

Commercial Lending Update

AUGUST 2020

OCC PROPOSES TO DEFINE “TRUE LENDER”

On July 22, 2020, the OCC issued a notice of proposed rulemaking (NPR) that if adopted, would establish when a national bank or federal savings association (collectively, “bank”) is the “true lender” when the bank makes a loan through a partnership with a non-bank third party, such as a marketplace lender. 85 FR 44223. The OCC issued the NPR in the face of a growing body of case law which has introduced divergent standards for determining which entity is the “true lender” in such a loan transaction (that is, made through a partnership with a non-bank third party) that is subsequently sold or otherwise transferred to a third party (for example, a marketplace lender).

In the NPR, the OCC identified divergent standards of case law that attempt to resolve the question of which entity is the “true lender.” The true lender notion is important in deciding which body of laws, including usury, applies to the loan. In some cases, courts have concluded that the form of a transaction alone resolves the issue (refer to *Beechum v. Navient Solutions, Inc.*, 2016 U.S. Dist. LEXIS 129782 (C.D. Cal. Sept. 20, 2016)). Under this analysis, the lender is simply the entity named in the loan agreement.

In other cases, courts apply fact-intensive balancing tests which consider a multitude of factors,

including: (i) how long the entity named as the lender holds the loan before selling it to the third party; (ii) whether a third party advances money that the named lender draws on to make loans; (iii) whether a third party guarantees minimum payments or fees to the named lender; (iv) whether a third party agrees to indemnify the named lender; and (v) how loans are treated for financial reporting purposes (refer to *CFPB v. CashCall, Inc.*, 2016 U.S. Dist. LEXIS 130584 (C.D. Cal. Aug. 31, 2016); and *CashCall, Inc. v. Morrissey*, 2014 W. Va. LEXIS 587 (W. Va. May 30, 2014)). The OCC said that courts do not necessarily consider all of the same factors or give each factor the same weight to determine which entity has the “predominant economic interest” in a transaction, even when nominally engaged in the same analysis.

In the NPR, the OCC pointed out that federal law authorizes banks to enter into contracts, to make loans, and to subsequently transfer the loans but the statutes do not specifically identify which entity is deemed to be the “true lender.” However, based on its own analysis of the applicable statutes, the OCC concluded that it is reasonable to conclude that a bank makes a loan (or is the “true lender”) whenever the bank, as of the date of origination: (i) is named as the lender in the loan agreement; or (ii) funds the loan.

The comment period on the NPR expires on September 3, 2020.



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ARRC RELEASES LIBOR TRANSITION TOOL

The Alternative Reference Rates Committee (ARRC) released the “Internal Systems and Processes: Transition Aid for SOFR Adoption” (Transition Aid) to support market participants transitioning from the London Interbank Offered Rate (LIBOR) to the Secured Overnight Financing Rate (SOFR). The Transition Aid supplements previous ARRC publications, including the “User’s Guide to SOFR,” the “Practical Implementation Checklist,” and the “Buy-Side Checklist,” to identify the processes and systems that may need to be updated for a successful transition to SOFR.

The ARRC said the Transition Aid is focused on banking institutions and suggested that each stakeholder decide for itself whether and to what extent to use the transition tool in preparing for the switch from US Dollar LIBOR to an alternative reference rate. The Transition Aid broadly classifies transition activities into categories such as operations or risk controls, with one-page summaries for the subtopics covered within each category.

Some of the more pertinent categories to BCG members are listed below:

- Operations;
- Risk Controls;
- Legal and Compliance; and
- Information Technology.

Each summary lists transition activities for market participants to consider, as well as sections on upstream and downstream areas that may be affected by the transition. The summaries also identify dependencies that may influence the timing and sequence of transition activities.

“Legal and compliance” is designated as category number 9 and its subcategory number 9.1 concerns “legal process support” (LPS). The LPS summary lists the transition steps and activities involved in transitioning an institution’s legal process support connected to LIBOR to an alternative reference rate. The steps include: (i) scope; (ii) plan; (iii) pre-

implementation prep; and (iv) execution. The scope transition step requires an institution to identify LIBOR’s impact across legal processes and communicate that impact to subject matter experts within the institution and collect feedback. There are seven other subcategories from 9.2 to 9.8.

“Operations” is designated as category number 6 and its subcategory number 6.1 concerns “transaction management” (TM). The TM summary lists the transition steps and activities an institution should undertake to ensure that TM systems can support new reference rates. According to the ARRC, an institution’s first step should be to ensure that it is properly resourced to support the anticipated, increased transaction volume. The operations category has three subcategories in total.

On July 1, 2020, the FFIEC issued a “Joint Statement on Managing the LIBOR Transition” (Joint Statement). In the Joint Statement, the FFIEC points out that its members’ supervisory focus during 2020-2021 will focus on evaluating an institution’s preparedness for LIBOR’s discontinuation, among other things. The FFIEC said that fallback language in financial contracts will determine how the replacement of a discontinued reference rate will be handled and that institutions with LIBOR-indexed contracts should take steps to include appropriate fallback language.

Attorneys at Aldrich & Bonnefin PLC have been assisting BCG members with drafting contractual fallback language in anticipation of LIBOR’s discontinuance at the end of 2021. Contact Mark Aldrich, Joel Cook or Bob Olsen at **MAldrich@ABLAWYERS.COM**, **JCook@ABLAWYERS.COM** or **ROlsen@ABLAWYERS.COM** for assistance. The Transition Aid is available on the ARRC’s website at **<https://www.newyorkfed.org/medialibrary/Microsites/arrc/files/2020/ARRC-Internal-Systems-Processes-Transition-Aid.pdf>**.