

Congress Moves to Repeal OCC's "True Lender" Rule (Updated)

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TAKEAWAYS

- ④ The Senate has voted to repeal the True Lender Rule using the Congressional Review Act, a measure allowing Congress to disapprove of agency actions and nullify recently adopted administrative rules.
- ④ The True Lender Rule is a recent Office of the Comptroller of the Currency rule designed to identify which party in a partnership between a national bank and a third party is deemed the "true lender."
- ④ Without the rule, these partnerships now face regulatory uncertainty, with legal and compliance requirements potentially determined on a case-by-case basis.

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On May 11, 2021, the Senate voted to repeal a Trump Administration regulation that defines which party is the "true lender" in partnerships between banks and non-banks, including financial technology and other non-bank lending companies. The Senate resolution now heads to the House of Representatives, which is expected to pass the resolution. President Biden has signaled his support for the repeal and will likely enact the repeal following a vote in the House. The repeal of this rule could create regulatory uncertainty for fintechs and other non-bank lenders that were relying on the rule.

Congressional Review Act

The Senate passed a resolution to repeal the "True Lender Rule" promulgated by the Office of the Comptroller of the Currency (OCC) by a vote of 52-47. This vote came under the Congressional Review Act (CRA), which permits Congress to review agency rules and regulations, and disapprove of rules via a joint resolution of Congress. Congress typically has 60 days to review agency rules under the CRA. However, the

Act also allows a new Congress another "look back" period for rules issued in the last 60 legislative days under the previous session of Congress. This means that rules promulgated under the Trump Administration between August 21, 2020 and January 20, 2021 are currently subject to review by the 117th Congress.

Under the CRA, once the House and the Senate pass a joint resolution disapproving of a rule, the measure goes to the President for enactment. If signed, the rule is nullified, and agencies are then prohibited from issuing or adopting the rule again "in substantially the same form." While this term is not defined by the CRA, the OCC will not be permitted to pass the True Lender rule, in its same form, at a future date. However, the rule does not "salt the earth," for all regulations in this space; agencies have discretion to advance future regulations that go beyond the disapproved rule. Whether Congress or agencies now led by Biden Administration appointees intend to adopt new regulations pertaining to bank and third-party lending partnerships remains to be seen.

The True Lender Rule

The OCC promulgated the True Lender Rule in October 2020, falling within the current CRA lookback period for the 117th Congress. This rule was an attempt by the OCC to provide regulatory clarity for lenders, adopting a framework for identifying which party would be considered the "true lender" in partnerships between national banks and non-bank third parties (including financial technology companies), therefore establishing whether certain state laws and regulations would apply to such loans. Under the rule, a national bank would be considered the lender when it "(1) is named as the lender in the loan agreement, or (2) funds the loan." As the true lender, the banks would retain the compliance obligations associated with the origination of the loan. Importantly, the rule also specifies that when one bank is named as lender and another institution funds the loan, the named lender is deemed to be the true lender making the loan. This clear and predictable test would provide certainty and allow all stakeholders, including borrowers, to easily identify the lender in a transaction.

When promulgating the True Lender Rule, the OCC emphasized that increasing legal uncertainty regarding banks' lending relationships with third parties had begun to discourage such partnerships, potentially limiting access to affordable credit and stifling innovative lending programs. The OCC stated that its supervision of national banks would negate concerns about what critics termed "rent-a-charter" or "rent-a-bank" arrangements. However, critics in Congress and elsewhere have said that the rule would instead facilitate these arrangements and potentially allow lenders to avoid state consumer protection requirements, including usury caps. Seven Attorneys General, led by New York Attorney General Letitia James, filed a lawsuit seeking an injunction against the rule for allowing businesses to avoid state law requirements.

Coming Regulatory Uncertainty

The fate of the True Lender rule will now be determined by the House of Representatives and President Biden. For the financial services industry, and particularly financial technology and other non-bank lending companies, repeal of the True Lender Rule could mean a return to uncertainty concerning which laws apply to a lending program. Both banks and non-banks in lending partnerships may be subject to a patchwork of state law requirements, compliance measures, and other regulations, including state usury caps. Fintech and other non-bank companies should be aware of the potential repeal of the True Lender Rule and preparing to assess compliance requirements or go-to-market strategies should the rule be repealed.

Update: On June 24, the House of Representatives also passed the resolution disapproving of the True Lender Rule, by a largely party line vote of 219-208. Speaker of the House Nancy Pelosi praised the repeal, repeatedly calling it the “fake lender rule” while speaking on the House floor, and referred to the rule as an “assault on families’ wellbeing.” President Biden has expressed support for the repeal and is now widely expected to sign the measure, finalizing the repeal of the rule.

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