

Congress Uses Congressional Review to Overturn OCC's True Lender Rule

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On June 24, the House of Representatives, like the Senate on May 11, voted to overturn the Office of the Comptroller of Currency's (OCC) "True Lender Rule" that was finalized in October 2020. The Senate initiated the process under the Congressional Review Act (CRA), and President Biden is expected to sign the resolution to complete the process. This is only the second time during the current term that Congress deployed such a tactic against the previous administration.

Under the Trump administration, the OCC settled on the bright-line "True Lender Rule" to clarify whether a national bank or federal savings association (collectively, "national bank") was the "true lender" in a partnership between the national bank and a third party — primarily fintech companies. These relationships began to surface as fintech companies entered the loan marketplace, looking to create affordable lending options for borrowers. Read more about the true lender proposal in our previous post.

The decision by Congress to overturn the OCC's action stems from the criticism by consumer advocates of the construction of the True Lender Rule and its potential loopholes for allegedly usurious lending tactics. On January 5, New York AG Letitia James led several attorneys general in filing suit against the OCC and Acting Comptroller Brian Brooks, alleging that the True Lender Rule was in direct conflict with the National Bank Act (NBA). Under the NBA, national banks are capped at charging a maximum interest rate set by the state where they are licensed. However, third parties and nonbank lenders can only charge the maximum rate allowed in the state where the loan is issued. The complaint alleged that, under the True Lender Rule, the national bank and third-party partnership allows third parties to take advantage by charging consumers the national bank's maximum interest rate. The complaint also alleged that the OCC rushed to issue the True Lender Rule, citing the unprecedented 4,000 comments received on the proposed rule in September 2020, of which a majority were in opposition.

By using the CRA, Congress can expedite (or "fast track") procedures, by which it may disapprove regulatory rules issued by federal agencies via a joint resolution. Generally, either house may submit a disapproval resolution within 60 days after Congress receives the proposed agency rule. The CRA also allows for a new Congress to review regulations issued in the last 60 legislative days under a previous session of Congress. Once a resolution is passed in both houses, it goes to the president for signature, and if so enacted, the agency rule may not take effect, and the OCC cannot issue a "substantially similar" rule. Since both the Senate and House of Representatives have now voted, the repeal will now go to President Biden. The Biden administration has already voiced support for the overturn of the True Lender Rule.

The OCC is currently battling with New York, California, and Illinois attorneys general over another bank-lending issue — the OCC’s Valid-When-Made Rule that was passed in May 2020. Several attorneys general brought actions against both the OCC and the Federal Deposit Insurance Corporation (FDIC) after both agencies finalized similar Valid-When-Made Rules, which also have been cited as alleged potential predatory lending pitfalls. The FDIC recently filed its motion for summary judgment on May 20.

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