



MORTGAGE BANKERS ASSOCIATION

September 3, 2020

Submitted via Federal eRulemaking Portal: <http://www.regulations.gov>

Acting Comptroller of the Currency Brian P. Brooks  
Office of the Comptroller of the Currency  
400 7th Street SW  
Suite 3E-218  
Washington, DC 20219

**Re: Notice of Proposed Rulemaking: Proposed True Lender Rule  
Docket ID OCC-2020-0026**

Dear Acting Comptroller Brooks:

The Mortgage Bankers Association (MBA)<sup>1</sup> appreciates the opportunity to comment on the Office of the Comptroller of the Currency's (OCC) notice of proposed rulemaking (NPR) titled National Banks and Federal Savings Associations as Lenders (Proposed True Lender Rule or Proposed Rule). MBA applauds the OCC for finalizing the *Madden*-fix rule which affirms the valid when made doctrine. Likewise, we commend the OCC for its current efforts to develop a uniform standard for determining whether a bank is a "true lender."

While we support the OCC's goal of resolving the "true lender" issue, we believe the Proposed Rule should be revised so as to ensure warehouse lenders do not fall within the "true lender" definition. As explained below, the modern mortgage market depends heavily on capital provided by warehouse lenders. Ensuring that warehouse lenders are not inadvertently covered by the "true lender" definition is crucial to maintaining a

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<sup>1</sup> The Mortgage Bankers Association (MBA) is the national association representing the real estate finance industry, an industry that employs more than 280,000 people in virtually every community in the country. Headquartered in Washington, DC, the association works to ensure the continued strength of the nation's residential and commercial real estate markets, to expand homeownership, and to extend access to affordable housing to all Americans. MBA promotes fair and ethical lending practices and fosters professional excellence among real estate finance employees through a wide range of educational programs and a variety of publications. Its membership of over 2,100 companies includes all elements of real estate finance: mortgage companies, mortgage brokers, commercial banks, credit unions, thrifts, REITs, Wall Street conduits, life insurance companies, and others in the mortgage lending field. For additional information, visit MBA's website: [www.mba.org](http://www.mba.org).

robust mortgage market, capable of providing broad access to affordable mortgage credit.

## **I. Overview of the Proposed True Lender Rule**

The proposal is intended to remedy uncertainty that resulted from courts' use of divergent standards to determine which entity is the "true lender" by creating a clear test to determine when a bank makes a loan. The OCC's proposal would clarify that a national bank or federal savings association is the "true lender" of a loan if, as of the loan's origination, the bank (1) is named the lender in the loan agreement, or (2) funds the loan.<sup>2</sup>

The "true lender" question relates to lending transactions where multiple parties are involved in the creation of a loan (e.g., third party provides marketing, application processing, or purchases a loan made by a bank soon after consummation). As these types of lending partnerships have become more prevalent, the need for clarity on this issue has become increasingly important. The "true lender" question often determines which state's interest rate limits apply to the loan. Once it is determined that a loan has been made by a bank under the OCC's standards, "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 interest term, pursuant to the *Madden-fix* rule."<sup>3</sup>

The OCC's proposed rule, therefore, would operate together with the recently finalized *Madden-fix* rule to provide much needed clarity, thereby enabling banks to more effectively and efficiently work with other market participants to manage their risks and leverage their balance sheets to meet consumers' needs for affordable credit. MBA commends the OCC for its commitment to clarifying the legal landscape surrounding the true lender issue, by bridging the current statutory gap. While we support the proposed rule's general framework, we believe certain refinements are necessary to prevent unintended outcomes. Specifically, MBA urges the OCC to clarify that entities that solely provide financing to a mortgage lender, such as warehouse lenders, are excluded from the definition of "true lender."

## **II. Recommendation: Warehouse Lenders Should Not be Treated as "True Lenders"**

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<sup>2</sup> 85 FR 44223, "National Banks and Federal Savings Associations as Lenders," July 22, 2020. Available at: <https://www.occ.gov/news-issuances/federal-register/2020/nr-occ-2020-97a.pdf>.

<sup>3</sup> 85 FR 44223, 44227.

As described above, the OCC's proposal would create two bases for establishing a bank as a "true lender." The first states that if a bank is named in the loan agreement as the lender as of the date of origination, this is conclusive evidence that the bank is exercising its authority, and has elected to subject itself to the applicable Federal laws and regulations governing lending by banks. The second alternative is more broad, classifying a bank as the lender if, at the time of origination, the bank funds the loan. The OCC explains that if the bank funds the loan, it has a predominate economic interest in the loan and, therefore, has made the loan, regardless of the lender named in the loan agreement. It is this second definition of "true lender" that MBA urges the OCC to address. As a threshold matter, the OCC should clarify if it did not intend for warehouse lending to fall within the true lender rule, or make it clear that when the warehouse lender provides the funds to the closing table they are the "true lender" to the independent mortgage banker but that the independent mortgage banker is the "true lender" to the consumer.

If the intent was to include such activities, the rule would fail to properly understand the role of warehouse lending. Warehouse lending is not mortgage lending – a warehouse line of credit merely allows an independent mortgage banker to originate a loan using funds borrowed under a warehouse credit agreement. Warehouse lenders primarily serve as temporary financing sources for residential mortgage lenders through various types of commercial credit facilities, including revolving lines of credit, repurchase facilities, and participation facilities. Typically, a mortgage lender would draw on its warehouse facility to fund its origination of a mortgage loan, and it later would repay that draw upon its sale of the mortgage loan into the secondary market. For any given mortgage loan, this draw-and-repay cycle usually would take place over a period of less than one month.

Importantly, while warehouses lenders provide capital, they do not make the underlying loans themselves; activities such as underwriting, servicing the loan, providing closing instructions, and identifying investors to purchase the loan are within the responsibility and discretion of the mortgage banker. Given a warehouse lender's limited direct involvement, it would be both unreasonable and inefficient to treat them as the "true lender," and as such subjected to the OCC's supervisory oversight (e.g., underwriting standards, loan documentation policies, consumer protection laws, etc.), with respect to the mortgage loans made by the warehouse bank's customer. As the OCC states, when a bank is named in the loan agreement, it can be substantiated that it willingly subjects itself to applicable federal laws. Solely providing short-term funding for a

lender's extension of a mortgage loan to a consumer does not evidence this same intent.<sup>4</sup>

Moreover, including warehouse lenders in the definition of "true lender" would impede the proposal's goal of encouraging innovation in the lending space and increasing access to credit across different markets. Without a warehouse lender, the number of loans that a mortgage lender could make would be limited by the amount of its available liquid assets. Independent mortgage banks simply do not have the capital to fund mortgage loans themselves at the closing table, which would be the only alternative if warehouse lenders cannot fund mortgage loans at closing without being deemed the "true lender." Thus, warehouse lenders play an integral role in the mortgage market by providing capital to independent mortgage banks and other loan originators, thereby facilitating access to credit and fueling innovation by providing capital for new entrants. Exposing warehouse lenders to liability as "true lenders" for the actions of mortgage loan originators would dramatically limit their involvement, thereby reducing capital in the system, stifling innovation, and limiting homebuyers' and other mortgagors' access to credit. Additionally, the warehouse financing model is built on the theory that passive warehouse lenders are not liable for indemnification and repurchase obligations. If that assumption is disturbed, the warehouse lending space may become unviable for OCC-regulated banks, resulting in an increase of the cost of funding mortgages and creating undue consumer harm.

Warehouse lending represents an important, diverse, and growing share of the market. Capital provided by warehouse lenders supports independent mortgage bankers who have funded a significant portion of the single-family mortgage market in recent years. It is therefore critical to enable these lending relationships to continue without the threat of liability for actions outside of the warehouse lender's control.

### **III. Conclusion**

Thank you in advance for your consideration of these comments. We welcome the opportunity to discuss the OCC's Proposed True Lender Rule and our recommendation concerning warehouse lenders further. Please feel free to direct any

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<sup>4</sup> Additionally, failing to exclude warehouse lenders would lead to the confusing result that certain loans could have two true lenders: under the first prong of the rule, the party whose name is on the loan agreement, and, under the second prong, the warehouse lender who funds the loan. Simultaneously having two "true lenders" would undercut the clarity the proposal works to resolve. Clarification that the OCC intended to exclude warehouse lenders from the definition would avoid this outcome.

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questions or comments to me directly ([pmills@mba.org](mailto:pmills@mba.org)) or to Justin Wiseman,  
Managing Regulatory Counsel ([jwiseman@mba.org](mailto:jwiseman@mba.org)).

Sincerely,

A handwritten signature in black ink, appearing to read "Pete Mills". The signature is fluid and cursive, with a large initial "P" and "M".

Pete Mills  
Senior Vice President  
Residential Policy and Member Engagement  
Mortgage Bankers Association