

Biden Signs Law Overturning True Lender Rule

July 2, 2021

On June 30, 2021, President Joe Biden signed a joint resolution to revoke the Office of the Comptroller of the Currency's (OCC) ["true lender" rule](#) (the "Rule"). Passed in October 2020, the Rule clarified that a national bank was the true lender of a loan if it was the named lender on the loan agreement or funded the loan. Under the Trump administration, the OCC [said](#) the Rule would provide regulatory clarity for banks, borrowers and other stakeholders to identify the lender in a transaction. However, many Democrats, including House Speaker Nancy Pelosi (D-Calif.), as well as consumer rights advocates, supported the repeal of the Rule, citing concerns about how the Rule might enable predatory lending and "rent-a-bank" partnerships between lenders and banks to lend at higher interest rates.

The [joint resolution](#) passed the Senate on May 11, 2021, on a vote of 52 to 47, with three Republican Senators voting in favor, and the House on June 24, 2021, on a vote of 218 to 208, with one Republican voting with 217 Democrats. Congress repealed the Rule pursuant to the Congressional Review Act (CRA), under which Congress can review agency rules and regulations, and repeal rules passed in the previous 60 legislative days through joint resolution. The repeal of the Rule fell under the "look back" period, which enables a new Congress to review rules issued in the final 60 days of the previous Congressional session.

Under the CRA, the OCC is now prohibited from reissuing the same rule or passing a new rule that is substantially similar to the repealed rule. Acting Comptroller of the Currency Michael J. Hsu [issued a statement](#) on June 24 after the House vote that "reaffirm[ed] the agency's long-standing position that predatory lending has no place in the federal banking system." Hsu said that going forward, the "OCC will consider policy options, consistent with the Congressional Review Act, that protect consumers while expanding financial inclusion."

The repeal of the Rule adds more complexity for certain fintech and other nonbank lending companies in determining their state regulatory requirements, particularly with respect to state interest rate cap restrictions and other state licensing and consumer credit compliance measures. Determining the true lender status in any given transaction likely will depend on the specific facts of each partnership. In the context of state usury laws, this change will become especially relevant as interest rates rise, unless there is federal legislative action to create a federal usury limit. Note that the Rule did not apply to state-regulated banks that are regulated by the Federal Deposit Insurance Corporation.

Biden's action renders moot a [lawsuit filed in January 2021](#) by eight state attorneys general, which was led by New York Attorney General Letitia James, who had [argued](#) that the Rule "sanction[ed] high-cost lending schemes devised to evade state usury laws" and "invi[te]d predatory consumer-lending partnerships between banks and lightly regulated non-depository lenders." With the Rule's repeal, courts are likely to continue to scrutinize certain bank partnership models where a national bank originated the loans.

Cooley summer associate [Katie Kaufman](#) contributed to this alert.

This content is provided for general informational purposes only, and your access or use of the content does not create an attorney-client relationship between you or your organization and Cooley LLP, Cooley (UK) LLP, or any other affiliated practice or entity (collectively referred to as "Cooley"). By accessing this content, you agree that the information provided does not constitute legal or other professional advice. This content is not a substitute for obtaining legal advice from a qualified attorney licensed in your jurisdiction and you should not act or refrain from acting based on this content. This content may be changed without notice. It

is not guaranteed to be complete, correct or up to date, and it may not reflect the most current legal developments. Prior results do not guarantee a similar outcome. Do not send any confidential information to Cooley, as we do not have any duty to keep any information you provide to us confidential. This content may be considered **Attorney Advertising** and is subject to our [legal notices](#).

Key Contacts

Elyse Moyer Washington, DC	emoyer@cooley.com +1 202 776 2113
Obrea Poindexter Washington, DC	opointexter@cooley.com +1 202 776 2997
Sean Ruff Washington, DC	sruff@cooley.com +1 202 776 2999

This information is a general description of the law; it is not intended to provide specific legal advice nor is it intended to create an attorney-client relationship with Cooley LLP. Before taking any action on this information you should seek professional counsel.

Copyright © 2023 Cooley LLP, 3175 Hanover Street, Palo Alto, CA 94304; Cooley (UK) LLP, 22 Bishopsgate, London, UK EC2N 4BQ. Permission is granted to make and redistribute, without charge, copies of this entire document provided that such copies are complete and unaltered and identify Cooley LLP as the author. All other rights reserved.