

The Importance of “True Lender”: The Community Bank Perspective

The Independent Community Bankers of America, representing community banks across the nation with more than 50,000 locations, appreciates the opportunity to provide this statement for the record for today’s hearing on the Office of the Comptroller of the Currency’s (OCC’s) “true lender” rule, “The Reemergence of Rent-a-Bank?” As we explained in [our comment letter](#) last August, we believe the OCC rule is critical to bringing clarity and accountability to lending and promoting wider access to credit through national bank and federal savings association partnership arrangements with third parties such as marketplace lenders. We urge your support for the OCC rule and oppose legislative efforts to repeal it using the Congressional Review Act (CRA).

Need for Clear “True Lender” Standard

The OCC’s true lender rule creates a clear and simple standard to determine when a bank makes a loan and is a “true lender.” Under the rule, a bank is a true lender if one of two conditions is met: (i) on the date of origination the bank is named as the lender in the loan agreement, or (ii) the bank funds the loan.

Without this clear standard, banks would not be able to fully exercise the authority granted to them under Federal law to sell, assign, or otherwise transfer loans. 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 were not in place. As a uniform approach with clear, unambiguous standards, the OCC rule creates certainty, allowing banks to manage their risks and work more effectively with third parties.

True Lender Supports Community Bank Fintech Partnerships

Community banks partner with financial technology companies (fintechs) to offer new and innovative products that reach more consumers and small business borrowers. These partnerships increase competition and product choice to the benefit of all. However, these partnerships cannot function effectively without the clear standard provided by the true lender rule.

True Lender Rule Creates Accountability for Consumer Compliance

A principal benefit of the new OCC rule is 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 of avoiding state usury laws and other state consumer protections. Clarity surrounding the true lender doctrine would promote accountability and should not absolve either a bank or its third-party partners of their regulatory responsibilities.

A True Lender Standard is a Necessary Complement to “Valid When Made” Rules

The OCC has recognized that the “valid-when-made” doctrine cannot be fully implemented without clarification of the “true lender” in any loan transfer.

The 2015 decision of the U.S. Court of Appeals for the Second Circuit in *Madden v. Midland Funding LLC* created considerable uncertainty about the validity of interest-rate terms after a national or state bank sells, assigns, or otherwise transfers a loan.

In response to this decision, both the FDIC and the OCC issued final regulations in 2020 that clarify that when a bank sells, assigns, or otherwise transfers a loan, interest permissible at the time the loan was made continues to be permissible following the transfer. ICBA strongly supports both the OCC and the FDIC regulations regarding federal interest rate authority. We agree that the bank’s power to make loans implicitly carries with it the power to assign loans, and therefore a national or state bank’s authority to make loans at particular rates necessarily includes the power to assign the loans at those rates. Denying an assignee – be it a bank or a non-bank – the right to enforce a loan’s terms would effectively reduce the salability of loans, make lenders less willing to originate loans, and thereby curtail access to credit, a critical ingredient of the post-COVID economic recovery.

This is the background and context in which the true lender rule must be understood. Valid-when-made cannot be fully implemented – and its benefits cannot be realized – without clarification of the true lender, particularly in the context of a partnership between a bank and third party, such as a marketplace lender.

Congressional Review Act Repeal of True Lender Would Create Legal Uncertainty and Limit Comptroller’s Discretion

ICBA opposes efforts to use the CRA to repeal the true lender rule. Repeal would only restore the considerable legal uncertainty that prevailed prior to the rule. A patchwork of court-created standards governed determination of the true lender in bank-third party partnerships. This uncertainty would undermine the creation, continuation, and investment in partnerships that are playing an important role in extending credit and supporting the economic recovery. Clarity, certainty, and accountability are necessary conditions of success.

What’s more, CRA is a blunt and counterproductive instrument. If true lender is repealed through CRA, the OCC would be prohibited from issuing any regulation in “substantially the same form.” Whatever one’s view of the current rule, we should all agree that a true lender rule is needed in some form to create the clarity necessary for a functioning credit market. While courts have not ruled on the scope of the phrase “substantially the same form,” CRA repeal of the current rule would unduly limit the discretion of the Comptroller in a way that is harmful to all interested parties.

Closing

Thank you again for convening today’s hearing. This is an important opportunity to examine the value of the OCC rule in extending credit and accountability for consumer compliance.