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Alert

OCC Finalizes Rule Clarifying the 'True Lender' in Bank/Nonbank Lending Partnerships

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On Oct. 27, 2020, the Office of the Comptroller of the Currency ("OCC") finalized a rule[1] that clarifies that a national bank or federal savings association (each, a "Federally Chartered Bank") is the "true lender" of a loan if, as of the date of origination, it either (1) is named as the lender in the loan agreement or (2) funds the loan ("Final Rule"). The Final Rule addresses the uncertainty that existed under federal law with regard to whether loans made pursuant to a partnership with a nonbank would be subject to the panoply of applicable federal laws and regulations governing lending by banks (including those providing for interest rate exportation or federal preemption of state law).

The Final Rule largely tracks the proposed rule issued in July,[2] but clarifies that in a situation involving two banks (as opposed to a bank/nonbank partnership), if, as of the date of origination, one bank is named as the lender in a loan agreement and another bank funds that loan, the bank that is named as the lender will be deemed to have made the loan. The Final Rule also addresses concerns raised by some commenters as to the applicability of the Final Rule to certain lending or financing arrangements, such as mortgage warehouse lending, indirect auto lending, loan syndication and other structured finance. The Final Rule clarifies that in such scenarios, the bank is generally not the true lender as it does not fund the loan at the time of origination (and would also not be the lender of record). In contrast, the bank is the true lender in a table funding arrangement when the bank funds the loan at origination. The Final Rule further clarifies that the true lender bank retains the compliance obligations associated with origination of the loan.

The OCC is currently involved in a lawsuit with certain state attorneys general over its recent "valid-when-made" final rule[3] clarifying that when a national bank or a federal or state savings association sells, assigns or otherwise transfers a loan, an interest rate that is permissible before such transfer remains permissible following the transfer. It is likely that Tuesday's Final Rule will face similar challenges in the courts. Further, there is a possibility of repeal in the event that Democrats take the Presidency and Congress in next week's elections. Sen. Sherrod Brown (D-OH), ranking member of the U.S. Senate Committee on Banking, Housing, and Urban Affairs, has indicated that he plans to challenge the Final Rule using "every legislative tool available."[4]

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[1] *See* https://www.occ.gov/news-issuances/federal-register/2020/nr-occ-2020-139a.pdf.

[2] *See* https://www.srz.com/resources/occ-issues-proposed-rule-clarifying-the-true-lender-in-bank.html.

[3] *See* https://www.srz.com/resources/new-york-california-and-illinois-sue-to-block-occ-rule-that.html.

[4] *See* https://www.brown.senate.gov/newsroom/press/release/brown-blasts-occ-rent-a-bank-rule.

The Final Rule will take effect 60 days after publication in the *Federal Register*.

If you have any questions concerning this *Alert,* please contact your attorney at Schulte Roth & Zabel or one of the authors.

Authored by Joseph P. Vitale and Nicholas A. Wilson.

Schulte Roth & Zabel
New York | Washington DC | London
www.srz.com