

# Insights

## OCC Issues Final "True Lender" Rule

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On October 27, 2020, the Office of the Comptroller of the Currency ("OCC") issued the final version of its "true lender" rule (the "Final Rule"). The Final Rule resolves uncertainty regarding which entity in a lending partnership between a bank and a nonbank lender is the "true lender." The Final Rule comes on the heels of the "Valid-When-Made" ("VWM") Rule issued by the OCC in June 2020. The OCC issued the VWM Rule in response to the Second Circuit's ruling in *Madden v. Midland Funding*, which held that a non-bank financial institution purchasing loans from a national bank cannot charge the rate of interest permissible under federal law.<sup>[1]</sup>

The VWM Rule (colloquially known as the "Madden-fix") confirmed that a loan is valid when made and assignees of a loan originated by a national bank may charge the same interest rate that national banks are authorized to charge under federal law. Nevertheless, the VWM Rule did not address which lender is the true lender in a bank/non-bank partnership.

The Final Rule provides that a bank makes a loan when, as of the date of origination, the bank (1) is named as the lender in the loan agreement or (2) funds the loan.<sup>[2]</sup> The Final Rule further clarifies that if, as of the origination date, one bank is the named lender in the loan agreement for the loan and a different bank funds the loan, the bank named as lender in the agreement is the bank making the loan.<sup>[3]</sup>

As noted above, Final Rule is the latest in a long series of actions taken by the OCC regarding loan origination that has resulted in a contentious debate between the OCC, state regulators, and consumer advocacy groups.

State regulators and consumer advocacy groups voiced concerns about the Final Rule—namely that the Final Rule, like the VWM Rule, allows nonbank lenders to operate under the so-called "rent-a-charter" scheme. The rent-a-charter process is borne out of the fractured regulatory network that has emerged due to preemption under federal law. Nonbank lenders are regulated based on state usury, licensing, and consumer protection laws. State usury laws do not apply to federally regulated banks because preemption permits those banks to charge interest based on the usury laws of its home state, including for out-of-state customers. Preemption allows nonbank lenders to use the "rent-a-charter" scheme to skirt state usury laws by partnering with federally regulated banks and charging interest based on the rate permitted under applicable state or federal law.

The VWM Rule affirmed that a loan is valid when made, allowing banks to transfer loans to nonbank lenders and "export" interest rates without fear those loans would be considered usurious under the laws of another state. The VWM Rule does not, however, address whether the bank or the nonbank lender is the "true lender" of loans originated by a bank but serviced by a nonbank lender. If considered the "true lender" under federal law, state licensing requirements, usury laws, and consumer protection statutes would apply to nonbank lenders.

The Final Rule provides a bright line test to determine which party is the "true lender" under the terms of the loan agreement. At the same time, the Final Rule does not resolve the tension between regulations at the state and federal level. A competitive gap remains between banks partnering with nonbank lenders to export interest rates across the country and those that do not. Further, state regulators will continue struggling to control in-state lending activities with adverse consequences.



The OCC addressed these concerns in the Final Rule by emphasizing that national banks remain obligated to establish prudent underwriting practices and must comply with all applicable law, including federal civil rights and consumer protection statutes.

The Final Rule is effective sixty days after the date it is published in the *Federal Register*. Please contact any member of the **Krieg DeVault Financial Institutions practice group** with any questions you may have about this alert.

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

[2] OCC, *National Banks and Federal Savings Associations as Lenders*, (October 27, 2020), 3, available at <https://www.occ.gov/news-issuances/federal-register/2020/nr-occ-2020-139a.pdf>.

[3] *Id.*, at 22.