Valid When Made" developments from the **Office of the Comptroller of the Currency (OCC)**, **Federal Deposit Insurance Corporation (FDIC)**, and **state litigation**. For national banks, the OCC's True Lender rule became effective on December 29, 2020. However, as expected, the Attorneys General of New York, California, Colorado, the District of Columbia, Massachusetts, Minnesota, New Jersey, and North Carolina (the States) filed a federal lawsuit in New York shortly after the new year alleging that the OCC's True Lender rule is invalid. The States argue that the OCC's True Lender rule facilitates predatory lending, preempts state usury law, and enables "rent-a-bank" schemes. The complaint further alleges that the OCC exceeded its statutory authority and questions the timing of the OCC's rule with a new administration on the way, which may have different policy priorities set by a new Comptroller.

We also note in passing that the OCC has recently issued an interpretation of its authority to preempt state law that is intended to rebut the States' arguments regarding that authority (**Interpretive Letter 1173, December, 2020**). To briefly summarize, Interpretive Letter 1173 codified the OCC's position that the limitations on its authority to preempt state consumer finance laws created by the Dodd-Frank Act do not apply to the True Lender rule. The OCC believes that the True Lender rule merely interprets the lending authority of federally-chartered lenders and that its authority to issue such a rule, even where it may preempt other types of state law, is more expansive.

In contrast, the FDIC appears unlikely to issue a True Lender rule for state-chartered banks. At PLI's 25th Annual Consumer Financial Services Institute in December, Leonard Chanin, Deputy to the FDIC Chairman, stated that the FDIC does not have the same authority under the Federal Deposit Insurance Act as the OCC has under the National Bank Act to determine when a loan is made by a state bank. Mr. Chanin told attendees that state law typically controls when a loan is made by a state bank and the FDIC likely cannot preempt state law on this issue without federal legislation. While this is not an official position from the FDIC, readers should not expect to see the FDIC issue a "simple, bright-line test" as the OCC did. For institutions that participate in marketplace lending, most of which are state-chartered banks, the lack of an FDIC rule creates a significant exception to the federal support for the marketplace lending model and appears to largely leave the issue to the states.

Marketplace lending programs that have state-chartered depository institutions acting as the lender should be cautious following Mr. Chanin's statement, recent litigation, and a new incoming federal administration

expected to be more deferential to state lending regulation. However, the natural next step may lie in a state True Lender rule – which may or may not be uniform. States with depository institutions that are heavily involved in rate exportation lending programs, either for their own accounts or with non-bank partners, may wish to enact laws that establish a bright-line test to help protect resident banks and provide some certainty to marketplace participants. However, it is uncertain whether governmental agencies in a given state would second guess the chartering state's rule. Therefore, if enacted, we anticipate that out-of-state consumers or regulatory agencies who wish to curtail or restrict marketplace lending operations would continue to challenge those operations. Nevertheless, a state law that clarifies the lender under the agreement in a bank partnership model would help to solidify the bank's position as the "true lender."

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