**FinReg Round-Up**
September 2020

Vol. 1 No. 7



In this month's FinReg Round-Up, we look at updated guidance on Bank Secrecy Act (BSA) and anti-money laundering (AML) enforcement actions, the settlement of the Colorado "true lender" litigation, and the continued fight over the Office of the Comptroller of the Currency (OCC) "fintech charter."

The four federal banking agencies have updated guidance on enforcement actions against financial institutions that fail to comply with BSA/AML obligations. Colorado reached a $1.55 million settlement with two nonbank lenders for exceeding the state's interest rate cap on consumer loans, presenting a possible model for other bank/fintech partnerships. And the fight over the fintech charter continues, as the OCC argues that the New York Department of Financial Services (NYDFS) has no standing to sue to block the OCC's fintech charter for special-purpose national banks that do not take deposits.

# BSA/AML Guidance Issued

Federal banking agencies issued a joint statement updating guidance on the evaluation of statutory enforcement actions when financial institutions fail to meet their BSA/AML obligations.

The guidance, issued by the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the National Credit Union Administration and the OCC, seeks to clarify the types and nature of BSA/AML compliance failures that will or are likely to cause the supervising agency to issue a cease-and-desist order instead of using other informal and formal channels for identifying regulatory concerns. It clarifies that isolated or technical violations generally will not result in an enforcement action.

The guidance is helpful is providing some clearer parameters for BSA/AML compliance by financial institutions. Because BSA/AML programs are risk-based and individually tailored to each financial institution and its activities, compliance failures are typically identified in hindsight and involve a degree of subjectivity on the part of the regulators. Although that subjectivity has not been—and as a practical matter cannot be—eliminated, the scenarios outlined in the guidance provide some insight into how the regulators view BSA/AML compliance programs.

Download the Joint Statement on Enforcement of Bank Secrecy Act/Anti-money Laundering Requirements here.

# Colorado Interest Rate Cap Lawsuit Settled

In a significant development for bank/fintech partnerships, Colorado's Attorney General's Office has settled two precedent-setting lawsuits against nonbank lenders for exceeding the state's 36% interest rate cap on consumer loans.

Under federal law, out-of-state banks can provide loans in Colorado at interest rates that exceed the state's limits as long as the interest rate is permitted in the bank's home state. The Attorney General sued Avant of Colorado LLC and Marlette Funding LLC, accusing the two non-bank lenders of illegally partnering with out-of-state banks WebBank and Cross River Bank to "rent" the banks' ability to make loans with interest rates that exceeded Colorado's limits. The Attorney General alleged that the nonbank lenders, not the banks, were the "true lenders," and as a result, the federal law allowing a bank to charge its home state interest rate in Colorado is inapplicable. Therefore, the loans were originated in violation of Colorado law.

Under the Aug. 18 settlement announced, Avant and Marlette and their bank partners (WebBank and Cross River Bank) agree not to lend to Colorado consumers at interest rates above 36%. They also agree to a number of other criteria for loans originated in Colorado, including:

- Letting the banks retain ultimate approval authority for the loans and control of all terms of credit.
- Allowing the banks' regulators to examine, review and audit Marlette and Avant.
- Requiring Marlette and Avant to obtain state lending licenses and submit annual compliance reports.
- Setting terms and conditions for the sale of the loans by the banks to Avant and Marlette.

As long as the lending programs comply with the required terms and conditions, the Colorado Attorney General agrees not to pursue claims that the loans violate Colorado law, including alleging that the banks are not the true lenders or that the assignment of the loans to a nonbank purchaser affects the ability of the purchaser to enforce the original terms of the loan, including the interest rate.

Although the terms of the agreement apply only to loans originated to Colorado residents, it is the first detailed outline of the terms and conditions necessary to deem the bank in a fintech partnership is the true lender. Prior to the settlement, courts were ruling on the true lender issue based either on the terms of the loan agreement (which typically named the bank as the lender) or on which party had the predominant economic interest in the loans (typically the fintech company, which almost always purchased all or most of the loans after origination).

The agreement notes that the "safe harbor" outlined in the agreement also will apply to any other fintech partnerships with WebBank and Cross River Bank. It remains to be seen whether other states will pursue similar settlements with banks and their fintech partners.

# OCC Defends Fintech Charter Program at the Second Circuit

The OCC is arguing that the NYDFS has no standing to sue the OCC to block its charter program for fintech firms to create special-purpose national banks that do not take deposits.

NYDFS sued OCC in 2018 after the agency introduced its charter program for fintech companies. A New York federal court blocked the program, and the OCC appealed to the Second Circuit.

In a brief filed with the Second Circuit on Aug. 13, the OCC argued that the dispute is not ripe for adjudication because the OCC has not received any applications for a special-purpose national bank charter with a connection

to New York. If the Second Circuit were to determine that NYDFS did have standing to bring the lawsuit, the OCC argued in the alternative that the department is unable to show that the OCC's interpretation of the term "business of banking" in the National Bank Act is unreasonable or that a bank must accept deposits in order to receive an OCC charter.

Many fintech companies currently have to register for and maintain licenses in every state and jurisdiction in which they transact with customers. So there is much interest in a fintech charter, as it would alleviate the need for these licenses, provide for a single regulator to monitor these companies, and encourage the development of new financial products and solutions.

## Related Professionals

Melissa Hall . . . . . mhall@loeb.com
Stephen A. Aschettino. . . . . saschettino@loeb.com



6422 REV1 09-03-2020