



Congressional Review Act  
and True Lender

# Remedy “True Lender” Rule via OCC Rulemaking – Not the CRA

SFA does not support Payday or other High Cost Lenders engaging with banks to use the True Lender Rule to evade state usury law.

SFA strongly opposes such schemes.

However, Congress' use of the Congressional Review Act (CRA) to nullify the True Lender Rule may lead to unintended consequences and costly uncertainty regarding foundational aspects that national banks and the capital markets rely on to provide consumers and small businesses access to affordable, responsible credit.

While historically the OCC has taken affirmative steps to reject such activity, the Acting and future Comptroller should expeditiously modify the True Lender Rule to explicitly prohibit such schemes.

## OCC True Lender Rule provides needed clarity

- On October 27, 2020, the Office of the Comptroller of the Currency (OCC) issued a rule that eliminates any ambiguity to when a bank is considered the “true lender” when extending a loan, including in the context of a bank and third-party partnership.
  - The Final Rule specifies that a bank is the true lender if on the date of the loan origination, the bank (1) is named as the lender in the loan agreement or (2) funds the loan.
  - In doing so, it provides certainty as to when federal law applies to national banks making a loan nationwide – and this includes their right to export rates.
  - Importantly, when a bank is the true lender, the rule also establishes that the bank retains full responsibility for ensuring the loans meets all federal standards, including consumer protection regulations.
  - It does not set the maximum rate a national bank can export nationwide.
- Absent the True Lender Rule, legal certainty established by the OCC’s corollary “Valid-When-Made” (VWM) rule, which is foundational to the capital markets funding these loans, could also be undermined.

- SFA supports VWM, as it is imperative to ensure the enforceability of a loan’s terms when a bank seeks to finance or sell any of their loans.
- Prior to the adoption of the True Lender Rule, a growing number of lawsuits began resulting in vastly inconsistent and often conflicting rulings with considerable subjectivity in determining when a national bank is the “*true lender*.”
- This legal ambiguity puts into question whether the loans purchased by investors, including those loans backing pension plan and mutual fund bond investments, are even valid in the first place – thus undermining the VWM determination.
- Uncertainty with True Lender and VWM can increase costs and limit access to credit for consumers.
  - Banks ability to finance and sell loans is essential to credit availability and reducing cost of credit, especially to underserved communities.
  - Capital markets securitization alone finances over \$12.7 trillion of consumer credit.
  - This important flow of capital can only occur when financing partners and loan purchasers know with certainty the loans are and will remain valid.

## True Lender Rule should be revised to include explicit guardrails to prohibit high-cost lending partnerships

- SFA agrees with the proponents of the CRA that appropriate OCC safeguards for bank-originated loans are essential to ensure fair and responsible lending to consumers and protection against predatory, high-cost lending.
  - The OCC has historically taken affirmative enforcement actions against any banks for partnership practices with high cost or payday lenders.
  - Even so, the OCC should take steps to ensure the True Lender Rule can’t be used as a mechanism which on its face allows high cost lender to partner with national banks simply to avoid state usury laws.
- SFA urges the Acting and future Comptroller to expeditiously modify the rule to address these shortcomings.
  - We encourage the Senate to confirm a Comptroller that makes this a priority.

## Revising the OCC Rule is the appropriate tool to address high-cost lending schemes – not invalidating it entirely through the CRA

- Repealing the True Lender Rule through the blunt tool of CRA would largely eliminate the OCC’s ability to offer the much-needed clarity through a formal rulemaking process.
  - The OCC’s ability to offer further guidance on true lender would be severely hampered, as the CRA will invalidate the rule and prohibit the agency from issuing another rule that is substantially similar.<sup>2</sup>
  - The CRA would bring back the ambiguity and legal uncertainty that existed prior to the rule.<sup>3</sup>
  - This includes the OCC’s ability to address any unintended consequences on the essential funding that the capital markets provide.
  - The OCC can and should strengthen the rule against potential abuse.

## Conclusion

- SFA supports the OCC providing the much-needed clarity and a uniform standard to the “true lender” issue and VWM as both foundational aspects of the legal and regulatory framework for everyday financing and sales arrangements.
- SFA agrees that explicit safeguards are needed to prevent potential abuse, however, using the blunt tool of the CRA hampers the OCC ability to avoid unintended consequences to the \$12.7 trillion consumer finance capital markets.
- SFA strongly opposes Senate Joint Resolution 15.
- A vote to repeal the OCC’s True Lender Rule through the CRA poses real risk to consumer access and cost of credit.
- It is critical that the OCC provide clarity and transparency through rulemaking for loans originated by national banks.

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<sup>2</sup> <https://uscode.house.gov/view.xhtml?path=/prelim@title5/part1/chapter8&edition=prelim>

<sup>3</sup> According to global law firm Mayer Brown, “Any rule invalidated under the CRA is treated as if the rule had never taken effect. Thus, a CRA invalidation of the true lender rule would revert the law governing when a bank is acting as the “true lender” to the various pre-rule, court-created standards, many of which were divergent and sometimes inconsistent.”

## About the Structured Finance Association

The Structured Finance Association (SFA) is the leading securitization trade association representing over 370 member companies from all sectors of the securitization market. Our core mission is to support a robust and liquid securitization market and help its members and public policymakers grow credit availability and the real economy in a responsible manner. SFA provides an inclusive forum for securitization professionals to collaborate and, as industry leaders, drive necessary changes, advocate for the securitization community, share best practices and innovative ideas, and offers professional development for industry members through conferences and other programs. For more information, visit [www.structuredfinance.org](http://www.structuredfinance.org).

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