



OCC TRUE LENDER RULE DISAPPROVED: NOW WHAT?

On June 30, 2021 President Biden signed the Joint Resolution of Congress disapproving the rule adopted by the Office of the Comptroller of Currency relating to “National Banks and Federal Savings Associations as Lenders” (85 Fed. Reg. 68742 (October 30, 2020)) (the “True Lender Rule”), and providing that such rule shall have no force or effect.

The True Lender Rule was published by the OCC on October 30, 2020 and provided that a bank makes a loan when the bank, as of the date of origination:

- (1) Is named as the lender in the loan agreement; or
- (2) Funds the loan.

If, as of the date of origination, one bank is named as the lender in the loan agreement for a loan and another bank funds the loan, the bank that is named as the lender in the loan agreement makes the loan.

The Acting Comptroller released a statement in anticipation of the disapproval of the True Lender Rule stating:

Moving forward, the OCC will consider policy options, consistent with the Congressional Review Act, that protect consumers while expanding financial inclusion. Both of these priorities are part of the agency’s mission of ensuring that national banks and federal savings associations provide fair access to financial services for all Americans and that customers are treated fairly.

At the time of the Rule’s adoption, the OCC stated that its goal was to provide legal certainty to banks, so what happens now? The legal uncertainty that the OCC was trying to address stems from (i) silence under federal banking law on when a bank “makes a loan” in connection with a third party and (ii) divergent judicial doctrines on who is the true lender. Uncertainty that continues to exist.

Under the Congressional Review Act that Congress used to disapprove the True Lender Rule, the OCC is prohibited from adopting a rule in substantially the same form. While it is not entirely clear what further action this permits the OCC to take in regard to the True Lender issue, there is no indication that the OCC intends to

adopt any future rules on this issue.

Thus, the nullification of the True Lender Rules takes banks back to existing case law and the legal uncertainty faced prior to the adoption of the True Lender Rule.

At the same time that Congress was disapproving the True Lender Rule, the OCC and other banking agencies started soliciting comments on proposed interagency guidance to managing risks associated with third party relationships. See 86 Fed. Reg. 38182 (July 19, 2021) (“Third Party Relationships Proposed Guidance”). The Third Party Relationships Proposed Guidance would replace each agency’s existing guidance on third-party risk management.

In the introduction to the Third Party Relationships Proposed Guidance the banking agencies acknowledge that “[b]anking organizations routinely rely on third parties for a range of products, services, and activities.” Thus, it is clear that banks routinely rely on third parties and there is nothing inherently inappropriate about this, provided risk posed by the third party is appropriately managed.

Against this backdrop, the increased scrutiny by regulators and some unfortunate court decisions decided in the context of poorly structured bank lending programs has made focusing on program structure increasingly important. Structure can refer to the legal arrangements between the parties, including decision making and assumption of risk, as well as documentation and advertising. Thus, what the legal documents say, both customer facing documents and business to business agreements, and what is done, both outwardly and behind the scenes, needs to be thoughtfully considered.

Under existing case law, there is no bright-line test to ensure that a bank is the “true lender” like there would have been under the OCC’s True Lender Rule. A bank’s “lender” status is based on multiple factors that various courts have found indicate that a party is acting as the lender. For example, a bank’s control and oversight over a loan program could support its “lender” status.

Thus, a lender may engage third parties without losing its “true lender” status provided that it retains adequate involvement with the loan program and appropriately manages third party relationships. However, the disapproval of the True Lender Rule may open up the floodgates for new “true lender” challenges. Even if not successful, “true lender” challenges cost time and money to defend. The hope is that courts will resolve and recognize the ability of banks to rely on

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third party expertise to deliver products and services. The legal uncertainty regarding a bank's "lender" status makes it more important than ever for bank loan programs to be properly structured.



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