Marketplace Lending Update #10: OCC's True Lender Rule Is Repealed

July 16, 2021

On June 30, 2021, President Biden signed a joint resolution of Congress under the Congressional Review Act ("CRA") to disapprove the OCC's True Lender Rule. As a result, the True Lender Rule is now repealed.

The True Lender Rule was published in the *Federal Register* on October 30, 2020. According to the OCC, the Rule sought to clarify marketplace confusion that arises when a national bank partners with a non-bank lender, such as a marketplace lender.[1] Determining which entity is making the loan (or is the "true lender") determines which laws apply to the loans. The True Lender Rule provided that a national bank is the true lender if, as of the date of origination, (1) the national bank is named as the lender in the loan agreement for a loan and another bank funds that loan, or (2) the national bank itself funds the loan.[2]

As Cadwalader has previously reported,[3] the Congressional Review Act gives Congress expedited procedures for agency rulemaking review. With that, Congress is empowered to pass resolutions of disapproval, which, when signed by the President, prevent an agency's rule from either taking effect or continuing. In essence, when the President signs a joint resolution, it is as if the rule had never taken effect.[4] Moreover, the rescinded rule "may not be reissued in substantially the same form, and a new rule that is substantially the same as such a rule may not be issued, unless the reissued or new rule is specifically authorized by a law enacted after the date of the joint resolution disapproving the original rule."[5]

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1 For a discussion of the bank origination model, see our Clients & Friends Memo, Marketplace Lending Update: Who's My Lender? (Mar. 14, 2018).

2 2 C.F.R. 7.1031(b).

3 For more information on the Congressional Review Act, *see* Clients & Friends Memo, Marketplace Lending Update #9: To Thine Own Self Be True? Not Necessarily (May 21, 2021).

4 5 U.S.C. § 801(f).

5 5 U.S.C. § 801(b)(2).

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The House passed its joint resolution on June 24, 2021 and the Senate passed its resolution on May 11, 2021. President Biden signed the resolution on June 30, 2021, thereby terminating the rule's effectiveness. Now, the patchwork of judicial decisions released before the OCC's issuance of the Rule will control the true lender determination and decide what law applies.

As we have previously advised, we believe the repeal of the True Lender Rule is largely symbolic and that risks for marketplace loans remain basically the same.[6] With that, the best ways to mitigate risks associated with challenges to bank-origination model loans include: (1) ensuring loan agreements have strong arbitration clauses reflecting contractual agreement to arbitrate any claims and not allow claims to be arbitrated on a class action basis,[7] and (2), limiting the interest rates to below the threshold typically targeted by the CFPB and the state AGs (usually, 36%).

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If you have any questions, please feel free to contact any of the following Cadwalader attorneys.

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6 *See* supra note 3.

7 *See* American Express Co. et al v. Italian Colors Restaurant et al., 570 U.S. 228 (2013) (holding that the Federal Arbitration Act does not permit courts to invalidate a contractual waiver of class arbitration on the ground that the plaintiff's cost of individually arbitrating a federal statutory claim exceeds the potential recovery).