DREHER TOMKIES LLP ALERT

FOR CLIENTS AND FRIENDS OF DREHER TOMKIES LLP

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OCC PROPOSES BRIGHT-LINE "TRUE LENDER" RULE FOR NATIONAL BANKS AND FEDERAL SAVINGS BANKS

The Office of the Comptroller of the Currency ("OCC") has proposed a rule that addresses when a national bank or federal savings bank will be deemed to make a loan under federal banking law and is the "true lender" in partnerships with third parties.

The OCC noted that federal banking law does not expressly address which entity makes a loan when a loan is originated in a partnership between a bank and third party. Based on a reasonable interpretation of federal banking law, OCC determined that a national bank or federal savings bank makes a loan, whenever it, as of the date of origination, (i) is named as the lender in the loan agreement *or* (ii) funds the loan. When a bank is named as the lender in the loan agreement, the OCC views that as conclusive evidence that a bank is exercising its authority to make loans pursuant to federal banking law and elects to be subject to such laws. (The bank will, consequently, be held responsible for such exercise of authority). The OCC also reasoned that when a bank funds a loan, the bank has a predominant economic interest in the loan and has made the loan regardless of who is named as the lender in the loan agreement. (Again, the bank will accordingly be held responsible). The OCC'S proposed rule sets forth a bright-line objective standard to determine the true lender of a loan.

Prior to this proposed rule, the OCC had not addressed who is the "true lender" in the context of a bank partnership, but courts have addressed this question creating divergent standards to determine which entity is the "true lender." The OCC views the "predominant economic interest" test, adopted by some courts in "true creditor" challenges, as giving courts too much subjectivity to determine who is the "true lender." According to the OCC, these courts have undermined banks' abilities to partner with third parties to lend on a nationwide basis. The proposed rule is intended to address the legal uncertainty created by ambiguities in federal banking law and by courts' "true lender" decisions. The OCC also justified the proposed rule based on various benefits that banks can realize by partnering with third parties including responsible innovation.

The OCC reiterated a bank's responsibility for ensuring that its loans are made in a safe and sound manner and in accordance with applicable laws and regulations in the context of third-party partnerships. The proposed rule reviews the OCC's enforcement authority under different federal laws to prevent banks from engaging in predatory, deceptive, abusive and unfair activities. The OCC believes that applicable statutes and regulations, enforceable guidelines and other issuances already include appropriate safeguards with respect to a bank's use of its lending power including in the context of a partnership with a third party. The OCC has used such authority in the past to restrict disfavored lending.

The OCC intends for the proposed "true lender" rule and the recently promulgated "*Madden*-fix" rule to provide clarity to national banks and federal savings banks regarding their lending activities. The OCC's proposed rule does not apply to other banks, credit unions or nonbank financial institutions, which can face "true lender" challenges as well.

Comments on the OCC's proposed rule are due September. The Federal Deposit Insurance Corporation is expected to release its own "true lender" proposed rule shortly.

Our firm has advised partnership programs for over 30 years including one of the first bank partnership programs. We are happy to discuss the implications of the OCC's proposed "true lender" rule for banks and nonbanks participating in partnership programs. ❑

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