in section 2.7 of appendix C1 in subpart B of this part.

(iii) Standard size dishwashers with a ''normal cycle'', as defined in section 1.12 of appendix C1 in subpart B of this part, of 60 minutes or less are not currently subject to energy or water conservation standards. Standard size dishwashers have a capacity equal to or greater than eight place settings plus six serving pieces as specified in ANSI/ AHAM DW–1–2010 (incorporated by reference, see § 430.3) using the test load specified in section 2.7 of appendix C1 in subpart B of this part.

(2) [Reserved]

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DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

12 CFR Part 7

[Docket ID OCC–2020–0026]

RIN 1557–AE97

National Banks and Federal Savings Associations as Lenders

AGENCY: Office of the Comptroller of the Currency, Treasury.

ACTION: Final rule.

SUMMARY: The Office of the Comptroller of the Currency (OCC) is issuing this final rule to determine when a national bank or Federal savings association (bank) makes a loan and is the ''true lender,'' including in the context of a partnership between a bank and a third party, such as a marketplace lender. Under this rule, 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.

DATES: The final rule is effective on December 29, 2020.

FOR FURTHER INFORMATION CONTACT: Andra Shuster, Senior Counsel, Karen McSweeney, Special Counsel, Alison MacDonald, Special Counsel, or Priscilla Benner, Senior Attorney, Chief Counsel's Office, (202) 649–5490, Office of the Comptroller of the Currency, 400 7th Street SW, Washington, DC 20219. For persons who are deaf or hearing impaired, TTY users may contact (202) 649–5597.

SUPPLEMENTARY INFORMATION:

I. Background

Lending partnerships between national banks or Federal savings associations (banks) and third parties play a critical role in our financial system.[1] These partnerships expand access to credit and provide an avenue for banks to remain competitive as the financial sector evolves. Through these partnerships, banks often leverage technology developed by innovative third parties that helps to reach a wider array of customers. However, there is often uncertainty about how to determine which entity is making the loans and, therefore, the laws that apply to these loans.[2] This uncertainty may discourage banks from entering into lending partnerships, which, in turn, may limit competition, restrict access to affordable credit, and chill the innovation that can result from these relationships. Through this rulemaking, the Office of the Comptroller of the Currency (OCC) is providing the legal certainty necessary for banks to partner confidently with other market participants and meet the credit needs of their customers.

However, the OCC understands that there is concern that its rulemaking facilitates inappropriate 'rent-a-charter' lending schemes—arrangements in which a bank receives a fee to 'rent' its charter and unique legal status to a third party. These schemes are designed to enable the third party to evade state and local laws, including some state consumer protection laws, and to allow the bank to disclaim any compliance responsibility for the loans. These arrangements have absolutely no place in the federal banking system and are addressed by this rulemaking, which holds banks accountable for all loans they make, including those made in the context of marketplace lending partnerships or other loan sale arrangements.

On July 22, 2020, the OCC published a notice of proposed rulemaking (proposal or NPR) to determine when a bank makes a loan.[3] Under the proposal, a bank made a loan if, as of the date of origination, it (1) was named as the lender in the loan agreement or (2) funded the loan.

As the proposal explained, federal law authorizes banks to enter into contracts, to make loans, and to subsequently transfer these loans and assign the loan contracts.[4] The statutory framework, however, does not specifically address which entity makes a loan when the loan is originated as part of a lending partnership involving a bank and a third party, nor has the OCC taken regulatory action to resolve this ambiguity. In the absence of regulatory action, a growing body of case law has introduced divergent standards for resolving this issue, as discussed below. As a result of this legal uncertainty, stakeholders cannot reliably determine the applicability of key laws, including the law governing the permissible interest that may be charged on the loan.

This final rule establishes a clear test for determining when a bank makes a loan, by interpreting the statutes that grant banks their authority to lend. Specifically, the final rule provides that a bank makes a loan when it, as of the date of origination, (1) is named as the lender in the loan agreement or (2) funds the loan.

II. Overview of Comments

The OCC received approximately 4,000 comments on the proposal, the vast majority of which were from individuals using a version of one of three short form letters to express opposition to the proposal. Other commenters included banks, nonbank lenders, industry trade associations, community groups, academics, state government representatives, and members of Congress.

Commenters supporting the proposal stated that the judicial true lender doctrine has led to divergent standards and uncertainty concerning the legitimacy of lending partnerships between banks and third parties. They also stated that, by removing the uncertainty, the OCC would help ensure that banks have the confidence to enter into these lending relationships, which provide affordable credit to consumers on more favorable terms than the alternatives, such as pawn shops or payday lenders, to which underserved communities often turn. Supporting commenters also observed that the proposal would enhance a bank's safety and soundness by facilitating its ability to sell loans. These commenters also noted that the proposal (1) makes clear that the OCC will hold banks accountable for products with unfair, deceptive, abusive, or misleading features that are offered as part of a relationship and (2) is consistent with the OCC's statutory mission to ensure that banks provide fair access to financial services.

Commenters opposing the proposal stated that it would facilitate so-called rent-a-charter schemes, which would

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[1] In this rulemaking, use of the terms ''partner'' or ''partnership'' does not connote any specific legal relationship between a bank and a third party, and the terms ''partnership'' and ''relationship'' are used interchangeably to describe a variety of relationships between banks and third parties.

[2] This is often referred to as a question of which entity is the 'true lender.'

[3] 85 FR 44223.

[4] *See* 12 U.S.C. 24(Third), 24(Seventh), 371, 1464; *see also* 12 CFR 7.4008, 34.3, 160.30.

result in increased predatory lending and disproportionately impact marginalized communities. Other opposing commenters stated that the proposal is an attempt by the OCC to improperly regulate nonbank lenders, a role they consider to be reserved exclusively to the states. Opposing commenters also asserted that the OCC did not have sufficient legal authority to issue the proposal and that the proposal violated the Administrative Procedure Act (APA) and 12 U.S.C. 25b.

Both supporting and opposing commenters recommended changes. These recommendations included (1) adopting a test that requires the true lender to have a predominant economic interest in the loan; (2) providing additional ''safe harbor'' requirements to enhance consumer protections (*e.g.,* interest rate caps); (3) clarifying that certain traditional bank lending activities do not fall under the funding prong of the rule (*e.g.,* indirect auto lending and mortgage warehouse lending); (4) providing additional details on how the OCC would supervise these relationships; and (5) stating that the rule will not displace certain federal consumer protection laws and regulations.

The comments are addressed in greater detail below.

III. Analysis

As noted in the prior section, commenters raised a variety of issues for the OCC's consideration. These are discussed below.

A. OCC's Authority To Issue the Rule

Some commenters argued the OCC lacks the legal authority to issue the rule because it would contravene the unambiguous meaning of 12 U.S.C. 85. These commenters believe that section 85 incorporates the common law of usury as of 1864, which they view as requiring courts to look to the substance rather than the form of a transaction. In a similar vein, commenters argued that section 85 incorporates all usury laws of a state, including its true lender jurisprudence. One commenter also argued that the proposal contradicts judicial and administrative precedent interpreting sections 85 and 86.

The OCC disagrees. The rule interprets statutes that authorize banks to lend—12 U.S.C. 24, 371, and 1464(c)—and clarifies how to determine when a bank exercises this lending authority. The OCC has clear authority to reasonably interpret these statutes, which do not specifically address when a bank makes a loan.[5]

Banks do not obtain their lending authority from section 85 or 12 U.S.C. 1463(g). Nor are these statutes the authority the OCC is relying on to issue this rule. The proposal referenced sections 85 and 1463(g) in the regulatory text to ensure that interested parties understand the consequences of its interpretation of sections 24, 371, and 1464(c),[6] including that this rulemaking operates together with the OCC's recently finalized '*Madden*-fix' rulemaking.[7] When a bank makes a loan pursuant to the test established in this regulation, the bank may subsequently sell, assign, or otherwise transfer the loan without affecting the permissible interest term, which is determined by reference to state law.[8]

Other commenters questioned the OCC's authority on different grounds. Some asserted the OCC lacks authority to (1) exempt nonbanks from compliance with state law or (2) preempt state laws that determine whether a loan is made by a nonbank lender. One commenter also asserted that the proposal is an attempt by the OCC to interpret state law. A commenter further argued that the OCC's statutory interpretation is not reasonable, including because the proposal (1) would allow nonbanks to enjoy the benefits of federal preemption without submitting to any regulatory oversight and (2) violates the presumption against preemption, especially in an area of historical state police powers like consumer protection.

This rulemaking does not assert authority over nonbanks, preempt state laws applicable to nonbank lenders, or interpret state law. It interprets federal banking law and has *no* direct applicability to any nonbank entity or activity. Rather, in identifying the true lender, the rule pinpoints key elements of the statutory, regulatory, and supervisory framework applicable to the loan in question. As noted in the proposal, if a nonbank partner is the true lender, the relevant state (and not OCC) would regulate the lending activity, and the OCC would assess the bank's third-party risk management in connection with the relationship itself.

Furthermore, because commenters expressed concern that this rule would undermine state usury caps, it is also important to emphasize that sections 85 and 1463(g) provide a choice of law framework for determining which state's law applies to bank loans and, in this way, incorporate, rather than eliminate, state law. These statutes require that a bank refer to, and comply with, the usury cap established by the laws of the state where the bank is located. Thus, disparities between the usury caps applicable to particular bank loans result primarily from differences in the state laws that impose these caps, not from an interpretation that section 85 or 1463(g) preempt state law.

A commenter also asserted that the OCC's interpretation is not reasonable because it (1) does not solve the problem it claims to remedy, arguing that the proposal itself is unclear and requires banks to undertake a fact-specific analysis and (2) departs from federal cases holding that state true lender law applies to lending relationships between banks and nonbanks.

The OCC believes that this rule provides a simple, bright-line test to determine when a bank has made a loan and, therefore, is the true lender in a lending relationship. The only required factual analysis is whether the bank is named as the lender or funds the loan. The OCC has evaluated various standards established by courts and has determined that a clear, predictable, and easily administrable test is preferable. This test will provide legal certainty, and the OCC's robust supervisory framework effectively targets predatory lending, achieving the same goal as a more complex true lender test.

Several commenters also asserted that the proposal contravenes 12 U.S.C. 1, which charges the OCC with ensuring that banks treat customers fairly. One

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[5] *See Chevron U.S.A., Inc.* v. *Nat. Res. Def. Council, Inc.,* 467 U.S. 837, 843 (1984) (''[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.''); *see also National Cable & Telecommunications Assoc., et al.,* v. *Brand X internet Services et al.,* 545 U.S. 967 (2005); *Gutierrez-Brizuela* v. *Lynch,* 834 F.3d 1142 (10th Cir. 2016).

[6] Although this rulemaking is not an interpretation of either section 85 or 1463(g), the OCC has clear authority to interpret these statutes, including as a basis for this rulemaking. *See Smiley* v. *Citibank (S.D.), N.A.,* 517 U.S. 735 (1996) (*Smiley*) (deferring to the OCC's reasonable interpretation of section 85's ambiguity with respect to meaning of ''interest''). Section 1463(g) is interpreted *in pari materia* to section 85. *See Gavey Props./762* v. *First Fin. Sav. & Loan Ass'n,* 845 F.2d 519, 521 (5th Cir. 1988) (''Given the similarity of language, the conclusion is virtually compelled that Congress sought to provide federally insured credit institutions with the same 'most favored lender' status enjoyed by national banks.''); 61 FR 50951, 50968 (Sept. 30, 1996) (''OTS and its predecessor, the FHLBB, have long looked to the OCC regulation and other precedent interpreting the national bank most favored lender provision for guidance in interpreting [12 U.S.C. 1463(g)] and OTS's implementing regulation.''); OTS letter from Harris Weinstein, December 24, 1992, 1992 WL 12005275.

[7] *Permissible Interest on Loans That Are Sold, Assigned, or Otherwise Transferred,* 85 FR 33530 (June 2, 2020).

[8] 12 CFR 7.4001(e) and 160.110(d).

commenter also argued that the proposal is inconsistent with the Community Reinvestment Act (CRA) because it encourages predatory lending. As the OCC explained in the proposal, the rule's purpose is to provide legal certainty to expand access to credit, a goal that is entirely consistent with the agency's statutory charge to ensure fair treatment of customers and banks' statutory obligation to serve the convenience and needs of their communities.

B. 12 U.S.C. 25b

Several commenters asserted that the agency should have complied with 12 U.S.C. 25b, which applies when the OCC issues a regulation or order that preempts a state consumer financial law. Some of these commenters argued that the proposal fails to meet the preemption standard articulated in *Barnett Bank of Marion County, N.A.* v. *Nelson, Florida Insurance Commissioner, et al.* (*Barnett*),[9] as incorporated into section 25b. Commenters also argued that (1) section 25b(f) does not exempt the OCC's proposal from the requirements of section 25b because the rule is not limited to banks charging interest and (2) the proposal undermines or contravenes section 25b(h) because it extends preemptive treatment to subsidiaries, affiliates, and agents of banks.

The OCC disagrees: The requirements of section 25b are inapplicable to this rulemaking. Section 25b applies when the Comptroller determines, on a case-by-case basis, that a state consumer financial law is preempted pursuant to the standard for conflict preemption established by the Supreme Court in *Barnett, i.e.,* when the Comptroller makes a preemption determination.[10] This rulemaking does not preempt a state consumer financial law but rather interprets a bank's federal authority to lend. Furthermore, commenters arguing that section 25b(f) (which addresses section 85) does not exempt this rulemaking from the procedures in section 25b and that sections 25b(b)(2), (e), and (h)(2) (which address bank subsidiaries, affiliates, and agents) preclude the agency from issuing this rule are mistaken; this rulemaking is not an interpretation of section 85, nor does it address the applicability of state law to bank subsidiaries, affiliates, or agents.

C. Administrative Procedure Act

Several commenters asserted that, for various reasons, the proposal is arbitrary and capricious and, therefore, in violation of the APA. Some commenters argued that the proposal lacks an evidentiary basis, either entirely or with respect to certain assertions, such as the existence of legal uncertainty. The OCC disagrees. The APA's arbitrary and capricious standard requires an agency to make rational and informed decisions based on the information before it.[11] Furthermore, the standard does not require the OCC to develop or cite empirical or other data to support its rule or wait for problems to materialize before acting.[12] Instead, the OCC may rely on its expertise to address the problems that may arise.[13]

The OCC has decided to issue this rule to resolve the effects of legal uncertainty on banks and their third-party relationships. In this case, the OCC's views are informed by courts' divergent true lender tests and the resulting lack of predictability faced by stakeholders.[14] While the OCC understands its rule may not resolve all legal uncertainty for every loan, this is not a prerequisite for the agency to take this narrowly tailored action.[15] Taking these considerations into account, the OCC has made a rational and informed decision to issue this rule.

Commenters also argued that the OCC's actions violate the APA because the agency has not given notice of its intention to reverse an existing policy or provided the factual, legal, and policy reasons for doing so. Specifically, these commenters referenced the OCC's longstanding policy prohibiting banks from entering into rent-a-charter schemes. This rulemaking does not reverse the OCC's position. The OCC's longstanding and unwavering opposition to predatory lending, including but not limited to predatory lending as part of a third-party relationship, remains intact and strong.[16] In fact, this rulemaking would solve the rent-a-charter issues raised and ensure that banks do not participate in those arrangements. As noted in the proposal, the OCC's statutes and regulations, enforceable guidelines, guidance, and enforcement authority provide robust and effective safeguards against predatory lending when a bank exercises its lending authority. This rule does not alter this framework but rather reinforces its importance by clarifying that it applies to every loan a bank makes and by providing a simple test to identify precisely when a bank has made a loan. If a bank fails to satisfy its compliance obligations, the OCC will not hesitate to use its enforcement authority consistent with its longstanding policy and practice.

Furthermore, the final rule does not change the OCC's expectation that all banks establish and maintain prudent credit underwriting practices and

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[9] 517 U.S. 25 (1996).

[10] Twelve U.S.C. 25b(b) also provides (1) a state consumer financial law is preempted if it has a discriminatory effect on national banks, in comparison with the effect of the law on a bank chartered by that state or (2) a state consumer financial law may be preempted by a provision of federal law other than title 62 of the Revised Statutes. *See* 12 U.S.C. 25b(b)(1)(A) and (b)(1)(C), respectively.

[11] *Ass'n of Private Colls. & Univs.* v. *Duncan,* 870 F. Supp. 2d 133, 154 (D.D.C. 2012); *see Motor Vehicle Mfrs. Ass'n of U.S., Inc.* v. *State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 52 (1983) (''The agency must explain the evidence which is available, and must offer a 'rational connection between the facts found and the choice made.' '' (quoting *Burlington Truck Lines, Inc.* v. *United States,* 371 U.S. 156, 168 (1962))).

[12] *Stilwell* v. *Office of Thrift Supervision,* 569 F.3d 514, 519 (D.C. Cir. 2009) (''The APA imposes no general obligation on agencies to produce empirical evidence. . . . Moreover, agencies can, of course, adopt prophylactic rules to prevent potential problems before they arise. . . . OTS based its proposal on its long experience of supervising mutual savings associations; its view found support in various comments submitted in response to the proposal.''); *Chamber of Commerce of U.S.* v. *SEC,* 412 F.3d 133, 142 (D.C. Cir. 2005) (holding that the SEC did not have to conduct an empirical study in support of its rulemaking where it based its decision on ''its own and its staff's experience, the many comments received, and other evidence, in addition to the limited and conflicting empirical evidence'').

[13] *FCC* v. *WNCN Listeners Guild,* 450 U.S. 582, 595–96 (1981) (granting deference to the agency's ''forecast of the direction in which future public interest lies''); *U.S. Telecom Ass'n* v. *FCC,* 825 F.3d 674, 732 (D.C. Cir. 2016) (''[A]n agency's predictive judgments about areas that are within the agency's field of discretion and expertise are entitled to *particularly deferential* review, as long as they are reasonable.'' (emphasis in original) (quoting *EarthLink, Inc.* v. *FCC,* 462 F.3d 1, 12 (D.C. Cir. 2006)).

[14] As explained in the proposal, in some cases, the court has concluded that the form of the transaction alone resolves this issue. In other cases, the courts have applied fact-intensive balancing tests, in which they have considered a multitude of factors. However, no factor is dispositive, nor are the factors assessed based on any predictable, bright-line standard. Even when nominally engaged in the same analysis—determining which entity has the ''predominant economic interest'' in the transaction—courts do not necessarily consider all of the same factors or give each factor the same weight. *See* 85 FR at 44224, n.8–15 and accompanying discussion. The comments the agency received from industry representatives further evidence this uncertainty.

[15] *See Taylor* v. *Fed. Aviation Admin.,* 895 F.3d 56, 68 (2018); *cf. Smiley,* 517 U.S. at 743 (stating ''that there was good reason for the Comptroller to promulgate the new regulation, in order to eliminate uncertainty and confusion'').

[16] Commenters also asserted that this rulemaking is inconsistent with OCC Interpretive Letter 1002 (May 13, 2004) (IL 1002), which specifically recognized the relationship between the entity that makes a loan and the applicable legal framework. While IL 1002 provides examples of how to determine which party makes a loan (*e.g.,* the party that funded the loan), it did not purport to establish a determinative true lender test. By establishing such a test, this rulemaking complements IL 1002 and does not represent a reversal of an agency position.

comply with applicable law, even when they partner with third parties. These expectations were in place before the OCC issued its proposal and will remain in place after the final rule takes effect. For these reasons, the final rule does not represent a change in OCC policy.

D. Comments on the Proposed Regulatory Text

As noted previously, the OCC's proposed regulatory text set out a test for determining when a bank has made a loan for purposes of 12 U.S.C. 24, 85, 371, 1463(g), and 1464(c). Under this test, a bank made a loan if, as of the date of origination, it was named as the lender in the loan agreement or funded the loan.

Some commenters supported the rule without change, stating that the proposal provided the clarity needed to determine which entity is the true lender in a lending relationship. Other commenters supported the proposal as a general matter but suggested specific changes, including clarifying that the funding prong does not include certain lending or financing arrangements such as warehouse lending, indirect auto lending (through bank purchases of retail installment contracts (RICs)), loan syndication, and other structured finance.

These commenters are correct that the funding prong of the proposal generally does not include these types of arrangements: They do not involve a bank funding a loan at the time of origination. For example, when a bank purchases a RIC from an auto dealer, as is often the case with indirect auto lending, the bank does not ''fund'' the loan.[17] When a bank provides a warehouse loan to a third party that subsequently draws on that warehouse loan to lend to other borrowers, the bank is not funding the loans to these other borrowers. In contrast, and as noted in the proposal, the bank is the true lender in a table funding arrangement when the bank funds the loan at origination.[18]

Another commenter recommended that the OCC consider the ''safe harbor'' established in the recent settlement between the Colorado Attorney General and several financial institutions and fintech lenders.[19] While we are aware of this settlement, the OCC believes that our approach achieves the goal of legal certainty while providing the necessary safeguards.

One commenter requested that the OCC expressly state in the final rule that the rulemaking is not intended to displace or alter other regulatory regimes, including those that address consumer protection. Another commenter requested that the OCC clarify how account information in true lender arrangements should be reported to consumer reporting agencies under the Fair Credit Reporting Act. As the preamble to the proposal noted, the OCC's rule does not affect the application of any federal consumer financial laws, including, but not limited to, the meaning of the terms (1) ''creditor'' in the Truth in Lending Act (15 U.S.C. 1601 *et seq.*) and Regulation Z (12 CFR part 1026) and (2) ''lender'' in Regulation X (12 CFR part 1024), which implements the Real Estate Settlement Procedures Act of 1974 (12 U.S.C. 2601 *et seq.*). Similarly, the OCC's rule does not affect the applicability of the Home Mortgage Disclosure Act (12 U.S.C. 2801 *et seq.*), the Equal Credit Opportunity Act (15 U.S.C. 1691 *et seq.*), the Fair Credit Reporting Act (15 U.S.C. 1681 *et seq.*), or their implementing regulations (Regulation C (12 CFR part 1003), Regulation B (12 CFR part 1002), and Regulation V (12 CFR part 1022)), respectively. The OCC recommends that commenters direct questions regarding these statutes and regulations to the Consumer Financial Protection Bureau.

Some commenters stated that the two prongs in the proposal's test would produce contradictory and absurd results. For example, several commenters noted that, under the proposal, two banks could be the true lender (*e.g.,* at origination, one bank is named as the lender on the loan agreement and another bank funds the loan). In response to this comment, we have amended the regulatory text to provide that where one bank is named as the lender in the loan agreement and another bank funds the loan, the bank named as the lender in the loan agreement makes the loan. This approach will provide additional clarity and allow stakeholders, including borrowers, to easily identify the bank that makes the loan. Otherwise, the OCC adopts the regulatory text as proposed.

E. Rent-a-Charter Concerns; Supervisory Expectations

The OCC received multiple comments expressing concern that the proposal would facilitate rent-a-charter relationships and thereby enable nonbank lenders to engage in predatory or otherwise abusive lending practices. These commenters noted that nonbanks are generally not subject to the type of prudential supervision that applies to banks and that usury caps are the most effective method to curb predatory lending by nonbanks. They argued that the OCC's rule would effectively nullify these caps and facilitate the expansion of predatory lending.

As explained above, in a rent-a-charter arrangement, a lender receives a fee to rent out its charter and unique legal status to originate loans on behalf of a third party, enabling the third party to evade state and local laws, such as usury caps and other consumer protection laws. At the same time, the lender disclaims any responsibility for these loans. As a result of these arrangements, consumers can find themselves in debt to an unscrupulous nonbank lender that is subject to very little or no prudential supervision on a loan at an interest rate grossly in excess of the state usury cap.

The OCC agrees that rent-a-charter schemes have no place in the federal financial system but disagrees that this rule facilitates such schemes. As noted above, instead, this proposal would help solve the problem by (1) providing a clear and simple test for determining when a bank makes a loan and (2) emphasizing the robust supervisory framework that applies to *any* loan made by a bank and to all third-party relationships to which banks are a party. As noted above, if a bank fails to satisfy its obligations under this supervisory framework, the OCC will use all the tools at its disposal, including its enforcement authority.[20]

Although the proposal discussed this supervisory framework in detail, it bears repeating because of its importance to

[17] Two commenters requested that the OCC clarify that references to a ''loan'' apply solely to finance arrangements that involve a loan of *money,* such as have been the subject of the bank-nonbank partnership arrangements prompting the proposal, and not to time price sales entered into by retail sellers regulated under applicable state sales finance laws (*e.g.,* RICs). We agree—the rule is intended to apply to loans of money by banks and not to retail sales of goods under RICs.

[18] Although the OCC is confident that its rule provides a clear and simple test for determining who is the true lender, the agency recognizes that, on occasion, there may be additional circumstances in which its application is unclear. In these circumstances, banks with questions should contact the OCC.

[19] Assurance of Discontinuance, *In re Avant of Colorado, LLC and Marlette Funding, LLC* (Aug. 7, 2020), *available at https://coag.gov/app/uploads/2020/08/Avant-Marlette-Colorado-Fully-Executed-AOD.pdf.*

[20] Depending on the structure of the bank and the activities it conducts, other regulators may have oversight roles as well. For example, the Consumer Financial Protection Bureau has exclusive supervisory authority and primary enforcement authority for federal consumer financial laws for banks that are insured depository institutions and have assets greater than $10 billion. *See* 12 U.S.C. 5515. The OCC generally has exclusive supervisory and enforcement authority for banks with assets of $10 billion or less. *See* 12 U.S.C. 5516, 5581(c)(1)(B).

this rulemaking. Every bank is responsible for establishing and maintaining prudent credit underwriting practices that: (1) Are commensurate with the types of loans the bank will make and consider the terms and conditions under which they will be made; (2) consider the nature of the markets in which the loans will be made; (3) provide for consideration, prior to credit commitment, of the borrower's overall financial condition and resources, the financial responsibility of any guarantor, the nature and value of any underlying collateral, and the borrower's character and willingness to repay as agreed; (4) establish a system of independent, ongoing credit review and appropriate communication to management and to the board of directors; (5) take adequate account of concentration of credit risk; and (6) are appropriate to the size of the institution and the nature and scope of its activities.[21] Moreover, every bank is expected to have loan documentation practices that: (1) Enable the institution to make an informed lending decision and assess risk, as necessary, on an ongoing basis; (2) identify the purpose of a loan and the source of repayment and assess the ability of the borrower to repay the indebtedness in a timely manner; (3) ensure that any claim against a borrower is legally enforceable; (4) demonstrate appropriate administration and monitoring of a loan; and (5) take account of the size and complexity of a loan.[22] Every bank should also have appropriate internal controls and information systems to assess and manage the risks associated with its lending activities, including those that provide for monitoring adherence to established policies and compliance with applicable laws and regulations, as well as internal audit systems.[23]

In addition, a bank's lending must comply with all applicable laws and regulations, including federal consumer protection laws. For example, section 5 of the Federal Trade Commission Act (FTC Act) provides that ''unfair or deceptive acts or practices in or affecting commerce'' are unlawful.[24] The Dodd-Frank Wall Street Reform and Consumer Protection Act also prohibits unfair, deceptive, or ''abusive'' acts or practices.[25] The OCC has taken a number of public enforcement actions against banks for violating section 5 of the FTC Act and will continue to exercise its enforcement authority to address unlawful actions.[26]

Banks also are subject to federal fair lending laws and may not engage in unlawful discrimination, such as ''steering'' a borrower to a higher cost loan on the basis of the borrower's race, national origin, age, or gender. If a bank engages in any unlawful discriminatory practices, the OCC will take appropriate action under the federal fair lending laws.[27] Further, under the CRA regulations, CRA-related lending practices that violate federal fair lending laws, the FTC Act, or Home Ownership and Equity Protection Act, or that evidence other discriminatory or illegal credit practices, can adversely affect a bank's CRA performance rating.[28]

The OCC has also taken significant steps to eliminate predatory, unfair, or deceptive practices in the federal banking system, recognizing that ''[s]uch practices are inconsistent with important national objectives, including the goals of fair access to credit, community development, and stable homeownership by the broadest spectrum of America.'' [29] To address these concerns, the OCC requires banks engaged in lending to take into account the borrower's ability to repay the loan according to its terms.[30] In the OCC's experience, ''a departure from fundamental principles of loan underwriting generally forms the basis of abusive lending: Lending without a determination that a borrower can reasonably be expected to repay the loan from resources other than the collateral securing the loan, and relying instead on the foreclosure value of the borrower's collateral to recover principal, interest, and fees.'' [31]

Additionally, the OCC has cautioned banks about lending activities that may be considered predatory, unfair, or deceptive, noting that many such lending practices are unlawful under existing federal laws and regulations or otherwise present significant safety, soundness, or other risks. These practices include those that target prospective borrowers who cannot afford credit on the terms being offered, provide inadequate disclosures of the true costs and risks of transactions, involve loans with high fees and frequent renewals, or constitute loan ''flipping'' (frequent re-financings that result in little or no economic benefit to the borrower that are undertaken with the primary or sole objective of generating additional fees).[32] Policies and procedures should also be designed to ensure clear and transparent disclosure of the terms of the loan, including relative costs, risks, and benefits of the loan transaction, which helps to mitigate the risk that a transaction could be unfair or deceptive. The NPR also highlighted specific questions that the OCC evaluates as part of its robust supervision of banks' lending relationships.[33]

In addition to this framework targeted at banks' lending activities, the OCC has issued comprehensive guidance on third-party risk management.[34] These standards apply to any relationship between a bank and a third party, including lending relationships, regardless of which entity is the true lender. Pursuant to this guidance, the OCC expects banks to institute appropriate safeguards to manage the risks associated with their third-party relationships.

Under the final rule, this robust supervisory framework will continue to apply to banks that are the true lender in a lending relationship with a third party. Rather than allowing banks to enter into rent-a-charter schemes, the final rule will ensure that banks understand that the OCC will continue

[21] 12 CFR part 30, appendix A, II.D; *see* 12 CFR part 34, appendix A to subpart D.

[22] 12 CFR part 30, appendix A, II.C.

[23] 12 CFR part 30, appendix A, II.A and II.B.

[24] 15 U.S.C. 45; *see also* 12 CFR 7.4008(c), 34.3(c), part 30, appendix C. Further, OCC guidance directly addresses unfair or deceptive acts or practices with respect to banks. *See* OCC Advisory Letter 2002–3, ''Guidance on Unfair or Deceptive Acts or Practices'' (Mar. 22, 2002); OCC Advisory Letter 2003–2, ''Guidelines for National Banks to Guard Against Predatory and Abusive Lending Practices'' (Feb. 21, 2003); OCC Advisory Letter 2003–3, ''Avoiding Predatory and Abusive Lending Practices in Brokered and Purchased Loans'' (Feb. 21, 2003); and OCC Bulletin 2014–37, ''Risk Management Guidance: Consumer Debt Sales'' (Aug. 4, 2014).

[25] Public Law 111–203, tit. X, sections 1031 and 1036, 124 Stat. 2005, 2010 (*codified at* 12 U.S.C. 5531 and 5536). The OCC recently issued a new booklet of the *Comptroller's Handbook* to provide guidance to examiners about the risks of banks and third parties engaging in lending, marketing, or other practices that may constitute unfair or deceptive acts or practices or unfair, deceptive, or abusive acts or practices. *See Comptroller's Handbook,* ''Consumer Compliance, Unfair or Deceptive Acts or Practices and Unfair, Deceptive, or Abusive Acts or Practices'' (June 2020).

[26] *See* 12 U.S.C. 1818(b).

[27] *See* 15 U.S.C. 1691; 42 U.S.C. 3601 *et seq.* As noted above, *supra* note 20, other regulators may have oversight roles as well and can be expected to take appropriate enforcement action to address unlawful action within their jurisdiction.

[28] *See* 12 CFR 25.17; 12 CFR part 25, appendix C, 12 CFR 25.28(c).

[29] OCC Advisory Letter 2003–2.

[30] *See,* 12 CFR 7.4008(b), 34.3(b), part 30, appendix A, II.C.2 and II.D.3.

[31] OCC Advisory Letter 2003–2, at 3.

[32] *See* OCC Advisory Letter 2000–7, ''Abusive Lending Practices'' (July 25, 2000); OCC Advisory Letter 2000–10, ''Payday Lending'' (Nov. 27, 2000); OCC Advisory Letter 2003–2; OCC Advisory Letter 2003–3; and OCC Bulletin 2014–37.

[33] *See* 85 FR at 44227.

[34] *See, e.g.,* OCC Bulletin 2013–29, ''Third-Party Relationships: Risk Management Guidance'' (Oct. 30, 2013); OCC Bulletin 2020–10, ''Third-Party Relationships: Frequently Asked Questions to Supplement OCC Bulletin 2013–29'' (Mar. 5, 2020).

to hold banks accountable for their lending activities.

IV. Regulatory Analyses

Paperwork Reduction Act. In accordance with the requirements of the Paperwork Reduction Act of 1995 (PRA), 44 U.S.C. 3501 *et seq.,* the OCC may not conduct or sponsor, and respondents are not required to respond to, an information collection unless it displays a currently valid Office of Management and Budget (OMB) control number. The OCC has reviewed the final rule and determined that it will not introduce any new or revise any existing collection of information pursuant to the PRA. Therefore, no submission will be made to OMB for review.

Regulatory Flexibility Act. The Regulatory Flexibility Act (RFA), 5 U.S.C. 601 *et seq.,* requires an agency, in connection with a final rule, to prepare a Final Regulatory Flexibility Analysis describing the impact of the rule on small entities (defined by the Small Business Administration (SBA) for purposes of the RFA to include commercial banks and savings institutions with total assets of $600 million or less and trust companies with total assets of $41.5 million or less) or to certify that the final rule would not have a significant economic impact on a substantial number of small entities.

The OCC currently supervises approximately 745 small entities. The OCC expects that all of these small entities would be impacted by the rule. While this final rule could affect how banks structure their current or future third-party relationships as well as the amount of loans originated by banks, the OCC believes the costs associated with any administrative changes in bank lending policies and procedures would be *de minimis.* Banks already have systems, policies, and procedures in place for issuing loans when third parties are involved. It takes significantly less time to amend existing policies than to create them, and the OCC does not expect any needed adjustments will involve an extraordinary demand on a bank's human resources. In addition, any costs would likely be absorbed as ongoing administrative expenses. Therefore, the OCC certifies that this rule will not have a significant economic impact on a substantial number of small entities. Accordingly, a Final Regulatory Flexibility Analysis is not required.

Unfunded Mandates Reform Act. Consistent with the Unfunded Mandates Reform Act of 1995 (UMRA), 2 U.S.C. 1532, the OCC considers whether a final rule includes a federal mandate that may result in the expenditure by state, local, and tribal governments, in the aggregate, or by the private sector, of $100 million adjusted for inflation (currently $157 million) in any one year. The final rule does not impose new mandates. Therefore, the OCC concludes that implementation of the final rule would not result in an expenditure of $157 million or more annually by state, local, and tribal governments, or by the private sector.

Riegle Community Development and Regulatory Improvement Act. Pursuant to section 302(a) of the Riegle Community Development and Regulatory Improvement Act of 1994 (RCDRIA), 12 U.S.C. 4802(a), in determining the effective date and administrative compliance requirements for new regulations that impose additional reporting, disclosure, or other requirements on insured depository institutions, the OCC must consider, consistent with principles of safety and soundness and the public interest, any administrative burdens that such regulations would place on depository institutions, including small depository institutions, and customers of depository institutions, as well as the benefits of such regulations. In addition, section 302(b) of RCDRIA, 12 U.S.C. 4802(b), requires new regulations and amendments to regulations that impose additional reporting, disclosures, or other new requirements on insured depository institutions generally to take effect on the first day of a calendar quarter that begins on or after the date on which the regulations are published in final form. This final rule imposes no additional reporting, disclosure, or other requirements on insured depository institutions, and therefore, section 302 is not applicable to this rule.

Congressional Review Act. For purposes of the Congressional Review Act (CRA), 5 U.S.C. 801 *et seq.,* the Office of Information and Regulatory Affairs (OIRA) of the OMB determines whether a final rule is a ''major rule,'' as that term is defined at 5 U.S.C. 804(2). OIRA has determined that this final rule is not a major rule. As required by the CRA, the OCC will submit the final rule and other appropriate reports to Congress and the Government Accountability Office for review.

Administrative Procedure Act. The APA, 5 U.S.C. 551 *et seq.,* generally requires that a final rule be published in the **Federal Register** not less than 30 days before its effective date. This final rule will be effective 60 days after publication in the **Federal Register**, which meets the APA's effective date requirement.

List of Subjects in 12 CFR Part 7

Computer technology, Credit, Derivatives, Federal savings associations, Insurance, Investments, Metals, National banks, Reporting and recordkeeping requirements, Securities, Security bonds.

Office of the Comptroller of the Currency

For the reasons set out in the preamble, the OCC amends 12 CFR part 7 as follows.

PART 7—ACTIVITIES AND OPERATIONS

■ 1. The authority citation for part 7 continues to read as follows:

Authority: 12 U.S.C. 1 *et seq.,* 25b, 29, 71, 71a, 92, 92a, 93, 93a, 95(b)(1), 371, 371d, 481, 484, 1463, 1464, 1465, 1818, 1828(m) and 5412(b)(2)(B).

■ 2. Add § 7.1031 to read as follows:

§ 7.1031 National banks and Federal savings associations as lenders.

(a) For purposes of this section, *bank* means a national bank or a Federal savings association.

(b) For purposes of sections 5136 and 5197 of the Revised Statutes (12 U.S.C. 24 and 12 U.S.C. 85), section 24 of the Federal Reserve Act (12 U.S.C. 371), and sections 4(g) and 5(c) of the Home Owners' Loan Act (12 U.S.C. 1463(g) and 12 U.S.C. 1464(c)), a bank makes a loan when the bank, as of the date of origination:

(1) Is named as the lender in the loan agreement; or

(2) Funds the loan.

(c) If, as of the date of origination, one bank is named as the lender in the loan agreement for a loan and another bank funds that loan, the bank that is named as the lender in the loan agreement makes the loan.

Brian P. Brooks,

Acting Comptroller of the Currency.

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DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 150

Burlington International Airport, South Burlington VT; Approval of Noise Compatibility Program

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notification.