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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: Notice of proposed rulemaking.

SUMMARY: The Office of the Comptroller of the Currency (OCC) is proposing a regulation to determine when a national bank or Federal savings association (bank) makes a loan and is the "true lender" in the context of a partnership between a bank and a third party, such as a marketplace lender. Under this proposal, 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: Comments must be received on or before September 3, 2020.

ADDRESSES: Commenters are encouraged to submit comments through the Federal eRulemaking Portal or e-mail, if possible. Please use the title "National Banks and Federal Savings Associations as Lenders" to facilitate the organization and distribution of the comments. You may submit comments by any of the following methods:

• *Federal eRulemaking Portal* – Regulations.gov Classic or Regulations.gov Beta

Regulations.gov Classic: Go to *https://www.regulations.gov/*. Enter "Docket ID OCC-2020-0026" in the Search Box and click "Search." Click on "Comment Now" to submit public comments. For help with submitting effective comments, please click on "View Commenter's Checklist." Click on the "Help" tab on the Regulations.gov home page to get information on using Regulations.gov, including instructions for submitting public comments.

Regulations.gov Beta: Go to *https://beta.regulations.gov/* or click "Visit New Regulations.gov Site" from the Regulations.gov classic homepage. Enter "Docket ID OCC-2020-0026" in the Search Box and click "Search." Public comments can be submitted via the "Comment" box below the displayed document information or click on the document title and click the "Comment" box on the top-left side of the screen. For help with submitting effective comments, please click on "Commenter's Checklist." For assistance with the Regulations.gov Beta site, please call (877)-378-5457 (toll free) or (703) 454-9859 Monday-Friday, 9am-5pm ET or e-mail to regulations@erulemakinghelpdesk.com.

• *E-mail*: regs.comments@occ.treas.gov.

• *Mail*: Chief Counsel's Office, Attention: Comment Processing, Office of the Comptroller of the Currency, 400 7th Street, SW, suite 3E-218, Washington, DC 20219.

• *Hand Delivery/Courier*: 400 7th Street, SW, suite 3E-218, Washington, DC 20219.

• *Fax*: (571) 465-4326.

Instructions: You must include "OCC" as the agency name and "Docket ID OCC-2020-0026" in your comment. In general, the OCC will enter all comments received into the docket and publish the comments on the Regulations.gov website without change, including any business or personal information provided such as name and address information, e-mail addresses, or phone numbers. Comments, including attachments and other supporting materials, are part of the public record and subject to public disclosure. Do not include any information in your comment or supporting materials that you consider confidential or inappropriate for public disclosure.

You may review comments and other related materials that pertain to this rulemaking action by any of the following methods:

• *Viewing Comments Electronically* – Regulations.gov Classic or Regulations.gov Beta: *Regulations.gov Classic*: Go to *https://www.regulations.gov/*. Enter "Docket ID OCC-2020-0026" in the Search box and click "Search." Click on "Open Docket Folder" on the right side of the screen. Comments and supporting materials can be viewed and filtered by clicking on "View all documents and comments in this docket" and then using the filtering tools on the left side of the screen. Click on the "Help" tab on the Regulations.gov home page to get information on using Regulations.gov. The docket may be viewed after the close of the comment period in the same manner as during the comment period. *Regulations.gov Beta*: Go to *https://beta.regulations.gov/* or click "Visit New Regulations.gov Site" from the Regulations.gov classic homepage. Enter "Docket ID OCC 2020-0026" in the Search Box and click "Search." Click on the "Comments" tab. Comments can be viewed and filtered by clicking on the "Sort By" drop-down on the right side of the screen or the "Refine Results" options on the left side of the screen. Supporting Materials can be viewed by clicking on the "Documents" tab and filtered by clicking on the "Sort By" drop-down on the right side of the screen or the "Refine Results" options on the left side of the screen." For assistance with the Regulations.gov Beta site please call (877) 378-5457 (toll free) or (703) 454-9859 Monday-Friday, 9am-5pm ET or e-mail to regulations@erulemakinghelpdesk.com. The docket may be viewed after the close of the comment period in the same manner as during the comment period.

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. Introduction

The U.S. economy relies on access to affordable credit to fuel economic growth and job creation. Americans rely on affordable credit to reach goals large and small, ranging from purchasing consumer goods, cars, and homes to starting or growing small businesses. While national banks and Federal savings associations (banks) play a critical role in supplying this credit, the financial system is most efficient when banks work effectively with other market participants to meet customers' credit needs. These relationships allow banks to manage their risks and leverage their balance sheets to increase the supply of available credit in ways they would not be able to if they were acting alone.

One way that banks achieve this efficiency is by selling loans to third parties and using the proceeds from these sales to make additional loans.[1] For example, credit card securitization allows a bank to originate very large loan pools for a diverse customer base at lower rates than if the bank had to fund the loans on its balance sheet.[2] By removing the assets and supporting debt from its balance sheet, the bank is able to save some of the costs of on-balance-sheet financing

[1] Conversely, banks may invest in loans made by third parties, which provides the third parties with additional capital to make new loans.

[2] Office of the Comptroller of the Currency, *Comptroller's Handbook*, "Asset Securitization" at 5 (Nov. 1997).

and manage potential asset-liability mismatches and credit concentrations.[3] Bank customers benefit from the increased availability of credit these securitization relationships provide.[4]

Lending relationships with third parties can also help banks meet customers' need for affordable credit, including the needs of unbanked or underbanked individuals.[5] For example, these relationships can enable banks to market affordable loan products to a wider range of potential customers or to develop or acquire innovative credit underwriting models that facilitate expanded access to credit. Banks can also work with third parties to develop responsible lending programs to help customers meet credit needs, including small-dollar lending programs designed to assist with cash-flow imbalances, unexpected expenses, or income shortfalls.[6]

While these lending relationships can be effective tools to facilitate affordable access to credit, there has been increasing uncertainty about the legal framework that applies to the loans made as part of these relationships. This uncertainty may discourage banks and third parties from entering into relationships, limit competition, and chill the innovation that results from these partnerships—all of which may restrict access to affordable credit.

Federal law authorizes banks to enter into contracts, to make loans, and to subsequently transfer these loans and assign loan contracts.[7] These statutes, however, do not specifically address which entity makes a loan (or, in the vernacular commonly used in case law, which entity is the "true lender") and, therefore, what legal framework applies, when the loan is

[3] *Id.* at 2.

[4] *Id.* at 4-5.

[5] Many relationships between banks and third parties address core banking functions other than lending (*i.e.*, making payments and taking deposits). *See, e.g.*, 12 CFR 5.20(e). However, relationships that do not involve making loans are beyond the scope of this rulemaking. In addition, for purposes of this rulemaking, references to partnerships are not limited to legal partnerships and include a variety of other arrangements through which banks can work with third parties. This rulemaking uses the terms partnership and relationship interchangeably.

[6] *See Interagency Lending Principles for Offering Responsible Small-Dollar Loans* (May 2020); *Joint Statement Encouraging Responsible Small-Dollar Lending in Response to COVID-19* (Mar. 2020).

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

originated as part of a lending relationship between a bank and a third party. Furthermore, the OCC has not previously taken regulatory action to resolve this ambiguity. In the absence of regulatory action, courts are left to determine when, in a lending partnership, a bank is making the loan and when its partner makes the loan.

A growing body of case law has introduced divergent standards for resolving this issue. In some cases, the court has concluded that the form of the transaction alone resolves this issue.[8] Under this analysis, the lender is the entity named in the loan agreement.

In other cases, the courts have applied fact-intensive balancing tests,[9] in which they have considered a multitude of factors, including: (1) how long the entity named as the lender holds the loan before selling it to the third party;[10] (2) whether the third party advances money that the named lender draws on to make loans;[11] (3) whether the third party guarantees minimum payments or fees to the named lender;[12] (4) whether the third party agrees to indemnify the

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[8] *See, e.g., Beechum v. Navient Solutions, Inc.*, No. EDCV 15-8239-JGB-KKx, 2016 WL 5340454, at *8 (C.D. Cal. Sept. 20, 2016) (holding that the court will look "only to the face of the transactions at issue").

[9] *See, e.g., CFPB v. CashCall, Inc.*, No. CV 15-7522-JFW, 2016 WL 4820635, at *5-*6 (C.D. Cal. Aug. 31, 2016) (examining "which party or entity has the predominant economic interest in the transaction," including by evaluating which party placed its money at risk).

[10] *Id.* at *6 (concluding that the third party was the true lender, including because "[a]lthough [the third party] waited a minimum of three days after the funding of each loan before purchasing it, it is undisputed that [the third party] purchased each and every loan *before* any payments on the loan had been made."); *CashCall, Inc. v. Morrisey*, No. 12-1274, 2014 WL 2404300, at *1, *7 (W.Va. May 30, 2014) (noting that the third party purchased loans within three days of origination but not clearly indicating whether this fact was considered as part of the predominant economic interest analysis); *Sawyer v. Bill Me Later, Inc.*, 23 F. Supp. 3d 1359, 1369 (D. Utah 2014) (noting that the named lender was the real party in interest, including because it "holds the credit receivables for two days").

[11] *See, e.g., CFPB v. CashCall*, 2016 WL 4820635, at *6 ("It is undisputed that [the third party] deposited enough money into a reserve account to fund two days of loans, calculated on the previous month's daily average and that [the named lender] used this money to fund consumer loans.").

[12] *See, e.g., id.* at *2 ("[The third party] guaranteed [the named lender] a minimum payment of $100,000 per month, as well as a $10,000 monthly administrative fee.").

named lender;[13] and (5) how loans are treated for financial reporting purposes.[14] 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.[15] These fact-intensive inquiries, coupled with the lack of a uniform and predictable standard, increase the subjectivity in determining who is the true lender and undermine banks' ability to partner with third parties to lend across jurisdictions on a nationwide basis.

As a result of this legal uncertainty, stakeholders cannot reliably determine which entity makes a loan, and therefore, the applicability of key aspects of the legal framework as of the date of origination is unclear. For example, Federal law establishes the interest a bank may charge on any loan it makes and authorizes the bank to export that rate from the state in which it is located to borrowers in other states.[16] While the OCC recently clarified that interest permissible on a loan made by a bank is not affected by the subsequent sale, assignment, or other transfer of the loan,[17] uncertainty remains regarding how to determine if a loan is, in fact, made by a bank as opposed to by its relationship partner.

To address this uncertainty, the OCC is proposing a clear test to determine when a bank makes a loan. In doing so, the OCC is fulfilling its responsibility to resolve ambiguities in the

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[13] *See, e.g., id.* at *3 ("[The third party] agreed to 'fully indemnify [the named lender] for all costs arising or resulting from any and all civil, criminal or administrative claims or actions . . . .'"); *CashCall v. Morrisey*, 2014 WL 2404300, at *7 (noting that the Circuit Court found that the third party agreed to indemnify the named lender).

[14] *CashCall v. Morrisey*, 2014 WL 2404300, at *7 (noting that loans were treated as if they were funded by the third party for financial reporting purposes).

[15] *Compare CFPB v. CashCall*, 2016 WL 4820635, *with CashCall v. Morrisey*, 2014 WL 2404300.

[16] *See* 12 U.S.C. 85, 1463(g); 12 CFR 7.4001, 160.110.

[17] 12 CFR 7.4001(e), 160.110(d) (effective Aug. 3, 2020); *Permissible Interest on Loans That Are Sold, Assigned, or Otherwise Transferred*, 85 FR 33,530 (June 2, 2020) (*Madden*-fix rule).

Federal banking laws it is charged with administering and ensuring clarity and uniformity for the banks it supervises.[18] The OCC's proposed rule would enable banks to fully exercise the lending authority granted to them under Federal law and allow stakeholders to reliably and consistently identify key aspects of the legal framework applicable to a loan. When a bank makes a loan, a robust Federal framework applies to ensure that banks are lending in a safe and sound manner and in compliance with applicable laws and regulations, and the OCC is the prudential regulator of the bank's lending activities. Additionally, if the bank makes the loan in the context of a relationship with a third party, the OCC ensures that the bank has instituted appropriate safeguards to manage the associated risks.[19] In contrast, if a third party makes a loan as part of a relationship with a bank, the OCC is not the prudential regulator of the lending activity, though it still assesses the bank's third-party risk management in connection with the relationship itself.[20]

II. Description of the Proposal

Several provisions of Federal banking law grant banks the authority to make loans. Specifically, section 5136 of the Revised Statutes (12 U.S.C. 24) provides that a national bank may engage in the business of banking, including by "loaning money." Section 24 of the Federal Reserve Act (12 U.S.C. 371) states that a national bank may "make . . . loans," and section 5(c) (12 U.S.C. 1464(c)) of the Home Owners' Loan Act states that a Federal savings association may "invest in, sell, or otherwise deal in . . . loans." Although each statute uses slightly different language to authorize banks to extend credit, none describes how to determine when a bank has,

[18] *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* 12 U.S.C. 93a (OCC authority to prescribe rules and regulations).

[19] *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).

[20] *See supra* note 19.

in fact, exercised this authority, and when, by contrast, the bank's relationship partner has made the loan. In light of this statutory ambiguity, the OCC has concluded, for the reasons set forth below, that it is reasonable to interpret these statutes to provide that a bank makes a loan whenever it, as of the date of origination, (1) is named as the lender in the loan agreement or (2) funds the loan.[21]

If a bank is named in the loan agreement as the lender as of the date of origination, the OCC views this imprimatur as conclusive evidence that the bank is exercising its authority to make loans pursuant to the statutes cited above and has elected to subject itself to the panoply of applicable Federal laws and regulations (including but not limited to consumer protection laws) governing lending by banks.[22]

There are also circumstances in which a bank is not named as the lender in the loan agreement but is still, in the OCC's view, making the loan.[23] To ensure that the OCC's rule would capture these circumstances, the agency is proposing a second standard based on which party funded the loan. Under this standard, if a bank funds a loan as of the date of origination, the OCC concludes that it has a predominant economic interest in the loan and, therefore, has made the loan—regardless of whether it is the named lender in the loan agreement as of the date of origination.[24] Under the OCC's proposal, the determination of which entity made the loan

[21] This proposal also interprets 12 U.S.C. 85 and 1463(g), which govern the interest permitted on bank loans. This proposal would not, however, affect the application of Federal consumer financial laws. For example, this proposal would not affect the meaning of the term "creditor" as used in the Truth in Lending Act, 15 U.S.C. 1601 *et seq*., and Regulation Z, 12 CFR part 1026, or the term "lender" as defined in Regulation X, 12 CFR part 1024.

[22] *See Beechum*, 2016 WL 5340454; *Lender*, *Black's Law Dictionary* (11th ed. 2019) ("A person or entity from which something (esp. money) is borrowed.").

[23] *See, e.g.*, OCC Interpretive Letter 1002 (May 13, 2004) (discussing "table funding" arrangements).

[24] As discussed previously, while courts have relied on a multitude of factors to evaluate which party has the predominant economic interest in a loan, the OCC believes that such a fact-specific analysis is unnecessarily complex and unpredictable.

under the above standards would be complete as of the date the loan is originated and would not change, even if the bank were to subsequently transfer the loan.[25]

Therefore, the OCC proposes that, 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) the Home Owners' Loan Act (12 U.S.C. 1463(g) and 12 U.S.C. 1464(c)), a bank makes a loan when, as of the date of origination, it (1) is named as lender in the loan agreement or (2) funds the loan.

The OCC invites comments on all aspects of this proposal, including whether there are additional lending arrangements that should be captured by the OCC's standards for determining when a bank makes a loan and whether the proposed standards would capture lending arrangements that should be excluded.[26]

III. Consequences of the Bank as Lender

A key objective of this proposal is to provide regulatory clarity and certainty that would enable banks and their partners to lend in a manner consistent with their business objectives and risk appetite and in compliance with applicable laws and regulations. As noted previously, identifying the lender would pinpoint key elements of the statutory, regulatory, and supervisory framework applicable to the loan in question. Specifically, when a bank makes a loan, it is responsible for ensuring that the loan is made both in a safe and sound manner and in accordance with applicable laws and regulations, even if the loan is made in the context of a third-party

[25] *See, e.g.*, *supra* note 17 and accompanying text.

[26] The OCC is also considering how the two standards interact and may revise its test if this interaction creates challenges in determining which party makes a loan.

partnership and even if the bank's partner is the customer-facing entity.[27] As the bank's prudential regulator, the OCC directly supervises these lending activities.[28] The OCC also ensures that the bank has instituted appropriate safeguards to manage the risks associated with the partnership.

While the OCC's prudential oversight of bank lending is multifaceted, it includes ensuring that the bank has prudent underwriting standards and loan documentation policies and procedures. In this regard, the OCC expects all banks to establish and maintain 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.[29] Moreover, banks are also 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

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[27] As the OCC has previously stated, "[a] bank's use of third parties does not diminish the responsibility of its board of directors and senior management to ensure that the activity is performed in a safe and sound manner and in compliance with applicable laws." OCC Bulletin 2013-29. *But see supra* note 21.

[28] 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).

[29] 12 CFR part 30, appendix A, § II.D; *see* 12 CFR part 34, appendix A to subpart D.

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.[30] A bank should also have appropriate internal controls and information systems to assess and manage the risks associated with its lending activities, including monitoring adherence to established policies, as well as internal audit systems.[31]

In addition, a bank's lending must be done in compliance with other 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.[32] The Dodd-Frank Wall Street Reform and Consumer Protection Act also prohibits unfair, deceptive, or "abusive" acts or practices.[33] 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.[34] The OCC has taken a number of public enforcement actions against banks for

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

[31] *Id.* at §§ II.A and II.B.

[32] 15 U.S.C. 45(a)(1), 45(n). OCC regulations regarding non-real estate and real estate lending, as well as the OCC's enforceable "Guidelines Establishing Standards for Residential Mortgage Lending Practices," expressly reference the FTC Act standards. *See* 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).

[33] Pub. L. 111-203, tit. X, sections 1031 and 1036, 124 Stat. 2005, 2010 (*codified at* 12 U.S.C. 5531 and 5536).

[34] Office of the Comptroller of the Currency, *Comptroller's Handbook*, "Consumer Compliance, Unfair or Deceptive Acts or Practices and Unfair, Deceptive, or Abusive Acts or Practices" (June 2020).

violating section 5 of the FTC Act, including for failure to: (1) provide sufficient information to allow consumers to understand the terms of the product or service being offered; (2) adequately disclose when significant fees or similar material prerequisites are imposed in order to obtain the particular product or service being offered; and (3) adequately disclose material limitations affecting the product or service being offered.[35] The agency will continue to exercise its enforcement authority to address unlawful actions.

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.[36] Further, under the Community Reinvestment Act (CRA) regulations, evidence of discriminatory or other illegal credit practices adversely affect a bank's CRA performance rating.[37]

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."[38] 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.[39] In the OCC's experience, "a departure from fundamental principles of loan underwriting generally forms the basis of abusive lending:

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[35] Recent OCC enforcement actions can be found on the OCC's website at *https://www.occ.gov/topics/laws-and-regulations/enforcement-actions/index-enforcement-actions.html*.

[36] *See* 15 U.S.C. 1691; 42 U.S.C. 3601 *et seq*. As noted above, *supra* note 28, other regulators may have oversight roles as well and can take appropriate enforcement action to address unlawful action within their jurisdiction.

[37] *See* 12 CFR 25.28(c); 12 CFR 25.17 (effective Oct. 1, 2020).

[38] OCC Advisory Letter 2003-2.

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

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."[40]

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).[41] 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 their loan transaction, which helps to mitigate the risk that a transaction could be unfair or deceptive.

The OCC believes that the applicable statutes and regulations, enforceable guidelines, and other issuances include appropriate safeguards with respect to a bank's use of its lending power and are also appropriate to consider in the context of a lending partnership. While partnerships provide benefits, including expanding access to affordable credit, they may also pose legitimate safety and soundness concerns and raise questions regarding banks' involvement in activities that may not be consistent with applicable laws and regulations, if they are not

[40] OCC Advisory Letter 2003-2.

[41] *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.

appropriately managed. In this regard, the OCC believes it is appropriate to re-emphasize that "any lending practices that take unfair advantage of borrowers, or that have a detrimental impact on communities . . . conflict with the high standards expected of [banks]."[42] To ensure that banks operate consistent with these principles, the OCC evaluates the following as part of its routine supervision of a bank's lending relationships with third parties:

- Does the bank appropriately manage the risks associated with its third-party relationships, including through policies and procedures that ensure adherence to the bank's risk appetite and tolerances and by appropriate ongoing monitoring of the third party's relevant activities?[43]
- Are the underwriting criteria for loans made by the bank as part of third-party relationships consistent with criteria the bank would use for loans made without a third party?[44]
    - If the underwriting criteria differs, are these underwriting criteria consistent with applicable law, including 12 CFR part 30, Appendix A, and with safety and soundness?
- Are the terms and structures of the bank's loan appropriate for the borrower? Are the lending practices appropriate?[45]
    - Are there characteristics, structures, or practices that make it difficult or impossible for a borrower to reduce or repay its indebtedness (*e.g.*,

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[42] OCC Advisory Letter 2003-2.

[43] *See, e.g.*, OCC Bulletin 2013-29; OCC Bulletin 2020-10.

[44] *See, e.g.*, 12 CFR part 30, appendix A, § II; OCC Bulletin 2013-29; OCC Bulletin 2020-10.

[45] *See, e.g.*, OCC Advisory Letter 2000-7; OCC Advisory Letter 2000-10; OCC Advisory Letter 2003-2; OCC Advisory Letter 2003-3.

repeated capitalization of interest; extended negative amortization; or a single payment or balloon payment)?

  - Are borrowers forced into costly rollovers, renewals, or refinancing transactions that are likely to result in debt traps or ongoing cycles of debt?

- Are the bank's overall returns on the loans reasonably related to the bank's risks and costs of the loans (*e.g.*, the total credit costs on short term loans, such as 12- to 36-month loans, are not substantial in relation to, or do not exceed, the principal amount of the loan)?[46]
- Do disclosures provide sufficient information to draw the borrower's attention to key terms and to enable the borrower to determine whether the loan meets their particular financial circumstances and needs? For example, would a borrower who is not financially sophisticated or who is otherwise vulnerable to abusive practices understand the terms of the loan, including the loan's relative costs, risks, and benefits?[47]

In addition to the consequences described above, the proposal would operate together with the OCC's recently finalized *Madden*-fix rule to provide greater clarity to banks regarding their lending activities.[48] Once it is determined that a loan has, in fact, been made by a bank under the clear standards set out in this proposal, the applicable Federal legal framework (1) determines the interest permitted on the loan, pursuant to 12 U.S.C. 85 and 1463(g), and (2) permits the loan to be subsequently sold, assigned, or otherwise transferred without affecting the

[46] *See, e.g.*, *Interagency Lending Principles for Offering Responsible Small-Dollar Loans* (May 2020); OCC Advisory Letter 2000-7.

[47] *See, e.g.*, OCC Advisory Letter 2003-2; OCC Advisory Letter 2000-10.

[48] *See supra* note 17.

interest term, pursuant to the *Madden*-fix rule. This clarity would enable banks to more effectively and efficiently work with other market participants to manage their risks and leverage their balance sheets to meet customers' needs for affordable credit.

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 notice of proposed rulemaking and determined that it would 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 proposed rule, to prepare an Initial 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 of less) or to certify that the proposed 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 proposal could affect how banks structure their current or future third-party relationships, the OCC does not expect that these adjustments would involve an extraordinary demand on a bank's human resources. Banks already have systems, policies, and procedures in place for issuing loans when third parties are involved, and it takes significantly less time to amend existing policies than to create them. In addition, any costs would likely be absorbed as ongoing administrative expenses. Based on this, the OCC believes the costs associated with any administrative changes in bank lending policies and procedures would be *de minimis*. Furthermore, legal certainty about whether a loan is made by a bank may encourage some banks to engage in new lending relationships or to expand their existing lending relationships. However, as noted, we do not expect the accompanying costs to be substantial. Therefore, the OCC anticipates that costs, if any, will be *de minimis* and certifies that this rule, if adopted, would not have a significant economic impact on a substantial number of small entities. Accordingly, a 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 the proposed 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 proposed rule does not impose new mandates. Therefore, the OCC concludes that implementation of the proposed 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. Although the proposed rule does not impose additional reporting, disclosures, or other new requirements on insured depository institutions, the OCC invites comments that will inform its consideration of the administrative burdens and the benefits of its proposal, as well as the effective date of the final rule.

List of Subjects

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 proposes to amend 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.

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 national bank or Federal savings association makes a loan when the national bank or Federal savings association, as of the date of origination:

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

(b) Funds the loan.

Brian P. Brooks
Acting Comptroller of the Currency.