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8584 Katy Freeway, Suite 420

Houston, TX 77024

Phone: 713-871-0005

Fax: 713-871-1358

Partners

Thomas E. Black, Jr.¹

Gregory S. Graham²

Shawn P. Black³

Managing Attorney Houston

Ryan Black⁴

Senior Lawyers

David F. Dulock

Diane M. Gleason

Daniel S. Engle⁵

Margaret Noles

Associates

Nick Stevens

Syndy Davis

Brandon Pieratt

Of Counsel

David M. Tritter

Calvin C. Mann, Jr.

Retired Partner(s)

Calvin C. Mann, Jr.

¹ Also Licensed in Iowa, New York, and Washington

² Also Licensed in Georgia

³ Also Licensed in Kentucky and New York

⁴ Also Licensed in Washington D.C.

⁵ Also Licensed in New York

To: Clients and Friends

From: David F. Dulock

Subject: OCC Issues “True Lender” Final Rule for National Banks and Federal Savings Associations

In the October 30, 2020, *Federal Register* (85 FR 68742, [click here](#)) the Office of the Comptroller of the Currency (OCC) issued a final rule that amends 12 CFR part 7 by adding §7.1031 to establish when a national bank or Federal savings association makes a loan and is the “true lender,” including in the context of a lending relationship between a bank and a nonbank third party lender, such as a mortgage company. Under the final rule, a national bank or Federal savings association makes a loan if, as of the date of origination, it is named as the lender in the loan agreement or funds the loan. The text of new §7.1031 is reprinted below:

§ 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.

The preamble to the final rule states that new §7.1031 “operates together with the OCC’s recently finalized ‘Madden-fix’ rulemaking” and “[w]hen 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.” (See this firm’s June 2, 2020, memorandum addressing the ‘Madden-fix’ posted on our website at <https://www.bmandg.com/> under the Resources section.)

In response to concerns expressed by some commenters, the final rule’s preamble clarifies that “the funding prong of [§7.1031] generally 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.” This is because “[t]hey do not involve a bank funding a loan at the time of origination.”

The final rule is effective on December 29, 2020.

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