

U.S. House of Representatives Votes to Override OCC True Lender Rule

June 25, 2021

The U.S. House of Representatives on June 24th voted 218 to 208 to repeal the Office of the Comptroller of the Currency's (OCC) "True Lender" rule under the Congressional Review Act (CRA). As discussed in [earlier alerts](#), the OCC published the rule last year to eliminate challenges regarding when a loan is actually made by a federally-chartered bank, instead of a non-bank partner that takes assignment of the loan shortly after origination. The True Lender rule adopted a simple bright-line test that said that if the national bank was the named lender in the loan documentation, the national bank was the true lender notwithstanding any other factor, such as whether the bank held the predominant economic interest in the loan.

As the Senate adopted its own CRA resolution to overturn the rule on May 11th, the measure now goes to the White House, where President Joe Biden is expected to sign it. We have the following thoughts on what this means going forward for bank partner lending programs:

What this means for the rule: The True Lender rule is overridden and will not take effect at all, ever.

What this means for state Attorneys General litigation challenging the rule: The litigation is now moot and should be dismissed.

What this means for the OCC: The OCC cannot propose a substantially similar rule unless specifically authorized by Congress to do so. We don't expect that to happen. Theoretically, the OCC (which still has an acting Comptroller at this time) could propose a True Lender rule that was not substantially similar to the old rule. However, there is no authority as to the scope of the "substantially similar" standard, and a legal challenge to any sort of similar proposed rule would be inevitable. We also note that a new Comptroller could propose a new rule that is not industry-friendly and argue that, as such, is not substantially similar to the old rule. For example, the OCC could propose a True Lender rule that adopted a form of predominant economic interest test. Such a rule would be subject to challenge as well, however, given the connection to the same issue. Our expectation is that the OCC will simply be silent on the issue absent legislation.

What this means for the law: If there is no new rule, strictly speaking, the legal result is that we are back to the status quo ante. Court decisions involving True Lender litigation will continue to reach contradictory results, as they will be based on the facts specific to each program and its structure, as well as the historical precedent in each jurisdiction. We will also continue to see state regulators and private litigants argue that True Lender questions should be resolved by applying the predominant economic interest test, or perhaps a new test that

they create to support their position if the predominant economic interest arguments suffer consistent losses. It is also possible that more states may want to adopt statutes like the Illinois predatory loan statute, as they will feel empowered by the resolution to do so.

What this means for banks: Strictly speaking, the Rule would have applied only to national banks, so they are directly impacted by the demise of the Rule. State-chartered banks, strictly speaking, are no worse off than they were before as the Rule never could have helped them and they were never going to get a similar FDIC rule. However, we recommend that all banks reassess their risk exposure under the predominant economic interest test given its continued use in litigation.

What this means for bank partners: Some partners will see no impact from the demise of the True Lender rule, as their programs are well structured and do not rely upon a True Lender rule to be well positioned for True Lender litigation based upon a predominant economic interest test. Partners may see some of their options disappear if the banks now feel that the bank partner model is subject to greater risk as a result of the action, but we do not anticipate significant impacts to the industry from the demise of the rule alone. We do anticipate, however, continued True Lender litigation. Certainly there will be revisions to existing programs to address the predominant economic interest test. High-cost programs may have to migrate to different models or cease operations in certain jurisdictions, and some partners may wish to obtain lending licenses rather than continue to assume the risk of True Lender litigation.

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