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Via Electronic Submission

August 31, 2020

Chief Counsel's Office,
Attention: Comment Processing
Comptroller of the Currency,
400 7th Street SW, Suite 3E–218,
Washington, DC 20219.

Re: National Banks and Federal Savings Associations as Lenders (Docket ID OCC–2020–0026)

Dear Sir or Madam:

The Independent Community Bankers of America ("ICBA")[1] appreciates this opportunity to respond to the Office of the Comptroller of the Currency's (OCC) proposed regulation concerning when a national bank or a Federal savings association makes a loan and is the "true lender" in the context of a partnership between a bank and third party, such as a marketplace lender. **The OCC is proposing that 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.**

Background

Federal law authorizes banks to make loans and to subsequently transfer or assign loans.[2] But these statutes do not address which entity makes a loan or is the "true lender." Consequently, when there is litigation over these statutes in the context of third-party marketplace lenders, courts have come up with divergent opinions on who is the true lender when a bank originates and immediately sells or transfers a loan.

In some cases, the courts have said the entity named in the loan agreement is the true lender. In other cases, the courts have applied fact-intensive tests in which they have considered a number

[1]The Independent Community Bankers of America® creates and promotes an environment where community banks flourish. With more than 50,000 locations nationwide, community banks constitute 99 percent of all banks, employ nearly 750,000 Americans and are the only physical banking presence in one in three U.S. counties. Holding more than $5 trillion in assets, nearly $4 trillion in deposits, and more than $3.4 trillion in loans to consumers, small businesses and the agricultural community, community banks channel local deposits into the Main Streets and neighborhoods they serve, spurring job creation, fostering innovation and fueling their customers' dreams in communities throughout America.
ICBA is dedicated *exclusively* to representing the interests of the community banking industry and its membership through effective advocacy, best-in-class education, and high-quality products and services.

[2] See 12 U.S.C. 24, 371, and 1464. See also 12 CFR 7.4008, 34.3, 160.30.

of factors such as (1) how long the entity named as the lender holds the loan before selling it to a third party, (2) whether the third party advances money that the named lender draws on to make loans, (3) whether the third party guarantees minimum payments or fees to the named lender, and (4) whether the third party agrees to indemnify the named lender.[3] However, since each court weighs each factor differently, there is no uniform and predictable standard that bankers can use to determine who is the "true lender."

Recently, a settlement was reached in two Colorado cases that addressed the true lender doctrine.[4] Under the terms of the complicated settlement, a bank is a "true lender" if it engages in certain oversight activities, the terms of the loans conform to certain requirements including an interest rate ceiling of 36%, the fintech entity obtains all necessary licenses, the bank's role is disclosed to consumers, and the sale of the loans originated by the bank meet one of several types of structures. While the terms of the settlement apply only to the named parties, this settlement may encourage other states to raise the true lender issue and challenge community bank/fintech partnerships if the OCC proposal is not ultimately adopted.

ICBA's Position

ICBA endorses the OCC's proposed rule since it provides a clear and simple standard to determine when a bank makes a loan and is a "true lender." Without this clear standard, banks would not be able to fully exercise the authority granted to them under Federal law. For example, partnering with third party marketplace lenders, securitizations, and even simple sales of loans would pose significant legal risks to community banks if this standard is not adopted. **A uniform approach with clear, unambiguous standards would restore certainty, allowing banks to manage their risks and work more effectively with third parties.**

In our letter dated January 30, 2020 to the OCC and the FDIC concerning Federal Interest Rate Authority, ICBA said it fully supported the FDIC's and the OCC's proposal to codify by regulation their previous positions concerning the "valid-when-made" doctrine and reverse the negative impact that the *Madden* decision[5] has had on the secondary market for loans. We said that both Section 85 as well as Section 27 of the Federal Deposit Insurance Act support the agencies' legal position that when a bank sells, assigns, or otherwise transfers a loan, interest permissible prior to the transfer continues to be permissible following the transfer. We also said that the proposal would encourage lending and provide some needed consistency to the national legal framework in which banks operate. ICBA believes that the OCC's proposed rule on true lender is a logical next step to fully implement the "valid-when-made" doctrine.

If this proposal is adopted, it will be up to the OCC to ensure that consumer regulations are not evaded once a national bank is considered the true lender. ICBA remains concerned with "rent-a-bank" schemes that are often set up for the sole purpose to avoid state usury laws and other

[3] *See, e.g., Beechum* v. *Navient Solutions, Inc.,* (C.D. Cal. Sept. 20, 2016) (holding that the court will look ''only to the face of the transactions at issue''). *See also CFPB* v. *CashCall, Inc.,* (C.D. Cal. Aug. 31, 2016) and *CashCall, Inc.* v. *Morrisey,* (W.Va. May 30,2014).

[4] *Fulford v. Avant of Colorado, LLC, et al,* (Colo. Dist. Ct. Denver County); *Fulford v. Marlette Funding LLC et al.,* (Colo. Dist. Ct. Denver County).

[5] *Madden v. Midland Funding LLC,*786 **F.3d** 246, 247 (2d Cir. 2015).

state consumer protections. Clarity surrounding the true lender doctrine must promote accountability and should not absolve either a bank or its third-party partners of their regulatory responsibilities. It will be the responsibility of the OCC to ensure that banks do not exploit this rule to engage in activities that are considered predatory, unfair or deceptive.

Conclusion

ICBA supports that OCC's true lender proposal and believes that it will provide some legal clarity for community banks when they sell or assign loans or engage with third party marketplace lenders. If you have any questions or would like additional information, please do not hesitate to contact me at (202) 821-4431 or Chris.Cole@icba.org.

Sincerely,
/s/Christopher Cole

Christopher Cole,
Executive Vice President and Senior Regulatory Counsel
Independent Community Bankers of America