ALAN WILSON
ATTORNEY GENERAL

June 23, 2021

Hon. Nancy Pelosi
Speaker
U.S. House of Representatives

Hon. Kevin McCarthy
Minority Leader
U.S. House of Representatives

Hon. Maxine Waters
Chairwoman
U.S. House Committee on Financial Services

Hon. Patrick McHenry
Ranking Member
U.S. House Committee on Financial Services

Re: Opposition to H.J Res 35/S. J Res 15

Dear Congressional House Leaders,

The undersigned state attorneys general write to express our support for the Office of the Comptroller of the Currency's (OCC) rule on "National Banks and Federal Savings Associations as Lenders,"[1] commonly known as the "true lender" rule, and our opposition to H.J.Res.35/S.J.Res.15, which provide for the rule's disapproval under the Congressional Review Act (CRA).

Despite the demonstrated benefits and consumer protections associated with bank-fintech third-party lending relationships, a handful of courts have called these arrangements into question. Most true-lender cases involve loans originated by a federally supervised bank, consistent with well-settled principles of federal law. Because of these principles, many courts have rightfully relied on the plain language of the loan agreement to hold that the bank is the true lender.[2]

Unfortunately, not all courts have followed suit, with a handful looking beyond the loan agreement to entertain claims that the non-bank has the "predominant economic interest" in the

[1] OCC, *National Banks and Federal Savings Associations as Lenders*, 85 Fed. Reg. 68,742 (Oct. 30, 2020) (codified at 12 C.F.R. § 7.1031), *available at* https://www.govinfo.gov/content/pkg/FR-2020-10-30/pdf/2020-24134.pdf.

[2] *See* Beechum v. Navient Solutions, Inc., 2016 WL 5340454 (C.D. Cal. Sept. 20, 2016); Sawyer v. Bill Me Later, Inc., 23 F. Supp. 3d 1359 (D. Utah 2014); Discover Bank v. Vaden, 489 F.3d 594 (4th Cir. 2007) *rev'd and remanded (on other grounds)*, 556 U.S. 49 (2009); Hudson v. ACE Cash Express, Inc., 2002 WL 1205060 (S.D. Ind. May 30, 2002); Krispin v. May Dept. Stores Co., 218 F.3d 919 (8th Cir. 2000); *cf.* SPGGC, LLC v. Ayotte, 488 F.3d 525, 534 (1st Cir. 2007).

transaction and is, therefore, the true tender[3] - even though the bank signed the loan agreement and funded the loan, and the borrower agreed to repay the bank.

The definition of the loan's true lender is significant because, if the bank is the true lender, then the loan is subject to the federal bank regulatory framework, including prudential supervision and fair lending principles. If the fintech firm is the true lender, however, then it may be subject to different licensing requirements and term regulation. In some states, this might even void the loan or make it uncollectible. In these circumstances, the lender may not be able to recover its principal, much less the cost of the loan, thwarting its reasonable commercial expectation.

Despite the explicit terms of the "four corners" of the loan agreements, some courts have made interpretations about the relationship between the lender and its fintech third-party service provider to the detriment of the party's involvement. By ignoring the actual terms of the loan, these court decisions can greatly alter the expectations of the bank, the fintech firm, the loan purchasers, investors, and all other subsequent participants. The resulting outcome is to invalidate not only that single transaction, but potentially entire portfolios of loans. Worse, a number of states are now trying to legislate arbitrary definitions of economic interest ungrounded in jurisprudence or experience.

In addition, many court cases have occurred months after the loan was originated. Such after-the-fact challenges introduce significant uncertainty and unpredictability into the lending market. This, in turn, diminishes market liquidity. It is critical to a stable and robust lending market to have standards that are clear, predictable, and that provide banks with a uniform set of rules to follow.

The OCC promulgated its rule in response to the increase in judicial actions calling into question the true lenders, which undermine the reasonable commercial expectations of all the participants in the loan transaction process and discourage bank-fintech providers' third-party service relationships. This rule comes at a critical juncture, given the immediate need for formal direction to clarify the ability of federally regulated banks to engage non-bank fintech providers to provide lending services. In footnote 3 of its June 2016 "Proposed Guidance for Third-Party Lending," the FDIC noted that courts are divided on whether third parties may avail themselves of an insured state bank's ability to export its home state's interest rate.[4] These decisions have had an unsettling impact on credit markets by increasing costs and decreasing competition. Continued regulatory uncertainty that upends long-settled interpretations of banking and contract

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[3] *See* Consumer Fin. Protection Bureau v. CashCall, Inc., 2016 WL 4820635 (C.D. Cal. Aug. 31, 2016); CashCall, Inc. v. Morrisey, No. 12-1274, 2014 WL 2404300 (W. Va. May 30, 2014) *cert. denied sub nom.* CashCall, Inc. v. Morrissey, 135 S. Ct. 2050 (2015); Bankwest, Inc. v. Baker, 324 F. Supp. 2d 1333 (N.D. Ga. 2004), *aff'd*, 411 F.3d 1289 (11th Cir. 2005), *en banc review granted*, 433 F.3d 1344 (11th Cir. 2005), *vacated for mootness*, 446 F.3d 1358 (11th Cir. 2008); People ex rel. Spitzer v. County Bank of Rehoboth Beach, 846 N.Y.S.2d 436 (2007); *cf.* Commonwealth of Pa. v. Think Finance, Inc., 2016 WL 183289 (E.D. Pa. Jan. 14, 2016); Ubaldi v. SLM Corp., 852 F. Supp. 2d 1190 (N.D. Cal. 2012).

[4] FDIC, Proposed Guidance: Examination Guidance for Third-Party Lending (July 29, 2016), https://www.fdic.gov/news/news/financial/2016/fil16050a.pdf.

law have chilling effect on the availability of capital and threaten to disrupt markets for consumer and commercial credit, impacting a broad range of financial services and products.

Without the regulatory certainty the OCC's "true lender" rule provides, fintech firms and investors may no longer be willing to enter into such transactions, depriving banks, the economy and, most importantly, consumers of the many benefits that these relationships provide. Given these circumstances, there is a strong and immediate need for the OCC "true lender" rule.

As our states' top enforcement officials, we also would like to make absolutely clear that the OCC "true lender" rule does not change in any way a bank's authority to export interest, nor does it give national banks the ability to charge an interest rate of their choosing. That authority is granted by federal statute. Both federal and state-chartered banks must conform to applicable usury rate limits. Disparities in interest rates from state-to-state result from differences in state laws, not from the OCC's rule. States continue to retain the authority to set usury standards and regulate both state-licensed banks and nonbank lenders. The rule also will have no effect at the federal level on the Consumer Financial Protection Bureau's (CFPB) ability to oversee and take enforcement action against nonbank lenders.

Contrary to critics' arguments, the True Lender rule does not further so-called "rent-a-charter" schemes where nonbanks pay a bank to exploit a bank's charter to issue loans. Instead, if the bank is a true lender, the rule prevents banks from originating loans and walking away from the responsibilities of legal compliance. "This will result in eliminating the greatest risk associated with abusive rent-a-charter."[5]

While we respect Congress's use of the CRA to strike down onerous rules often made despite congressional objections, we oppose use of the act in this case. Striking down the OCC True Lender rule through the CRA would restrict the OCC's ability to address the true lender issue in the future. This is because the enactment of a CRA joint resolution of disapproval prevents federal agencies from issuing a new rule in "substantially the same form…unless the reissued or new rule is specifically authorized by a law enacted after the date of the joint resolution."[6]

As our country works to recover from the Covid-19 pandemic, access to capital is critical to economic growth and job creation. Bank- fintech relationships will play a major role in this effort. The OCC "true lender" rule provides much-needed guidance and clarity, helping to preserve the benefits that bank-fintech relationships offer to the economy. Congressional adoption of H.J.Res.35/S.J.Res.15 would remove this clarity and risk shutting down the opportunity for federally regulated banks to leverage the expertise of fintech service providers, making capital harder to access and undermining our economic recovery.

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[5] Hearing on Oversight of Prudential Regulators: Ensuring the Safety, Soundness, Diversity and Accountability of Depository Institutions during the Pandemic Before the U.S. House Comm. on Fin. Servs., 116 Cong. (Nov. 12, 2020) (Statement of Brian P. Brooks, Acting Comptroller of the Currency)

[6] Maeve P. Carey, What Is the Effect of Enacting a Congressional Review Act Resolution of Disapproval?" Congressional Research Service, October 30, 2018. Available at: https://fas.org/sgp/crs/misc/IN10660.pdf.

Sincerely,

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