

## The OCC's true lender rule has been repealed

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On June 30, President Biden signed the resolution to repeal the OCC's true lender rule from the Trump administration. With majority votes from the House and the Senate, the rule has been nullified, and the OCC may not issue any substantially similar rule without subsequent statutory authorization.

President Biden has signed a joint resolution of disapproval passed by the House and the Senate with majority votes<sup>1</sup> under the Congressional Review Act to repeal the so-called true lender rule that the Office of the Comptroller of the Currency (OCC) finalized in October 2020 ([True Lender Rule](#)).<sup>2</sup> This was a somewhat expected result given the White House's explicit support for the passage of the repeal resolution and its view that the True Lender Rule "undermines state consumer protection laws and would allow the proliferation of predatory lending."<sup>3</sup>

The True Lender Rule has been controversial since its inception. The OCC intended to provide, by amending 12 C.F.R. Part 7, legal certainty for national banks and federal savings associations (banks) in making loans under lending partnerships with a third party, such as a fintech marketplace lender. Some welcomed the True Lender Rule, including Republicans and certain financial industry groups, claiming that the bright-line rule would give underserved consumers better access to favorable loan rates. Others, such as Democrats and consumer advocacy groups, strongly opposed it, arguing that the rule would allow predatory lenders to skirt state interest rate limits on loans and prey on vulnerable consumers. In January 2021, attorneys general from various states, including from California, New York, Colorado and Massachusetts, brought a [lawsuit](#) against the True Lender Rule. Within the OCC, political pressure to overturn the rule had become apparent, particularly following the appointment of Acting Comptroller Michael Hsu, replacing former Acting Comptroller Blake Paulson, who drew the ire of Democratic lawmakers over his defense of the rule issued under the leadership of his predecessor, former Acting Comptroller Brian Brooks.

Under the Congressional Review Act, Congress may repeal regulations issued by federal agencies by passing a joint resolution of disapproval subsequently signed by the president. Once a disapproval resolution is enacted, the rule may not take effect, and the agency may not promulgate a replacement rule that is substantially similar to the one repealed without subsequent statutory authorization. If a rule is disapproved after taking effect, it is treated as if it had never gone into effect.

The True Lender Rule, which became effective on December 29, 2020, will be treated as though if it had never taken effect. The OCC is prohibited from issuing any replacement rule unless it obtains statutory authorization. On the day the House passed the resolution, Acting Comptroller Hsu issued a responding [statement](#) reaffirming the OCC's long-standing position against predatory lending and prioritization of fair access to financial services.

The repeal of the True Lender Rule marks a return to a world in which true lender issues will be determined on a case-by-case basis, informed by differing state laws and the facts in each particular instance. The absence of a consistent national law on the question will thus create uncertainty for investors, banks and marketplace lenders about the ability of loan purchasers to collect, as assignee of loans, the interest rates that had originally been agreed to. In [one](#) pre-True Lender Rule instance, that uncertainty led to a state regulator filing a lawsuit against a marketplace lender that was resolved, after several years of litigation, by a settlement in which an out-of-state bank agreed (among other things) to cap the interest rates on all loans it made in the state.

The practical impact may be limited in today's low interest rate environment but may become more important as interest rates rise. The prospect of federal legislation is unclear, but there have been various proposed bills that would create a federal usury limit while they still have a long way ahead in the legislation process.<sup>4</sup>

If you have any questions regarding the matters covered in this publication, please reach out to any of the lawyers listed below or your usual Davis Polk contact.

**Margaret E. Tahyar**

+1 212 450 4379

margaret.tahyar@davispolk.com

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- <sup>1</sup> The House passed the joint [resolution](#) by a vote of 218-208 on June 24, 2021, following the Senate's passing the [resolution](#) by a vote of 52-47 on May 11, 2021.
- <sup>2</sup> OCC, National Banks and Federal Saving Associations as Lenders, 85 Fed. Reg. 68,742 (to be codified at 12 C.F.R. pt. 7). For details on the True Lender Rule and background information, see Davis Polk Client Update, [The OCC Finalizes a Rule to Answer the True Lender Question](#) (Oct. 9, 2020); Davis Polk White Paper, [Federal Banking Regulators Can and Should Resolve Madden and True Lender Developments](#) (Aug. 14, 2018).
- <sup>3</sup> Executive Office of the President, Statement of Administration Policy, [S.J. Res. 15 – Disapproval of the rule submitted by the Office of the Comptroller of the Currency relating to “National Banks and Federal Savings Associations as Lenders”](#) (May 11, 2021).
- <sup>4</sup> See e.g., [H.R.5050 – Veterans and Consumers Fair Credit Act](#); [S.2833 – Veterans and Consumers Fair Credit Act](#); [S.1659 – Protecting Consumers from Unreasonable Credit Rates Act of 2017](#).