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MEMORANDUM

July 21, 2020

To Our Clients and Friends

Re: Comptroller Proposes True Lender Rule

The Comptroller of the Currency has proposed a rule that would determine when a national bank or federal savings association is the “true lender” when making a loan. The proposal responds to ongoing legal uncertainty regarding who is the lender when a bank partners with third parties. Under the proposal, a national 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. The deadline for submitting comments on the proposed rule is September 3, 2020.

The Comptroller noted that case law has applied different standards for resolving the true lender issue. Some courts have concluded that the form of the transaction resolves the issue, holding that if the lender is the entity named in the loan agreement it is the lender. In other cases, courts have applied fact-intensive balancing tests in which they considered multiple factors. The proposal is intended to address the legal uncertainty by applying a uniform and predictable standard nationwide. As a result, the proposal provides that if a bank is named as the lender in the loan agreement as of the date of origination, it is conclusive evidence that the bank is exercising its authority to make the loan. The proposal goes on to state that in circumstances where a bank is not named as the lender in the loan agreement, the bank will be regarded as making the loan if the bank funds a loan as of the date of origination regardless of whether it is the named lender in the loan agreement and even if it subsequently transfers the loan

The Comptroller also stated that references in the proposal to bank “partnerships” with third parties are not limited to legal partnerships, but rather include a variety of other arrangements through which banks work with third parties. Relationships that do not involve making loans, however, are beyond the scope of the proposal.

A copy of the Comptroller’s *Federal Register* notice is available on our website at <http://schwartzandballen.com/news.html>.

For more information, please call Gilbert Schwartz, Robert Ballen, Heidi Wicker, or Victor Razon at (202) 776-0700.