CSBS Letter re: CRA Resolution on True Lender

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June 14, 2021

The Honorable Maxine Waters
Chairwoman House Committee on Financial Services
Washington, D.C. 20515

The Honorable Patrick McHenry
Ranking Member House Committee on Financial Services
Washington, D.C. 20515

Dear Chairwoman Waters and Ranking Member McHenry,

On behalf of the Conference of State Bank Supervisors (CSBS)[1], I am writing to express our members' support of the Congressional Review Act (CRA) joint resolution (H.J. Res.35) to strike down the Office of the Comptroller of Currency's (OCC) true lender rule.

We thank Congress for drawing needed attention to this important issue and for taking the first steps to overturn this harmful rule that has been widely criticized for undercutting state consumer protection laws by extending national bank preemption to third-party nonbanks to enable so called "rent-a-bank" schemes. In particular, the rule would enable nonbanks to charge otherwise illegal interest rates on loans in which a nonbank holds the predominant economic interest by asserting that its national bank partner is the true lender merely because the bank's name was on the loan for a day or two.

State regulators have long maintained that the true lender doctrine is and should remain a matter of state law as issues of credit affordability and access are inherently matters of local concern. Moreover, the OCC should not erode state consumer rights and protections, particularly when it refuses to follow the process mandated by Congress to preempt those protections.

The OCC’s True Lender Rule

The OCC’s final rule[2], was issued to establish when a national bank or federal savings association makes a loan and is the “true lender” in the context of a partnership between a bank and a third-party nonbank, such as a marketplace lender. Specifically, the OCC’s rule states that the bank makes a loan when, as of the date of origination it (1) is named as the lender in the loan agreement, or (2) funds the loan.[3]

The OCC established this highly formalistic true lender test to eliminate the legal uncertainty arising from the state law true lender doctrine. The state law true lender doctrine looks to the substance, rather than the form, of lending transaction to determine, based on all the facts and circumstances, what entity is truly the lender. The doctrine has been invoked by consumers and state officials and applied by courts in challenges to rent-a-bank arrangements in which nonbanks partner with a bank to use federal preemption so that the nonbank can charge interest rates above that permitted by state law.

The OCC believes that the case-by-case, substantive review involved in applying the state law true lender doctrine creates uncertainty for nonbanks attempting to structure bank-nonbank partnerships and discourages them from originating loans through such arrangements which ultimately restricts “access to affordable credit.” To eliminate this legal uncertainty, the OCC issued a highly formalistic federal true lender test to override the state law true lender doctrine through federal preemption.

While state regulators recognize the importance of facilitating access to credit, the OCC’s rule is fatally flawed for the reasons we briefly highlight below. Accordingly, CSBS supports Congressional disapproval under the CRA of the OCC’s true lender rule.

State Regulators’ Concerns Regarding the OCC’s Final True Lender Rule

We encourage Congress to review our letter sent to the OCC on September 3, 2020, which thoroughly explains why state regulators oppose on both legal and policy reasons, the OCC test to determine when a national bank is a true lender (“true lender test”).[4] This letter reiterates two key major policy concerns state regulators have regarding the OCC’s true lender rule.

- ***The OCC's true lender test is so formalistic that it permits nonbanks to effectively lend at otherwise usurious interest rates.***

CSBS opposes the true lender test because it is so formalistic and bright-line that it allows nonbanks to charge otherwise impermissible interest rates even when the nonbank bears the entire economic interest in the loan ostensibly made by its national bank partner.

Although the OCC's rule is alleged to eliminate the legal risk faced by nonbanks partnering with national banks to make loans, the rule does not identify the scenarios in which this risk manifests itself. To be clear, the legal risk arises when a nonbank seeks to charge an interest rate higher than that permitted under the usury law of the state in which the borrower resides on the grounds that its bank partner could charge such an interest rate if it had the predominant economic interest in the loan made through the lending partnership. This legal risk is most acute when lending arrangements are structured so as to minimize the bank partner's economic interest in the loan, for instance, by the nonbank advancing the money used to fund the loans or indemnifying the bank for any credit losses arising from the loans.

While the rule states that the legal uncertainty with which it is concerned has resulted from the lack of a "uniform and predictable standard," it does not incorporate any of the various substantive factors that courts have considered in determining whether a bank partner has the predominant economic interest in the loan. Instead, the rule puts forth a highly formalistic test that would deem a bank to be the true lender even when the bank has no "skin in the game" because its nonbank partner bears all the risk with respect to the loans purportedly made by its bank partner.

- ***The OCC's true lender rule completely disregards the long-standing role that states have held in limiting the interest charged to their citizens by nonbank lenders.***

State regulators have long maintained that the true lender doctrine is and should remain a matter of state law as issues of credit affordability and access are inherently local concerns.

The animating purpose of the rule according to the OCC was, again, the OCC's concern that the state law true lender doctrine "restricts access to affordable credit." This justification naturally raises a number of important policy questions, including how should we balance the need for credit access with the need that such credit be affordable, and who should strike this balance? But, in issuing its true lender rule, the OCC did not acknowledge nor address these significant public policy questions.

Due to this lack of thoughtful consideration, the OCC’s true lender rule completely failed to weigh the relative importance of consumers being able to, as citizens, enact laws governing the terms and conditions at which credit is offered in their state. The rule explains that there should be no concern that the test will enable nonbanks to charge otherwise usurious rates because if the national bank is deemed the lender, then the bank will be supervised by the OCC for compliance with “the panoply of applicable Federal laws and regulations,” including ensuring that the credit that is offered to borrowers through these lending partnerships is affordable.

Historically, the balance between credit affordability and credit access has been struck by citizens at the state level through the enactment of consumer protection laws (including usury laws), through the medium of state officials enforcing these laws, and through courts interpreting and applying these laws. Yet, the OCC’s rule upends this historical application and simply concludes, without explanation, that the OCC is better positioned to strike this balance than citizens themselves. The OCC assuming this position as the ultimate arbiter of credit affordability in the U.S. is particularly troublesome given that the credit to which the rule seeks to expand access by creating certainty as to its legality has been deemed, by citizens, to be usurious and yet, in the OCC’s view, is affordable. Therefore, state regulators have opposed the rule because it fails to consider the relative importance of consumers, as citizens, having a say in how the balance between credit affordability and access is struck in their state.

Conclusion

We support the CRA challenge to the OCC’s true lender rule, which if it stands, will eviscerate the power of state interest rate caps and rid state regulators of the most effective tool to protect consumers from such predatory lending.

Sincerely,

John W. Ryan President and CEO

cc:
The Honorable Jesus “Chuy” Garcia

The Honorable Raul Grijalva
The Honorable Eleanor Holmes Norton

Footnotes

[1] CSBS is the nationwide organization of banking regulators from all 50 states, American Samoa, the District of Columbia, Guam, Puerto Rico, and the U.S. Virgin Islands. The mission of CSBS is to support the leadership role of state banking supervisors in advancing the state banking system; ensuring safety and soundness; promoting economic growth and consumer protection; and fostering innovative state regulation of the financial services industry. CSBS supports the state banking agencies by serving as a forum for policy and supervisory process development, by facilitating regulatory coordination on a state-to-state and state-to-federal basis, and by facilitating state implementation of policy through training, educational programs, and exam resource development.

[2] See Office of the Comptroller of Currency's (OCC) final rule, "National Banks and Federal Savings Associations as Lenders" available at https://www.govinfo.gov/content/pkg/FR-2020-10-30/pdf/2020-24134.pdf

[3] The rule also provides that "if, as of the date of origination, one bank is named as the lender in the loan agreement for a loan and another bank funds that loan, the bank that is named as the lender in the loan agreement makes the loan."

[4] See CSBS Comment Letter: National Banks and Federal Savings Associations as Lenders (September 3, 2020) available at https://www.csbs.org/policy/statements-comments/csbs-comment-letter-national-banks-and-federal-savings-associations.

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