S. HRG. 117–291

THE REEMERGENCE OF RENT-A-BANKS

HEARING

BEFORE THE

COMMITTEE ON
BANKING, HOUSING, AND URBAN AFFAIRS
UNITED STATES SENATE

ONE HUNDRED SEVENTEENTH CONGRESS

FIRST SESSION

ON

EXAMINING THE REEMERGENCE OF RENT-A-BANK SCHEMES

APRIL 28, 2021

Printed for the use of the Committee on Banking, Housing, and Urban Affairs

Available at: https://www.govinfo.gov/

U.S. GOVERNMENT PUBLISHING OFFICE
47–913 PDF WASHINGTON : 2023

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C O N T E N T S

WEDNESDAY, APRIL 28, 2021

WITNESSES

Additional Material Supplied for the Record

THE REEMERGENCE OF RENT-A-BANKS

WEDNESDAY, APRIL 28, 2021

U.S. SENATE,
COMMITTEE ON BANKING, HOUSING, AND URBAN AFFAIRS,
Washington, DC.

The Committee met, via Webex, Hon. Sherrod Brown, Chairman of the Committee, presiding.

OPENING STATEMENT OF CHAIRMAN SHERROD BROWN

Chairman BROWN. The Senate Committee on Banking, Housing, and Urban Affairs will come to order.

This hearing is in the virtual format. A few reminders as we begin.

Once you start speaking, there will be a slight delay before you are displayed on the screen. To minimize background noise, please click the mute button until it is your turn to speak or to ask questions.

You should all have one box on your screens labeled "Clock" that will show how much time is remaining. For witnesses, you will have 5 minutes for your opening statements. For all Senators, the 5-minute clock still applies, of course, for your questions.

At 30 seconds remaining, you will hear a bell ring to remind you your time is almost up. It will ring again at zero.

If there is a technology issue, we will move to the next witness or Senator until it is resolved. And to simplify the speaking order process, Senator Toomey and I have agreed to go by seniority for this hearing.

Emerson teaches us that history is a battle between what he called "the innovators" and "the conservators." The innovators work to find new ways to make Government work for the people it serves and deliver results for everyone.

But the conservators—the corporations, the special interests, the elite who have amassed wealth and power at the expense of workers and their families—the conservators never give up.

So it is with predatory lending.

In the late 1990s, payday lenders were desperate to find a way to evade State laws that limited them from charging exorbitant interest rates that trap people in a cycle of debt they cannot get out of, no matter how hard they work.

They came up with what the OCC called "rent-a-charter"—what we now know as the "rent-a-bank" scheme.

Because banks are generally not subject to these State laws, payday lenders funneled their loans through a small number of willing banks. It looked like the banks were making the loans when really it was the payday lenders.

Federal regulators, Republicans and Democrats, saw through this ruse.

Under President Bush, the OCC described these rent-a-bank schemes as "abusive"—their words—and later warned about banks that "rent out their charters to third parties who want to evade State and local consumer protection laws."

In the years that followed, the OCC and FDIC shut down a series of these schemes by payday lenders and banks.

States from across the country also stepped in to crack down.

The Georgia Legislature in 2004 passed a law to crack down on rent-a-bank schemes. Regulators in West Virginia and the Ranking Member's and my home States of Pennsylvania and Ohio and New York and Maryland and other States followed suit.

States also passed new laws to limit interest rates on payday loans.

Since 2010, Montana, South Dakota, Colorado, Illinois, Virginia, and last year Nebraska all passed laws to cap interest rates on payday loans at 36 percent—still a very high number that will make any company plenty of money.

Several other States, including California and Ohio, also passed laws to limit the interest that can be charged on consumer loans.

These new laws passed with overwhelming, bipartisan support.

More than 75 percent of voters in Nebraska and South Dakota supported the ballot initiatives to cap interest rates on payday loans.

In recent years, new fintechs have emerged that partner with banks to offer responsible small-dollar loans at affordable rates.

Of course, the payday lobby did not give up. We now have a separate group of online payday lenders resurrecting the same old rent-a-bank scheme and not even attempting to hide it.

One online lender recently told its investors that it would get around California's new law by making loans through "bank sponsors that are not subject to the same proposed State level rate limitations." Another one said "There is no reason why we would not be able to replace our California business with a bank program."

Given the broad, bipartisan support for these laws, we all hoped that the Trump OCC would take action and crack down on these schemes—schemes that have been rejected by voters and legislatures in State after State.

The last Republican administration under President Bush stood up for consumers on this point.

But last year, the OCC issued what is known as the "true lender rule," overruling voters of both parties and giving a free pass to these abusive rent-a-bank schemes.

The rule was rushed through by the Acting Comptroller who cut his teeth helping banks ruthlessly foreclose on homeowners and a Deputy Comptroller with deep ties to the payday lobby. Republicans have selected the two of them to be witnesses at today's hearing.

The OCC and Mr. Brooks have argued that the true lender rule is necessary so that the agency has the necessary authority to oversee banks' relationships with payday lenders.

But that is just not true. The OCC did not lack any authority when it cracked down on rent-a-bank schemes in the early 2000s.

The OCC also attempted to justify its efforts by claiming that it promotes "innovation" and provides "certainty" to the markets.

The only certainty we need is the certainty that workers and their families will be protected from these exploitative interest rates.

The last thing we should be doing is encouraging lenders to, in their words, "innovate." We know that just means new ways to get away with ripping people off.

That is why across the country, a broad, bipartisan coalition is asking Congress to overturn the OCC's harmful true lender rule.

That support includes the National Association of Evangelicals, the Southern Baptist Convention, and other members of the Faith in Just Lending Coalition.

That coalition wrote to Congress: "Predatory payday and auto title lenders are notorious for exploiting loopholes in order to offer debt trap loans to families struggling to make ends meet. The OCC's 'true lender' rule creates a loophole big enough to drive a truck through." That was the Faith in Just Lending Coalition words.

I would also like to submit the entire letter for the record, along with letters from a bipartisan group of State Attorneys General, State bank regulators, 375 consumer, civil rights, labor, and small business organizations asking Congress to overturn the true lender rule.

Today we will hear from one of the members of the faith coalition, Dr. Frederick Haynes, senior pastor of Friendship-West Baptist Church in Dallas.

We will hear today from North Carolina Attorney General Josh Stein. He represents a bipartisan coalition of State Attorneys General, including the Republican Attorneys General in Nebraska and South Dakota, who have called on Congress to overturn the OCC's true lender rule.

Like so much we do, this comes back to one question: Whose side are you on? You can stand on the side of online payday lenders that brag about their creativity in avoiding the law and finding new ways to prey on workers and their families. Or we can stand up for families and small businesses and the State Attorneys General and State legislatures who have said, "Enough" and are trying to protect themselves and their States from predatory lending schemes.

Some issues that come before this Committee are complicated, they divide people, there are thorny nuances to consider. This really is not one of them. It is simple: Stop predatory lenders instead of encouraging them.

Ranking Member Toomey, you are recognized. Thank you.

OPENING STATEMENT OF SENATOR PATRICK J. TOOMEY

Senator TOOMEY. Thank you, Mr. Chairman.

You know, in the last decade, we have seen financial technology companies—fintechs—driving amazing new innovations in financial markets. Fintechs have had remarkable success in developing technology-oriented solutions to meet consumers' needs.

As many banks have exited the personal loan market, fintechs have filled the gap, and today they issue nearly 40 percent of all the unsecured personal loan in America.

In recent years, both nationally chartered and State-chartered banks and credit unions have begun to partner with fintechs to offer improved products and reach more customers. This is particularly beneficial for community banks, who often lack the resources to develop banking technology. In fact, 65 percent of community banks consider fintech partnerships important to their business strategy.

These partnerships also generate significant consumer benefits. Bank–fintech partnerships generate efficiencies that can lower the price of financial products, expand consumer choice, and increase competition. And these bank–fintech partnerships offer a large variety of credit products—not just small-dollar loans but credit cards, home equity lines of credit, personal loans, auto loans, mortgages, and small business loans as well.

Unfortunately, recent court rulings have applied differing legal tests to determine which partner in these relationships is the true lender who is legally responsible for the loans. And these tests have created uncertainty that threaten to reduce the access to credit for customers, especially for riskier borrowers. That is why there has been bipartisan congressional support and industry support for clarifying the issue.

So last year, the OCC issued its true lender rule to provide this much-needed regulatory clarity, and the rule holds a national bank responsible for a loan when, at the time the loan is originated, the bank is either named in the loan agreement or it funds the loan. This allows the OCC to supervise these loans and ensure that the bank is not evading the law, including consumer protection laws.

Contrary to some claims, the rule is not intended to facilitate "rent-a-charter" arrangements where banks do not comply with the law. In fact, the OCC's rule does just the opposite. A rent-a-charter arrangement means that no party takes compliance responsibility for a loan. That is where the true lender rule comes in and is different. It ensures that the national banks that partner with third parties are accountable for the loans they issue through these partnerships, and it allows the OCC to supervise the origination of these loans.

You do not have to take my word for it. The current Acting Director of the OCC—not a political appointee but one who has been a career civil servant for more than 30 years—recently wrote to Congress making this very point.

The true lender rule also provides the clarity needed for bank–fintech partnerships to flourish and for national credit markets to function. For over four decades, Federal law has allowed both nationally chartered and State-chartered banks to "export" the State law governing interest rates from their home State where they are based.

The true lender rule simply allows fintechs to partner with banks, which already operate with these efficiencies.

Absent the true lender rule, uncertainty about who the true lender really is creates uncertainty about whether the bank can export its interest rate. If the bank guesses wrong, the loan could be unenforceable. That uncertainty jeopardizes the viability of the bank–fintech partnerships. More importantly, it disrupts the functioning of the secondary market for credit.

Why does the secondary market matter? Because when a bank sells a loan, it frees up capital to make another loans. This is very well understood in the mortgage space. When a bank sells a mortgage to the GSEs, it frees up the capital to lend to an additional homebuyer. Well, the same principle applies to the secondary market here.

Banks will likely issue far fewer loans if they cannot reliably sell those loans into the secondary market. Fewer loans means less access to credit; less access means higher costs and less willingness to provide the limited supply of credit to higher-risk borrowers. The result? The most marginalized consumers are hit the hardest.

This is not just my opinion. Almost 50 leading financial economists from prominent universities—including Harvard, Stanford, and the University of Pennsylvania—made these very points in an amicus brief in support of the OCC's true lender rule.

We have empirical evidence, too. Studies have shown that after a 2015 court ruling created uncertainty around the ability to export interest rates to New York, it became significantly harder to get loans in New York, especially for higher-risk borrowers.

Despite the importance of the true lender rule, some, I know, want to rescind it using the Congressional Review Act. And I suspect the motivation is that overturning the rule would subject more loans to State interest rate caps. But that may not be the effect. I think the more likely effect is that these loans simply will not get made.

That is why price controls are not the answer. They will exclude people from the banking system. They will restrict the credit supply and make it harder for low-income consumers to access credit that they need.

The best form of consumer protection is a robust, competitive market. Preserving the regulatory certainty and clarity the true lender rule advances that cause.

Thank you, Mr. Chairman.

Chairman BROWN. Thank you, Ranking Member Toomey, for your comments.

I will introduce the witnesses.

Mr. Josh Stein is Attorney General of North Carolina. As Attorney General, he works to protect North Carolina families from crime and consumer fraud. He previously served as a State Senator, as Deputy Attorney General for Consumer Protection in the North Carolina Department of Justice.

Ms. Lisa Stifler is the director of State Policy at the Center for Responsible Lending. She works with organizations and lawmakers to eliminate abusive lending and debt collection practices in her State. Ms. Stifler also advocates on the national level on abusive debt collection and debt settlement practices as well as predatory auto and student lending.

Dr. Frederick Haynes is senior pastor, activist, and educator with the Friendship-West Baptist Church in Dallas. Dr. Haynes currently serves as chairman of the board of the Samuel DeWitt Proctor Conference, a board member of the Conference of National

Black Churches, and the National Action Network. He is a member of the board of trustees for Paul Quinn College.

Mr. Brian Brooks is the former Acting Comptroller of the Currency. Prior to becoming Acting Comptroller, Mr. Brooks served as Senior Deputy Comptroller and Chief Operating Officer. Before joining OCC, Mr. Brooks worked at Coinbase, Fannie Mae, O'Melveny & Myers, and at OneWest Bank.

Mr. Charles W. Calomiris is Henry Kaufman Professor of Financial Institutions at Columbia Business School, director of the business school's Program for Financial Studies' Initiative on Financing Growth in Emerging Markets, and a professor at Columbia School of International Public Affairs. He previously served as Senior Deputy Comptroller for the OCC.

Welcome to our witnesses. General Stein, we will start with you. Thank you for joining us.

STATEMENT OF JOSH STEIN, ATTORNEY GENERAL, STATE OF NORTH CAROLINA

Mr. STEIN. Mr. Chairman and Members of the Committee, my name is Josh Stein, Attorney General of North Carolina, and I am pleased to have this opportunity to discuss the OCC's so-called true lender rule. It is more accurate, however, to call it the "fake lender rule" because predatory lenders dress up their loans to try to make them look as though they were made by an entity exempt from State usury law, such as a national bank regulated by the OCC. If not reversed, this new rule provides a get-out-of-jail-free card to predatory lenders who violate State laws limiting interest rates and fees on consumer loans.

For nearly 200 years, State and Federal courts, using the true lender doctrine, have recognized and outlawed subterfuges that put form over substance. This doctrine looks to whether a predatory lender retains the predominant economic interest in the loan to determine whether the predatory lender is the true lender and, therefore, must comply with State rate caps.

North Carolina has a long history of strong laws and vigorous enforcement against unfair consumer lending. For a brief experimental period, from 1997 to 2001, North Carolina law permitted payday lending. During that time we learned firsthand the economic damage these incredibly high-cost loans inflict on working families, especially those in neighborhoods of color and near military bases.

The average borrower rolled over more than eight loans at 419 percent from the same store, and one out of seven borrowers took out more than 19 loans per year. These loans were not a source of occasional credit as the marketing suggested but, rather, a debt merry-go-round borrowers could not get off.

Anita Monti, a 61-year-old grandmother from Garner, made $9 an hour working the second shift. She wanted to buy her five grandchildren Christmas presents, but she was living paycheck to paycheck. She went to an Advance America storefront and borrowed $300. In 2 weeks, she did not have the money she owed, and her electric bill was due. So she had to renew the $300 loans. Like so many others, she did this over and over.

After paying fees every 2 weeks for a year, in all nearly $2,000 just to borrow $300. She was only able to repay the original loan after earning a raise to $12 an hour and scrimping on food.

Due to the exorbitant interest rates and patterns of harmful, repeat borrowing that buried thousands of North Carolinians like Anita in debt, North Carolina's Legislature allowed this law to sunset in 2001. After the sunset, most payday lenders complied and closed their doors. However, others, including Advance America and ACE Cash Express, looked for ways to circumvent North Carolina law using rent-a-bank schemes. The banks' names were placed on the loan documents, but the payday lenders marketed, underwrote, assumed the risk, claimed the profits, and made the loans at sky-high interest rates of up to 521 percent to North Carolina consumers.

After an enforcement action by the then-North Carolina Attorney General, the North Carolina Commissioner of Bankers held that the payday lender, despite its rent-a-bank subterfuge, was, in fact, the true lender and, therefore, subject to State usury law.

North Carolina is by no means alone in protecting our borrowers. Other States have also relied on the true lender doctrine to stop payday lenders from using rent-a-bank schemes to evade their State interest rate laws. This new rule threatens to upend efforts to protect our people. Along with seven other Attorneys General, I filed a lawsuit in the Southern District of New York challenging the rule, and we are confident in our legal position. The congressional review process, however, provides a far more straightforward and quicker means to reverse the fake lender rule than does litigation. That is why a bipartisan group of 25 Attorneys General recently urged Congress to disapprove this new rule.

Protecting our constituents is our highest calling, and I am proud to stand up for hardworking North Carolinians like Anita. As Senators, you have the authority to help people like her all across this country. It is an awesome power, and I ask that you exercise it.

Thank you for your time.

Chairman BROWN. Thank you, General Stein.

Ms. Stifler, you are recognized for 5 minutes.

STATEMENT OF LISA F. STIFLER, DIRECTOR OF STATE POLICY, CENTER FOR RESPONSIBLE LENDING

Ms. STIFLER. Good morning, Chairman Brown, Ranking Member Toomey, and Members of the Committee. I am Lisa Stifler, director of State Policy at the Center for Responsible Lending, an affiliate of Self-Help Credit Union. Thank you for the opportunity to discuss the single greatest threat to the ability of States to protect their residents from payday and other high-cost loans.

With the blessing and facilitation of Federal regulators, we are seeing the reemergence of predatory rent-a-bank lending schemes. In these schemes a nonbank lender makes loans at rates higher than allowed by State law by renting the name and charter of a rogue bank that is exempt from State interest rate caps, and then the nonbank lender attempts to claim that exemption for itself. These partnerships are shams, created with the express purpose of skirting State law, and they trap consumers in unaffordable loans.

The OCC's true lender rule will pave the way for more of these schemes to proliferate. The rule was hastily proposed and then finalized a week before the 2020 election, with the agency failing to meaningfully address concerns raised in the more than 4,000 comments filed. The rule facilitates rent-a-bank schemes just like those used by payday lenders in the early 2000s until both Federal and State regulators shut them down.

The rule overturns the decades-long OCC position that these sham arrangements are an abuse of the national charter. The OCC also ignored the procedural requirements in the Dodd–Frank Act established by Congress to prevent this exact kind of regulator overreach—the OCC's aggressive preemption of State consumer protection laws that precipitated the 2008 financial crisis.

It is no mystery what happens when these protections are removed. The cycle of financial instability caused by high-cost lending is the reason States adopted these protections in the first place. The harms fall mostly on lower-income working families and communities of color. That is why faith leaders, community, and civil rights groups across the country are united in opposition to this rule as well as Attorneys General and State banking regulators from both parties.

How the OCC's rule will work is already clear, because OCC-regulated banks are enabling some of the most predatory loans on the market. For over a year, Stride Bank has been helping the payday lender CURO pilot installment loans at rates as high as 179 percent APR for loans up to $5,000. This outrageously priced loan is illegal in almost every State, yet the OCC rule invites predatory lenders to evade State laws by paying a bank to put its name on the paperwork.

Another OCC-regulated bank, Axos Bank, rents its name and charter to the predatory small business lender World Business Lenders. WBL Loans run in the tens and even hundreds of thousands of dollars and carry rates as high as 268 percent. Often secured by the borrower's personal residence, these loans are causing small business owners to lose their home.

The OCC is aware of these sham arrangements, but it has taken no public action against the banks and even directly supported WBL in court. Clearly, the agency's assurances that the rule will not allow harmful loans are belied by these facts and the agency's own actions.

People in communities across the country are reeling from the economic impacts of COVID–19. As we look to create a strong recovery for all, one way not to help these families is to eviscerate State interest rate laws. Congress and the prudential regulators should focus on ensuring a fairer financial system that serves all consumers rather than creating new avenues for predatory lenders to drive consumers further away from the financial Main Street. Because Congress has not yet enacted a Federal interest rate ceiling, State interest rate limits are the only protection against high-cost predatory loans.

This is not a close call or even a complicated issue. The OCC's rushed and ill-conceived rule is bad for consumers and small businesses, is bad for States' rights, overturns centuries of case law, and is antithetical to the goal of an inclusive economic recovery. And it is illegal under Federal law.

Simply put, this rule facilitates loans illegal under State law, not just any loans but ones reaching 200 and 300 percent APR. That is the decision here—siding with illegal lending practices or standing up against them. We urge you to stand up against them and repeal the OCC rule.

Thank you, and I look forward to answering your questions.

Chairman Brown. Thank you, Ms. Stifler.

Dr. Haynes is recognized for 5 minutes. Welcome to the Committee.

STATEMENT OF REVEREND DR. FREDERICK D. HAYNES, III, SENIOR PASTOR, FRIENDSHIP-WEST BAPTIST CHURCH, DALLAS, TEXAS

Reverend HAYNES. Good morning, Chairman Brown, Ranking Member Toomey, and Members of the Committee. I am Frederick Douglass Haynes, III. I serve as the pastor of Friendship-West Baptist Church, a congregation of 12,000 parishioners in Dallas, Texas.

I am grateful for the opportunity to morally appeal to you on behalf of a broad and diverse faith community coalition that includes Southern Baptist Convention's Ethics and Religious Liberty Commission, the National Association of Evangelicals, the National Baptist Convention, and the United States Conference of Catholic Bishops—quite a diverse coalition. And we are appealing to you because we must stop those who would use their greed to exploit those in need through high-cost predatory debt traps that we consider usury.

Faith groups of all traditions representing 118 million Americans mobilized to call on the CFPB to enact a strong rule addressing the inimical systems of payday lending debt traps. We call on you now to stop this harmful rent-a-bank rule. Usury and economic exploitation of the poor are condemned in all faith traditions. Those who exploit the poor through predatory practices are referred to in Scriptures as "wolves." The predatory practitioners of rent-a-bank schemes may well be referred to as wolves dressed up in the legitimacy of a bank. But the victims of such practices testify that an economic predator by any other name is still trapping the desperate in debt. These "moral monsters," to use the language of James Baldwin, feed their greed at the expense of the vulnerable.

For years we have worked to expose these debt traps clad in deceptive wardrobes from the crass neon signs that litter the neighborhoods of the needy to the polished promises of fintech lenders who claim to be the saviors of families who need access to credit. The con, of course, is that the access they impose on these families is a deceitful, dead-end debt booby trap, as they aim to draw them into a machine calibrated to siphon funds from their bank accounts until they have all but bled them dry. Many end up filing bankruptcy due to the moral bankruptcy of the predatory lenders, who make them pay a high cost for being poor.

I have seen this in my church. I could give you many examples, but, quickly, a widowed grandmother paid back $800 for a $300 loan. Immoral. A young college graduate who worked two jobs took out a payday loan as his mother became sick, believing it would help him get through the crunch, but an interest rate of 450 percent set him up to bring him down financially. He ended up losing the car he needed to get to work. That is immoral.

Predatory payday, car title, and installment lenders strip billions every year by replicating a dreadful, disadvantageous practice and hiring lobbyists to put a halo on their devilment for lawmakers and regulators.

I am appalled by the harm done to those who face historic divestment, who are exploited; they suffer from economic injustice. These communities were crippled already by redlining, and now they are being ripped off by the social violence of financial predators. For decades banks used maps to deny loans to communities of color, and now through rent-a-bank schemes, they are using maps to locate and serve as legalized loan sharks of those same communities.

Payday lenders have an ugly history of setting up shop in Black and Brown neighborhoods. We have seen this firsthand in the community surrounding our church here in Dallas, and research bears it out. Now many are shifting to online loans through rent-a-bank schemes and targeting the same struggling communities.

That the OCC would open up our communities to more exploitation when we are suffering already so severely from COVID–19 is immoral; it is disgraceful that the OCC would give predatory lenders a way to charge 200 to 400 percent interest and even more, even in States that have fought hard to stop this predation with a 36 percent interest rate cap. That is indeed obscene, and as we would put it in my faith community, it is sinful and demonic.

We strongly oppose the OCC's plan to enable predatory lenders to ignore State interest rate caps. Please understand true lending is really false. It is a lie. Jesus said the truth will set you free, lies will lock you up. This is not a savior. It is the seductive slave master, and we are calling upon you to reject this.

Chairman BROWN. Thank you, Dr. Haynes, for your comments. Mr. Brooks, you are recognized for 5 minute.

STATEMENT OF BRIAN P. BROOKS, FORMER ACTING COMPTROLLER OF THE CURRENCY

Mr. BROOKS. Thank you, Chairman Brown, Ranking Member Toomey, and Members of the Committee. Thanks for the opportunity to discuss the OCC's true lender rule.

My testimony obviously provides more details, but I did want to highlight several issues to help Members better understand the rule, what it does and does not do, what it achieves, and what the effect would be of overturning the rule.

So the OCC true lender rule clarifies when a national bank or savings association is the true lender of a loan and provides a bright line as to when OCC examination and enforcement authority applies to ensure compliance with the very consumer protection and other legal requirements being discussed today associated with these kinds of loans. The rule provides a plain language definition that a bank is the true lender if, on the date of origination, it is named as the lender in the loan agreement or if it funds the loan on that date. The rule clarifies that, as the true lender, the bank retains the compliance obligations associated with making the loan, even if the loan is later sold.

Rather than a safe harbor, as critics of the rule suggest, the rule ensures that the bank faces strict Federal supervision for all the compliance considerations for making the loan, including, but not limited to, fair lending, consumer compliance, sound underwriting, and BSA and anti–money-laundering regulations.

The rule actually negates concerns regarding harmful rent-a-charter arrangements by preventing situations where banks make loans on behalf of third parties, as we discuss previously, and then walks away from any responsibility for the loan.

In issuing the rule, the agency was acutely sensitive to this issue and expressly that it would "hold banks accountable for all loans they make, including those made in the context of marketplace lending partnerships or other loan sale arrangements." Specifically, the OCC emphasized its "expectation that all banks [will] establish and maintain prudent credit underwriting practices and comply with applicable law, even when they partner with third parties." If not, "the OCC will not hesitate to use its enforcement authority consistent with its longstanding policy and practice." And as I am sure Committee Members know, the OCC's record here is positive, demonstrating significant enforcement actions all the way back to the early 2000s that penalize banks when they have allowed their charters to be rented out to abuse consumers.

Now, the true lender rule must be understood in context. True lender is the third component of a three-component legal regime. Component number one of the regime is the principle of interest rate exportation. The Supreme Court in its 1978 Marquette decision and Congress' 1980 enactment of the Depository Institutions Deregulation and Monetary Control Act allowed both national banks and State banks to export their home State's interest rate to customers in other States. This principle is not new, nor is it partisan. Marquette was argued by Robert Bork but decided by Justice William Brennan on behalf of a unanimous Supreme Court. The Monetary Control Act enjoyed majority support of both parties and was signed into law by President Jimmy Carter.

Now, the second component of the legal regime of which true lender is a part is the "valid when made" concept. That concept flows from the idea that banks have the ability to sell loans to third parties. This is good policy because it allows banks to take the money generated by the loan sale and recycle that money into the next loan, thus increasing the total supply of credit. And economic studies show that when banks are not able to do this and their available funds to make loans is reduced, the first people to suffer are low- and moderate-income Americans. Court cases from around the country have held that the interest rate on a loan that is valid when made by a bank remain valid even after the loan is sold to a third party. The exception is the famous Madden decision, and we now know the effect Madden.

In the two States subject to that decision, loans to low- to moderate-income Americans fell by 64 percent afterward. And why? Because when bank lending is limited to the bank's own balance sheet, the bank will first make loans to the safest and usually richest borrowers. And when it runs out of lendable funds or when it reached borrowers whose market rate of interest exceeds the legal rate, it will stop lending. In other words, Madden did not reduce the price of credit to those borrowers. It reduced the availability of credit to people who needed it most.

Criticism of Madden, again, is not a partisan issue. President Obama's Solicitor General advised the Supreme Court that the Madden court of appeals "erred in holding that State usury laws may validly prohibit a national bank's assignee from enforcing the interest-rate term of a debt assignment that was valid under the law of the State in which the national bank is located." Again, that is the Obama administration's Solicitor General speaking.

Having said all this, the true lender rule does not alter States' authority to supervise their own banks or nonbank lenders or to define what true lender means for State-chartered banks, nor does it alter State authorities to license, regulate, and enforce laws applicable to nonbank lenders and financial services providers. And I think the States should vigorously exercise those authorities regarding those State-licensed companies.

I would note that the very payday lenders and others that often come in for criticism are State-licensed companies, and if the State has serious concerns about them, they are, of course, free to revoke their licenses or take other action.

Senators, the issue here is that the price controls, and I would ask you to consider that price controls result in shortages.

Thank you.

Chairman BROWN. Thank you, Mr. Brooks.

Dr. Calomiris is recognized for 5 minutes. Thank you for joining us.

STATEMENT OF CHARLES W. CALOMIRIS, HENRY KAUFMAN PROFESSOR OF FINANCIAL INSTITUTIONS, COLUMBIA BUSINESS SCHOOL

Mr. CALOMIRIS. Thank you. Chairman Brown, Ranking Member Toomey, Members of the Committee, it is a pleasure to be with you today. I request that my written testimony and a supporting document that I quote extensively in my testimony be entered into the record as well.

I will explain the economic benefits that arise from allowing financial institutions of various kinds to partner with each other in providing lending services to their customers in the context of an integrated national market for loans. A massive amount of evidence has come to light showing advantages of an integrated national market for loans that permits diverse businesses with different comparative advantages to work together in the lending supply chain.

Recently, a nonpartisan group of 47 leading scholars of banking working at America's greatest universities summarized this literature in an amicus brief, which was filed in support of the OCC's defense of its "valid when made" rule and, by extension, its true lender rule. My testimony describes that consensus, which is remarkably clear and unequivocal.

The true lender rule clarifies that a bank that originates a loan retains the consumer protection obligations related to making that loan and whether or not it sells the loan to another party. Some

State authorities oppose the “valid when made” and true lender rules to preserve the ability of the State to enforce usury laws that limit interest rates on loans.

If State challenges were upheld in the courts, that would wreak havoc on the national market for loan sales. But why does that matter to individual consumers? A central insight of the amicus brief is that the competitive abilities to originate loans, to hold loans, or to perform other services related to loans in the supply chain differ across providers. Pooling funds and skills in the loan supply chain within an integrated, competitive, and innovative national market makes loans cheaper for borrowers.

A quote from the brief: “If the usury law of the loan buyer’s State applied to the loan, the market for loan sales would be significantly disrupted: an institution in one State could legally make the loan but institutions in other States may not purchase it with the same pricing. Consequently, the integrated secondary market for loan sales would be reduced and fragmented across groups of States with similar usury laws. Therefore, to preserve a well-functioning market for loan sales, the OCC’s Rule should be maintained.”

Low-income risky and small-dollar borrowers would be especially harmed if the rule were rejected. “The expansion of lending and lowering of risk made possible by loan sales should lead to more financial inclusion and broader access to credit. Studies have shown that loan sales reduce the interest rates that borrowers pay on their loans and increase the likelihood that borrowers will receive a loan. These advantages should, in theory, be especially important for small and risky borrowers, who are often excluded from receiving loans when credit is constrained. Moreover, many innovative new fintech lenders rely on loan sales as a means of leveraging their origination capabilities, which can carry particular benefits for less wealthy or higher-risk borrowers. Limits on the viability of the loan sales market would therefore have adverse effects on the underserved by limiting their ability to receive lower cost loans as well as receive funds through innovative financial inclusion intermediaries.”

But shouldn’t we worry that allowing loan sales across State lines undermines the effectiveness of usury laws? Is that a bad thing? Quoting again from the study, “Usury rates attempt to restrict any potential market power that banks can use to disadvantage borrowers. However, usury ceilings also could differentially curtail loans to riskier and lower-quality borrowers, thus pushing them toward less-regulated types of borrowing. Empirical research quite broadly supports the notion that the latter effect dominates: that riskier-looking borrowers (who are often minorities or others with limited financial access) are hurt when usury ceilings are binding and benefited when they are loosened or eliminated.”

I will close with two of my observations. Advocates of usury laws point to borrowers’ lack of information as a rationale for usury laws. A borrower could qualify perhaps for a loan at 8 percent, but may not be aware of that, and a lender might trick him or her into agreeing to a much higher interest rate. This sort of trickery is possible when loan markets lack competition and when borrowers lack information about their own credit risk. As the appendix to my testimony shows, the role of new fintech entrants, who should not be confused with payday lenders—in fact, they are the competition of payday lenders. As the appendix shows, the role of new fintech entrants in strengthening competition and empowering borrowers with new sources of information are precisely the reasons that fintech firms are making important contributions to financial inclusion.

I will stop there. Thank you very much.

Chairman BROWN. Thank you, Dr. Calomiris, for your testimony.

I will begin the questions and then turn to Senator Toomey. I will start with Dr. Haynes, Dr. Frederick Douglass Haynes. You are testifying today as part of a broad coalition of faith-based institutions working to end predatory lending, as you made clear. These institutions politically certainly differ all across the political spectrum. Why are they united in this work to end predatory lending and opposed to the true lender rule?

Reverend HAYNES. Well, because of the fact that across all faith traditions, you know, usury is condemned. Economically exploiting those who are already vulnerable, those practices are condemned. In both the Hebrew Bible as well as the Greek New Testament, usury is condemned. Jesus overturned the money tables that may well be fintech or payday loan scores of his day. The Hebrew Bible repeatedly warns against usury, so this is something that we are joined together because morally we all agree that usury is wrong. Morally we all agree that exploitation of the poor is something that God frowns upon. And so that is why, again, though we may be ideologically and politically different, we all agree morally that usury damages any community.

Chairman BROWN. Thank you, Dr. Haynes.

Ms. Stifler, how is the true lender rule from the OCC different from how the agency approached rent-a-bank schemes under the Bush administration?

Mr. STEIN. Thank you for asking this question, Senator Brown. This rule, the OCC's rule, is a 180-degree change in policy. Under the Bush administration, the OCC emphasized that preemption was an inalienable right of the bank itself. It looked at rent-a-bank schemes and said that preemption is not like excess office space in a bank-owned office building that the bank can just rent out. So it shut the schemes down.

The OCC then finalized the true lender rule by absolute contrast, laid out a welcome mat to predatory lenders, and said, "Here is your preemption." Put another way, the OCC under the Bush administration looked at the substance of the transaction just as courts have done for hundreds of years, and the OCC that issued this rule prioritized what is on a form on a piece of paper, even if that is a sham.

Chairman BROWN. So do you think the Bush era OCC would have shut down this rent-a-bank scheme if the new true lender rule had been in place?

Mr. STEIN. No, not the ones that we saw back in the 2000s, the ones that General Stein talked about that North Carolina and other States shut down. What we saw in those was that on the paperwork all that was required was a name on the loan, and that is what we saw in the early 2000s. So even though from the consumer perspective they might walk into the payday loan store, say

Advance America, they got the loan at the Advance America store, they made payments to Advance America, they dealt with the collection attempts from Advance America, and were sued by Advance America because the bank's name—in this case it was People's National Bank—was on the loan document under this rule that would have been sufficient and would not have been shut down. It would have been allowed.

So, yeah, the schemes in the 1990s and 2000s would not have been shut down like they did.

Chairman BROWN. Thank you for that.

General Stein, the OCC claims the true lender rule does not limit States' ability to regulate payday and other nonbank lenders. You testified, in fact, the rule preempts State law, takes away your authority to shut down rent-a-bank schemes that are targeting residents in your State of North Carolina. Can you explain why?

Mr. STEIN. Yes, the reason we succeeded in North Carolina in running the payday lenders out in 2004 and 2005 was because we brought a case to the Commissioner of Banks, and they concluded that the predominant economic interest of those loans was the payday lenders. Their relationship, the payday lenders' relationship with the banks, the national banks, was simply paying them for use of their logo on the bank application form, on the loan application form.

If the true lender rule, as presented by the OCC, takes full effect and is not repealed by Congress, the exact same relationship that we successfully defeated and ran out of North Carolina, it will be challenging for us to win such a case in the future. And this decision about what is in the interest of North Carolina consumers, I am sorry, is not for the OCC to make. It is for the people of North Carolina through their State elected representatives, it is their decision to make. And we have made that decision. I have heard a couple of people testifying that there is a concern about shortage of credit. We want a shortage of high-cost, illegal, harmful loans. That is a good thing and a decision that we as a State have made.

Chairman BROWN. Thank you, General Stein.

Senator Toomey is recognized.

Senator TOOMEY. Thank you, Mr. Chairman.

Let me go to Mr. Brooks. it seems to me one of the principal virtues of the true lender rule is that it creates a clear rule, provides certainty in advance about who is responsible for a loan when banks and nonbanks partner to make the loan. Could you just tell us, why is that important? Why is it important for market participants to have that regulatory certainty? And what would the effect be if this rule gets repealed and there is no certainty?

Mr. BROOKS. Well, Senator Toomey, I really appreciate the question. The certainty that is most important here under the true lender rule has to do with the certainty of the interest rate enforceability, OK? So the question is: Should banks invest dollars in lending to low- and moderate-income people whose risk profile necessitates a somewhat higher interest rate for the loan to be valid and profitable?

If the bank is not sure or if the markets are not sure whether that interest rate will be valid when that loan is sold into a credit card securitization or sold into a personal loan securitization, the market will not invest in that, which means that those loans go away. And I cannot emphasize this too much. It is not that the loans become cheaper. It is that the loans go away. And I think General Stein's comment that there are people out there who actually want those loans to go away is an interesting sort of lens into the way to think about this——

Senator TOOMEY. Let me just—I mean, the idea that we should forbid people from having access to loans because they cannot be trusted to make a good decision for themselves, does that strike you as a little bit patronizing and condescending?

Mr. BROOKS. Well, you know, Senator, I guess I would hesitate to make characterizations of other people who I respect, but, look, our thought at the——

Senator TOOMEY. I am talking about the idea.

Mr. BROOKS. Yeah. The idea is not consistent with the concept of a pluralistic, capitalist democracy. Personally, I took our relatively high interest rate student loans that were not tax deductible that today people would find shocking. That is what allowed me to get my life on track from a low-income small town in southern Colorado. And so I do not look at interest as a bad thing. If I am someone who has dings on my credit and I need a 2-year personal loan to replace my roof or do one of the many things that people use these loans for, I do not think it is up to me to say that is a bad thing.

Senator TOOMEY. Yeah, it might be OK for the consumer to be able to make that decision.

Mr. BROOKS. Right.

Senator TOOMEY. Some have suggested that the true lender rule creates a new legal regime that effectively revokes State usury laws and allows nonbank lenders to issue these loans that are not subject to regulatory oversight, so both of these things. But as I think you mentioned in your comments, for many decades, both federally and State-chartered banks have had the legal authority—and it really has not been very controversial—to export their interest rates.

So does the rule really have the effect of undermining States' rights? And what about this claim that somehow it creates a regulatory wasteland where these loans are just not subject to regulation?

Mr. BROOKS. Yeah, so, Senator, there is a lot there, but I would just say, first of all, the concept is not new. As I say, you know, Justice Brennan, no less, writing for a unanimous Supreme Court, upheld the principle of rate exportation. President Jimmy Carter upheld that right for State banks as well. And so to be clear, the idea that a rate of interest can be charged that is higher than the borrower's home State rate has been the law of the land since 1978. There is nothing new about that, and that was supported by broad, bipartisan majorities of both parties.

In terms of the regulatory wasteland, there are two points to understand here. First of all, these predatory lenders, the people you are talking about, are State-licensed entities. Let me repeat that. They are State-licensed entities, and a State is absolutely free to yank the license of any of those kinds of companies that it wants to, and it should if it thinks that consumer abuses are going on.

The point of the rule, however, is simply to make clear that banks can leverage their balance sheet through loan sales to make more credit available to more people. If that principle is debatable, I think someone should stand up and debate it. But if the idea is Advance America's, they should have their licenses yanked by the State who licensed them.

Senator TOOMEY. Thanks. Just quickly, Professor Calomiris, you know, I think somebody clearly indicated that their concern with the true lender rule is that if it were overturned, it would subject some number of additional loans to State price caps in the view that price controls are good for consumers. Is it your view that price controls are good for consumers and that that is what we ought to seek? I think your mic is off.

Mr. CALOMIRIS. Oh, somebody—is it on now?

Senator TOOMEY. Now it is, yes.

Mr. CALOMIRIS. The evidence which I summarized in my statement clearly shows that usury laws are bad for consumers, that they limit credit availability for consumers, especially for low-income and small borrowers and high-risk borrowers. So there is no question about that. That is not just my opinion. That is the entire economic literature.

What I would also point out is that the opportunity that I think all of us have in our minds that we would like to see, borrowers who can qualify for lower interest rate loans not be tricked into high interest rate loans. I think that is a valid issue. And what I want to point out, I hope everyone will just take a few minutes to read my 5-page appendix, on what is going on right now in financial inclusion and protecting consumers coming from these fintech bank partnerships. It is really exciting. It is quite impressive. It has absolutely nothing to do with payday lending except that it is an alternative to payday lending, and it is steering low-income and low-dollar borrowers to much lower interest rates. That is what is at stake here.

So I think we have a pretty severe mischaracterization of these very flexible and innovative new partnerships that are really empowering consumers in new ways, and I give many examples in my testimony. Since I wrote my testimony, some people have actually come to me and said, "Hey, you left me out. I am a firm that is doing this, too." So it is actually a very broad-based and exciting new movement, and I hope we do not, in some misguided attempt to thwart something, undermine this progress.

Senator TOOMEY. Thanks very much.

Thank you, Mr. Chairman.

Chairman BROWN. Thank you, Senator Toomey.

Senator Reed from Rhode Island is recognized for 5 minutes.

Senator REED. Thank you, and let me direct my question to Attorney General Stein. There has been a recurring discussion about the effect of interest rate caps, usury laws on unintended consequences, and restricting credit. I think in North Carolina you actually have some real evidence of what happens when a law is impose and then again when it is taken off. Could you comment on that, General?

Mr. STEIN. I would be happy to, Senator Reed. Thank you. Yeah, we actually are a bit of an experiment. I guess that is how federalism is supposed to work. We authorized it, and then we took away that authorization. And there was an extensive study done by UNC after the law went away surveying low-income households and universally needed credit. And the conclusion of the survey was that the absence of storefront payday lending did not have a meaningful impact on availability of credit to households in need because there were an array of other options available to them.

In fact, when they asked the households what they thought, 90 percent of them said that they thought payday lending was a bad thing. And of the universe of those households that had taken out payday loans in the past, by more than a 2:1 ratio, they said these were bad things, not good things; that they were incredibly easy to get into because of the marketing and ease, but incredibly difficult to get out of.

And so, yes, there are alternatives to credit, alternative credit options to people that are not exploitative, and that is much better.

Senator REED. Thank you very much, General.

Ms. Stifler and Dr. Haynes, we have been talking about sort of the direct course and repayment of these loans with high interest, but we are working with Chairman Brown and others to pass the Military Lending Act, which has a 36-percent cap on loans. And when the Department of Defense was finalizing its rules, they pointed out there are associated costs to the payday lending. People sort of literally lost their jobs because they became insolvent and they were discharged, and the discharge cost additional money.

So could you perhaps talk about some of the nonmonetary costs that have been incurred because of predatory loans? First, Ms. Stifler.

Ms. STIFLER. Thank you, Senator Reed. I would be happy to. So there are payday and other high-cost loans that are associated with a cascade of long-lasting financial consequences. They include bankruptcy, insufficient fund fees, other bank penalty fees, and often being shut out of the banking financial mainstream because of bank account closures. Borrowers who take out car title loans often lose their cars to repossession and are unable to get to work and are at risk of losing their jobs. A lot of the debt associated with high-cost loans come with health consequences due to stressors of being in debt. And for small business borrowers, they deal with harassment, bank fees, bankruptcy, loss of their business, and often loss of personal homes.

So those are just some of the other additional harms, and I am sure Dr. Haynes has some personal stories that he can bring to bear.

Senator REED. Thank you. Doctor.

Reverend HAYNES. Right, and I will just add that the attack on the mental health of those who find themselves stressed out because they cannot, again, pay off the loans, and their economic situation not only spirals downward and they find themselves again stressed, but there are so many other ramifications, it is almost a domino effect of consequences. So when you move from the mental health, not only to mental health, but then the families, I have literally seen families fall apart because they could not handle the stress of having been put in the debt trap that they found themselves in.

And so mental health as well as families falling apart are just two examples of the cascading effect of these predators.

Senator REED. Thank you very much. I am not aware of my time, Mr. Chairman. I have one other question.

Chairman BROWN. Certainly. Proceed, Senator Reed. Go ahead.

Senator REED. Ms. Stifler, you said in your written testimony, "predatory lending is fundamentally, structurally different than responsible lending. High-cost lending turns incentives on their head, so that lenders succeed when borrowers fail." Could you explain that?

Ms. STIFLER. Certainly. With reasonably priced loans, lenders only succeed when borrowers are able to repay the principal. But with high-cost loans, this is not the case. So with a high-cost installment loan like many in these rent-a-bank schemes that we are seeing, the high interest rates slow down the repayment of principal so much that the borrower can pay for months or even years without making virtually any dent in the principal. But the borrower has paid so much in interest alone by then that the lender who has already reached a profit on the loan without the borrower's principal balance decreasing at all.

There are examples. For example, in Maryland, a borrower took out a $2,000 installment loan with Opportunity Financial, also known as OppLoans, that is offered through a rent-a-bank scheme that the District of Columbia Attorney General was suing for their rent-a-bank scheme. And after more than a year of paying on that loan, the borrower reported having paid $4,600, and the principal, the $2,000 loan had not decreased at all.

So this is an example of how truly unaffordable loans can get you stuck in the debt trap, and the flip of what affordable loans do for borrowers as they are actually paid off.

Senator REED. Thank you.

Thank you, Mr. Chairman.

Chairman BROWN. Thank you, Senator Reed.

Senator Tillis of North Carolina is recognized for 5 minutes.

Senator TILLIS. Thank you, Mr. Chairman. And a special welcome to General Stein. It is good to see you. We spent time in the legislature together.

I first have to go back to my time. When I was 13 years old, I knew what a 90-day note was because that is what my dad got back when we had personal banking relationships, and some of the larger banks or regional banks were willing to take a risk on somebody who had no guaranteed income stream. I did construction work for him. He would get a project from insurance damage. He would go to the bank, get a 90-day note with the understanding that we could probably get it done in 60 days and pay it off.

Nowadays, you virtually have no personal banking relationship with the large banks, particularly for somebody like my father who had six mouths to feed, and I would argue probably a relatively high-risk profile. Fortunately for him, he was able to pay them off.

But, Mr. Brooks and Mr. Calomiris, it seems like those days are gone from most of the large banking institutions, so I am worried—when I was in the legislature, invariably when we would have a discussion about shutting down some of these higher interest rates, higher-risk loans, the caucus that came to me first was the African-

American communities that the lower interest loans were not going to be available to them, and so they were more likely to go off the books and get loans from people who were far more predatory because they escaped any regulatory oversight. Do you agree with that opinion, if we are not careful with the policies moving forward with the OCC rule?

Mr. BROOKS. So, Senator, I will kick it off, if I might, and thank you for the question. I would say the whole point of the work that the OCC did over the last year, starting with the small-dollar lending guidance and culminating in true lender, was to get banks more involved in this market so that we had to rely less on nonbanks. I do find it a little bit puzzling why we are spending so much time talking about payday lending when I do not think the OCC is ever likely to endorse a payday lending arrangement at all. What we are really talking about is the personal loan market, the market where fintechs now have a larger market share than banks do because banks have left that segment. And that market is all about people like your dad. We are talking about $5,000 to $15,000 balance loans that do not have a 2-week repayment and are not refinanced a hundred times. We are mostly talking about installment loans that have, you know, a 90-day to 2-year repayment period at interest rates that range from 20 to 50 percent. That is sort of the core of what that market is, and it is all about your dad. Banks stopped making those loans a long time ago because of consolidation. The question is: How can we get supervised entities back in the market to do that in a way that holds somebody accountable? That is the point.

Senator TILLIS. Mr. Calomiris, I want to go to you, but I would also like you all to add to our talk again. I think Senator Toomey spoke about this. We just want to get rid of all these high-interest loans. When we do that, the inference you could draw from that, somebody who is watching this hearing, it is because there is going to be a plethora of low-interest loans for that same base. So if you can respond to my first question and add color to that, then, Mr. Brooks, we will go back to you.

Mr. CALOMIRIS. Well, I want to answer both your questions. First, the answer is that, yes, the economics literature has shown—and both the amicus brief and in my testimony, it says so—that the people who suffer from these very binding usury ceilings are lower-income, small-dollar, and higher-risk borrowers, absolutely. That is the evidence very clearly.

And what is really exciting—and I want to be more positive. What is so exciting is that what we are seeing with these fintech providers who are partnering with banks in the loan supply chain is that they are actually helping to bring more credit at lower interest rates and that they are not just doing that by providing capital, but they are also providing education, different language consultation services. They are making sure people are not tricked. And this is really helpful.

So characterizing this as payday lending is just completely false. As Mr. Brooks said, this is not about payday lending. The OCC is not involved in payday lending or sanctioning. This is about broadening the base of access for consumers, and that is really where the discussion should be focused. I hope people will read my appendix, give a little bit more of a sense of the richness of what is going on right now.

Senator TILLIS. Well, I thank you both for your responses. I may have a couple of questions for the record.

Look, there is no question that there are predatory lenders out there, and there is no question—that is why I supported financial literacy initiatives when I was Speaker of the House in North Carolina—that we need to make everybody aware of their lowest-cost option for financing. Count me in for doing that. But removing this for the dads of today who are trying to get that short-term loan to put food on the table for six kids, count me out of that.

Thank you, Mr. Chair.

Chairman BROWN. Thank you, Senator Tillis.

Senator Warren of Massachusetts is recognized for 5 minutes.

Senator WARREN. Thank you, Mr. Chairman.

So in our legal system, States set interest rate caps, determining what interest rates constitute usury. If I lend to my neighbor in Massachusetts, our interest rate will be capped at the Massachusetts maximum, which is 20 percent.

The idea of protecting borrowers from usury dates back to the Code of Hammurabi, to the Bible, to the Koran, to every colony in prerevolutionary America, and to every State in the United States. In 1979, the Supreme Court took that away, opening a loophole to let federally chartered banks escape centuries of usury laws. And then over time, banks figured out that they could open that loophole even wider through the so-called rent-a-bank scheme.

Now, under this arrangement, a nonbank lender like an online lender or payday loan company that would usually be subject to usury laws finds a bank that is willing to originate a loan on its behalf and funnels the loan through the bank and avoids State interest rate caps. That means that instead of interest rate caps like 20 percent, which the State legislature determined, interest rates can go to 35 percent or 400 percent or 1,000 percent.

Last year, the OCC issued a rule clarifying who is entitled to the usury exemption in cases like these.

Mr. Brooks, you were Acting Comptroller when the OCC's true lender rule was finalized. The rule acknowledges that rent-a-bank schemes have, and I am going to quote you here, "no place in the Federal financial system." Is that your personal view as well?

Mr. BROOKS. Oh, absolutely.

Senator WARREN. Good. It is mine, too. So let us take a look at what the rule you pushed through actually allows. Mr. Brooks, under your rule, if a payday lender arranges a loan for a consumer, it is subject to State usury laws. But under the OCC's new rule, if that same payday lender arranges for a bank to originate the loan and then the payday lender immediately buys the loan back from the bank to collect the payments, the bank would be considered the true lender so long as it was named in the loan agreement, and that loan would be exempt from the State's usury laws under this rule from the OCC. Is that correct?

Mr. BROOKS. If the bank is named as the lender, so the consumer is told that that is their lender, or if the bank funds the loan, then, right, the bank is expected to treat that as though it is its own loan for underwriting, consumer protection, and all purposes.

Senator WARREN. And because banks have an exemption from State usury caps, there would essentially be no limit as to what the payday lender could charge a borrower if it just funnels its loan through a bank. So could it be 20 percent or 35 percent or 400 percent or 1,000 percent?

Mr. BROOKS. Well, Senator Warren, I disagree with the premise, because in the example we are talking about, it is not that the payday lender is charging a rate. It is that the bank is charging a rate, which means the bank has to assess ability to repay. They have to assess fair lending and everything else. It is not that the payday lender is originating. It is that the bank is originating subject to supervision.

Senator WARREN. Well, I see what you are trying to do with the language about who is originating. I understand that the payday lender has gotten the bank to put its name on the paper. But my question is: If it is the payday lender who finds the customer, who has the whole idea, who puts this together, but gets the bank to put its name on the paper, will that loan be subject to usury laws? It is a pretty straightforward question.

Mr. BROOKS. I think, Senator Warren, it is the preamble to the question that is not straightforward, because the preamble assumes that the bank would originate a payday loan with all that implies, with the likelihood of refinance, with the likely inability to repay. Banks are not allowed to do that. The whole point——

Senator WARREN. Well, let me just stop you right there, just because I want to be clear on this. The new rule you have put in place says let us look at the paperwork, and if the bank's name is on the paper, that is what is going to control.

Now, I realize that you want to talk about the additional other places that there are rules and regulations governing the behavior of the banks. So the OCC is going to let payday lenders get an exemption from usury laws, but the OCC is going to continue to take enforcement actions when the bank originates a loan if it does not consider, for example, the borrower's ability to pay. In other words, I think what you are saying to me is the OCC will be tough on banks. Is that right?

Mr. BROOKS. Well, there is a lot that you said that I disagree with, but, yes, the OCC's history of being tough on banks in non-ability-to-repay circumstances is pretty well demonstrated.

Senator WARREN. If the Chair will just indulge me for a minute here, I want to look at the OCC's history on how tough you have been. Let me just look at an example from Massachusetts, and that is, in 2018, Axos Bank rented itself out to a nonbank company called World Business Leaders to lend to a Massachusetts small business at 92 percent interest, which is well above our Commonwealth's usury cap of 20 percent. The company arranged the loan, set the terms, collected the payments, but the name Axos Bank was on the loan document.

So let me just ask you, Mr. Brooks, this one will be a really short question. How many enforcement actions has the OCC taken against Axos Bank in recent years?

Mr. BROOKS. It is a great question, but we did not have the true lender rule in 2018, which is sort of the point.

Senator WARREN. So how many enforcement actions did you take? Because all the rest of the rules were still in place.

Mr. BROOKS. Senator Warren, I personally imposed more than $1 billion in penalties——

Senator WARREN. So how many—it is a really straightforward question. I have got one bank charging 92 percent interest. How many enforcement actions did you take? There is a word you do not want to have to say here.

Mr. BROOKS. I am not sure.

Senator WARREN. Zero. None. Under the previous Administration, banking regulators wrote rules the way the banking industry wanted, created loophole after loophole for bad actors, and put the interests of the wealthy and the powerful ahead of families and small businesses. We are going to have a chance to vote on this in the Congressional Review Act resolution to nullify the true lender rule, and I very much hope that we pass that and undo the damage that the Trump-appointed regulators have done.

Thank you, Mr. Chairman, and thank you for your indulgence on time.

Chairman BROWN. Thank you, Senator Warren.

Senator Cortez Masto is recognized for 5 minutes.

Senator CORTEZ MASTO. Thank you, Mr. Chairman, and thank you to the panel. I so appreciate the conversation today. It is just so important.

Mr. Brooks, let me ask you this: Some nonbank lenders have openly acknowledged that they are funneling their loans through banks to evade State interest rate caps. Isn't that true?

Mr. BROOKS. If there is a nonbank lender that said any of those words, I would be very, very surprised.

Senator CORTEZ MASTO. Well, they have. So as the regulator, doesn't that concern you? As a former regulator, shouldn't that concern you?

Mr. BROOKS. Yeah, so, Senator, I am not aware of anyone who has publicly said they are either funneling or——

Senator CORTEZ MASTO. I understand. I am telling you they have, and so I appreciate that, but as somebody that now is making you aware of it, I would assume—maybe I should not assume—that you should be concerned about it. And isn't it true that the FDIC has not proposed any similar rule?

Mr. BROOKS. Well, that is not quite right. So as I said, there are three laws that work together. They are all integrally related. So there is the interest rate exportation rule, which I do not think anybody is questioning. There is the "valid when made" rule, which really is what this whole discussion has been about today, because this really has not been about true lender; it has been about whether a bank can sell a loan to a nonbank and have the interest rate travel. And the FDIC did adopt that rule around the same time the OCC adopted it.

Senator CORTEZ MASTO. So let me ask you this, let me ask you this, because you are going to talk it to death. And I appreciate that. Listen, I have listened and I appreciate that. But as a former Attorney General, I have to be concerned about those individuals who are out there that literally are using it to skirt around State laws. You know that. We know that. It is happening. And I appreciate where you are coming from because you were the Comptroller, Acting Comptroller, when this law was passed.

Let me ask Attorney General Stein, based on this new rule that banks' names on paper control and the example that Senator Warren just gave to Mr. Brooks, how would that affect your ability to challenge a payday lender and a bank who is skirting your State interest rate caps? Would it make it more difficult to challenge that arrangement and protect your constituents in your State?

Mr. STEIN. Thank you, Senator Cortez Masto. Absolutely. This is a perfect example of the OCC trying to preempt States' ability to protect their people from unlawful, high-cost, harmful loan products. Now, ask yourself: These third-party lenders, are they doing these relationships with national banks in States that do not have interest rate caps? No. They will only enter into these relationships with national banks because they have to take a slice of their fee to pay the bank for use of the logo on their application form. They do not want to do it if they do not have to. They only will do that in States like North Carolina, like Massachusetts, like Pennsylvania, where the State legislatures have made the determination that they want to protect their people. And the OCC will make it much more difficult for us to enforce State law against those types of subterfuges.

Senator CORTEZ MASTO. Thank you. And let me just say, in the FDIC's 2019 How America Banks survey, 5.7 percent of Nevada households had taken out a payday loan. That is the highest in the Nation. And according to the Center for Responsible Lending, the typical annualized percentage interest on a payday loan in Nevada is 652 percent. Now, our State legislature has taken steps to regulate payday lending, including the development of a data base tracking payday loans.

Ms. Stifler, let me ask you this: Would the OCC's new rule undercut Nevada's ability to track those loans to consumers or even challenge the State from taking future action to limit predatory lending?

Ms. STIFLER. Thank you for that question, Senator. Yes, this rule will impede Nevada's ability to track loans and also in the future to set interest rate limits. But one thing I want to clear up around confusion that is happening around why we are talking about payday loans. It is because payday lenders are engaging in these schemes right now, online and in stores. Just as Mr. Calomiris—sorry if I am pronouncing that wrong—has found fintech companies engaging in good behavior, we have been finding daily payday lenders and other high-cost lenders engaging in online and in-store behavior. Check into Cash, one of the frequent users of rent-a-bank schemes in the 2000s, is using the scheme again in States like Ohio, Arizona, Virginia, Nebraska, and California, States that have capped rates in recent years on payday and other high-cost installment loans and are doing it in-store and online.

Senator CORTEZ MASTO. Thank you. I know my time is up. Thank you so much, Chairman Brown, for this great conversation today.

Chairman BROWN. Thank you, Senator Cortez Masto.

Senator Van Hollen is recognized for 5 minutes.

Senator VAN HOLLEN. Well, thank you, Mr. Chairman, and thank you for holding this important hearing. Thank you to all the witnesses.

As we have heard, this new so-called true lender rule really just opens up the floodgates to rent-a-banks and predatory lending. I do hope that Congress will muster the votes to overturn it.

In my State of Maryland, we have laws in place to try to prevent predatory lenders so they cannot take advantage of consumers. Under our State law, the maximum interest rate on a $1,000 loan is 33 percent; on a $2,000 loan it is 24 percent; on a loan greater than $2,000, it is 24 percent. And yet through these rent-a-bank schemes, predatory lenders can essentially evade these caps, launder high-interest-rate loans, and we are talking about rates 179 percent or higher, and they can do this just by having a rubber stamp partnership with these banks, as has been described.

Ms. Stifler, you started to talk about this in response to Senator Cortez Masto's question, but from your research, have you seen this resurgence of rent-a-bank schemes? If so, how are they the same or how are they different from what we saw in the early 2000s when the OCC and State Attorneys General shut them down? If you could just go into detail, because some claim that we are not seeing these problems.

Ms. STIFLER. Thank you for the question, Senator Van Hollen. Yes, we are seeing a reemergence of rent-a-bank schemes. There have been some rogue banks renting out their charters over the past few years with a handful of schemes, but increasingly we are seeing more and more of these schemes emerging, thanks to the OCC and FDIC recent actions over the past couple of years. Today's schemes are fundamentally the same as in the 2000s, early 2000s. The nonbank handled virtually all of the loan functions, but the bank's name is on the paperwork as the lender in order to try to get around State law. Shortly after origination, the nonbank lender buys the bulk of the financial interest in the loan from the bank, and, you know, while some of today's schemes might be dressed up a little bit fancier with a fintech aura than the older schemes, they still have the same rent-a-back evasion.

The loans we are seeing are still extremely high cost and extremely predatory. They are made by payday lenders. They may not be the 2-week loans that perhaps Mr. Brooks is thinking of, but they are the 18-month loans at $5,000. They are offered in stores and online, like I mentioned, and, you know, they are growing. They are also point-of-sale loans, they are car title loans, and they are high-cost loans that in 45 States plus the District of Columbia are not legal right now.

Senator VAN HOLLEN. Well, thank you. And, Mr. Stein, just to follow up on that—and thank you for bring the legal actions that you are on the grounds of preemption, that this rule preempts State law and violates the criteria that need to be applied for any kind of preemption. From your perspective and the perspective of the States, what has been the experience with the OCC's preempting State consumer protection laws in the past? And are there parallels between what is happening now and what happened in the early 2000s that contributed to the meltdown?

Mr. STEIN. Thank you, Senator Van Hollen. A great question. This is not the OCC's first gambit at trying to keep States from looking out for their borrowers. North Carolina was the first State in the country to pass an antipredatory lending law back in 1998, and then a number of other States followed. And these were laws that required an analysis of a borrower's ability to repay, a prohibition on flipping loans to charge unnecessary fees, negative amortization—all these things that led to a surge in dangerous, high-cost, subprime loans throughout the early 2000s.

We fought back against their preemptive moves, but the damage was done, and we all lived through the painful Great Recession that was really sparked by the meltdown of subprime mortgage lending. That is why you all passed the Dodd–Frank Act, and that is why you all put restrictions on the OCC's ability to preempt States, because you had seen that negative experience.

The OCC is currently flouting the dictates of Congress by failing to engage in the preemption requirement you imposed on them, and that is why we urge you all to exercise your authority under the Congressional Review Act.

Senator VAN HOLLEN. Well, thank you, and I hope we will. And as you know, Senator Brown and I have filed exactly that proposal for Congress to act to overturn it. Thank you very much, all of you, for your testimony.

Thank you, Mr. Chairman.

Chairman BROWN. Thank you, Senator Van Hollen.

Senator Smith, thank you for allowing Senator Warnock to go next. I really appreciate that, as I am sure he does, because he has got somewhere he needs to go. Senator Warnock from Georgia is recognized for 5 minutes.

Senator WARNOCK. Thank you so very much, Mr. Chairman.

As Chair of the Subcommittee on Financial Institutions and Consumer Protection, I am very concerned about this issue. And I want to make it very clear that I am going to do everything I can to protect consumers, but especially the most marginalized. Vulnerable people are the ones who are targeted by these loans. And this so-called true lender rule, what a misnomer. There is nothing true about it. It provides an avenue for predatory lenders to partner with banks to peddle harmful short-term loans with triple-digit interest rates—triple-digit—in States that have reasonable and often voter approved caps like North Carolina on interest rates to protect consumers.

Today nearly 16,000 payday and auto loan stores operate nationwide. I have seen this up close and firsthand as a pastor in the Auburn Avenue community in Atlanta, Georgia, and in other pastorates.

Pastor Haynes, let me begin with you. We have worked on these issues for years, and I know of your involvement and advocacy, and we often talk about financial predators who take advantage of the poor, our most vulnerable sisters and brothers. In your testimony you shared some of these lived experiences of many who attend your church, which is predominantly African-American. Could you briefly talk about how these rent-a-bank arrangements are affecting both older and younger generations at Friendship-West Church and in the surrounding communities? And what do you think of the long-term economic and wealth consequences for the consumer?

Reverend HAYNES. Thank you for the question, Senator Warnock. As you know, usury is un-Biblical, it is immoral, and the reason is because of the damage it does to those who are already economically vulnerable. In the area where I am blessed to pastor, sadly, within a 3-mile radius you have in excess of 20 payday loan and car title loan stores. At the same time, we have seen banks vacate that area, and so the payday and car title loan stores become the options that persons have in order to make up for being in an underserved area. And, of course, they find themselves in a debt trap, and that debt trap does so much damage to the community. It does damage to the family, and the bottom line is that we are talking about those who are already vulnerable who live in a community that is underserved and suffers from being disinvested. And so when you combine all of that—and earlier, persons were talking about taking away choices from consumers. And yet when the options are predatory, you set them up to make choices that will have consequences that, again, would do damage to the family and further damage to a community that is already underserved. And, Pastor Warnock, you can appreciate this. I just do not want Jesus to say to America in the judgment, "I was hungry, and you gave me a payday loan through a rent-a-bank scheme."

Senator WARNOCK. Thank you so much, Pastor Haynes, and I think it is an important point that you make this assumption about somehow we are providing options when the reality is people are being ghettoized and channeled and marginalized to these inferior loan products that set up a cycle of debt.

Ms. Stifler, in your testimony you noted that these types of lenders disproportionately hit communities of color due to the long history of racial discrimination within housing, banking, lending, and employment, often aided and abetted by some of our Government's own policies.

In addition to passing the Senate Joint Resolution to overturn this bad rule, what other actions should our Federal regulators take to close this predatory loophole and lessen its impact on vulnerable communities?

Ms. STIFLER. Senator Warnock, thank you for the question. Yes, I mean, there are a number of actions that can be taken at the Federal level, whether it is the regulators or you all in Congress. I think one of the key policies that could be pursued is a Federal interest rate ceiling, like I mentioned in my testimony. While 18 States plus the District of Columbia have strong interest rate caps on payday loans and they represent over 115 million people in the country, the rest of the country is at risk to predatory payday loans. So it is something the Congress can do and that we support is a Federal interest rate cap of 36 percent or less.

Senator WARNOCK. We have to support Senate Joint Resolution 15. This is the start, and there is more work to be done. Thank you so much for your testimony, and thank you, Mr. Chairman.

Chairman BROWN. Thank you, Senator Warnock.

Senator Smith from Minnesota is recognized for 5 minutes.

Senator SMITH. Thank you, Chair Brown.

So every year in Minnesota, people in Minnesota—and all across the country—are taken advantage of by financial institutions, by companies, by individuals acting in bad faith. And we know researchers and advocates like some that we have today on this great panel have long criticized payday lenders for preying on struggling consumers and trapping them in this cycle of debt. And too often we know that the victims of these abusive practices are from low-income communities and from communities of color. People are ripped off, and it is immoral and disgraceful. In Minnesota, a 2016 analysis showed that black Minnesotans are twice as likely as Minnesotans as a whole to live within 2½ miles of a payday loan store.

So I want to drill in on this in a couple of different ways. I would like to start with Attorney General Stein. You joined a group of other Attorneys General, including our outstanding Attorney General from Minnesota, Keith Ellison, in filing a lawsuit against the OCC to challenge this so-called true lender rule. So can you just explain to us whether or not you think that this so-called true lender rulemakes it easier for payday lenders to rip off consumers? I mean, that is how it seems to me. It just makes it easier for them to do this.

Mr. STEIN. Senator Smith, thank you. Yes, absolutely, the effect of this fake lender rule, to be more accurate, is that payday lenders in States where it is illegal for them to operate will pay a fee to a national bank for use of its logo on its paperwork and then engage in payday lending in States to the detriment of residents where it is not a lawful product.

Senator SMITH. So not only does it make it easier for these payday lenders to rip people off, but it also makes it harder for you to do your job of protecting consumers, which is part of what your charter is, your job is as an Attorney General, right?

Mr. STEIN. There is no question. I headed the Consumer Protection Division in 2001 to 2008. The law banning payday loan lending went into effect in 2001. It took us 5 years of vigorous enforcement of State law until we succeeded in chasing out the last storefronts of payday lenders in North Carolina. It was hard work, but we succeeded. This new rule will put in jeopardy all of that hard work.

Senator SMITH. So I am struggling to understand, like, why would we do this? Why would anybody think that it is a good idea to make it easier to rip people off like this? What is the justification?

Mr. STEIN. Well, greed. I mean, what drives payday lending is greed. These folks know that they can make money. Ms. Stifler noted in her comments that the entire business model of payday lending is not someone repaying the loan. The entire model is dependent on a percentage of those borrowers never being able to repay the principal and being on the hook for the ongoing fees for weeks and weeks and weeks and weeks at a time. And if everybody repaid their loan and were done after 2 weeks, the business would not exist.

Senator SMITH. Right.

Mr. STEIN. It is entirely dependent on those who are desperate and in a hard way.

Senator SMITH. But it seems to me, Mr. Chair, that as policymakers we should be making it harder and not easier for payday lenders to prey on people who are trapped in this cycle of debt, and that we also need to see that these predatory practices do not just happen randomly across the community, that they specifically are targeting Black and Brown folks. And I would really like, in the little bit of time that I have left, Pastor Haynes, I so appreciate your testimony. And I am just wondering, as you think about your parishioners and the community that you serve, how would you connect this rent-a-bank scheme with other examples in our history of policies and practices that have discriminated against Black and Brown people? I mean, specifically we have banks, for example, that make it harder for Black and Brown people to borrow money, and then at the same time we make it easier for predatory lenders like this to come into communities and trap people?

Reverend HAYNES. Thank you for that question, Senator Smith. I will just simply say that, again, we have a history of redlining Black and Brown communities, and that history now continues in that in the past, you know, neighborhoods were targeted or Zip codes were targeted for noninvestment, nonloan, nonbank opportunities, and now the target is to exploit those who are already vulnerable. And I think it would be just a novel concept for the OCC, instead of protecting predators, let us see to it that banks serve all consumers and all consumers in a way that is just, fair, and moral.

Senator SMITH. Well, I could not agree with you more. I think that should be the work of this Committee and the work that we have ahead of us. We need to understand that it is not an accident of history that this is happening in Black and Brown communities. This is the design of how things have been done that we need to break that pattern, and that is what I look forward to working on.

Thank you very much.

Chairman BROWN. Thank you, Senator Smith, for your questions.

The hearing is drawing to a close. Today's testimony makes it obvious why we need to overturn the OCC's true lender rule that enables a new group of payday lenders to resurrect the same old rent-a-bank scheme. How do we know this is happening? Just as General Stein pointed out, look at where this new group of payday lenders is using that strategy. They lend directly in States with no rate caps, but then use the rent-a-bank strategy in States where there are limits on the amount of interest they can charge, conservative States, States that are known to most of us as pretty Republican, States like Georgia, North Carolina, South Dakota—Georgia, I would argue; Senator Warnock might disagree with that.

We heard talk today about how payday lenders say they provide options. We have heard that over and over, options and opportunities, but debt traps are not really reasonable options. We heard a lot today about access to credit and how overturning this rule might decrease that access. But be clear, we do want it to decrease access to loans at interest rates so high they ruin people's lives. That is the whole point of the hearing, the whole point of our CRA resolution.

I would ask anyone who wonders if we really should be cracking down on these predatory lenders to listen to the testimony from workers we had on this Committee yesterday. We listened to five workers talk about their lives. They were diverse geographically, racially, gender. They talked about their struggles, and part of that is their struggles with debt when they are low-wage workers and are having difficulty. They have worked hard their whole lives. That hard work has never paid off like it should. If you believe in the dignity of work, you work hard, you ought to be able to get ahead.

One worker, a woman from southern West Virginia, said, "They call me the working poor, but," she said, "'working' and 'poor' should not be in the same sentences."

If we are concerned too many people cannot afford a car repair or a medical bill or another emergency, the solution is not to trap them in a cycle of debt. It is to raise their wages.

So thank you all, all five of you, for testifying, for being here today.

For Senators who wish to submit questions for the record, these questions are due 1 week from today, on Wednesday, May 5th, so please abide by that.

For our witnesses, we ask you within 45 days to respond to any of these questions. Thank you again, all of you, for being here.

The Committee is adjourned. Best wishes. Thank you.

[Whereupon, at 11:36 a.m., the hearing was adjourned.]

[Prepared statements, responses to written questions, and additional material supplied for the record follow:]

PREPARED STATEMENT OF CHAIRMAN SHERROD BROWN

Emerson teaches us that history is a battle between what he called "the innovators" and "the conservators." The innovators work to find new ways to make Government work for the people it serves, and deliver results for everyone.

But the conservators—the corporations, the special interests, the elite who've amassed wealth and power at the expense of workers and their families—the conservators never give up.

And so it is with predatory lending.

In the late 1990s, payday lenders were desperate to find a way to evade State laws that limited them from charging exorbitant interest rates that trap people in a cycle of debt they can't get out of, no matter how hard they work.

They came up with what the OCC called "rent-a-charter"—what we now know as the "rent-a-bank" scheme.

Because banks are generally not subject to these State laws, payday lenders funneled their loans through a small number of willing banks. It looked like the banks were making the loans, when it was really the payday lenders.

Federal regulators, Republicans and Democrats, saw through this ruse.

Under President Bush, the OCC described these rent-a-bank schemes as "abusive," and later warned about banks that "rent out their charters to third parties who want to evade State and local consumer protection laws."

In the years that followed, the OCC and FDIC shut down a series of these schemes by payday lenders and banks.

States from across the country also stepped in to crack down.

The Georgia legislature, in 2004, passed a law to crack down on rent-a-bank schemes. Regulators in West Virginia, Ohio, Pennsylvania, New York, Maryland, and other States followed suit.

States also passed new laws to limit interest rates on payday loans.

Since 2010, Montana, South Dakota, Colorado, Illinois, Virginia, and just last year Nebraska, all passed laws to cap interest rates on payday loans at 36 percent—still a very high number that will make any company plenty of money.

Several other States, including California and my home State of Ohio, also passed laws to limit the interest that can be charged on consumer loans.

These new laws passed with overwhelming, bipartisan support.

More than 75 percent of voters in Nebraska and South Dakota supported the ballot initiatives to cap interest rates on payday loans.

In recent years, new fintechs have emerged that partner with banks to offer responsible small-dollar loans at affordable rates.

Of course the payday lobby didn't give up.

And now we have a separate group of online payday lenders resurrecting the same old rent-a-bank scheme. They aren't even attempting to hide it.

One online lender recently told its investors that it would get around California's new law by making loans through "bank sponsors that are not subject to the same proposed State level rate limitations."

Another one said "There's no reason why we wouldn't be able to replace our California business with a bank program."

Given the broad, bipartisan support for these laws, we all hoped that the Trump OCC would take action and crack down on these schemesschemes that have been rejected by voters and legislatures in State after State.

The last Republican administration under President Bush stood up for consumers on this point.

But last year, the OCC issued what's known as the True Lender Rule, overruling voters of both parties and giving a free pass to these abusive rent-a-bank schemes.

The rule was rushed through by the Acting Comptroller who cut his teeth helping banks ruthlessly foreclose on homeowners and a Deputy Comptroller with deep ties to the payday lobby—and whom Republicans have selected to be witnesses at today's hearing.

The OCC and Mr. Brooks have argued that the True Lender rule is necessary so that the agency has the necessary authority to oversee banks relationships with payday lenders.

But that's just not true—the OCC didn't lack any authority when it cracked down on rent-a-bank schemes in the early 2000s.

The OCC also attempted to justify its efforts by claiming that it promotes "innovation" and provides "certainty" to the markets.

The only certainty we need is the certainty that workers and their families will be protected from exorbitant, exploitive interest rates.

And the last thing we should be doing is encouraging payday lenders to, in their words, "innovate"—we know that just means new ways to get away with ripping people off.

That's why across the country, a broad, bipartisan coalition is asking Congress to overturn the OCC's harmful True Lender Rule.

That support includes:

- the National Association of Evangelicals,
- the Southern Baptist Convention,
- and other members of the Faith in Just Lending Coalition.

That coalition wrote to Congress, quote: "Predatory payday and auto title lenders are notorious for exploiting loopholes in order to offer debt-trap loans to families struggling to make ends meet. The OCC's 'True Lender' rule creates a loophole big enough to drive a truck through."

I'd also like to submit the entire letter for the record, along with letters from a bipartisan group of State attorneys general, State bank regulators, and a coalition of 375 consumer, civil rights, labor, and small business organizations asking Congress to overturn the True Lender Rule.

Today we'll hear from one of the members of that faith coalition, Dr. Frederick Haynes, senior pastor of Friendship-West Baptist Church in Dallas, Texas.

We'll also hear today from North Carolina Attorney General Josh Stein.

General Stein represents a bipartisan coalition of State attorneys general, including the Republican attorneys general in Nebraska and South Dakota, who have called on Congress to overturn the OCC's True Lender Rule.

Like so much we do, this comes back to one question: whose side are you on?

You can stand on the side of online payday lenders that brag about their creativity in avoiding the law and finding new ways to prey on workers and their families.

Or we can stand up for families and small businesses, and the State attorneys general and State legislatures who have said "enough" and are trying to protect themselves and their States from predatory lending schemes.

Some issues that come before this committee are complicated, they divide people, there are thorny nuances to consider. This isn't one of them. It's simple: Let's stop predatory lenders instead of encouraging them.

PREPARED STATEMENT OF SENATOR PATRICK J. TOOMEY

Thank you, Mr. Chairman.

In the last decade, we have seen financial technology companies—fintechs—driving new innovations in the financial markets. Fintechs have had remarkable successes in developing technology-oriented solutions to meet consumer needs.

As many banks have exited the personal loan market fintechs have filled the gap, increasing their consumer lending by 72 percent between 2005 and 2018. Today, they issue nearly 40 percent of all unsecured personal loan balances.

In recent years, both nationally chartered and State-chartered banks and credit unions have begun to partner with fintechs to offer improved products and reach more consumers. This is particularly beneficial for community banks, who lack resources to develop banking technology. In fact, 65 percent of community banks consider fintech partnerships important to their business strategy.

These partnerships also generate significant consumer benefits. Bank–fintech partnerships generate efficiencies that can lower the price of financial products, expand consumer choice, and increase competition. Bank–fintech partners offer a large variety of credit products—not just small-dollar loans—including credit cards, home equity lines of credit, personal loans, auto loans, mortgages, and small business loans.

Unfortunately, recent court rulings have applied differing legal tests to determine which partner in these relationships is the true lender who is legally responsible for the loans. These tests have created uncertainty that threaten to reduce access to credit for consumers, especially for riskier borrowers. That's why there has been bipartisan Congressional support and industry support for clarifying this issue.

Last year, the OCC issued its True Lender rule to provide this much-needed regulatory clarity. This rule holds a national bank responsible for a loan when, at the time the loan is originated, it is named in the loan agreement or it funds the loan. This allows the OCC to supervise these loans and ensure the bank is not evading the law, including Federal consumer protection laws.

Contrary to what some claim, this rule is not intended to facilitate "rent-a-charter" arrangements where banks don't comply with the law. In fact, the OCC's rule does just the opposite. As the OCC has explained, in a rent-a-charter arrangement "a bank receives a fee to 'rent' its charter and unique legal status to a third party . . . to enable the third party to evade State and local laws . . . and to allow the bank to disclaim any compliance responsibility for the loans."

In other words, a "rent-a-charter" arrangement means no party takes compliance responsibility for a loan. That's where the True Lender rule comes in. It ensures that national banks that partner with third parties are accountable for the loans they issue through these partnerships, and allows the OCC to supervise the origination of these loans.

You don't have to take my word for it. The current Acting Director of the OCC—who has been a career civil servant for more than 30 years—recently wrote to Congress making this very point.

The True Lender rule also provides the clarity needed for bank–fintech partnerships to flourish and for national credit markets to function. For over four decades, Federal law has allowed both nationally chartered and State-chartered banks to "export" the State law governing interest rates from the home State where they are based.

This allows the bank to comply with the law of the one State where the bank is located, rather than the 50 different States where its customers are located, in order to facilitate an interstate market for credit. The True Lender rule allows fintechs to partner with banks, which already operate with these efficiencies.

Uncertainty about who the true lender is creates uncertainty about whether the bank can export its interest rate. If the bank guesses wrong, the loan could be unenforceable. This uncertainty jeopardizes the viability of bank–fintech partnerships. More importantly, it also disrupts the functioning of the secondary market for credit.

Why does the secondary market matter? When a bank sells a loan it frees up capital to make more loans. Perhaps the best-known illustration is mortgages. When a bank sells a mortgage to the GSEs it frees up capital to lend to additional homebuyers. The same principle applies to the secondary market here.

Banks will likely issue far fewer loans if they cannot reliably sell them into the secondary market. Fewer loans means less access to credit; less access means higher costs and less willingness to provide the limited supply of credit to higher-risk borrowers. The result? The most marginalized consumers are hit the hardest.

This isn't just my opinion. Almost 50 leading financial economists from prominent universities—including Harvard, Stanford, and the University of Pennsylvania—made these very points in an amicus brief in support of the OCC's True Lender rule.

We have empirical evidence, too. Studies have shown that after a 2015 court ruling created uncertainty around the ability to export interest rates to New York, it became significantly harder to get loans in New York, especially for higher-risk borrowers.

Despite the importance of the True Lender rule, some Democrats want to rescind it using the Congressional Review Act. The rationale appears to be that overturning the rule may subject more loans to State interest rate caps.

However, price controls are not the answer. They exclude people from the banking system. Price controls restrict the credit supply and make it harder for low-income consumers to access needed credit.

The best form of consumer protection is a robust, competitive market. Preserving the regulatory certainty and clarity the True Lender rule advances that cause.

PREPARED STATEMENT OF JOSH STEIN

ATTORNEY GENERAL, STATE OF NORTH CAROLINA

APRIL 28, 2021

Mr. Chairman and Members of the Committee, my name is Josh Stein, the Attorney General of North Carolina. I am pleased to have this opportunity to discuss the OCC's so-called True Lender Rule. This rule, if not reversed, provides a get-out-of-jail-free card to predatory lenders who violate State laws limiting interest rates and fees on consumer loans.

Many States set rate caps on consumer loans. For instance, in my home State of North Carolina, the maximum legal rate for consumer loans under $4,000 is 30 percent. These State consumer protection lending laws enjoy broad and bipartisan support, not only in North Carolina but across the country. For example, in the 2020 election, more than 82 percent of Nebraska voters approved a ballot measure to cap interest on payday loans at 36 percent. South Dakota voters approved a similar measure in 2016. Many of these lenders in our States are licensed, well-regulated, and compliant with State usury laws.

However, for as long as States have protected their resident borrowers from predatory lenders, those lenders have sought to evade State laws. Greed is a powerful motivator. One of their favorite ruses in recent decades has been to dress up the paperwork of their loans to make them look to be made by an entity exempt from State usury law, such as a national bank regulated by the OCC.

The courts have long recognized and outlawed these subterfuges that put form over substance. A longstanding legal principle, dating as far back as a 1835 U.S. Supreme Court opinion written by Chief Justice Marshall, demands an "examin[ation] into the real nature of the transaction" to determine whether a loan violates usury laws.

Many States including my own have incorporated Chief Justice Marshall's reasoning into their State law through the "true lender" doctrine (or sometimes called the "de facto lender" doctrine). It is a principle of State law that typically looks to whether a predatory lender retains the "predominate economic interest" in the loan to determine whether the predatory lender is the loan's true lender and therefore must comply with State rate caps.

North Carolina and other States have relied on the "true lender" doctrine to combat the illegal schemes of modern predatory lenders. North Carolina has a long history of strong laws and vigorous enforcement against payday lending. For a brief experimental period, from 1997 to 2001, North Carolina law allowed payday loans, and our State became home to 10 percent of the payday loan storefronts in the Nation with a heavy concentration in neighborhoods of color and near military bases. During that time period, we learned firsthand the economic damage these loans inflict on working families. The median loan was for $244 for a period of 8–14 days at an APR of 419 percent. The average borrower got more than 8 loans from the same store, and one out of seven borrowers took out more than 19 loans per year. These loans were not a source of occasional credit as their marketing suggested but rather a debt treadmill from which borrowers had trouble escaping; for a person struggling to keep their head above choppy financial waters, the loans were not a life preserver but an anvil.

Let me tell you briefly about Arthur Jackson (not his real name), a warehouse worker and grandfather of 7, who lives in Raleigh, NC, went to the same Advance America payday store for over 5 years. He got a single $200 loan, that was later increased to $300. Advance America flipped the same loan over 100 times, collecting $52.50 for each transaction, while extending him no new money. He ended up paying interest of over $5,000 for the loan, fell behind on his mortgage, and had to file for bankruptcy to save his home.

Lisa Terry, from Winston-Salem, NC, was a single mother making less than $8 an hour. She went to a payday store and got a $255 loan. Two weeks later, like so many borrowers, she didn't have the funds to pay it off, so she renewed or "rolled over" the loan. She paid renewal fees every 2 weeks for 17 months—paying $1254 in fees alone—without paying down the loan. She thought she was getting new money each time, not realizing that she was simply borrowing back the $300 she had just repaid. She said, "I felt like I was in a stranglehold each payday. After a while, I thought, 'I'm never going to get off this merry-go-round.' I wish I'd never gotten these loans."

Finally, Anita Monti, a 61 year old grandmother from Garner, made $9 an hour working second-shift at computer hard drive manufacturer. She wanted to buy her five grandchildren presents for Christmas, but she was living paycheck to paycheck. She went to an Advance America store and borrowed $300, less a $45 fee. In two weeks, she didn't have the money she owed, and her electric bill was due. So, she borrowed another $300, not realizing it was the same $300 over again. Only after getting a raise to $12 an hour and scrimping on food was she able, a year later, to pay the almost $2,000 in fees she paid week after week to get that $300 loan. As she said, "I needed the cash to get through the week. It didn't cross my mind that I was borrowing back my own money."

Due to the exorbitant interest rates of the loans and patterns of harmful, repeat borrowing that buried in debt thousands of North Carolinians like Arthur, Lisa and Anita, North Carolina's legislature allowed the law to sunset in September 2001. After the sunset, most payday lenders complied with the law and closed their doors. However, others looked for ways to circumvent North Carolina law through subterfuges, including rent-a-bank schemes. In particular, several national payday lending chains, including ACE Cash Express and Advance America, reached out to a few rogue national and State-chartered banks [including Goleta National Bank, Peoples National Bank of Paris (Texas), Republic Bank & Trust (of Kentucky) and First Fidelity Bank of Burke (South Dakota)] to which North Carolina's interest rate caps did not apply.

The banks' names were placed on the loan documents identifying the banks as the lenders, and the payday lenders continued making loans at sky-high interest rates of up to 521 percent to North Carolina consumers. The payday lenders contended, based on the loan documents, that they were no longer lenders—and that they were instead the "marketing, processing, and servicing agents" of the banks. Very notably, the payday lenders only used these "rent-a-bank" schemes in States like North Carolina that prohibited payday lending; in other States that allowed these high-rate loans, the payday lenders made the loans in their own names.

The North Carolina Attorney General's office under then Attorney General, now Governor, Roy Cooper took action against these schemes. I directed the Consumer Protection Division at that time. We asserted that the payday loans were covered by the true lender doctrine, which has been an integral part of North Carolina law since the 1800s. In February 2005, together with the Office of the North Carolina Commissioner of Banks, we brought an enforcement action against Advance America, which had continued its rent-a-bank arrangements.

In December 2005, the Commissioner of Banks held that Advance America was, in fact, engaged in the business of lending in North Carolina and was therefore subject to North Carolina usury law. Advance America stopped making loans in North Carolina. Subsequently, in March 2006, three other large payday lending chains, Check Into Cash, Check 'n Go, and First American Cash Advance, all of which had used out-of-State banks, also agreed to stop making payday loans in North Carolina.

North Carolina is by no means alone in protecting borrowers; other States have also relied on the true lender doctrine, as adopted in their State's common law, to stop payday lenders from using sham rent-a-bank schemes to evade States' interest rate laws. Examples of States that have taken action against rent-a-bank schemes in the last two decades using the true lender doctrine include, among others, Colorado, the District of Columbia, Georgia, New York, Ohio, Pennsylvania, and West Virginia. In each of these cases, the sole purpose for the payday lenders' entering into arrangements with the banks was, or is, to make loans to our States' residents at rates that are unlawful. There is no other purpose, because these lenders can, and do, make loans in their own name in States where they can—thus, these "rent-a-bank" arrangements are a blatant sham to evade State laws.

The OCC's new, so-called True Lender Rule will upend States' ability to protect their people. In fact, calling it the "True Lender Rule" is an upside down farce; it is more accurate to call it the "Fake Lender Rule" because it overturns the true lender doctrine developed by States. It allows predatory lenders to avoid State rate caps by slapping the name of a national bank on the loan's paperwork. This is literally taking the paper form and elevating it over the loan's substance. Under the rule, it does not matter that the predatory lender in a rent-a-bank scheme retains the "predominate economic interest" in the loan.

The OCC, through the Acting Comptroller, not only rammed through the Fake Lender Rule one week before the 2020 election, but it did so unlawfully. The OCC radically exceeded its statutory authority in issuing the rule. Although the OCC purports to be interpreting portions of three Federal banking laws, none of them authorize rent-a-bank schemes or give the OCC authority to preempt the State law true lender doctrine.

The rule is also unlawful because the OCC ignored the centuries of court decisions recognizing and refining the true lender doctrine. The OCC's interpretation as set forth in the rule is unreasonable because it supplants well established court precedent established over centuries with an artificial and unprecedented standard. Reputable lenders submitted comments to the OCC warning the rule may create legal confusion for various types of standard lending arrangements, but the OCC refused to address those concerns. Indeed, the OCC has never identified a single court or regulator that has used the standard it adopts in the rule.

The rule's endorsement of predatory lenders' ruses unlawfully ignored the OCC's own historical opposition, under the Clinton, Bush, and Obama administrations, to rent-a-bank schemes and to the prospect of abusive, triple-digit interest-rate loans being made to financially distressed consumers in States that expressly forbid such loans. In the early 2000s during the Bush administration, consistent with its guidance, the OCC took action against at least four national banks that had entered into rent-a-bank schemes with nonbank payday lenders; the OCC's orders required the national banks to terminate their partnerships with the payday lenders and to cease making the loans. And, as recently as 2018, in small dollar loan guidance the OCC declared that it "views unfavorably an entity that partners with a bank with the sole goal of evading a lower interest rate established under the law of the entity's licensing State(s)." However, shortly before promulgating the Fake Lender Rule, the

OCC inexplicably withdrew that guidance and is now implicitly, if not explicitly, supporting rent-a-bank schemes with this new rule.

This new rule is galling not only because it ignores court and administrative precedent, but also because the OCC flouted the commands of Congress in finalizing it. In the Dodd–Frank Act, Congress required the OCC to adhere to strict procedural requirements before preempting State consumer protection laws to prevent the OCC from repeating its horrendous record on preemption that led to the Great Recession. But in issuing the Fake Lender Rule, the OCC refused to comply with the procedural requirements mandated by Congress.

State attorneys general from California, New York, Colorado, the District of Columbia, Massachusetts, Minnesota, New Jersey, and North Carolina filed a lawsuit in the Southern District of New York challenging this rule. We are optimistic about our ability to reverse the rule through litigation.

That said, I urge Congress to exercise its power under the Congressional Review Act to reign in a rogue OCC that believes it can disregard Congressional mandates. The congressional review process provides a far more straightforward means to reverse the Fake Lender Rule than litigation and the potential years it will take to secure a final court ruling. I am pleased that a bipartisan group of 25 Attorneys General, including General Rutledge of Arkansas, General Peterson of Nebraska, and General Ravnsborg of South Dakota, recently urged Congress to disapprove this new rule under the Congressional Review Act because it will facilitate predatory lending in our States.

Protecting our constituents is our highest calling. Playing a small role in running out of my State the payday lenders that abused hard-working people like Arthur, Lisa, and Anita is something I take immense pride in. As Senators, you have the authority to help people like them all across this country. It is an awesome power, and I ask that you exercise it.

PREPARED STATEMENT OF LISA F. STIFLER

DIRECTOR OF STATE POLICY, CENTER FOR RESPONSIBLE LENDING

APRIL 28, 2021

Good morning Chairman Brown, Ranking Member Toomey, and Members of the United States Senate Committee on Banking, Housing, and Urban Affairs. Thank you for the opportunity to provide testimony today. My name is Lisa Stifler, and I am the Director of State Policy at the Center for Responsible Lending. CRL is a nonprofit, non-partisan research and policy organization dedicated to protecting homeownership and family wealth by working to eliminate abusive financial practices. CRL is an affiliate of Self-Help, one of the nation's largest nonprofit community development financial institutions. For 40 years, Self-Help has created asset-building opportunities for low-income individuals, rural communities, women, and families of color. In total, Self-Help has provided over $9 billion in financing to 172,000 homebuyers, small businesses, and nonprofit organizations and serves more than 160,000 mostly low-income families through 72 credit union branches in North Carolina, California, Florida, Illinois, South Carolina, Virginia, Washington, and Wisconsin.

For almost a decade I have worked on state policy related to consumer protection and advocacy issues ranging from debt collection and student loans to payday and high-cost installment lending. In that time, rent-a-bank schemes, or the ability of a non-bank lender to launder loans through a bank in order to claim that state interest rates and other consumer protection laws do not apply, has reemerged as one of the most significant threats to states' rights to protect their residents from predatory lending. These schemes were used in the late 1990s and early 2000s by payday lenders to make 400% APR payday loans in states that did not allow them merely by putting a bank's name on the paperwork. In response, the Office of the Comptroller of the Currency (OCC) and Federal Deposit Insurance Corporation (FDIC) cracked down on these schemes. To address the title of this hearing, we are indeed seeing a re-emergence of rent-a-bank, this time with high-cost installment loans.

In a reversal of decades-long policy and overturning centuries-old anti-evasion doctrine, this practice has been blessed by the OCC's True Lender rule issued in October 2020, only a week before the presidential election and in the midst of a devastating pandemic and recession. The rule defined the true lender solely in one sentence with no consumer guardrails - a bank is the 'true lender' if, as of the date of origination, the bank (1) is "named as the lender in the loan agreement," or (2) "funds the loan".[1]

This rule was just one of a number of actions by then-Acting Comptroller Brian Brooks that attempted to exceed Congressional authority in order to expand bank privileges, like preemption, to entities that are not banks, including attempting to charter non-bank entities engaged in a wide variety of financial activities.

This rule will officially open the door to predatory lenders throughout the country. We have already observed a number of online and payday lenders enter into rent-a-bank schemes to evade state laws in the consumer and business lending space. We fully expect with this rule there will be many more, effectively dismissing any consumer protections in place. This rule is coming at a time that is critical for rebuilding family incomes and our economy following the health and economic impacts of COVID-19. This is especially poignant for Black and Latino households that disproportionately have lower incomes and less wealth.[2]

My testimony today will cover the history of Rent-a-Bank; how it has worked thus far; the OCC True Lender Rule and the immediate need for Congress to repeal the Rule via Congressional Review Act (CRA). We have reached the point that without Congressional action, this Rule will open the floodgates to a level of harmful lending that states will be unable to mitigate.

I. The US has a history of protecting consumers with interest rate laws

From our country's inception, states have protected their citizens from financial abuse, setting standards for lenders and, since the time of the American Revolution, states have set interest rate caps to protect their residents from predatory lending.[3]

States have a long-standing, well-recognized interest in determining the consumer protection policies best suited to prevailing conditions and priorities within state borders. As compared with the federal government, states are more familiar, accessible, and accountable to their constituencies and can more nimbly develop consumer protection policies to address the problems they face.[4] The Constitution preserves the rights and role of states within our federalist republic.

Presently, policy trends at the state and federal levels for more than a decade have been to rein in the harms of the unsafe loans, ranging from the 2006 passage of the 36% rate cap in the Military Lending Act to voter-enacted 36% rate caps in South Dakota, Colorado, and Nebraska in 2016, 2018, and 2020, respectively. Ballot initiatives in Montana (2010), Arizona (2008) and Ohio (2008) were also met with large majorities of no less than 60%, supporting interest rate caps in those states. More recently, California's new law caps installment loans of $2,500 - $9,999 at 36% plus the federal funds rate. And just last month, Illinois became the eighteenth state, plus the District of Columbia, to cap interest rates at 36% APR or less. Since 2005, no new state has legalized payday lending. States with rate caps that prevent the payday loan debt trap are home to more than 115 million people—more than a third of the U.S. population.

These state efforts have resulted in 45 states and the District of Columbia (DC) imposing interest rate caps on some consumer loans. Among those that cap rates, the median annual rate including all fees is 38.5% for a $500, six-month loan; 32% for a $2,000, two-year loan; and 25% for a $10,000, five-year loan.[5] While payday and other high-cost lenders are pushing hard at the state level to make high-cost longer-term loans legal in more states, most states are typically successful in enforcing their interest rates against the products to which interest rate caps apply and have not reported any black-market lending or concerns around credit access.[6] But Rent-a-Bank, blessed by the OCC's "true lender" rule, will undermine these long-standing legal and regulatory landscapes and severely hamstring states' ability to enforce rate caps.

II. "Rent-a-bank" schemes have been used in an attempt to evade state interest rate caps

A. How "rent-a-bank" schemes work

In the past two decades, in the wake of the deregulation of bank interest rates, payday lenders and other high-cost lenders have tried to hide behind banks to evade state usury laws. The non-bank lender decides to offer loans at rates that are illegal under state law. Because national and federally-insured banks are generally exempted from state interest rate laws, the non-bank lender finds a bank willing to become the nominal "originator" of the loans the non-bank lender offers. In sum, the non-bank lender is the public face of the loan program. Neither the customers nor the general public are aware of the financial gymnastics behind the transaction that purport to legitimize a loan that would be illegal in the hands of the non-bank lender alone.

Typically, the non-bank lender is involved both on the front end of the loan program—designing the loan program, marketing the loans to consumers or small businesses, taking and processing applications—and on the back end, servicing and collecting the loans and owning or benefiting from the assigned loans or receivables. While the bank may make some underwriting decisions, at least nominally, it typically does so by using criteria, software, or analysis primarily designed or provided by the non-bank company. In more recent incarnations, the bank may also claim to retain ownership of the "loan" or "account" and only to sell receivables. Even in cases where the bank may retain a share of the receivables, the non-bank company typically has the larger share of the economic interest in the program. Increasingly, these models are being used by predatory lenders charging extraordinarily high rates that result in harmful outcomes for consumers.

Some of these models operate with brazen openness about the centrality of evasion of state usury laws. In 2000, the OCC itself described the older payday loan Rent-a- Bank arrangements in terms that are essentially the same as today's arrangements. This description eliminates any doubt as to how the "bank partnership" model works:

The bank originates the loan; the loan acquires the bank's right to "rate exportation" (ie, the right to ignore usury laws in all states but the bank's home state); and the non-bank handles marketing, consumer interactions, servicing and/or other tasks associated with the loan.

In both the older payday loan rent-a-bank schemes and in the newer ones, non-bank lenders argued that they were only the agent, service provider, or assignee of the bank.[7] For example, as described in one case, Advance America was identified as "the fiscal agent and loan marketer/servicer." Advance America "procures the borrower and submits a loan application to BankWest. BankWest then approves (or denies) the application and advances all funds." The bank "used a separate third-party "loan processing agent" (an automated-consumer-information database that the payday lender itself used in other states) to electronically approve applications.[8]

However, like many of the rent-a-bank schemes that exist today, in the older payday loan rent-a-bank schemes, banks had limited involvement in the actual lending activity or decision making. The payday lender was responsible for providing the capital for the loans, marketing the loans, soliciting borrowers, accepting and processing applications, often approving or arranging for the approval of loans through another party, disbursing loan proceeds, servicing and collecting the loans, and indemnifying the bank for losses and liabilities. The payday lender also saw the bulk of the profit.[9]

The bank was only nominally engaged–the bank funded the loans (with capital from the payday lender) and was listed as the lender on the loan documents but almost immediately sold the loans back to the payday lender.[10] The bank saw significant profit while sharing none of the risk for the loans made.[11]

B. OCC Crackdown on Rent-a-Schemes of Old

The OCC has historically taken very seriously the risks that rent-a-bank schemes pose for national banks. In the late 1990s and early 2000s, banks, including national banks and federal savings associations, entered into agreements with payday lenders to help the payday lenders evade state interest rate caps.

In 2000, the OCC, with the Office of Thrift Supervision (OTS) issued guidance on payday lending, flagging a number of risks to banks from these arrangements with payday lenders.[12] These included credit risk, should the nonbank not meet its terms of the contract;[13] transaction risk, should the nonbank misrepresent information;[14] and reputation risk associated with facilitating loans with terms that a nonbank could not make directly.[15] The guidance also expressed substantive concerns with the payday loan product, including flagging that "*renewals without a reduction in the principal balance . . . are an indication that a loan has been made without a reasonable expectation of repayment at maturity.*"[16] And it cited the agency's general guidance on abusive lending, which identifies "*loan flipping, i.e., frequent and multiple refinancings*" as a characteristic of abusive lending.[17]

In 2002, the agency strongly condemned rent-a-bank schemes. Comptroller John D. Hawke called the schemes "an abuse of the national charter,"[18] noting that "[t]he preemption privileges of national banks derive from the Constitution and are not a commodity that can be transferred for a fee to nonbank lenders."[19] He criticized the payday lending industry, which "has expressly promoted such a 'national bank strategy' as a way of evading state and local laws. Typically, these arrangements are originated by the payday lender, which attempts to clothe itself with the status of an 'agent' of the national bank. **Yet the predominant economic interest in the typical arrangement belongs to the payday lender, not the bank.**"[20]

"The benefit that national banks enjoy by reason of this important constitutional doctrine [the Supremacy Clause] cannot be treated as a piece of disposable property that a bank may rent out to a third party that is not a national bank. ***Preemption is not like excess space in a bank-owned office building. It is an inalienable right of the bank itself.****"* -- Comptroller Hawke, 2002[21]

Hawke highlighted the safety and soundness risks these schemes posed: "[They are] *highly conducive to the creation of safety and soundness problems* at the bank, which may not have the capacity to manage effectively a multistate loan origination operation that is in reality the business of the payday lender."[22] He noted a recent enforcement action against a "small national bank that dramatically demonstrated its inability to manage such a relationship in a safe and sound manner."[23]

The OCC's 2003 annual report cites enforcement actions against three national banks that were partnering with storefront payday lenders, terminating those partnerships in each case.[24] In one enforcement action, the Comptroller noted that the OCC is "particularly concerned where an underlying purpose of the relationship is to afford the vendor an escape from state and local laws."[25]

The risks highlighted by the OCC in the early 2000s remain today. In fact, the reputation risk by bank involvement in high-cost lending is likely only higher than it was in the early 2000s. Since the early 2000s, the harms of high-cost lending, both short-term loans and longer-term loans, have become more fully documented and known. Several states have had statewide ballot initiatives that capped interest rates at 36% APR or less. And direct bank involvement in payday lending by a handful of banks, until 2013 guidance that generally led to its end,[26] was met with sweeping public condemnation from virtually every sphere – the military community,[27] community organizations,[28] civil rights leaders,[29] faith leaders,[30] socially responsible investors,[31] state legislators,[32] and members of Congress.[33]

C. State Enforcement Against Rent-a-Bank Schemes

High-cost lenders are notoriously relentless in their efforts to evade state usury laws and any legislation intended to rein them in.[34] However, states are typically successful in enforcing their interest rates against nonbanks.[35] In the late 1990s and early 2000s, lenders attempted to evade the usury laws applying to balloon-payment payday loans through rent-a-bank. These schemes were shut down twenty years ago in large part due to actions taken by state Attorneys General and banking regulators to enforce state usury and consumer protection laws, exposing the arrangements for the evasion scheme that they are. In a series of actions taken from 2002-2005 in states like Colorado, North Carolina, New York, Oklahoma, and Georgia, regulators and courts found that the payday lenders, not the banks, were the true lender.[36] Under the rule, however, these kinds of enforcement actions would be preempted, and states would be unable to enforce state usury laws against predatory lenders that launder their loans through banks to evade the state laws.

III. "Rent-a-bank" schemes severely harm financially vulnerable consumers, disproportionately burden communities of color, and exacerbate racial wealth disparities.

In recent years, the harms of high-cost lending have been more comprehensively and thoroughly documented than ever before.[37] High-cost lending is a debt trap by design, exploiting the financially distressed and leaving them worse off, leading to a host of financial consequences that include greater delinquency on other bills,[38] high checking account fees and closed accounts,[39] and bankruptcy.[40]

A review of the CFPB Consumer Complaints data on those predatory lenders currently using "rent-a-bank" scams find several recurring themes:

- consumers puzzled and distraught that their large bi-weekly or monthly payments are not reducing principal due to the loan's high interest rates;
- frequent inability to sustain the high payments;
- queries about how such loans can possibly be legal;
- distress caused by wage garnishment; and
- stress caused by relentless collection calls to a borrower's home or workplace.[41]

For further discussion of why high-cost lending is fundamentally different from responsible lending, see section VI.C below.

A. Consumer High-Cost Installment Loans

There has been substantial growth in the issuance of larger loans with longer terms with rates ranging from 100%-200% APR. The move to longer-term high-cost installment lending is occurring among brick-and-mortar payday lenders, but also through lenders operating online.[42] Many of these online lenders, making excessively priced loans with direct access to a borrowers' bank account and no safeguards of affordability, seek to disguise their harmful lending practices under the guise of "fintech." The "fintech" label does not wipe away the underlying harms and consequences of these unaffordable loans. Regardless of whether the loan is made through an "app" or a storefront, high-cost loans, made without regard to the borrower's ability to afford them, result in high default rates—sometimes staggeringly high, as exemplified by a brazen "rent-a-bank" schemer, Elevate. Net charge offs for the Rise and Elastic, Elevates products, in the most recent 10-K made up 41% of revenue.[43]

Defaults push struggling families into deeper financial distress, often including aggressive collection efforts, lawsuits, and wage garnishment, as well as increased difficulty meeting other expenses and obligations. They also make it harder for borrowers to obtain more affordable loans, and thus reduce access to better credit and increase reliance on more abusive products. This debt trap is the high-cost lender's chosen business model.

B. Auto title loans

FDIC-regulated Capital Community Bank (CCBank) currently facilitates auto title lending through a rent-a-bank scheme with Loan Mart at rates of 60% to 222% APR. Loan Mart is operating in states that currently prohibit car title lending, including Indiana, Michigan, Ohio, Oklahoma, South Dakota, and Washington.[44] The FDIC has done nothing to shut down this abuse, which is on-going.

Auto title loans can be particularly devastating. In addition to inflicting the same harms caused by payday and other high-cost installment loans, auto title loans put borrowers at substantial risk of losing their car. The consequences of losing one's vehicle are dire—both the loss of an essential asset and the serious disruption of a borrower's ability to get to work, earn income, and manage their lives. More than a third of auto title borrowers have reported pledging the only working car in their household as security for their auto title loan.[45] Research has found that an astounding one in five auto title borrowers have their car repossessed.[46] In Virginia, a state that allows longer-term car title loans, lenders seized over 70,000 cars between 2014 and 2017.[47]

Mere statistics on the loan performance of high-cost loans, staggering as they are, do not do justice to the brutal financial, emotional, and physical turmoil these toxic products inflict. The distress can pervade every facet of a person's life, often extending to the borrower's family members as well. Growing research documents the links between high-cost loans and negative health impacts.[48]

C. Payday lenders disproportionately harm communities of color.

By issuing its fake lender rule, the OCC is enabling practices that increase and further entrench racial wealth disparities. High-cost lending disproportionately harms communities of color, exploiting and perpetuating the racial wealth gap. A legacy of racial discrimination in housing, lending, banking, policing, employment, and otherwise, has produced dramatically inequitable outcomes that persist today. Communities of color, often largely segregated due to the history of redlining and other federally operated or sanctioned racially exclusionary housing policies, experience higher rates of poverty, lower wages, and higher cost burdens to pay for basic living expenses. Payday lenders peddling unaffordable loans cause particular harm to these communities.[49]

Storefront lenders, which often offer both short-term and longer-term loans, target borrowers of color, in part by concentrating their locations in communities of color.[50] Indeed, the communities most affected by redlining are the same who are saturated by payday lenders today. Multiple studies have found that payday lenders are more likely to locate in more affluent communities of color than in less affluent white communities.[51] In light of this targeting, it is unsurprising that a disproportionate share of payday borrowers come from communities of color, even after controlling for income.[52] The disparity in payday loan borrowing is especially significant given that African Americans and Latinos are much less likely to have checking accounts, typically a requirement for a payday loan, than whites.[53] In its newer form, rent-a-bank has become more sophisticated yet, retained its old partnerships. LoanMart, who participates in rent-a-bank lending with Capital Community Bank, partners with CVS, grocery stores as well as traditional payday lenders via Money Gram to allow for proceeds of its loans to be dispersed *(see Appendix A).*

Online high-cost lenders may focus more on subprime credit scores than geography. But the historical discrimination against communities of color is also reflected in credit scoring.[54] Lenders that focus on subprime borrowers will inevitably disproportionately target borrowers of color. The algorithms and big data that "fintech" lenders use may also result in disparate impacts on these communities.[55]

Communities of color have historically been disproportionately left out of the traditional banking system, a disparity that persists today. About 17 percent of African American and 14 percent of Latino households are unbanked, compared to 3 percent of white households.[56] High-cost loans, with their high association with lost bank accounts,[57] drive borrowers out of the banking system and exacerbate this disparity. By sustaining and exacerbating an existing precarious financial situation, high-cost lending reinforces and magnifies existing income and wealth gaps—and perpetuates discrimination today.[58] Schemes to evade state interest rate limits therefore not only harm families in economic distress, but also exacerbate existing racial inequities.

IV. Rent-a-bank schemes have reemerged in recent years as the most significant threat to state interest rate laws and other consumer protections.

Despite the crackdown on rent-a-bank schemes in the 1990s and 2000s, rent-a-bank schemes have re-emerged over the past few years. Sanitized as a "bank partnership model," these arrangements are used by predatory lenders charging extraordinary rates, as described in this section and elsewhere in the comment. In recent years, we have seen state-regulated lenders laundering their loans through banks and charging over 100% APR on:

- Online installment loans
- Online lines of credit
- Small business loans secured by homes
- Auto-title loans
- Retail financing offering both in stores and online.

These schemes are used by some companies that charge rates that, while 36% or below, are still high and may for many loans exceed the rates states allow, especially for larger loans. In addition, these loans may exceed the loan amounts allowed by states or have abusive loan features including poor underwriting and predatory debt collection practices. Oportun is an example of a rent-a-bank lender that lends at 36% in states with lower rate caps, and is currently under investigation by the Consumer Financial Protection Bureau for their abusive debt collection practices.[59]

These programs are predominantly run by nonbank companies that are and should be subject to state law. Typically, the nonbank is the dominant force behind the program both on the front end – designing the loan program, marketing the loans to consumers or small businesses, taking and processing applications – and on the back end, servicing and collecting the loans and owning or benefiting from the assigned loans or receivables. The bank nominally makes underwriting decisions, but often using criteria, software, or analysis primarily designed or provided by the nonbank company. Thus, key decisions are led by the nonbank.[60] In more recent incarnations, the bank may claim to retain ownership of the "loan" or "account" and only to sell receivables. The bank may retain a share of the receivables, but the nonbank company typically has a far larger share of the economic interest in the program.

For example, in its 2020 10-K, rent-a-bank lender Elevate described the use of a Special Purpose Vehicle (SPV) in which it uses to originate its installment loans in 18 states through FinWise Bank:

> *"..FinWise Bank, which originates Rise installment loans in 18 states. FinWise Bank initially provides all of the funding, retains a percentage of the balances of all of the loans originated and sells the remaining loan participation in those Rise installment loans to a third-party SPV, EF SPV, Ltd. ("EF SPV"). Prior to August 1, 2019, FinWise Bank retained 5% of the balances and sold a 95% participation to EF SPV. On August 1, 2019, EF SPV purchased an additional 1% participation in the outstanding portfolio with the participation percentage revised going forward to 96%. These loan participation purchases are funded through a separate financing facility (the "EF SPV Facility"), effective February 1, 2019, and through cash flows from operations generated by EF SPV."*[61]

Predatory lenders' desire for a rule like this could not be clearer. They have pushed for years for federal authorization of the "bank partnership model."[62] High-cost lenders argued that the agency's rule to overturn *Madden*,[63] though illegal and extremely harmful in its own right, did not give them the clarity they desired.[64]

Last year, as California was passing a rate cap of approximately 36% on loans of $2,500-$9,999, three large high-cost lenders (Elevate, Enova, and CURO) that had been charging 135%-199% APR in California indicated their plans to evade the law through new rent-a-bank schemes.[65] The lenders were met with strong resistance,[66] and to our knowledge they have not moved forward.[67] But this rule would presumably give them the confidence they seek to do so, in California and in additional states.

A handful of banks are currently engaged in predatory rent-a-bank schemes. These are primarily FDIC-supervised banks. But involvement of OCC-supervised banks is growing and will explode if this rule is not overturned – a reality the rule fails to meaningfully address. OCC banks are helping predatory small business lenders and high-cost installment loans offered by payday lenders, as discussed elsewhere in this testimony. **OCC-supervised Stride Bank**, until just this month, laundered loans for payday lender **CURO (SpeedyCash)** for a pilot installment loan product offered by **Verge Credit**. Loan amounts spanned from $500-$5,000, with terms 6-60 months, at APRs of 37% to 179%.[68]

As is describe later in this testimony, **OCC-supervised Axos Bank** is helping predatory small business lender **World Business Lender** to make small business loans that run in the tens to hundreds of thousands of dollars at interest rates as high as 250% and higher.[69] For example, WBL laundered two loans through Axos Bank made to a Harlem restaurant that totaled $67,000 and carried an interest rate of 268% APR. As a result of the predatory loans, the small business is facing litigation and foreclosure on the owners' home.[70]

The current FDIC-supervised bank schemes are described below to illustrate some of the kinds of predatory schemes additional OCC-supervised banks are likely to engage in now that the rule is finalized.

Republic Bank & Trust (Kentucky-chartered) and **FinWise Bank** (Utah-chartered) are helping three high-cost lenders, **OppLoans**, **Elevate**, and **Enova**, make installment loans or lines of credit in excess of 100% APR in a total of at least 30 states that do not allow such high rates.[71]

Capital Community Bank (CCBank) (of Utah) is helping car title lender **LoanMart** evade state law in a number of states, including California.[72] LoanMart's loans range from 60-222% interest; a typical loan is $2,500, 18-month loan at 90%, totaling $2,136 in interest.[73] CCBank is also helping payday lenders **Check 'n Go** and **Check Into Cash** restart their rent-a-bank schemes. Both storefront payday lenders used rent-a-bank schemes to operate payday loan stores in states that did not allow them in the 1990s and 2000s.[74]

Despite having these schemes previously shut down, Check 'n Go's parent company, **Axcess Financial**, is partnering with CCBank to offer the **Xact** online installment loan for loans up to $5,000 that last up to 18 months, with APRs that range from 145%-225%.[75] Xact offers these loans in a number of states that do not allow installment loans at these rates and even states like California and Ohio that recently passed reforms to cap or limit rates on high-cost loans. The Check Into Cash product, **CC Connect**, is also an online installment product with loans up to $2,450 that can carry APRs as high as 224.99%.[76] Like the Xact product, CC Connect is offered in eight states, none of which allow loans at such high rates. Half of the states where CC Connect is now available, California, Nebraska, Ohio, and Virginia, passed laws over the last few years limiting the rates that payday and other high-cost lenders can charge.

In addition, **Transportation Alliance Bank**, **dba TAB Bank** (Utah)[77] is helping **EasyPay Finance** make predatory loans for furniture, appliances, pets, auto repairs and other products. For example, TAB helped EasyPay make a $1,500 loan for a car repair at a rate of 188.99%, with bi-weekly payments of $129 for 26 months. The marketing the mechanic provided the borrower was for EasyPay Finance. The loan documents indicate that EasyPay Finance is the "servicer" and refer to it as the "agent" of TAB Bank. Retailers promote EasyPay's 90-day "same as cash" deferred interest loans, with back interest becoming due if the loan is not repaid in 90 days.

Finally, **First Electronic Bank**,[78] a Utah-chartered ILC, is being used by **Personify Financial** to offer high-cost installment loans of $1,000 to $10,000 at APRs as high as 179.99% in 22 states that do not allow that rate for some or all loans in that size range.[79] Personify touts itself as "Serving the Underestimated Underbanked" with a target market of those with incomes between $20,000 and $75,000, many with less-than-prime credit.[80] It claims to "fill[] the void left by traditional financial institutions" while it "makes payday lenders and other sources of short-term financing obsolete."[81] But a consumer narrative later in this section conveys a borrower's struggle to repay a Personify Financial loan on top of multiple payday loans, which in total took 90% of the borrower's take-home income for well over three months.[82] This narrative supports the reality that neither Personify Financial, nor any other high-cost lender, is "making payday lenders . . . obsolete," as it claims. Rather, it is piling yet more unaffordable debt on those also struggling with payday loans.

Some states have taken steps to address rent-a-bank schemes with the tools available to them. In June 2020, the District of Columbia sued one of these predatory rent-a-bank lenders, Elevate, with which Republic Bank & Trust and FinWise Bank scheme, for violating its interest rate cap as the true lender in those schemes.[83] More recently, earlier this month, the District also sued Opportunity Financial (OppFi), with which FinWise Bank also schemes, for making loans up to $4,000 at APRs up to 198%, far in excess of the District's cap of 24%.[84] The OCC Rule seeks to foreclose the District's ability to enforce its rate caps against Elevate. Indeed, Elevate has praised the Rule for the "regulatory clarity" it would bring.[85] Additionally, the California Department of Business Oversight has announced a formal investigation into whether Wheels Financial Group, LLC (doing business as LoanMart), is evading California's newly enacted interest rate cap through its recent partnership with Capital Community Bank (CCBank), a Utah-chartered out-of-state bank.[86] Likewise, the Rule would prevent California, Nebraska, and Illinois from enforcing their hard-fought new rate cap laws.

V. The "Fake Lender" Rule is an affront to Congress's efforts to rein in OCC preemption and illegally usurps states' historical and constitutional role in our Federalist system by asserting OCC authority over nonbanks.

A. The "Fake Lender" Rule would preempt state interest rate laws for nonbanks.

In late October 2020, the OCC finalized a rule commonly called the "true lender rule" but more aptly called the Fake Lender Rule ("fake lender rule" or "rule"). The fake lender rule specifies that a national bank or federal savings association "makes" a loan when, as of the date of origination, the bank is either "*[n]amed as the lender in the loan agreement*" or "*[f]unds the loan.*"[87] The OCC asserted that this rule will operate "together with the OCC's recently finalized 'Madden-fix' rule" -- another unfounded rule that we oppose and that States' Attorneys General are challenging in litigation -- which allows any assignee of a loan made by a bank, including a nonbank assignee, to charge any rate the bank could charge on the loan. The "Madden fix" rule applies even if the loan is sold immediately after origination.

The effect of the fake lender rule is that so long as a bank's name is on the paperwork, a loan could carry any interest rate permitted for a bank in the bank's home state – that is, for most banks, any rate at all – both on origination and upon immediate sale to a nonbank.

Under the fake lender rule, a bank's name on the loan agreement is the only requirement. A nonbank that designs, runs, effectively controls, and gets most of the profits from the lending program could ignore state usury laws even if the name on the loan agreement or funding is a sham and the bank plays an insignificant role in the program – or even no role at all. The bank does not need to have even the tiniest bit of involvement in the loan program, does not need to provide funding, charge interest or take any risk. Virtually all of the interest and profits, other than the fee to the bank for use of its name, could go to the nonbank lender. Indeed, the rule does not even require that the bank know about or approve use of its name or have conducted any review of the lending program. The OCC claims that as long as the bank's name is on the paperwork, then as a matter of law and interpretation of the National Bank Act, the bank "makes" the loan.

The impact of this rule will be to prevent courts from examining the truth of the lending arrangement to determine whether the bank or the nonbank entity is the true lender. Even if it is obvious or discovery shows that the bank's name on the agreement is a sham, a mere contrivance used to hide the fact that the lending program is run by a nonbank, the loan would be considered a bank loan, exempt under the National Bank Act from state usury laws.

As discussed in the following sections, however, the OCC lacks authority to determine the interest rates that nonbanks may charge.

B. In the wake of the 2008 financial crisis, Congress acted on a bi-partisan basis to ensure that the OCC has no authority over nonbanks.

In 2010, Congress rebuked the OCC and other federal banking agencies for their broad preemption of state laws, "which [Congress] believed planted the seeds 'for long-term trouble in the national banking system.'[88] "[T]he simple failure of federal regulators to stop abusive lending" [89] had been "a major cause" of "a financial crisis that nearly crippled the U.S. economy."[90] In the years leading up to the crisis, the OCC continued to staunchly defend preemption while ignoring the writing on the wall, clear to so many others: that foreclosures on predatory, unaffordable mortgage loans would bring the economy to its knees.[91] States had been preempted from regulating mortgages made by banks and bank affiliates and subsidiaries on the very terms that made many mortgages dangerous: balloon payments, negative amortization, variable rates, and other nontraditional terms.[92]

Congress reacted by curtailing the OCC's power to preempt state laws, especially as to nonbank entities like nonbank mortgage lending subsidiaries. By adding Section 25b to the National Bank Act, Congress aimed to "address an environment where abusive mortgage lending could flourish without State controls."[93]

Congress enshrined into statute, no fewer than three separate times, the principle that nonbanks related to or acting on behalf of a bank are governed by state laws. Bank affiliates and subsidiaries – except for those that are themselves chartered as banks – are subject to state law to the same extent as any other nonbank entity. The state laws to which nonbanks are subject include those governing the cost of credit.

Congress made clear that state laws apply "notwithstanding" Section 85. For example, Section 25b(e) states:

> *"Notwithstanding any provision of title 62 of the Revised Statutes ...a State consumer financial law shall apply to a subsidiary or affiliate of a national bank (other than a subsidiary or affiliate that is chartered as a national bank) to the same extent that the State consumer financial law applies to any person, corporation or other entity subject to such State law."*

Title 62 of the Revised Statutes includes the provisions of 12 U.S.C. § 85 governing the interest rates charged by national banks.

Section 25b(b)(2) is to similar effect:

> *[Title 62]...[does] "not preempt, annul, or affect the applicability of any State law to any subsidiary or affiliate of a national bank (other than a subsidiary or affiliate that is chartered as a national bank). "*

Section 25b(h) extends this same clarification to "agents" of national banks:

> *"Clarification of law applicable to nondepository institution subsidiaries and affiliates of national banks...*
>
> *No provision of [title 62]...shall be construed as preempting, annulling, or affecting the applicability of State law to any subsidiary, affiliate, or agent of a national bank (other than a subsidiary, affiliate, or agent that is chartered as a national bank)."* [94]

Three times Congress reaffirmed this priniciple, and three times it articulated its sole exception: for subsidiaries or affiliates chartered as national banks. Had Congress intended to add an exception for third party "partners" of national banks, it would have done so.

The OCC's attempt to give rate exportation privileges to bank assignees even when the bank is not the true lender will produce the nonsensical result of privileging mere contractual counter-parties over subsidiaries, affiliates and agents of national banks – even those that are wholly owned by a national bank. There is no reasonable reading of the NBA that would support this outcome.

C. *The Fake Lender Rule attempts to prevent courts from applying the centuries-old, universally accepted substance-over-form doctrine to root out evasions of usury laws*

i. Courts have used substance-over-form for centuries to stop evasions of usury law.

Under the first prong of the OCC's true lender rule, a bank would be deemed to be the lender as long as, as of the date of origination, the bank "Is named as the lender in the loan agreement."[95] Nothing more is required. The loan agreement could be a complete sham, with the lending program run entirely, or virtually entirely, by a nonbank lender that designed the operation, set the terms, handles all interactions with the consumer, effectively controls all of the decisions and operations, receives all of the payments, takes virtually all of the risk, and reaps the vast majority of the profits.

Once the bank is deemed the lender, the interest rate would be controlled by the rate exportation provisions of the NBA. The usury laws that govern nonbank lenders – even potentially the nonbank usury laws of the bank's home state – would be preempted. Courts would have no ability to look beyond the loan agreement to determine the truth or to assess whether the paperwork is a mere sham or contrivance to conceal the fact that the true lender is a nonbank.

The OCC has no authority to prevent a search for the truth. The substance-over-form anti-evasion doctrine is consistent with, and is not preempted by, the NBA. The doctrine was well established when the NBA was enacted, has been used to prevent evasions by banks of the NBA's usury provisions, and has been recognized by courts of appeal and nearly every lower court to assess whether the true lender is a nonbank covered by state usury laws. The OCC provided no basis in the NBA and no basis in logic to preempt this vast body of caselaw and to prevent courts from assessing the truth.

Since the earliest days of this country, the Supreme Court and the courts of every state have routinely done what the rule would forbid: look beyond the paperwork of transactions to discover the true essence in order to prevent evasions of usury laws.

In 1825, the Supreme Court remarked: "Usury is a mortal taint wherever it exists, and no subterfuge shall be permitted to conceal it from the eye of the law; this is the substance of all the cases, and they only vary as they follow the detours through which they have had to pursue the money lender."[96]

In 1835, Chief Justice Marshall explained in greater length in *Scott v. Lloyd*:

> *"The ingenuity of lenders has devised many contrivances, by which, under forms sanctioned by law, the [usury] statute may be evaded. Among the earliest and most common of these is the purchase of annuities, secured upon real estate or otherwise...The purchase of an annuity therefore, or rent charge, if a bona fide sale, has never been considered as usurious, though*

> *more than six per cent profit be secured.* ***Yet it is apparent, that if giving this form to the contract will afford a cover which conceals it from judicial investigation, the [usury] statute would become a dead letter.*** *Courts, therefore, perceived the necessity of disregarding the form, and examining into the real nature of the transaction. If that be in fact a loan, no shift or device will protect it."*[97]

Justice Marshall noted that "[t]hough this principle may be extracted from all the cases, yet as each depends on its own circumstances, ... those circumstances are almost infinitely varied ...."[98]

Again, in *Miller v. Tiffany*, decided just after the enactment of the National Bank Act of 1863 and just before the 1864 Act, the Supreme Court recognized that courts look beyond the form of a transaction to its "real character."[99] The Court found no evidence "of a fraudulent purpose to evade by shift or device the usury statute," and thus under general rules the Court honored the parties' choice in their contract of the law of the state of performance. The Court observed, however, that "[t]hese rules are subject to the qualification, that the parties act in good faith, and that the form of the transaction is not adopted to disguise its real character."[100]

As the OCC itself argued when proposing the earlier rule on interest rates charged by assignees, the NBA incorporates "longstanding common law principle[s]" that existed before the passage of the NBA or HOLA.[101] Indeed, last year, in making the argument that a "longstanding rule relating to usury certainly applies" to the interpretation of the NBA, the OCC cited two Supreme Court cases, *Nichols v. Fearson* and *Gaither v. Farmers & Mechanics Bank*, that recognize that courts may look beyond devices used to evade usury laws.[102] In the 1835 case, *Nichols v. Fearson*, the Court found that there was no usury, but only after finding that there was no agreement for a loan "nor any device to evade the [usury] statute."[103] In the 1828 case, *Gaither v. Farmers & Mechanics Bank*, the Court quoted approvingly an earlier case holding that collateral given to enforce a usurious contract is void, because " 'it would be a shift or device, by which the statutes of usury would be defeated.' "[104]

These anti-evasion principles are part of the backdrop of the law of usury against which the NBA was adopted. There is nothing in the NBA that overrides this longstanding principle that courts look beyond form to substance in preventing evasions of usury laws.

The substance-over-form doctrine remains the universal rule today. Courts have looked beyond the form of transactions to the substance when enforcing the usury provisions of the NBA.[105] Virtually every state continues to recognize the traditional rule that courts will look beyond the face of documents to the truth to prevent evasions of usury laws.[106]

The OCC's rule will override the longstanding rule that "the real substance of the transaction must be searched out" and that usury laws "cannot be defeated by the simple expedient of a written contract."[107]

ii. In recent years, as payday lenders and others have hidden behind banks, courts overwhelmingly have applied traditional substance-over-form rules to search for the true lender.

In the past two decades, in the wake of the deregulation of bank interest rates, payday lenders and other high-cost lenders have tried to hide behind banks to evade state usury laws. Consistent with the longstanding substance-over-form approach to usury cases, courts have looked beyond the name on the loan agreement to search for the "true lender" (or "actual lender," "de facto lender" or "real party in interest"). This approach has been endorsed by several federal courts of appeals and nearly every lower court that has addressed the issue.

In *CashCall v. Morrisey*,[108] for example, the court quoted an earlier usury case and cited the 1895 case on which it relied:

> "The usury statute contemplates that a search for usury shall not stop at the mere form of the bargains and contracts relative to such loan, but that all shifts and devices intended to cover a usurious loan or forbearance shall be pushed aside, and the transaction shall be dealt with as usurious if it be such in fact. Crim v. Post, 41 W.Va. 397, 23 S.E. 613 (1895)."[109]

Similarly, in *Bankwest v. Oxendine*,[110] the court applied traditional substance-over-form doctrine to determine whether the nonbank was the true lender:

> To determine if a contract is usurious, we critically examine the substance of the transaction, regardless of the name given it, or, stated another way, "[t]he theory that a contract will be usurious or not[,] according to the kind of paper–bag it is put up in, or according to the more or less ingenious phrases made use of in negotiating it, is altogether erroneous. The law intends that a search for usury shall penetrate to the substance."[111]

On at least four occasions, federal courts of appeals have endorsed looking beyond form to substance to assess whether a bank is the true lender, and thus exempt under federal banking law from the consumer's state interest rate cap, or whether a nonbank is the true lender. We discuss these cases in detail in our comments on the proposed fake lender rule.[112] And virtually every lower court that has had the opportunity to do so has indicated that courts may look beyond the recitations in the loan documents to examine the facts in order to determine whether the true lender is an entity subject to state interest rate caps.[113]

Against this overwhelming wealth of support for a substance-over-form approach, the OCC cites a single case, *Beechum v. Navient Solutions, Inc.*, for the position that "the form of the transaction alone" resolves which party is the lender.[114] That case is an unpublished district court case relying on and interpreting the California Constitution; the court did not address issues of federal banking law.[115] Whether or not *Beechum* is a correct interpretation of the California Constitution, it provides no support for the OCC's claimed authority under the NBA, nor any basis to reject the traditional substance-over-form approach to preventing evasion of usury laws.[116]

VI. The OCC's Cursory Attempts to Justify Its Outrageous Rule Fail at Every Turn

A. The OCC's claim that the rule is needed to address "uncertainty" is wrong.

The OCC's primary rationale for the fake lender rule is that it is necessary to address "uncertainty." But as discussed above, there is no such uncertainty. The substance-over-form rule is nearly universally accepted, including by federal courts of appeals and in cases assessing who the true lender is for purposes of application of the NBA and other federal banking laws. The only uncertainty comes not from ambiguity in the statute but from the "infinitely varied" contrivances of usurious lenders and their "ingenuity" in the "many contrivances" they have developed to evade usury laws.[117] Cases "only vary as they follow the detours through which they have had to pursue the money lender."[118]

The OCC has not pointed to a single case identifying any ambiguity in the terms of the NBA. Yet the OCC's claim that the name on the loan agreement is all that matters has been soundly rejected.[119]

The OCC asserts that under *Chevron*, it may resolve "ambiguities" – that "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."[120] But what the OCC is proposing is not resolving an ambiguity in the NBA; instead, it is proposing to preempt a vast swath of traditional, widely accepted state usury law doctrine. *Chevron* is thus not applicable. Moreover, since the OCC is attempting to preempt state law governing nonbank entities, only the lesser *Skidmore* deference test applies.[121] But the OCC's interpretation does not merit even *Skidmore* deference, both because the OCC lacks statutory authority to interpret state law, and because the proposal fails to provide a persuasive rationale for its interpretation.

The OCC also cites its desire to create a "clear test" and a "predictable, bright-line standard" instead of a "fact-intensive balancing test."[122] But from the Supreme Court on down, courts have routinely emphasized that, in matters of usury, facts and the truth matter, and there is no single test.

B. The OCC's claim that the rule will increase access to "affordable" credit is unsupportable and dangerous.

The OCC attempts to justify its rule as a policy matter as increasing access to credit, including for unbanked or underbanked individuals and including small dollar lending programs.[123] As an initial matter, even if the OCC were correct that its proposal would increase access to "affordable credit," that should not be mistaken as a basis of authority for the OCC to preempt state law. It is not the OCC's role to set policy on the availability of credit offered by nonbank entities or to second-guess the judgment of states. The OCC *does*, however, have a duty to ensure that consumers are treated fairly – a duty the former Acting Comptroller emphasized.[124]

The OCC hypothesizes that the uncertainty it purports to exist with third party relationships "may discourage" these relationships, "limit competition, and chill the innovation that results from these partnerships--all of which may restrict access to affordable credit." We address the OCC's claim of a lack of certainty in the preceding subsection. But even assuming there were uncertainty, the OCC offers no support for the notion that affordable credit is restricted by bank resistance to rent-a-bank schemes. The rule also fails to address the overwhelming evidence that these schemes in fact promote credit with an unacceptably high likelihood of *unaffordability*. **Indeed, the *only* kind of credit this rule promotes is high-cost credit that violates state usury limits.** The OCC also cites no compelling evidence (indeed, we know of none) showing consumers in states with lower interest rate caps are worse off by not having access to higher-rate loans.[125]

In addition, the OCC suggests that the rule will enable banks to "reach a wider range of potential customers or to develop or acquire innovative credit underwriting models that facilitate expanded access to credit"[126] or serve their own customers with, for example, small-dollar lending programs.[127] But banks can do all of this, including innovative underwriting and small dollar loan programs, already, as the true lender, without resorting to rent-a-bank schemes. Likewise, the OCC could hold banks accountable for their failure to provide equitable access to responsible instead of facilitating or further entrenching a dual financial system.

The OCC has not identified a problem that the rule will solve. Moreover, in all rent-a-bank schemes, banks are facilitating high-cost loans for the nonbank's customers -- not their own customers. Banks do not offer the loans directly to their own customers in branches or online, or market or disclose the loans on their websites. In fact, the proposal overwhelmingly encourages off-balance sheet lending. The originate-to-distribute model notoriously limits the "skin in the game," or a significant stake in how the loans ultimately perform, needed to incentivize lenders to make affordable loans. As the foreclosure crisis that led to Congress's reining in of the OCC's preemption laid bare, originators tend to better assess affordability when they plan to hold onto the loans themselves rather than off-load them.[128]

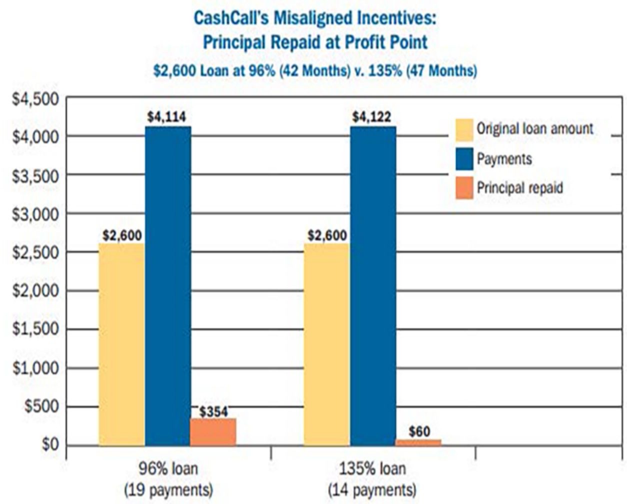
C. The OCC fails to meaningfully consider that high-cost lending is fundamentally different than responsible lending and inflicts severe harm on financially vulnerable consumers.

Toxic high-cost loan products inflict financial, emotional, and physical turmoil that can pervade every aspect of a person's life. Growing research documents the links between high-cost loans and negative health impacts.[129]

Today's high-cost loans include so-called "fintech" lenders offering longer-term loans that portray themselves as better alternatives to payday loans, but which, in most significant respects, lead to similar problems as loans by traditional, "non-fintech" payday lenders. These longer-term loans typically still carry extremely high interest rates, are often still tied to repayment on payday, still made with little regard for the borrower's ability to repay the loan while meeting other expenses, and still have a business model that can profit despite high borrower defaults.[130] These loans often inflict as much or more harm – creating a deeper, longer debt trap – for borrowers than two-week payday loans.[131]

Harm caused by high-rate loans extends far beyond the higher cost itself. Yes, a 99% APR costs dramatically more than a 15% APR loan. And the payments alone often strip financially distressed borrowers of what little they may have, leaving them without funds for needed expenses. But the harm is far more than the total cost of the loan. High-cost credit is not like a gallon of milk at the grocery store – a one-and-done purchase for which free market economies, as a general matter, reject price fixing. As a nation we generally *have* regulated the price of credit. And this is because predatory lending is fundamentally, structurally different than responsible lending.

High-cost lending turns incentives on their head, so that lenders succeed when borrowers fail.[132] As shown in the following chart,[133] high rates slow down repayment of principal so much that for months, or even years, progress toward principal can be close to negligible, even after hundreds or thousands of dollars has been repaid. Litigation against CashCall – which has been shown to be the true lender in rent-a-bank schemes[134] – exposed its predatory business model. CashCall, even without breaking 100% APR, recovered far more than its original principal and started making a profit at month 19 on its 42-month loan, even while very little of those payments were applied to principal. That discrepancy only grew, with the profit point at 14 months on a 47-month loan, once CashCall increased the interest rate and lengthened the term. The chart also demonstrates how little progress the borrower has made toward principal at that point, and how long they have to go.



Once even small portions of principal are paid down, lenders aggressively push refinances to borrowers to keep them on a high-cost debt treadmill.[135] Even with these high refinance rates, defaults on high-cost loans are extraordinarily high.

Thus, high-cost lending is not just credit at a higher price, it is a debt trap. It is a wrecking ball of a business model, designed by lenders to extract as much as possible, for as long as possible, from often already desperate borrowers, leaving them worse off than when they started. In this way, high-cost lending is also a mechanism that siphons resources from the poorest communities – often communities of color – to some of the wealthiest companies and individuals in the world.[136]

Consumer narratives of dozens of borrowers of loans made by lenders using rent-a-bank schemes, were submitted to the committee for inclusion in the record.

D. OCC supervision will not compensate for preemption of usury laws

OCC oversight cannot replace state usury laws. This is clear for a number of reasons. There is no greater consumer protection against abusive lending than interest rate caps. In addition, prudential regulators' focus on safety and soundness has often come at the expense of consumer protection, even though the two should not be in conflict. Even if OCC oversight could, in theory, hold predatory lending in check, the OCC's recent track record shows that it is not doing so. Moreover, the OCC will not have direct oversight over the third parties with whom banks partner, creating confusion about the supervision of the nonbank. And broad guidances advising underwriting in general terms, like those cited in the rule, have not prevented predatory mortgage lending, bank payday loans, or rent-a-bank schemes by OCC-supervised institutions.

i. The OCC has been enabling predatory rent-a-bank schemes in small business and consumer lending.

Even without the true lender rule, the OCC actively supported a predatory rent-a-bank scheme in the small business arena, nor has it stopped **OCC-supervised Axos Bank** from its engagement in rent-a-bank schemes involving predatory small business loans despite truly shocking fact patterns. Clearly the OCC's supervision of Axos is not ensuring sound underwriting or stopping it from letting itself be used by predatory lenders– even when the bank is facing extensive litigation.

In July 2019, the OCC filed an amicus brief supporting **World Business Lenders (WBL)** in a district court bankruptcy case, *Rent-Rite Super Kegs v. World Business Lenders.*[137] The OCC is defending WBL's ability to charge 120% APR on a $550,000 loan despite Colorado's lower (but still hefty) 45% business interest rate cap because the loan was originated through a bank (FDIC-supervised Bank of Lake Mills).

Not one word of the OCC's brief expresses any concern about the ridiculously predatory interest rate. The OCC chose to side with a predatory lender in a case that is not at the appellate level, when the bank is not involved in the case, and where there is no argument that the bank would be impacted if WBL were limited to collecting 45% APR instead of 120% APR.

The OCC's decision to support WBL in the *Rent-Rite* case is shocking enough and dispels any hopes that the OCC would crack down on predatory loans being made through rent-a-bank schemes. But what is even more telling is that WBL's current rent-a-bank partner is OCC-supervised Axos Bank, formerly known as Bank of Internet (BOFI), a federal savings association.[138]

Several cases filed in court against WBL reveal that the *Rent-Rite* case is not an aberration. In fact, its predatory practices have been going on for some time. A 2014 article describes how WBL employs some of the worst actors and practices from the foreclosure crisis for its predatory lending practices towards small businesses.[139] The company's model is to approach struggling businesses and charge exorbitant rates, using a bank as a front to escape interest rate limits. The loans are secured by personal residences, making the high rates truly shocking, and in some cases the business aspect of the transaction appears to be trumped up to disguise that these are loans for personal purposes and are covered by consumer laws. The bank has little if anything to do with the loans, and in more than one case, WBL appears to have used a power of attorney for the bank.

The facts described below are taken from the complaints as alleged. There is a striking similarity to them:[140]

- In *Speer v. Danjon Capital et al.,* filed in Connecticut in late 2019, Elissa Speer is facing a civil action in Nevada and a foreclosure of a residential property in Connecticut after taking out a $30,000 loan alleged to be at 400% and a second loan of $20,000, alleged to be at 121% APR.[141] The loans were offered by Danjon Capital in collusion with World Business Lenders, but were purportedly on funds lent by Bank of Lake Mills. After executing the first note and mortgage, Danjon refused to release the funds unless Speer executed a lease agreement for "restaurant equipment" despite the fact that Speer was never in the restaurant business and she alleged that the equipment referenced, including two backpack leaf blowers, had no practical restaurant use. The complaint alleges that the defendants disguised residential mortgage loans made to consumers primarily for personal, family, or household uses, as commercial loans in order to avoid Connecticut's licensure and other laws.

- In *Vincent Deramo Jr. et al. v. World Business Lenders, LLC*, filed in Florida in 2017, a general contractor and his wife allege that World Business Lenders contacted them, saying they were an agent for Bank of Lake Mills, and offered a $400,000 loan, secured by their home and later refinanced. Despite the promise of a 15% APR, they allege that WBL actually charged them 72-73% APR. The documents were prepared by WBL and were mailed to WBL and the plaintiffs had no contact with the bank. The mortgage was assigned from the bank to WBL through a signature of the vice president of WBL as power of attorney for the bank.[142]

- In *B&S Medical Supply et al v. World Business Lenders et al.*, filed in New York in 2017, WBL solicited Boris Simon, the owner of B&S Medical Supply, for a $28,000 business loan at 73% APR, provided by Liberty Bank, that was secured by Simon's home. The business loan application contained both the business logo and contact information of WBL and Liberty. The loan was immediately assigned from Liberty to WBL. WBL corresponded with Simon, referring to itself as the "Lender" and saying that it would service the loan and have the right to collect payments.[143]

- In *Kaur et al. v. World Business Lenders et al.*, filed in Massachusetts in April 2019, a married couple was threatened with foreclosure after borrowing $175,000 at 92% APR from World Business Lenders for their business, New England Distributors, secured by a mortgage on their house.[144] The loan paperwork listed BOFI/Axos Bank as the lender, but the loan was presented by WBL, all the forms were WBL forms, and the application discussed WBL's role including ordering a valuation of the collateral. The mortgage was assigned from BOFI to WBL and that assignment by BOFI "was signed by World Business Lenders, LLC, as attorney-in-fact for BOFI Federal Bank."[145]

- In *Adoni et al. v. World Business Lenders, LLC, Axos Bank and Circadian Funding*, filed in New York in October 2019, Jacob Adoni has been threatened with threats to foreclose on his home after receiving a $90,000 loan at 138% APR secured by his personal residence.[146] Adoni was contacted by Circadian Funding with an offer of a personal loan that would be funded by WBL and Axos Bank. He was told that the loan documents would be provided to him at 12:00 pm and he must execute them by 6:00 pm or the offer would no longer be valid. Adoni was told by Circadian that the loan was meant to be a personal loan to him, but it was necessary for the loan documents to make reference to his business. The defendants "have inundated Mr. Adoni with multiple threats to foreclose on his home and on the mortgage."[147]

- In *Quantum-Mac Int'l v. World Business Lenders, et al.*, filed in Georgia in June 2020, a small business owner was given a $50,000 loan at 88% APR.[148] WBL prepared all of the documents with BOFI Federal Bank (known known as Axos Bank) listed as the lender, and then an officer of WBL used a power of attorney for the bank to assign the loans to WBL. WBL is seeking $133,519 in interest and is threatening to foreclose on the owner's home.

- In *Koffel et al. v. World Business Lenders et al.*, filed in Florida in June 2020, a realty company challenged a loan at rate of over 100%.[149] WBL prepared all loan documents but only BOFI Federal Bank (Axos Bank) was named, though the borrowers never communicated with the bank. The complaint alleges that when World Business Lenders (WLB) was "confronted with the fact that the loans were outrageous and criminally usurious, WBL replied that was because

Nevada does not have such laws and that WBL agreed they were using BofI [Axos Bank] solely for the purpose as a 'rent a bank.'"

For nearly a year, CRL and other organizations have been raising concerns about the OCC's support for World Business Lenders.[150] Yet despite multiple lawsuits against WBL and, in some cases, Axos Bank, over loans originated by Axos, the OCC has not stopped this predatory sham arrangement. The cases just keep coming – as recently as last summer, small businesses continue to sue trying to escape the devastating rent-a-bank loans that Axos is enabling, nor have EBL and Axos Bank eluded media coverage.[151]

Indeed, if the OCC were really supervising Axos Bank's rent-a-bank loans, it should have been on notice long before, because WBL is not the only predatory lender Axos is helping:

- In the case *In re: Lam Cloud Management, LLC; Straffi, Ch. 7 Trustee v. Retail Capital LLC d/b/a Credibly et al.*, filed in New Jersey in 2017, the Chapter 7 bankruptcy trustee of a technology company filed an adversary proceeding against Axos Bank (under its former name, BOFI Federal Bank) over a 2014 loan. Axos nominally originated and then quickly assigned to Quick Bridge a $132,000 loan at about 76% APR despite New Jersey's 30% criminal usury cap.[152] Quick Bridge made daily withdrawals from the small business's bank account.

- In *Hamilton d/b/a The Design Studio v. Business Financial Services*, filed in Texas in November 2019, the plaintiff challenged a $42,000 loan taken out in 2018 from that had a 274% APR.[153] The promissory note was given to Axos Bank.[154]

Of course, it should not take lawsuits for the OCC to become aware of and stop predatory and abusive conduct by its banks. That is what supervision is supposed to do – identify and stop scurrilous practices without waiting for them to result in harm that leads to private litigation.

But just as the OCC repeatedly assured Congress in the run-up to the 2008 financial crisis that its supervision was ensuring responsible mortgage lending, the OCC's assurances this time around are not to be believed. That is why Congress reined in the OCC's preemption power and restored the role of states, and why the OCC has no authority to preempt state usury laws that prevent nonbanks from engaging in predatory lending.

In addition, OCC-supervised Stride Bank (Oklahoma) has been enabling predatory lender **CURO**'s newest product, **Verge Credit.** For over a year, until this month, Verge was offering loans of $500-$5,000, with terms 6-60 months, at APRs of 37% to 179%. Its "example" loan was a $2,000, 24-month loan at 94% APR, resulting in total interest of $2,496. Verge promoted itself as "100% transparent" because of its relationship with Stride Bank: "Stride Bank, N.A. has a servicing partnership with Verge Credit to offer bank-originated personal loans. Why? Stride Bank is a national bank that is federally regulated. **That means you are under the protection of federal regulators (who make sure consumer laws are followed). 100% legit.**"[155] CURO operates the SpeedyCash brand; below is an example of a SpeedyCash loan offered in California before the state's bipartisan rate cap of 36% (plus federal funds) made it illegal. It shows a $2,600, 3.5-year loan at 135% interest, with payments totaling $12,560. Verge stopped accepting applications this month, just as the federal Congressional Review Act debate around the fake lender rule approached its peak.

SPEEDY CASH (Unsecured)
INSTALLMENT LOAN PROMISSORY NOTE

ANNUAL PERCENTAGE RATE The cost of your credit as a yearly rate	FINANCE CHARGE The dollar amount the credit will cost you	Amount Financed The amount of credit provided to you or on your behalf	Total of Payments The amount you will have paid after you have made all payments as scheduled
135.211%	$9,960.35	$2,600.00	$12,560.35

Your Payment Schedule will be:

Number of Payments	Amount of Payment	When Payment is Due
90	$138.09	Every 14 days , beginning 28 Feb 2014

ii. The rule encourages lending over which the OCC will not have adequate oversight.

The OCC's rule encourages lending programs over which the OCC will have less oversight than if banks were to lend directly, outside of these "partnerships." The OCC asserts that it will be the prudential regulator of the bank's "lending activities" where banks are considered the lender under this rule.[156] But as we know from bank/nonbank "partnerships" historically and today, the bank plays only a nominal role in the "lending activities." Most of the "lending activities" – establishment of key underwriting criteria, loan design, pricing, marketing, application processing, loan servicing, customer service, collections, and virtually all the other aspects of the program that actually determine consumers' experiences with the loans – happen at the nonbank. Even if the bank nominally maintains control over these activities, it is primarily a rubber stamp. And the rule, by establishing a purely superficial definition of "true lender," will only make that more true.

Thus, most of the action will remain at the nonbank, the OCC's oversight of which involves "ensur[ing] that the bank has instituted appropriate safeguards to manage the associated risks."[157] Yet managing risks to the bank is not the same thing as ensuring protection of consumers. The OCC cites 2013 guidance and a supporting 2020 FAQ as support for its oversight of partnerships. The 2013 guidance provides that normally the OCC supervises "the relationship" with the third-party while reserving that it "may use its authority to examine the functions or operations performed by a third-party on the bank's behalf." The guidance does not provide that the OCC is examining the third-party itself – only the relationship – and the OCC does not explain when it would view the nonbank as acting on the bank's behalf. The 2020-10 FAQ has only one question addressing lending (Question 19), which only generally addresses the bank's management of risk with the third party.[158]

This framework is not reassuring: We know that banks seeking to rent their charters have little skin in the game and thus take on little risk themselves. Consequently, they also have little financial incentive to manage the risks that the lending programs pose to consumers. The OCC's rule would appear to allow a bank to completely protect itself from risk through indemnification agreements, escrow accounts, and other mechanisms. Yet the less risk to the bank, the more to the consumer.

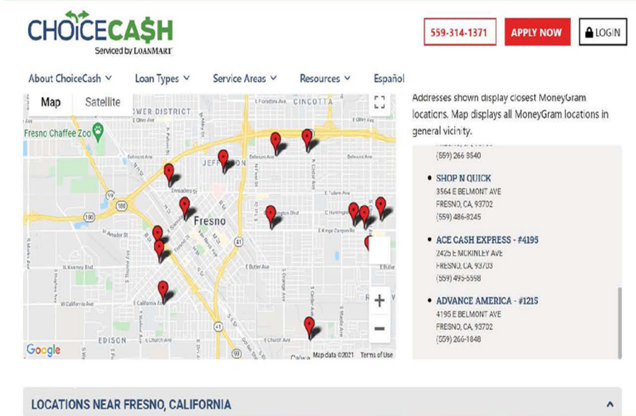
The OCC has also attempted to defend the rule by pointed to the agency's oversight more broadly, including relating to underwriting, and the federal consumer financial protection laws against unfair, deceptive, and abusive practices and fair lending laws apply to these loans (as they do to all consumer loans). The OCC has stated that it assesses the appropriateness of the loan's terms and structures and "the lending practices" in light of 2000 and 2003 OCC guidances addressing predatory and payday lending. But none of these guidances or statements are replacements for clear usury limits. And all are cold comfort, particularly in light of (1) the predatory lending being done by current rent-a-bank schemes with OCC-supervised banks that the OCC is permitting and even encouraging, discussed above, as well as (2) the high-cost predatory loans the rule will invite, as evidenced by the praise the OCC proposed rule received from clearly predatory lenders. And to be sure, these guidances do not give the agency the authority to overturn long-established law and violate the National Bank Act.

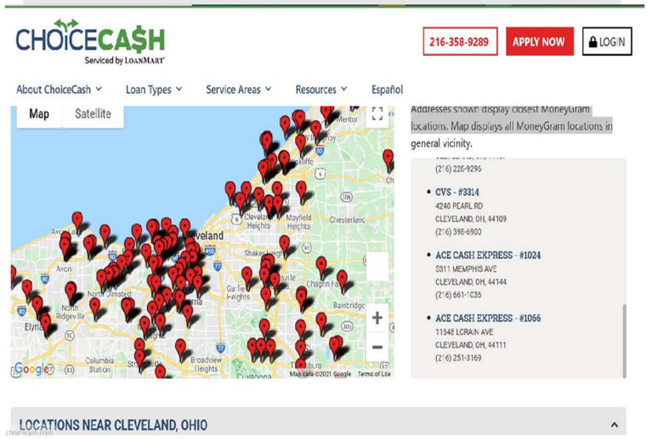
VII. Conclusion

While the OCC Rule discusses principles of safety and soundness, the agency is at the same time supporting or permitting predatory lending through rent-a-bank schemes and dramatically undermining state usury limits. These actions, ultimately encouraging banks to be bolder about engaging with predatory lending, pose safety and soundness risks that the OCC has not acknowledged or considered.

By emboldening predatory lending in states whose laws do not permit it, the Rule nullifies the right of states to set their own policy. These states include several whose voters, in the last ten years, have overwhelmingly chosen at the ballot box to cap rates at approximately 36%.[159] This proposal would essentially nullify those voters' votes, and preemptively prevent voters and state legislators who want to eradicate predatory lenders from their states from doing so in the future. Congress has a moral obligation to its constituents and consumers to utilize the Congressional Review Act to overturn this rule and pass a federal interest rate cap aligned with the Military Lending Act, to sufficiently protect consumers.

APPENDIX A: Loan Mart Choice Cash Products Partnering with Payday Lenders to distribute proceeds





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[1] Office of the Comptroller of the Currency, National Banks and Federal Savings Associations as Lenders, 85 Fed. Reg. 68742 (2020).

[2] Signe-Mary McKernan, Caroline Ratcliffe, Eugene Steuerle and Sisi Zhang, *Less Than Equal: Racial Disparities in Wealth Accumulation* (2013), Urban Institute, available at *Less Than Equal: Racial Disparities in Wealth Accumulation | Full Report | Urban Institute*; Emmanuel Nieves, *Running in Place: Why the Racial Wealth Divide Keeps Black and Latino Families From Achieving Economic Security.* (2018), Prosperity Now, available at Running in Place: Why the Racial Wealth Divide Keeps Black and Latino Families From Achieving Economic Security | Prosperity Now

[3] James M. Ackerman, Interest Rates and the Law: A History of Usury, 1981 Ariz. St. L.J. 61 (1981).

[4] *See Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) (stating that federalism "assures a decentralized government that will be more sensitive to the diverse needs of a heterogenous society" and "allows for more innovation and experimentation in government").

[5] National Consumer Law Center (NCLC), *State Rate Caps for $500 and $2,000 Loans (Mar. 2021),https://www.nclc.org/images/pdf/high_cost_small_loans/payday_loans/FS_State_Rate_Caps_2021.pdf; NCLC, A Larger and Longer Debt Trap? Analysis Of States' APR Caps For A $10,000 5-year Installment Loan (Oct. 2018), overview http://bit.ly/2QOp6AG and full report, http://bit.ly/instloan1*

[6] *See* Diane Standaert and Brandon Coleman, *Ending the Cycle of Evasion: Effective State and Federal Payday Lending Enforcement* (2015), Center for Responsible Lending, *available at* http://www.responsiblelending.org/payday-lending/research-analysis/crl_payday_enforcement_brief_nov2015.pdf.

[7] *BankWest, Inc. v. Baker*, 411 F.3d 1289, 1295 (11th Cir. 2005) ("To avoid this direct prohibition, however, payday stores have entered into agency agreements whereby the stores procure such payday loans for out-of-state banks …"), *reh'g granted, op. vacated*, 433 F.3d 1344 (11th Cir. 2005), *op. vacated due to mootness*, 446 F.3d 1358 (11th Cir. 2006); *Flowers v. EZPawn Oklahoma, Inc.*, 307 F.Supp.2d 1191, 1196, 1205 (2004) ("Defendants assert that they acted as servicers for the loan made by County Bank… Defendants submit that County Bank developed the loan product at issue, approved and made the extension of the loan to the Plaintiff and all others similarly situated, funded the loan …"); *Colorado ex rel. Salazar v. Ace Cash Express*, 188 F.Supp.2d 1282 (D. Colo. 2002) ("Defendant admits that it is a 'loan arranger/agent.'"); *Commonwealth v. Think Finance, Inc.*, 2016 WL 183289 (E.D. Pa. Jan. 14, 2016).

[8] *BankWest, Inc. v. Baker*, 411 F.3d 1289 (11th Cir. 2005) ("To avoid this direct prohibition, however, payday stores have entered into agency agreements whereby the stores procure such payday loans for out-of-state banks …"), *reh'g granted, op. vacated*, 433 F.3d 1344 (11th Cir. 2005), *op. vacated due to mootness*, 446 F.3d 1358 (11th Cir. 2006).

[9] *See* Jean Ann Fox, Consumer Federation of America, *Unsafe and Unsound: Payday Lenders Hide Behind FDIC Bank Charters to Peddle Usury*, 17-19, (Mar. 30, 2004) (identifying rent-a-bank schemes in Texas, Florida, and California), https://consumerfed.org/pdfs/pdlrentabankreport.pdf.

[10] *BankWest*, 411 F.3d 1289; *see In re Advance America, Cash Advance Centers of North Carolina, Inc.*, 05:008:CF, NC OCOB Final Order against Advance America, December 22, 2005, https://www.nccob.org/public/docs/AboutUs/43_AANCFINALORDER122205.pdf.

[11] *Id.*

[12] OCC Advisory Letter No. AL 2000-10 (Nov. 27, 2000), https://occ.gov/news-issuances/advisory-letters/2000/advisory-letter-2000-10.pdf.

[13] *Id.* ("Contractual agreements with third parties that originate, purchase, or service payday loans may increase the bank's credit risk due to the third party's inability or unwillingness to meet the terms of the contract . . .").

[14] *Id.* ("Because payday loans may be underwritten off-site, there is the risk that agents or employees may misrepresent information about the loans or increase credit risk by failing to adhere to established underwriting guidelines.")

[15] *Id.* ("Banks face increased reputation risk when they enter into arrangements with third parties to offer payday loans with fees, interest rates, or other terms that could not be offered by the third party directly.")

[16] *Id.*

[17] *Id.* (citing OCC AL 2000-7 on Abusive Lending Practices). *See also* OCC AL 2002-3 on Predatory and Abusive Lending Practices.

[18] Remarks by John D. Hawke, Jr., Comptroller of the Currency, Before the Women in Housing and Finance at 10 (Feb. 12, 2002), https://www.occ.treas.gov/news-issuances/speeches/2002/pub-speech-2002-10.pdf.

[19] https://www.occ.treas.gov/news-issuances/news-releases/2002/nr-occ-2002-10.html.

[20] Remarks by John D. Hawke, Jr., Comptroller of the Currency, Before the Women in Housing and Finance at 10 (Washington, D.C. Feb. 12, 2002), https://www.occ.treas.gov/news-issuances/speeches/2002/pub-speech-2002-10.pdf.

[21] *Id.* (emphasis added).

[22] *Id.*

[23] Remarks by John D. Hawke, Jr., Comptroller of the Currency, Before the Women in Housing and Finance at 10 (Washington, D.C. Feb. 12, 2002), https://www.occ.treas.gov/news-issuances/speeches/2002/pub-speech-2002-10.pdf.

[24] OCC, Annual Report, Fiscal Year 2003, p. 17*; see also*, Jean Ann Fox, "Unsafe and Unsound: Payday Lenders Hide Behind FDIC Bank Charters to Peddle Usury," Consumer Federation of America, March 30, 2004 at 17

[25] https://www.occ.gov/news-issuances/news-releases/2003/nr-occ-2003-3.html. The Office of Thrift Supervision also issued an advisory, noting "Associations should not 'lease' their charter out to nonthrift entities through an agreement that allows the nonthrift entity to circumvent state and local law." OTS Bulletin 82, Aug. 18, 2003, at 8.

[26] The OCC rescinded that guidance in 2017.

[27] *See, e.g.*, Testimony of Steve Abbot, former President of the Navy-Marine Corps Relief Society, Before the U.S. Committee on Banking, Housing and Urban Affairs (Nov. 3, 2011) (noting bank payday loans among the "most egregious trends"); Comments of Michael Archer, Director of Military Legal Assistance, Marine Corps Installations East, to CFPB (April 4, 2012): "Most ominously, a few large banks have gotten into the business of payday loans through the artifice of calling the loans open ended credit," http://www.regulations.gov/#!documentDetail;D=CFPB-2012-0009-0056.

[28] Hundreds of groups urged the prudential regulators to stop banks from trapping borrowers in payday loans. Letters from approximately 250 groups to FDIC, OCC, FRB and CFPB, March 13, 2013, (http://ourfinancialsecurity.org/blogs/wp-content/ourfinancialsecurity.org/uploads/2013/03/Bank-Payday-Sign-On-Letter-3-13-13-Final.pdf) and February 22, 2012, (http://www.responsiblelending.org/payday-lending/policy-legislation/regulators/Dear-Regulators.pdf). Thousands of individuals and many community groups filed comments with the OCC urging that Wells Fargo's Community Reinvestment Act rating be negatively impacted because it makes payday loans, including CRL and NCLC (http://www.responsiblelending.org/payday-lending/policy-legislation/regulators/cra-comment_wells-nov-29-2012_final.pdf).

[29] *See, e.g.*, Letter from Benjamin Todd Jealous, President and Chief Executive Officer, NAACP, to FDIC, OCC, FRB, and CFPB opposing bank payday lending (Feb. 21, 2013), http://www.responsiblelending.org/payday-lending/policy-legislation/regulators/NAACP-redatory-Pay-Day-Loans-to-regulators-BTJ.pdf.

[30] *See, e.g.*, Elaina Ramsey, Faith Groups Take On Payday Lenders, Sojourners, https://sojo.net/magazine/stub/faith-groups-take-payday-lenders (discussing a National Day of Action among faith leaders in early 2013 to address payday lending). In connection with this National Day of Action, Rev. DeForest B. Soaries, jointly with other nationally prominent African American ministers, called for "an end to enslavement to both payday lenders and the banks now offering equally dangerous products" in *An Emancipation Proclamation from Payday Lending.* Center for Responsible Lending, *Bank Payday Lending: Overview of Media Coverage and Public Concerns*, CRL Issue Brief, March 7, 2013, http://www.responsiblelending.org/payday-lending/tools-resources/BPD-media-coverage-3-7-13.pdf

[31] For proxy year 2013, investors filed shareholder resolutions with the four largest banks making payday loans expressing concern about the product and requesting data, which none of the banks agreed to provide. Wells Fargo (https://trilliuminvest.com/shareholder-proposal/payday-lending-wells-fargo-2013/); Fifth Third Bank (http://www.trilliuminvest.com/resolutions/payday-lending-fifth-third-bancorp-2013/); U.S. Bank; (https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2013/dominisocial012513-14a8.pdf); and Regions (https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2013/congregationsisters011413-14a8.pdf).

[32] *See, e.g.*, "Legislative Black Caucus slams Regions Bank over payday-style loans," Raleigh News and Observer "Under the Dome," Oct. 11, 2012, http://www.cashcowadvances.com/paydayblog/legislative-black-caucus-slams-regions-bank-over-payday-style-loans.html (quoting letter from N.C. Senator Floyd McKissick, Jr., chairman of the N.C. Legislative Black Caucus, to Regions Bank, which stated: "We are deeply concerned about recent reports of Regions Bank offering its 'Ready Advance' payday loans in North Carolina . . . . High-cost, short-term balloon loans

like these sharply increase the financial distress of families under economic strain"); Letter from Arizona Democratic Caucus to the prudential banking regulators, February 2012 (noting that Arizona "has spent countless state resources to study and understand the effects of [payday lending], and ultimately outlaw payday lending entirely" and calling on federal regulators to "take immediate action so that meaningful reforms taking place in Arizona and throughout the country in the name of consumer protection will not be undermined.").

[33] In January 2013, several Senators wrote the FRB, OCC, and FDIC urging action to address bank payday lending (http://www.blumenthal.senate.gov/newsroom/press/release/blumenthal-calls-on-regulators-to-act-to-stop-abusive-bank-payday-lending). In April 2013, House members did the same. For further documentation of opposition to bank payday lending, *see* Center for Responsible Lending, *Bank Payday Lending: Overview of Media Coverage and Public Concerns* at 10, CRL Issue Brief, March 7, 2013, http://www.responsiblelending.org/payday-lending/tools-resources/BPD-media-coverage-3-7-13.pdf.

[34] For example, high-cost lenders evaded the 2006 federal Military Lending Act until its more comprehensive regulations in 2015, and they schemed to evade the CFPB's payday lending rule as it was being developed. For a fuller discussion of the myriad ways high-cost lenders have engaged in evasion, *see* Comments of CRL, NCLC, CFA, and additional consumer and civil rights groups to CFPB on its Proposed Rule on Payday, Vehicle Title, and Certain High-Cost Installment Loans, Oct. 7, 2016, at 35-40, https://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/crl_payday_comment_oct2016.pdf.

[35] *See* Diane Standaert and Brandon Coleman, *Ending the Cycle of Evasion: Effective State and Federal Payday Lending Enforcement* (2015), Center for Responsible Lending, http://www.responsiblelending.org/payday-lending/research-analysis/crl_payday_enforcement_brief_nov2015.pdf.

[36] Jean Ann Fox, Consumer Federation of America, Unsafe and Unsound: Payday Lenders Hide Behind FDIC Bank Charters to Peddle Usury (Mar. 30, 2004), https://consumerfed.org/pdfs/pdlrentabankreport.pdf; National Consumer Law Center, Consumer Credit Regulation § 3.5.4 (3d ed. Forthcoming 2020), updated at www.nclc.org/library.

[37] CFPB, Rule Addressing *Payday*, Vehicle Title, and Certain High-Cost Installment Loans, Final Rule, 82 Fed. Reg. 54472 (Nov. 17, 2017) (CFPB Payday Rule) and Docket No. CFPB-2016-0025 associated with that rule; *see* CRL and NCLC's comments to that docket, filed with additional consumer and civil rights groups, here: https://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/crl_payday_comment_oct2016.pdf (CRL, NCLC, et al., Comments on CFPB Payday Rule); *see id.* at §2, pp. 17-40 (discussing harm to consumers).

[38] Brian Melzer, *The Real Costs of Credit Access: Evidence from the Payday Lending Market*, (2011), Oxford University Press, *available at* http://bit.ly/10M01tZ; Agarwal, S., Skiba, P. M., & Tobacman, J., *Payday loans and credit cards: New liquidity and credit scoring puzzles?* NBER Working Paper (2009), *available at* http://bit.ly/RtDsXx.

[39] CFPB Payday Rule, 82 Fed. Reg. 54564, 73; *see also* Dennis Campbell, Asis Martinez Jerez, & Peter Tufano, *Bouncing out of the Banking System: An Empirical Analysis of Involuntary Bank Account Closures,* Harvard Business School, 12/3/08, *available at* www.bostonfed.org/economic/cprc/conferences/2008/payment-choice/papers/campbell_jerez_tufano.pdf.

[40] Paige Marta Skiba and Jeremy Tobacman, *Do Payday Loans Cause Bankruptcy?,* Vanderbilt University and the University of Pennsylvania, 10/10/08, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1266215.

[41] Complaints related to Elevate, OppLoans, Enova (NetCredit), Curo (SpeedyCash), and LoanMart, 2015 to present; downloaded from CFPB's complaint database and on file with CRL.

[42] e.g. Enova International "Successful Product Diversification Efforts: Revenue Diversification by product type. Enova International: Data Analytics Platform In Play (NYSE:ENVA) | Seeking Alpha

[43] Elevate Credit, Inc. Form 10-K Filed 2/26/21 for the Period Ending 12/31/20. See pg. 70 of ELEVATE CREDIT, INC. (seekingalpha.com)

[44] Loan Mart Title Loan Store Locator. Title Loan Store Locator | Find Title Loans Near Me Online (800loanmart.com) Accessed April 26, 2021.

[45] CFPB Payday Rule, 82 Fed. Reg. at 54573 & n. 592 (internal citations omitted).

[46] CFPB Single-Payment Vehicle Title Lending at 4 (2016). CRL estimates that approximately 340,000 auto title borrowers annually have their car repossessed, well exceeding the population of St. Louis. For calculation, *see* CRL, Public Citizen, NCLC et. al comments on CFPB's proposed repeal of the ability-to-repay provisions of the payday rule at 26, n.90 (May 15, 2019), https://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/comment-cfpb-proposed-repeal-payday-rule-may2019.pdf.

[47] Virginia Bureau of Financial Institutions." 2017 Annual Report," page 57, http://bit.ly/2UOkDj1

[48] One finds that access to payday loans substantially increased suicide risk—including by over 16% for those ages 25-44. Jaeyoon Lee, *Credit Access and Household Welfare: Evidence From Payday Lending* (SSRN Working Paper, 2017. Another finds that short-term loans, including payday loans, are associated with a range of negative health outcomes, even when controlling for potential confounders. Elizabeth Sweet et al., *Short-term lending: Payday loans as risk factors for anxiety, inflammation and poor health,* 5 SSM—Population Health, 114–121 (2018), *https://doi.org/10.1016/j.ssmph.2018.05.009.* These outcomes include symptoms of physical health, sexual health, and anxiety, as well as higher levels of C-reactive protein, which is an indicator of many long-term diseases, including cardiovascular disease, and an indicator of psychological stress. *Id.* Another study finds that restrictions on payday lending reduced liquor sales. Harold E. Cuffe & Christopher G. Gibbs, *The Effect of Payday Lending Restrictions on Liquor Sales,* 85(1) J. Banking & Fin. 132–45 (2017). In one study of qualitative data, respondents revealed symptoms of "allostatic load," a health psychology term that describes how compounding stress can lead to wear and tear on the body. Elizabeth Sweet et al., *Embodied Neoliberalism: Epidemiology and the Lived Experience of Consumer Debt*, 48(3) International Journal of Health Services (2018). The authors describe the respondents as having "embodied" their debt through idioms like "drowning in debt" and "keeping [their] head above water," which illustrated that the participants "experienced debt as a bodily sensation, not only a socioeconomic position or emotional stressor." *Id.* One payday borrower has reported that after being a "a pretty healthy young person," she "became physically sick, broke out in hives . . . [and] had to go to urgent care" as a result of her high-cost loan. Health Impact Partners and Missouri Faith Voices, *When Poverty Makes You Sick: The intersection of health and predatory lending in Missouri* (Feb. 2019), https://humanimpact.org/wp-content/uploads/2019/02/HIP-MFV_PayDayLending_2019.02fin1.pdf. Another expressed feeling, "[i]f I died, my debt would die with me. At least I could give my family that." *Id.*

[49] *See* CFPB Payday Rule, 82 Fed. Reg. at 54556-57.

[50] *See, e.g.*, Delvin Davis, *et al.*, *Race Matters: The Concentration of Payday Lenders in African-American Communities in North Carolina*, Center for Responsible Lending (2005), http://www.responsiblelending.org/north-carolina/nc-payday/research-analysis/racematters/rr006-Race_Matters_Payday_in_NC-0305.pdf (finding that, even when controlling for a variety of other factors, African-American neighborhoods had three times as many payday lending stores per capita as white neighborhoods in North Carolina in 2005); Assaf Oron, *Easy Prey: Evidence for Race and Military Related Targeting in the Distribution of Payday Loan Branches in Washington State*, Department of Statistics, University of Washington (2006) (concluding based on a study of Washington State payday lenders that "payday businesses do intentionally target localities with a high percentage of African Americans.").

[51] Li, *et al.*, *Predatory Profiling: The Role of Race and Ethnicity in the Location of Payday Lenders in California,* Center for Responsible Lending (2009), http://www.responsiblelending.org/payday-lending/research-analysis/predatory-profiling.pdf; Brandon Coleman and Delvin Davis, *Perfect Storm: Payday Lenders Harm Florida Consumers Despite State Law*, Center for Responsible Lending at 7, Chart 2 (March 2016); Delvin Davis and Lisa Stifler, *Power Steering: Payday Lenders Targeting Vulnerable Michigan Communities*, Center for Responsible Lending (Aug. 2018), https://www.responsiblelending.org/research-publication/power-steering-payday-lenders-targeting-vulnerable-michigan-communities; Delvin Davis, *Mile High Money: Payday Stores Target Colorado Communities of Color*, Center for Responsible Lending (Aug. 2017; amended Feb. 2018), https://www.responsiblelending.org/research-publication/mile-high-money-payday-stores-target-colorado-communities-color.

[52] CFPB Payday Rule, 82 Fed. Reg. at 54556. African-Americans are payday borrowers at three times the rate, and Hispanics at twice the rate, of non-Hispanic whites. 82 Fed. Reg. at 54556-57 (citing 2015 FDIC National Survey of

Unbanked and Underbanked Households (calculations using custom data tool)). Vehicle title borrowers are also disproportionately African-American and Hispanic. *Id.*

[53] 2017 FDIC National Survey of Unbanked and Underbanked Households, at 3, *available at* https://www.economicinclusion.gov/downloads/2017_FDIC_Unbanked_HH_Survey_Report.pdf.

[54] *See* Chi Chi Wu, *Past Imperfect: How Credit Scores and Other Analytics "Bake In" and Perpetuate Past Discrimination*, National Consumer Law Center (May 2016), https://www.nclc.org/images/pdf/credit_discrimination/Past_Imperfect050616.pdf.

[55] *See* Testimony of Chi Chi Wu, National Consumer Law Center, Before the U.S. House Committee on Financial Services Task Force on Financial Technology Regarding "Examining the Use of Alternative Data in Underwriting and Credit Scoring to Expand Access to Credit" (July 25, 2019); Carol A. Evans, *Keeping Fintech Fair: Thinking about Fair Lending and UDAP* Risks, Consumer Compliance Outlook (2017), https://consumercomplianceoutlook.org/2017/second-issue/keeping-fintech-fair-thinking-about-fair-lending-and-udap-risks/.

[56] 2017 FDIC National Survey of Unbanked and Underbanked Households, at 3, *available at* https://www.economicinclusion.gov/downloads/2017_FDIC_Unbanked_HH_Survey_Report.pdf.

[57] CFPB found that about half of borrowers with online payday loans paid a nonsufficient funds (NSF) or overdraft fee. These borrowers paid an average of $185 in such fees, while 10% paid at least $432. It further found that 36% of borrowers with a bounced payday payment later had their checking accounts closed involuntarily by the bank. CFPB Online Payday Loan Payments at 3-4, 22 (April 2016).

[58] For further on the undersigned groups' concerns about the harm payday and vehicle title loans cause communities of color, and the efforts we have long made to stop that harm, see the sampling of references cited here: http://stopthedebttrap.org/wp-content/uploads/2014/11/PayDay-loans.7-2016.pdf; http://stopthedebttrap.org/wp-content/uploads/2015/08/lcchr_resolution_payday_deposit_advance_lending_12dec2015.pdf; http://stopthedebttrap.org/wp-content/uploads/2015/08/naacp_letter_obama_payday_15december2014.pdf; http://ourfinancialsecurity.org/2011/04/hilary-shelton-cfpb-testimony/; http://www.responsiblelending.org/payday-lending/policy-legislation/states/Letter-JBond_Rendell-012306.pdf; https://nalcab.org/nalcab-new-pay-day-rule-step-forward-latino-consumers-businesses/.

[59] Comments of the Center for Responsible Lending, et al, on *Oportun's New Bank Charter Application* (Dec. 22, 2020), https://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/comment-occ-oportun-nationalbankcharter-22dec2020.pdf.

[60] As but one indication of the lender's control over the business, note Elevate's discussion of its control over their products' APRs: "We aim to manage our business to achieve a long-term operating margin of 20%, and do not expect our operating margin to increase beyond that level, as we intend to pass on any improvements over our targeted margins to our customers in the form of lower APRs. We believe this is a critical component of our responsible lending platform and over time will also help us continue to attract new customers and retain existing customers." Press Release: 10Q, Elevate Credit, Inc. (Aug.10, 2018).

[61] *Form 10-K (Annual Report)* (February 26, 2021), at 65, Elevate Credit, Inc., *available at* https://seekingalpha.com/filings/pdf/14750383.pdf.

[62] For example, when the FDIC issued its Request for Information on small dollar lending in late 2018, an attorney who represents payday lenders wrote: "[P]erhaps *most significantly*, this RFI could serve as a vehicle for the FDIC to confirm that, in a properly structured loan program between a bank and a nonbank marketing and servicing agent, the Federal Deposit Insurance Act authorizes state-chartered banks to charge the interest allowed by the law of the state where they are located, without regard to the law of any other state, despite "true lender" and *Madden* arguments to the contrary." Jeremy T. Rosenblum, *FDIC seeks comment on small-dollar lending*, Ballard Spahr's Consumer Finance Monitor, Nov. 15, 2018, https://www.consumerfinancemonitor.com/2018/11/15/fdic-seeks-comments-on-small-dollar-lending/ (emphasis added).

[63] The so-called "*Madden*-fix" rules issued by the FDIC and OCC allow a nonbank to ignore state rate limits if the loan was originated by a bank and assigned to the nonbank, even though limiting the nonbank's rates does not

significantly interfere with the bank's business. *See, e.g.,* Office of the Comptroller of the Currency, Permissible Interest on Loans that are Sold, Assigned, or Otherwise Transferred, 85 Fed. Reg. 33530 (2020).

[64] *See e.g.,* Comments of Opportunity Finance, LLC (OppLoans) to "Permissible Interest on Loans that are Sold, Assigned, or Otherwise Transferred", ID OCC-2019-0027-0029 (January 22, 2020), https://beta.regulations.gov/document/OCC-2019-0027-0029; Comments of Marketplace Lending Association (MLA) to "Permissible Interest on Loans that are Sold, Assigned, or Otherwise Transferred", ID OCC-2019-0027-0036 (January 22, 2020), https://beta.regulations.gov/document/OCC-2019-0027-0036.

[65] *See* NCLC, "Payday Lenders Plan to Evade California's New Interest Rate Cap Law Through Rent-A-Bank Schemes" (Oct. 2019), http://bit.ly/rent-a-bank-ib (quoting earnings calls).

[66] *See* Press Release, Advocates Urge FDIC, OCC, *Federal Reserve to Stop Banks from Helping Payday Lenders Evade State Interest Rate Limits* (Nov. 7, 2019) (discussing letters to the agencies from a coalition of 61 consumer, civil rights, and community groups, flagging the lenders' statements of intent to evade California law and urging the regulators to prevent rent-a-bank schemes in California and elsewhere), https://www.responsiblelending.org/media/advocates-urge-fdic-occ-federal-reserve-stop-banks-helping-paydaylenders-evade-state-interest. Those letters attached another letter from Californians for Economic Justice to the California Department t of Business Oversight, the Attorney General, and the Governor, flagging the same concerns. *See also* Letter from Rep. Katie Porter of California to FDIC, Dec. 20, 2019 and Tweet: "High-cost lenders announced during their earnings calls that they planned to target CA borrowers with abusive loan terms banned in our state. Today, I'm forwarding transcripts of those calls to federal watchdogs. I won't stand by while bad actors try to skirt our laws." https://twitter.com/RepKatiePorter/status/1208039708095238145?s=20.

[67] *See* Rise Website, https://www.risecredit.com/how-online-loans-work/#WhatItCosts (last visited September 3, 2020) (indicating that Rise is not available in California at this time).

[68] See Section VI.D.i.

[69] Gretchen Morgenson, *New Trump Admin Rule Makes it Easier for Lenders to Charge Small Businesses Super-High Interest Rates*, NBC News (Dec. 8, 2020), https://www.nbcnews.com/business/economy/new-trump-administration-rules-make-it-easier-lenders-charge-small-n1250023.

[70] *Id.*

[71] For details on rent-a-bank lending, see NCLC, *High-Cost Rent-a-Bank Loan Watch List* (tracking which lenders are scheming with which banks in which states), https://www.nclc.org/issues/high-cost-small-loans/rent-a-bank-loan-watch-list.html; NCLC, *Fact Sheet: Stop Payday Lenders' Rent-a Bank Schemes!* (Dec. 2019), http://bit.ly/StopRent-a-BankSchemes; NCLC, *Issue Brief: FDIC/OCC Proposal Would Encourage Rent-a-Bank Predatory Lending* (Dec. 2019), http://bit.ly/FDICrent-a-bankproposal (providing links to lenders' websites).

[72] *See* https://www.800loanmart.com/ (last visited July 1, 2020) ("Loans for certain California residents, and residents of Delaware, District of Columbia, Florida, Illinois, Indiana, Kansas, Kentucky, Michigan, Mississippi, Oklahoma, Ohio, Oregon, South Dakota, Tennessee, Texas, and Washington residents are made by Capital Community Bank . . ..").

[73] *See* https://www.800loanmart.com (accessed April 2021).

[74] *See* Jean Ann Fox, Consumer Federation of America, *Rent-a-Bank Payday Lending: How Banks Help Payday Lenders Evade State Consumer Protections (*2001), https://consumerfed.org/pdfs/paydayreport.pdf (listing Check Into Cash and Check 'n Go as using rent-a-bank schemes to operate stores in North Carolina); Charlotte Business Journal, *Three N.C. Payday Lenders Shut Down* (Mar. 1, 2006), https://www.bizjournals.com/charlotte/stories/2006/02/27/daily29.html.

[75] *See* https://www.xact.com/ (accessed April 2021).

[76] *See* https://checkintocash.com/cc-connect/ (accessed April 2021).

[77] *See* https://www.easypayfinance.com/privacy-policy/ (last visited July 1, 2020) ("Not available to customers in NY. Financing offered to residents in AL, AR, CO, CT, FL, GA, HI, IA, IN, LA, MA, MD, ME, MI, MN, MS, MT, NC, NE, NJ, OH, OK, RI, SC, SD, TN, TX, VT, WV, WY and District of Columbia is made by Transportation Alliance Bank, Inc., dba TAB Bank, which determines qualifications for and terms of credit. Financing in all other states is administered by EasyPay Finance.").

[78] https://www.firstelectronic.com (last visited September 8, 2020). First Electronic Bank is a "wholly owned subsidiary of Fry's Electronics" which is based in Silicon Valley. https://www.firstelectronic.com/about-us (last visited September 8, 2020).
[79] https://www.personifyfinancial.com (last visited June 30, 2020). Those states are Alaska, Arizona, Delaware, Florida, Hawaii, Indiana, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Mississippi, Montana, Nebraska, North Carolina, Ohio, Oklahoma, Tennessee, Texas, and Washington. In early 2020, this list included California and Rhode Island, but those states no longer appear on Personify's website.
[80] https://www.applieddatafinance.com (last visited June 30, 2020).
[81] *Id*.
[82] Comments of Center for Responsible Lending, National Consumer Law Center (on behalf of its low income clients), and several additional consumer and civil rights organizations, on the OCC's proposed rule at Appendix, Personify Financial, last bullet, Sept. 3, 2020, https://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/comment-occ-true-lender-3sep2020.pdf.
[83] Press Release, Office of the Attorney General for the District of Columbia, *AG Racine Sues Predatory Online Lender for Illegal High-Interest Loans To District Consumers*, June 5, 2020, https://oag.dc.gov/release/ag-racine-sues-predatory-online-lender-illegal.
[84] Press Release, Office of the Attorney General for the District of Columbia, *AG Racine Sues Online Lender for Making Predatory and Deceptive Loans To 4,000+ District Consumers*, April 6, 2021, https://oag.dc.gov/release/ag-racine-sues-online-lender-making-predatory-and.
[85] Press Release, Elevate Credit, Inc., *Elevate Statement on the OCC Proposed True Lender Rule*, July 21, 2020, https://www.marketscreener.com/quote/stock/ELEVATE-CREDIT-INC-25805249/news/Elevate-Credit-Statement-on-the-OCC-Proposed-True-Lender-Rule-30971600/.
[86] Press Release, California Department of Business Oversight, *DBO Launches Investigation Into Possible Evasion of California's New Interest Rate Caps By Prominent Auto Title Lender, LoanMart*, September 3, 2020 ("starting in 2020, rather than continuing to make loans with rates that comply with the Fair Access to Credit Act, LoanMart stopped making state-licensed auto title loans in California. Instead, using its existing lending operations and personnel, LoanMart commenced "marketing" and "servicing" auto title loans purportedly made by CCBank . . ."), https://dbo.ca.gov/2020/09/03/dbo-launches-investigation-into-possible-evasion-of-californias-new-interest-rate-caps-by-prominent-auto-title-lender-loanmart/.
[87] OCC, National Banks and Federal Savings Associations as Lenders, Final Rule, 85 Fed. Reg. 68742, 47 (Oct. 30, 2020).
[88] *Lusnak v. Bank of America*, 883 F.ed 1185, 1189 (quoting S. Rep. No. 111-176, at 2 (2010)).
[89] *Lusnak*, 883 F.ed 1189 (quoting The Creation of a Consumer Financial Protection Agency to Be the Cornerstone of America's New Economic Foundation: Hearing Before S. Comm. On Banking, Hous., and Urban Affairs, 111th Cong. 82 (2009) (Statement of Travis Plunkett, Legislative Director, Consumer Federation of America)).
[90] *Lusnak*, 883 F.ed 1189 (9th Cir. 2018) (quoting S. Rep. No. 111-176, at 2 (2010)). *See also* Testimony of Eric Stein, Center for Responsible Lending, Before the Senate Committee on Banking, Housing and Urban Affairs Hearing (2008).
[91] Testimony of Martin Eakes, Center for Responsible Lending, Before the Senate Committee on Banking, Housing and Urban Affairs Hearing On The Office of the Comptroller of the Currency's Rules on National Bank Preemption and Visitorial Powers (2004), https://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/20040407_testimony_eakes_preemption.pdf.
[92] *The Financial Crisis Inquiry Commission, The Financial Crisis Inquiry Report*, pgs. xxiii, 111-113, 126. In 2006, national banks, federal thrifts, and their subsidiaries made 32% of subprime loans, 40% of Alt A loans, and 51% of interest-only and option ARM loans. *See* Lauren Saunders, National Consumer Law Center, *Restore The States' Traditional Role As 'First Responder'* (Sept. 2009), available at http://www.nclc.org/images/pdf/preemption/restore-the-role-of- states-2009.pdf.A total of over $700 billion in risky loans were made by entities that states could not touch.
[93] *Lusnak*, 833 F.ed at 1189 (quoting S. Rep. No. 111-176, at 17).

[94] 12 U.S.C. § 25b(h)(2).

[95] Proposed 12 C.F.R. § 7.1031(a), 85 Fed. Reg. at 44228.

[96] *De Wolf v. Johnson*, 23 U.S. 367 (1825).

[97] *Scott v Lloyd*, 34 U.S. 418, 446-47 (1835) (emphasis added).

[98] *Id*. at 447.

[99] 68 U.S. 298, 310 (1863).

[100] *Id*.

[101] 84 Fed. Reg. 64229, 64231 (Nov. 21, 2019). While we opposed the "OCC's rule on "Permissible Interest on Loans That Are Sold, Assigned, or Otherwise Transferred" and disagreed with its characterization of the so-called "valid-when-made" rule, we agree that longstanding legal principles are relevant in interpreting, and may be incorporated into, the NBA. Our quarrel was not whether cases such as *Nichols* and *Gaither* are relevant, but rather with how the OCC characterized and interpreted them. Neither *Nichols* nor *Gaither* had anything to do with the permissible rate on a loan assigned to an entity covered by a different set of laws, nor with the ability of a bank to assign its legal privileges. But both cases do recognize that courts may look beyond devices to prevent evasions of usury laws, which the OCC's proposed rule would prevent.

[102] *See* Fed. Reg. at 64231 n.16, n.17.

[103] 32 U.S. 103 (1833).

[104] 26 U.S. 37, 44 (1828) (quoting *Harrison & Hamell*, 5 Taunton, 780).

[105] *Anderson v. Hershey*, 127 F.2d 884, 886 (6th Cir. 1942) (rejecting the purported form of the transaction as a "device" to collect usury because courts "look behind the form of the transaction to its substance"); *Daniel v. First National Bank of Birmingham*, 227 F.2d 353, 355 (5th Cir. 1956) ("That public policy [against usury] cannot be defeated by the simple expedient of a written contract, but the real substance of the transaction must be searched out… 'No disguise of language can avail for covering up usury, or glossing over an usurious contract. The theory that a contract will be usurious or not, according to the kind of paper bag it is put up in, or according to the more or less ingenious phrases made use of in negotiating it, is altogether erroneous. The law intends that a search for usury shall penetrate to the substances.'") (quoting *Pope v. Marshall*, 78 Ga. 635, 4 S.E. 116, 118 (1887)); *First Nat'l Bank v. Nowlin*, 509 F.2d 872, 876 (8th Cir. 1975) ("'The [NBA usury] section has regard to substance, not merely to form ….'" (*quoting Evans v. Nat'l Bank of Savannah*, 251 U.S. 108, 118 (1919) (Pitney, J., dissenting); *First Nat'l Bank v. Phares*, 174 P. 519, 521 (Okla. 1918) ("In deciding whether any given transaction is usurious or not, the courts will disregard the form which it may take, and look only to the substance of the transaction in order to determine whether all the requisites of usury are present. *** If all these requisites are found to be present, the transaction will be condemned as usurious, whatever form it may assume and despite any disguise it may wear.") (quoting 39 Cyc. 918); *see also FDIC v. Lattimore Land Corp*., 656 F.2d 139, 148 n.15 (5th Cir. 1981) (agreeing that in enforcing the NBA's usury provision, courts can look beyond disguises that conceal "the actual lender," but in the instant case there was no dispute about which party "was the lender in fact").

[106] For a long list of some of the hundreds of cases that emphasize the importance of looking beyond form to substance, *see* Comments of Center for Responsible Lending, National Consumer Law Center (on behalf of its low income clients), and several additional consumer and civil rights organizations, on the OCC's proposed rule at 17, n.36, Sept. 3, 2020, https://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/comment-occ-true-lender-3sep2020.pdf; *see also* National Consumer Law Center, Consumer Credit Regulation § 3.9.1 (2d ed. 2015), *updated at* https://library.nclc.org.

[107] *Daniel et al*., 227 F.2d at 355.

[108] 2014 WL 2404300 (W.Va. May 30, 2014).

[109] 2014 WL 2404300 at *14 (*quoting Carper v. Kanawha Banking & Trust Co*., 157 W.Va. 477, 207 S.E.2d 897 (1974)); *see Crim v. Post*, 23 S.E. at 616 (notwithstanding "the various shifts and devices that are often used to cover up the usury[,]… the law requires the lender on oath to discover the money really lent, and all bargains, contracts, or shifts relative to such loan; and makes them ineffectual, no matter how complicated such contracts may be. The law evidently intends that the search for usury shall penetrate to the substance").

[110] 266 Ga.App. 771, 598 S.E.2d 343 (Ga. App. 2004).

[111] *Oxendine*, 598 S.E.2d at 348 (*quoting Pope v. Marshall*, 78 Ga. 635, 640, 4 S.E. 116 (1887); *accord Daniel*, 227 F.2d at 355; *Georgia Cash America, Inc. v. Greene*, 318 Ga.App. 355, 734 S.E.2d 67, 73 (2012) (finding triable issue of whether true lender was the payday lender or was a bank exempt from the Georgia usury statute).

[112] Comments of CRL, NCLC et. al., on proposed fake lender rule at 26-27, https://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/comment-occ-true-lender-3sep2020.pdf

[113] For detailed discussion, see *id.* at 28, https://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/comment-occ-true-lender-3sep2020.pdf.

[114] 85 Fed. Reg. at 44224.

[115] *Beechum v. Navient Solutions, Inc.*, No. EDCV 15–8239–JGB–KKx, 2016 WL 5340454 at *4 (C.D. Cal. Sept. 20, 2016) ("Because the Court finds Plaintiffs' loans are exempt from California's usury prohibition, the Court does not reach the question of whether Plaintiffs' claims are preempted by the National Bank Act.")

[116] The *Beechum* court acknowledged the substance-over-form doctrine, but claimed that the cases plaintiffs cited did not apply when "assessing whether the transaction or a party to the transaction fall under a constitutional or statutory exemption from the usury prohibition." 2016 WL 5340454 at *5. The court's rationale for this distinction was dubious, and the court was apparently unaware of many cases that did in fact look to substance in those situations.

[117] *Scott v. Lloyd*, 34 U.S. at 447.

[118] *DeWolf*, 23 U.S. at 385.

[119] *See, e.g., Morrisey*, 2014 WL 2404300 at *15 *(*"The 'federal law test' advocated by CashCall examines only the superficial appearance of CashCall's business model. Further, if we were to apply the 'federal law test' as CashCall advocates, we would always find that a rent-a-bank was the true lender of loans such as those at issue in this case.").

[120] *Id*.

[121] 12 U.S.C. § 25b(b)(5)(A); *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944) (explaining that an agency's views are "entitled to respect" only to the extent that they have the "power to persuade"); *Lusnak v. Bank of Am., N.A.,* 883 F.3d 1185, 1192 (9th Cir.), *cert. denied,* 139 S. Ct. 567, 202 L. Ed. 2d 403 (2018).

[122] 85 Fed. Reg. at 68744.

[123] 85 Fed. Reg. at 44224.

[124] OCC Website, https://www.occ.treas.gov/about/index-about.html (last visited on 9/3/20); OCC News Release 2020-69, Brian P. Brooks Statement on Becoming Acting Comptroller**,** May 29, 2020, https://www.occ.gov/news-issuances/news-releases/2020/nr-occ-2020-69.html.

[125] Robin Howarth, Delvin Davis, & Sarah Wolff, *Shark Free Waters: States Are Better Off without Payday Lending*, Center for Responsible Lending, at 4 (Aug. 2016), https://www.responsiblelending.org/research-publication/shark-free-waters-states-are-better-without-payday-lending.

[126] 85 Fed. Reg. 44224.

[127] 85 Fed. Reg. at 44224 ("Banks can also work with third parties to develop responsible lending programs to help customers meet credit needs, including small-dollar lending programs designed to assist with cash-flow imbalances, unexpected expenses, or income shortfalls.").

[128] Moody's Investor Services, Press Release, *Moody's: Unique risks in marketplace versus traditional lending* (May 5, 2015), https://www.moodys.com/research/Moodys-Unique-risks-in-marketplaceversus-traditional-lending--PR_324544; *see also* Michael Corkery, *Pitfalls for the Unwary Borrower Out on the Frontiers of Banking*, New York Times (Sept. 13, 2015), https://www.nytimes.com/2015/09/14/business/dealbook/pitfalls-for-the-unwary-borrower-out-on-the-frontiers-of-banking.html?mcubz=0, ["Pitfalls, NY Times"]. Moody's credit-rating firm likens this industry to mortgage lending in the years leading up to the 2008 financial crisis in that "the companies that market the loans and approve them quickly sell them off to investors," relieving themselves of the risk of the loan later going bad.

[129] One finds that access to payday loans substantially increased suicide risk—including by over 16% for those ages 25-44. Jaeyoon Lee, *Credit Access and Household Welfare: Evidence From Payday Lending* (SSRN Working Paper,

2017. Another finds that short-term loans, including payday loans, are associated with a range of negative health outcomes, even when controlling for potential confounders. Elizabeth Sweet et al., *Short-term lending: Payday loans as risk factors for anxiety, inflammation and poor health,* 5 SSM—Population Health, 114–121 (2018), *https://doi.org/10.1016/j.ssmph.2018.05.009.* These outcomes include symptoms of physical health, sexual health, and anxiety, as well as higher levels of C-reactive protein, which is an indicator of many long-term diseases, including cardiovascular disease, and an indicator of psychological stress. *Id.* Another study finds that restrictions on payday lending reduced liquor sales. Harold E. Cuffe & Christopher G. Gibbs, *The Effect of Payday Lending Restrictions on Liquor Sales,* 85(1) J. Banking & Fin. 132–45 (2017). In one study of qualitative data, respondents revealed symptoms of "allostatic load," a health psychology term that describes how compounding stress can lead to wear and tear on the body. Elizabeth Sweet et al., *Embodied Neoliberalism: Epidemiology and the Lived Experience of Consumer Debt*, 48(3) International Journal of Health Services (2018). The authors describe the respondents as having "embodied" their debt through idioms like "drowning in debt" and "keeping [their] head above water," which illustrated that the participants "experienced debt as a bodily sensation, not only a socioeconomic position or emotional stressor." *Id.* One payday borrower has reported that after being a "a pretty healthy young person," she "became physically sick, broke out in hives . . . [and] had to go to urgent care" as a result of her high-cost loan. Health Impact Partners and Missouri Faith Voices, *When Poverty Makes You Sick: The intersection of health and predatory lending in Missouri* (Feb. 2019), https://humanimpact.org/wp-content/uploads/2019/02/HIP-MFV_PayDayLending_2019.02fin1.pdf. Another expressed feeling, "[i]f I died, my debt would die with me. At least I could give my family that." *Id.*

[130] CRL, NCLC, et al., *Comments on CFPB Payday Rule* at § 2.5 (pp. 31-34) and § 10.1-10.3 (pp. 165-172)*; see also CFPB Proposed Rule on Payday, Vehicle Title, and Certain High-Cost Installment Loans, discussion of longer-term high-cost loans*, 81 Fed. Reg. 47864, 47885-92 (July 11, 2016).

[131] *Id.*

[132] *Seegenerally*, NCLC, *Misaligned Incentives: Why High-Rate Installment Lenders Want Borrowers Who Will Default* (July 2016), https://www.nclc.org/issues/misaligned-incentives.html.

[133] This chart is drawn from NCLC, *Misaligned Incentives*, *supra*, at 15.

[134] *CashCall v. Morrisey,* 2014 WL 2404300 (W.Va. May 30, 2014)*; Consumer Financial Protection Bureau v. CashCall, Inc.*, 2016 WL 4820635 (C.D. Cal. Aug. 31, 2016).

[135] The CFPB found that for online payday installment loans (the channel for most new "fintech" loans) refinance rates were very high. CFPB Supplemental Findings on payday, payday installment, and vehicle title loans (June 2, 2016) at 15 (35% for storefront, 22% for online). *See also* Elevate Credit, Inc., Form 10K, 2019, https://www.sec.gov/Archives/edgar/data/1651094/000165109420000010/elevate10-kx2019.htm, at 15 (noting "[a]pproximately 55% of Rise installment customers in good standing had refinanced or taken out a subsequent loan as of December 31, 2019, with 40% of the outstanding Rise installment loan balances on that date consisting of new customer loans and 60% related to returning customer loan."). While mainstream lenders also often have substantial rates of refinancings, those lenders also charge rates that permit reasonable amortization of loan balances.

[136] Nicholas Confessore, *Mick Mulvaney's Master Class in Destroying a Bureaucracy From Within*, N.Y. Times Magazine, Apr. 16, 2019 (discussing the involvement of venture capitalists and private equity firms in high-cost lending and quoting Diane Standaert, former director of state policy at CRL: "These are entities that suck up billions of dollars a year from people making $25,000 a year. And it's going into the pockets of the wealthiest peoples in the world.").

[137] *See Amicus Brief of the [FDIC] and the [OCC] in Support of Affirmance and Appellee, In Re: Rent-Rite Super Kegs West Ltd.*, https://www.consumerfinancemonitor.com/wp-content/uploads/sites/14/2019/09/Amicus_Brief.pdf (Sept. 10, 2019); *see also* Letter to the OCC and FDIC from NCLC, CRL, and additional groups opposing the agencies' support of a predatory small business lender using a rent-a-bank scheme (Oct. 24, 2019), https://www.nclc.org/issues/ltr-opp-rent-a-bank.html.

[138] World Business Lenders, Small business loans for big business growth (homepage) https://www.wbl.com/.

[139] Zeke Faux, *Wall Street Finds New Subprime With 125% Business L*oans, Bloomberg (May 22, 2014), https://bloom.bg/2WLWRYG.

[140] These cases were collected and summarized by the National Consumer Law Center.

[141] Complaint, *Speer v. Danjon Capital et al.*, No. 3:19-cv-01778 (D. Conn. filed Nov. 12, 2019), *available at* https://www.nclc.org/images/Speerv.DanjonCapital.pdf.

[142] Complaint, *Vincent Deramo Jr. et al. v. World Business Lenders, LLC and WBL SPE II, LLC* (filed May 16 2017 in Cir. Ct., Sarasota, FL, removed to federal court June 16, 2017 as No, 8:17-cv-1435-RAL-MAP), *available at* https://www.nclc.org/images/Deramov.WBL_.pdf.

[143] Complaint, *B&S Medical Supply, Inc., N.Y. and Boris Simon v. World Business Lenders, LLC and Liberty Bank, Inc.*, No. 1:17-cv-03234 (S.D.N.Y. filed May 31, 2017), *available at* https://www.nclc.org/images/BandSMedSupplyv.WBL_.pdf.

[144] Complaint, *Kaur et al v. World Business Lenders et al.* (removed to D. Mass. June. 19, 2019 as 1:19-cv-11364), *available at* https://www.nclc.org/images/Kaurv.WBL_.pdf.

[145] *Id.* at 21.

[146] Complaint, *Adoni et al. v. World Business Lenders, LLC et al* (removed to E.D.N.Y. Dec. 12, 2019 as No. 2:19-cv-06971), https://www.nclc.org/images/Adoni-v.-World-Business-Lenders.pdf.

[147] *Id.* at 5.

[148] *Quantum-Mac Int'l, Inc., Okwu v. World Business Lenders, LLC et al.*, No. 1:20-cv-02353-WMR (N.D. Ga. Filed June 2, 2020), https://www.nclc.org/images/pdf/legislation/Quantum-Mac-v.-WBL-complaint.pdf.

[149] *Koffel et al. v. World Business Lenders, LLC, et al.*, No. CACE-20-009401 (17th Jud'l Cir. For Broward Co., FL filed June 7, 2020), https://www.nclc.org/images/pdf/legislation/Koffel-et-al-v-WBL-complaint.pdf.

[150] *See* Letter from small business, consumer and civil-rights groups to Comptroller Joseph M. Otting re FDIC and OCC support for predatory small business lender (Oct. 24, 2019), https://www.nclc.org/issues/ltr-opp-rent-a-bank.html.

[151] *See, e.g.,* Zeke Faux, *Wall Street Finds New Subprime With 125% Business Loans*, Bloomberg (May 22, 2014), https://bloom.bg/2WLWRYG; Gretchen Morgenson, *New Trump Admin Rule Makes it Easier for Lenders to Charge Small Businesses Super-High Interest Rates*, NBC News (Dec. 8, 2020), https://www.nbcnews.com/business/economy/new-trump-administration-rules-make-it-easier-lenders-charge-small-n1250023.

[152] Complaint to Avoid and Recover Transfers Pursuant to 11 U.S.C. §§ 547, 548 and 550 and for Damages Pursuant to Applicable Law, Straffi, Ch. *Trustee v. Retail Capital, LLC et al.*, No. 15-19010 (Bk. Ct. D.N.J. filed Mar. 23, 2017), https://www.nclc.org/images/pdf/legislation/Straffi-v.-Retail-Capital-complaint.pdf.

[153] Plaintiff's Original Petition, Request For Disclosures, First Set of Interrogatories, and Request for Production, No. 067-313281-19 (D.Ct. of Tarrant Co., TX filed Nov. 13, 2019), https://www.nclc.org/images/pdf/legislation/Hamilton-v.-BFS-complaint.pdf.

[154] *See id.*, Exhibit 1.

[155] Previously on Verge Credit's website, on file with author
(emphasis added).

[156] 85 Fed. Reg. at 68745-46.

[157] OCC Proposed Rule, 85 Fed. Reg. 44225.

[158] OCC Bulletin 2013–29, ''Third-Party Relationships: Risk Management Guidance'' (Oct. 30, 2013); OCC Bulletin 2020–10, ''Third-Party Relationships: Frequently Asked Questions to Supplement OCC Bulletin 2013–29'' (Mar. 5, 2020).

[159] Arizona Payday Loan Reform, Proposition 200 (2008), https://ballotpedia.org/Arizona_Payday_Loan_Reform,_Proposition_200_(2008) (60% of voters opposed continuing an exemption from the state's rate cap); Pat Ferrier, Fort Collins Coloradoan, "Colorado election: Proposition 111, capping interest on payday loans, passes" (Nov. 6, 2018) (77% of voters voted to approve a 36% rate cap); Matt Volz, Missoulian, Montana voters approve payday loan, real estate tax initiatives (Nov. 3 2010). http://bit.ly/2KqQ7rb (73% of Montana voters approved a 36% rate cap); Ohio Payday Lender Interest Rate Cap, Referendum 5 (2008) https://ballotpedia.org/Ohio_Payday_Lender_Interest_Rate_Cap,_Referendum_5_(2008)#cite_note-ohsos-1 (63% in favor of a 28% rate cap); South Dakota Official Election Returns and Registration Figures, Primary Election (June

7, 2016), https://sdsos.gov/elections-voting/assets/ElectionReturns2016_Web.pdf (76% in favor of a 36% rate cap). In Arizona, the payday lenders later found a loophole for auto title loans. In Ohio, the payday lenders found a loophole in the mortgage laws. The Ohio legislature later closed that loophole but allowed higher-cost loans than the voters had approved.

PREPARED STATEMENT OF REVEREND DR. FREDERICK D. HAYNES, III

SENIOR PASTOR, FRIENDSHIP-WEST BAPTIST CHURCH, DALLAS, TEXAS

APRIL 28, 2021

Good morning Chairman Brown, Ranking Member Toomey, and Members of the United States Senate Committee on Banking, Housing, and Urban Affairs. I am Frederick Douglass Haynes, III. I serve as Senior Pastor of Friendship-West Baptist Church, a congregation of 12,000 parishioners in Dallas, Texas.

I am grateful for the opportunity to come before you to speak on behalf of a broad and diverse faith community to morally appeal to you to see how important it is to stop those who would use their greed to exploit those in need through high-cost predatory debt traps that we, of many faith traditions, overwhelmingly consider usury.

Usury and economic exploitation of the poor are condemned in all faith traditions. Those who exploit the poor through predatory practices are referred to as "wolves" in the scriptures. The predatory practitioners of "Rent-A-Bank" schemes may well be referred to as wolves dressed up in the legitimacy of a bank. The victims of such practices, however, testify that an economic predator by any other name is still trapping the desperate in debt. These "moral monsters," to use the language of James Baldwin, feed their greed at the expense of the vulnerable.

For us, it is a simple matter of right and wrong, and we strongly oppose the Office of the Comptroller of the Currency's plan to enable predatory lenders to ignore State interest rate caps by paying a bank willing to masquerade as the "true lender." A few rogue banks are already participating in these exploitative agreements, and the OCC's rule would certainly bless the arrangement of laundering predatory loans and allow such devious schemes to proliferate.

For many years, people of faith have come together and made a priority of challenging debt traps clad in deceptive wardrobes ranging from the crass quick-cash neon signs that litter the neighborhoods of the needy, to the polished promises of "fintech" lenders who claim to be the saviors of families who need "access to credit," and the regulators who agree.

The con, of course, is that the "access" they impose on these families is a deceitful dead end to a debt booby trap, as they aim to draw them into a machine calibrated to siphon funds from their bank accounts until they have all but bled them dry. In many cases, their harm goes beyond reaping fees several times the dollar amount of their customer's original loan to forcing a closed account, and thus sinking that family into a sea of bad credit options and ending their access to mainstream banking services. Many must file bankruptcy due to the moral bankruptcy of the predatory lenders, who make them pay a high cost for being poor.

I have seen the real-world impact of these debt traps on the lives of my parishioners far too often. A grandmother who had recently lost her husband and needed cash for medicine took a $300 loan, and responsibly paid it off. But not before the debt trap machine did what it was designed to do and rolled her over several times, until she had paid back $800 for that $300 loan.

Another of my congregants, a recent college graduate, worked two jobs to make ends meet. When his mother became sick, he had to choose between paying his car loan and her medication and utilities. He took out a payday loan believing it would help him get through the crunch, but an interest rate of 450 percent set him up to bring him down financially, and he ended up losing the car he needed to get to work.

Unfortunately, these are just two of many examples of persons who experienced the "soul killing" of working hard for so little, while coming up short and needing an extension that dug them deeper into debt.

This clearly harmful and underhanded practice is played out in congregations of all faith traditions all across the country, and in communities that are already economically bereft, and underbanked. Predatory payday, car title lender and installment lenders rob financially vulnerable people of billions in fees every year, by replicating a dreadful, disadvantageous practice and hiring lobbyists to put a halo on their devilment for lawmakers and regulators.

Faith leaders across Christian, Jewish, and Muslim traditions have for decades been compelled to join together in the battle against usury and predatory lending debt traps. Faith groups representing 118 million Americans mobilized to call on the Consumer Financial Protection Bureau to enact a strong rule addressing the inimical systems of payday lending debt traps; and have been up in arms again as the rule faces threats.

I am a part of a coalition of conscience, Faith for Just Lending, that includes Christian denominations from the right to the left and across the broad middle who are bound together in opposition to predatory lending and inspired by a vision of fair and just financial practices that serve the dignity of all of our American families. The coalition includes Catholic Charities USA, Center for Public Justice, Cooperative Baptist Fellowship, Ecumenical Poverty Initiative, Ethics & Religious Liberty Commission of the Southern Baptist Convention, Faith in Action (formerly PICO National Network), National Association of Evangelicals, National Baptist Convention USA, National Latino Evangelical Coalition, The Episcopal Church, and United States Conference of Catholic Bishops, to name a few.

I am especially appalled by the harm done to communities that face historic divestment, who are exploited and suffer from economic injustice. These communities have historically been crippled by redlining and now they are being ripped off by the social violence of financial predators. For decades banks used maps to deny loans to communities of color and now they are using maps to serve as loan sharks of those same communities. We know that payday lenders have a history of setting up shop in Black and Brown neighborhoods; we have seen this firsthand in the community surrounding our church, and research bears it out. Now these payday lenders are shifting to online loans through rent-a-bank schemes and targeting the same struggling communities.

That the OCC would open up our communities to more exploitation at a time when we are suffering so severely from COVID–19 and its economic impact is immoral and disgraceful, especially when we have seen some of these predatory lenders get Paycheck Protection Program (PPP) relief funds that kept their debt traps functioning through the crisis. That the OCC would make a rule giving predatory lenders a way to charge 200–400 percent interest and more, even in States that have fought hard to stop this predation with a 36 percent interest rate cap—that is indeed obscene, and as we would put it in my faith community, sinful and demonic.

I offer with my testimony, letters from the Faith for Just Lending coalition and the Faith & Credit Roundtable calling for a repeal of the OCC's rule. All are engaged with efforts to end poverty; and are deeply concerned about the impact of the rule on our hardworking families and our financially vulnerable communities. The States have the authority and the responsibility of protecting consumers from predatory lenders, and Congress and the OCC must respect that authority.

We ask for your recognition of the vast, deep financial harm predatory lending causes along with the hurt and disruption it causes to families. We ask for you to follow the model of Jesus and announce, "Good news to those made poor by economic exploitation" and pass a 36 percent cap. There is a way to provide access to credit without engaging in legalized loansharking.

We ask, finally, for your strong and proactive support of the Congressional Review Act that will overturn the OCC's true lender rule, and remember the wisdom of Thomas Piketty who warns, "When private interests exceed the interest of the public, we cease to be a republic or a democracy."

Thank you for the opportunity to share my testimony today. I look forward to answering any questions you may have.

March 24, 2021

Re: Support Congressional Review Act (CRA) challenge to Office of the Comptroller of the Currency's (OCC) "National Banks and Federal Savings Associations as Lenders" rule

Dear Members of Congress:

We write to urge you to support the Congressional Review Act (CRA) challenge to the Office of the Comptroller of the Currency (OCC)'s "National Banks and Federal Savings Associations as Lenders" rule. The OCC rule overrides state usury laws, legalizing predatory lending even in states that have outlawed it.

Since its creation in 2015, Faith for Just Lending has called for limits on predatory lending. In the wake of the major economic disruption caused by the coronavirus pandemic, many Americans have lost their jobs, incomes, and social support. Now, more than ever, we should also prohibit usury and economic exploitation. Collectively our organizations and denominations represent millions of Christians across the country. Our churches and charities are actively engaged in efforts to end poverty, alleviate suffering and promote opportunities for all people to flourish. **We are deeply concerned about how the OCC's rule will impact the working families and vulnerable communities we serve.**

Over the last several decades, high-cost lending to those in need has increased significantly. Nearly 16,000 payday and car title loan stores operate nationwide. Taking advantage of loopholes and a weakening of traditional usury laws, many of these lenders now offer loans at 300% APR and higher. Far too often, the result is families trapped in a cycle of debt with even less ability to pay the bills, keep food on the table, save for the next emergency, or provide for their children. Currently 19 states and the District of Columbia have enacted rate caps to protect borrowers from usurious interest rates and fees.

The OCC's rule threatens existing state protections against predatory payday lending and emboldens lenders by encouraging non-bank lenders to partner with banks as the "true lender", thus evading state interest rate caps. The rule allows lenders charging interest rates of 179% or higher to evade state rate caps.

Scripture condemns usury and teaches us to respect the God-given dignity of each person and to love our neighbors rather than exploiting their financial vulnerability. Thus, just lending is a matter of Biblical morality and religious concern. Fairness and dignity are values that should be respected in all human relationships including business and financial relationships. Existing state rate caps of 36% APR and below allow for responsible products to thrive and flourish in the marketplace. They also serve as a bulwark against predatory actors.

We urge you to support the CRA challenge to the OCC's rule and urge you to respect the authority and responsibility of states to enact strong consumer protections without providing a loophole for predatory lenders to subvert existing state rate caps.

Sincerely,

The undersigned members of Faith for Just Lending
Contact: Katie Thompson katie.thompson@cpjustice.org 908-472-8820

Southern Baptist Ethics & Religious Liberty Commission

National Latino Evangelical Coalition

Cooperative Baptist Fellowship

National Association of Evangelicals

National Baptist Convention, USA, Inc.

Center for Public Justice

Faith & Credit Roundtable

CRL Center for Responsible Lending

April 27, 2021

Dear Members of Congress,

As people of faith concerned about the dignity and worth of all God's children, we write to urge you to support S.J.Res. 15/H.J.Res 35, the Congressional Review Act measure to overturn the OCC's so-called "true lender" rule. By enabling nefarious partnerships between predatory lenders and banks who are willing to pose as the true lender for a fee, the "rent-a-bank" scheme blessed by the rule would trample state consumer protections. This misguided rule allows non-bank lenders to effectively pay for a bank's exemption from state interest rate caps, enabling predatory lenders to charge far in excess of the usury cap in states where they operate. This circumvents the right of states to set and enforce usury caps that prevent predatory lending.

As faith leaders, we witness and minister to the pain and suffering in our communities. We see that time and again predatory loans make suffering worse. At a time of great economic peril in our nation, we urge you to vote to overturn this rule and focus instead on supporting hardworking people with fair and responsible resources.

Existing state rate caps of around 36% APR allow for responsible products to thrive and flourish in the marketplace. They also serve as a bulwark against predatory actors. The "true lender" rule provides an easy avenue for predatory lenders to evade these critical protections.

Forty-five states set caps on installment loans that could simply be ignored by high-cost lenders who partner with banks and make loans with terms that create a harmful cycle of debt. Eighteen states plus the District of Columbia cap interest rates on payday loans around 36% to stop this predation. Illinois joined the ranks of states stopping predatory payday lending in March of this year; in November 2020, Nebraska voters passed a 36% rate cap for payday loans at the ballot with 83% of voters in support of the measure. The harmful "true lender" rule gives predatory lenders a green light to enter all of these states and set up shop with lending schemes designed to drain wealth from those who have the least.

Scripture states in Proverbs 22:22 "do not rob the poor because they are poor." Our faith communities have worked long and hard to stop predatory lenders from robbing families and vulnerable communities of their very dignity. In fact, according to polling in January 2020, almost 70% all Christians are concerned about the practice of rent-a-bank. Too often, loans that are marketed as help instead make it more difficult to care for basic needs, provide for children, and build futures with financial stability and prosperity.

We strongly oppose the OCC "true lender" rule and urge you to vote to overturn it. The actions of states who have chosen protect consumers in their state deserve respect, American families deserve better, and God requires more from a just society.

Sincerely,

The Faith and Credit Roundtable

National Organizations

United Church of Christ, Justice and Local Church Ministries
National Baptist Convention USA Inc.
Cooperative Baptist Fellowship
Samuel DeWitt Proctor Conference

State/Regional Faith Organizations
The Ohio Council of Churches
Project GREEN, Grand Rapids, MI
Missouri Faith Voices
Mustard Seed Ministries
Faith Commons, Dallas, TX
LUCHA Ministries, Inc., Fredericksburg, VA
Cooperative Baptist Alabama, Birmingham, AL
Fifth Episcopal District, African Methodist Episcopal Church
Westside Sponsoring Committee, Pointe Coupee Parish, LA

Houses of Worship
First Baptist Church of Corona, East Elmhurst, NY
Friendship-West Baptist Church, Dallas, TX
New St. Mark Baptist Church, Baltimore, MD
South Main Baptist Church, Houston, TX
House of Love and Prayer, Harlingen, TX
Church of the Highlands, Shreveport, LA
Second Baptist Church, Memphis, TN
Faith Baptist Church, Georgetown, KY
Denver District AME Zion Church, Denver, CO

Individual Faith Leaders

Rev. Dr. Jay Kieve
Cooperative Baptist Fellowship South Carolina
Anderson, South Carolina

Rev. Dr. Stephen Cook
Second Baptist Church
Memphis, TN

Prof. Kristopher Norris
Calvary Baptist Church
Washington, DC

Robert Tucker
Crescent Hill Baptist Church
Louisville, KY

Erin Conaway
Seventh & James Baptist Church
Waco, TX

Cliff Vaughn
Good Faith Media
Nashville, TN

Bil Baxley
Greystone Baptist Church
Raleigh, NC

Richard Sample
Cooperative Baptist Fellowship
Fremont, CA

Karen Morrow
Cooperative Baptist Fellowship
Clifton, TX

Minister Susie C. Reeder
Snyder Memorial Baptist Church
Fayetteville, NC

Associate Pastor Dihanne Moore
Oasis International Worship Center
Decatur, GA

Rev. Aaron Brittain
Talbot Park Baptist Church
Norfolk, VA

Caitlyn Gudmundsen
Ravensworth Baptist Church
Lutheran Services in America
Fairfax, VA

Rev. Kristin Ericka McAttee
Cooperative Baptist Fellowship of Oklahoma
Norman, OK

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Second Baptist Church
Little Rock, AR

Rose A Bear
Baptist Collegiate Ministry
Terre Haute, IN

Paulette Reeves
First Baptist Church
Austin, TX

Rev. Jeni Cook Furr
Woodland Baptist Church
San Antonio, TX

Sharon Vickrey
Royal Lane Baptist
Dallas, TX

Luise Snell
Waco, TX

Terri Byrd
Cooperative Baptist
Birmingham, AL

Pastor Lloyd Fields
Greater Gilgal Baptist Bible Church
Kansas City, Missouri

Dr. Greg Smith
LUCHA Ministries, Inc.
Fredericksburg, VA

Leslie Weirich
Second Baptist Church
Liberty, MO

Pastor Michelle Carroll
First Baptist Church at the Singing Bridge
Frankfort, KY

Jerilyn Sanders
The Chalmers Center
Flintstone, GA

Carolyn Hansen
Compassion Coalition
Knoxville, TN

Rev. Dr. Charles E. Goodman, Jr.
Tabernacle Baptist Church
Augusta, GA

PREPARED STATEMENT OF BRIAN P. BROOKS

FORMER ACTING COMPTROLLER OF THE CURRENCY

APRIL 28, 2021

Introduction

Chairman Brown, Ranking Member Toomey, and Members of the Committee, thank you for the opportunity to appear before you today to discuss the Office of the Comptroller of the Currency's (OCC's) True Lender Rule and its importance for access to credit, bank balance sheet management, and the safety and soundness of the banking system.

It is important to note at the outset that the True Lender Rule [1] was adopted by the OCC following the earlier implementation of the separate "valid when made" rule. [2] "Valid when made," discussed more fully below, was adopted along substantially similar lines by both the OCC and the Federal Deposit Insurance Corporation (FDIC). [3] While a Congressional Review Act resolution has been filed in the House of Representatives and the Senate with respect to the True Lender Rule, the time period for filing any such resolution with respect to the earlier "valid when made" rule elapsed some time ago. That means that the rule today is that both national banks (under the OCC's rule) and State banks (under the FDIC's rule) may originate loans at an interest rate lawful under the law of the State where the bank is located, and may sell such loans to nonbank investors, without regard to interest rate caps in the State where the borrower or downstream investor is located. Nullification of the True Lender Rule will not change that. As explained below, the purpose of the later-adopted True Lender Rule is simply to clarify when a bank is the true lender with respect to a particular loan and provide a bright line as to when OCC examination and enforcement authority applies to ensure compliance with consumer protection and other legal requirements with respect to the loan. Since the "valid when made" rule will continue in force in any event, it is important to consider the potential negative effects of undoing a rule whose purpose is to ensure that banks exercising their authority under "valid when made" principles comply with legal requirements when they engage in secondary market transactions.

"Valid When Made," Secondary Markets, and Access to Credit: Increasing Credit Availability to Low- and Moderate-Income Americans by Allowing Banks to Leverage Their Balance Sheets Through Fintech and Other Partnerships

The total demand for consumer credit in the United States far exceeds the amount of bank balance sheets dedicated to that business segment. [4] Moreover, State interest rate caps historically made it harder for residents of some States to access credit than residents of other States. Congress and the Supreme Court have addressed these problems in two ways. First, the Supreme Court's 1978 decision in Marquette Nat'l Bank of Minneapolis v. First of Omaha Serv. Corp. [5] and Congress' 1980 enactment of the Depository Institutions Deregulation and Monetary Control Act allowed both national and State banks to export their home State's interest rate to customers in other States. Marquette reached a bipartisan result. The case was successfully argued by Robert Bork, and Justice William Brennan authored the decision for a unanimous Court. Congress' decision to expand the Marquette rule on interest rate exportation to State banks as well as national banks was similarly bipartisan, passing with an overwhelming majority of both Democrats and Republicans and signed into law by President Jimmy Carter. In short, in the inflation crisis of the late 1970s, when the prime rate peaked at 21.50 percent and some States had 8 percent usury caps, American leaders of all political stripes understood the importance of allowing State interest rate exportation to improve access to credit.

The second way Congress addressed the inadequacy of bank balance sheets to address all consumer loan demand is in empowering national banks to sell their loans to third parties. The National Bank Act provides that banks may enter into contracts, and the Supreme Court has held consistently for almost 200 years that banks' contracting powers specifically include the power to sell and assign their interest in loans to investors. [6] The implication for credit access is clear: When a bank sells a loan, it frees up balance sheet to make the next loan. This is true when a bank sells a consumer loan to a marketplace lender; when a bank sells a mortgage to one of the GSEs; or when a bank securitizes its credit card receivables. The prin-

[1] 85 FR 68742 (Oct. 30, 2020).
[2] 85 FR 33530 (June 2, 2020).
[3] See 85 FR 44146 (July 22, 2020).
[4] *https://www.federalreserve.gov/releases/g19/current/*
[5] 439 U.S. 299 (1978).
[6] See Planters' Bank of Miss. v. Sharp, 47 U.S. 301 (1848).

ciple is the same: Banks tap secondary market investors to sell loans and use the proceeds to make more loans. If we think access to credit is a good thing—and Federal Reserve research shows that countries with more widely available credit have lower poverty rates [7]—it follows that letting banks make more loans rather than less is desirable.

This idea was called into question in the 2015 Second Circuit Court of Appeals decision in Madden v. Midland Funding LLC. [8] In marked contrast to the bipartisan consensus of the late 1970s surrounding interest rate exportation, some advocates cheered Madden for enforcing a State usury law and protecting consumers from high interest rates. But the reality of that "protection" was far murkier. Multiple studies of the effect of Madden on credit markets found that, when unable to sell higher interest rate loans to investors, banks focused their lending activities on smaller loans to wealthier and higher-credit-score consumers. [9] One study found that banks in the States subject to the Madden ruling reduced lending to LMI borrowers by an astounding 64 percent. [10] In short, the available evidence showed that enforcing a State usury limit against a bank-originated loan did not make credit less expensive for LMI borrowers; it made credit less available. This evidence is supported by the analysis of numerous economics and finance professors who submitted a brief amicus curiae in support of the OCC's position in litigation brought by the State of California and others seeking to challenge the "valid when made" rule. [11]

Madden was at a minimum a legally debatable decision and not in line with either preexisting precedent nor later authorities. In 2005, another Federal court of appeals held that "the assignee of a debt . . . is free to charge the same interest rate that the assignor . . . charged the debtor . . . even if the assignee does not have a license that expressly permits the charging of a higher rate." [12] During the Obama administration, the Solicitor General opined that the Madden court "erred in holding that State usury laws may validly prohibit a national bank's assignee from enforcing the interest-rate term of a debt assignment that was valid under the law of the State in which the national bank is located." [13] And just last year the U.S. Court of Appeals for the Ninth Circuit criticized Madden at length in holding that another State law that impaired the ability of national banks to sell loans in the secondary market was preempted. [14]

The True Lender Rule: Providing Clarity Necessary To Allocate Responsibility for Legal Compliance

While the OCC and FDIC "valid when made" rules clarified established law regarding banks' powers to sell loans in the secondary market without jeopardizing the enforceability of the relevant interest-rate terms, it did not specify when the bank was the legal originator of the loan and when a fintech, marketing partner, or other nonbank company was the legal originator. The purpose of the True Lender Rule is to provide clarity on that question.

Prior to the True Lender Rule, courts employed a variety of subjective multifactor balancing tests to determine who the true lender was with respect to a given loan transaction. In New York and Connecticut, the States subject to the Madden decision, the question was irrelevant because even if a bank actually originated the loan the interest rate became unenforceable following sale to a nonbank investor. But outside those States, the complicated question of who is the true lender consumed enormous litigation resources to resolve in any given case. In some cases, courts held that a bank was the true lender and thus upheld the enforceability of the transaction against a usury challenge. [15] In other cases presenting similar circumstances, courts held that the bank's involvement was not sufficient to make it the true lender and held the transaction to violate State usury laws. [16]

One purpose of the True Lender Rule was to eliminate the uncertainty caused by subjective multifactor balancing tests—uncertainty that had the potential to seri-

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[7] See, e.g., *https://www.dallasfed.org/-/media/documents/research/eclett/2006/el0610.pdf*.

[8] 786 F.3d 246 (2d Cir. 2015).

[9] See Colleen Honigsberg et al., "How Does Legal Enforceability Affect Consumer Lending? Evidence from a Natural Experiment", 60 *J.L. & Econ.* 673, 675 (2017) (cited in McShannock v. JP Morgan Chase Bank, N.A., No. 19-15899 (9th Cir. 2019)).

[10] See Piotr Daniesewicz and Ilaf Elard, "The Real Effects of Financial Technology: Marketplace Lending and Personal Bankruptcy" 22 (2018), *https://tinyurl.com/y5s3s7oh*.

[11] See *https://www.occ.gov/publications-and-resources/publications/economics/hamiltons-corner/amicus-brief.pdf*.

[12] Olvera v. Blitt and Gains, P.C., 431 F.3d 285, 286, 289 (7th Cir. 2005).

[13] *https://www.justice.gov/sites/default/files/osg/briefs/2016/06/01/midland.invite.18.pdf*

[14] McShannock v. JP Morgan Chase Bank NA, *https://cdn.ca9.uscourts.gov/datastore/opinions/2020/09/22/19-15899.pdf*.

[15] See, e.g., Beechum v. Navient Solutions, Inc., 2016 WL 5340454 (C.D. Cal. Sept. 20, 2016).

[16] See, e.g., CFPB v. CashCall, Inc., 2016 WL 4820635 (C.D. Cal. Aug. 31, 2016).

ously disrupt secondary markets (including securitization markets) for consumer loans and reduce access to credit, particularly among those who need it most. It did not seem controversial to simply answer the question of whether the bank or another party was in fact the true originator of a loan. But another purpose of the True Lender Rule was to address allegations about "rent-a-charter" schemes. While "rent-a-charter" is not a legal or technical concept, OCC staff took the concept to refer to situations in which a nonbank paid a fee to a bank for the sole purpose of evading legal requirements, without the bank actually being involved in loan underwriting, risk management, or legal compliance. In short, the OCC took "rent-a-charter" to mean an arrangement in which the nonbank was seeking to ensure that no one was actually responsible for consumer protection or other compliance obligations.

That is precisely why the OCC, in issuing the True Lender Rule, expressly stated that it would "hold[. . .] banks accountable for all loans they make, including those made in the context of marketplace lending partnerships or other loan sale arrangements."[17] Specifically, the OCC emphasized its "expectation that all banks [will] establish and maintain prudent credit underwriting practices and comply with applicable law, even when they partner with third parties."[18] If not, "the OCC will not hesitate to use its enforcement authority consistent with its longstanding policy and practice."[19] This is in contrast with historical practice in which banks sought to minimize their role in loan origination at the same time their marketing partners sought to disclaim responsibility as the true lender. Under the True Lender Rule, the days of each party pointing the finger at the other are over; borrowers and regulators now know who is responsible if the bank either is named on the note or funds the loan on the date of origination. This clarity thus is positive not only for secondary market functioning, but for consumer protection accountability.

The OCC has a long history of holding banks accountable for failing to manage the consumer protection obligations and compliance risks of third-party service providers, including those partners involved in making loans to consumers. In the early 2000s, the OCC took several groundbreaking actions that are precedents for preventing abuses in certain relationships.[20] Those actions continue to provide an important playbook for consumer protection today and demonstrate the value of strong Federal supervision.

True Lender and the Role of States: The Dual Banking System, Parity, and Usury

Some critics of interest rate exportation claim that it undermines State authority over their own credit markets. That has not been the view of leaders of either party historically. As noted above, the Marquette decision holding that national banks may export their home States' interest rate to borrowers in other States was argued by Robert Bork and decided by Justice William Brennan writing for a unanimous Supreme Court; the Depository Institutions Deregulation and Monetary Control Act, which extended interest rate exportation powers to State banks, was approved by overwhelming majorities of both parties in Congress and signed into law by President Jimmy Carter; and President Obama's Solicitor General took the position that Madden, the most prominent case to criticize interest rate exportation in the context of secondary market loan sales, was wrongly decided. Nonetheless, the argument persists that States should be able to establish the rules for their own credit markets, and that interest rate exportation somehow interferes with that principle.

The most straightforward answer to this concern is that Congress viewed the correct balance of State and Federal power through the lens of the dual banking system. In Congress' view, the most important concern was not preserving State usury laws but ensuring that State banks operate on a level playing field as national banks. Thus, as noted, Congress gave State banks the same authority to export their home States' interest rates that national banks enjoyed under Marquette.

Second, nothing about the True Lender Rule (as distinct from the "valid when made" rule, which is not under Congressional Review Act challenge) affects State authority to set rules regarding when a State-chartered bank (as opposed to a marketplace lender) is the true originator of a given loan. This is why the OCC and FDIC both adopted versions of the "valid when made" rule, but only the OCC adopted the True Lender Rule. The OCC, as the chartering agency for national banks,

[17] *https://www.federalregister.gov/documents/2020/10/30/2020-24134/national-banks-and-federal-savings-associations-as-lenders*

[18] Id.

[19] Id.

[20] See, e.g., OCC NR 2002-85 (*https://www.occ.gov/news-issuances/news-releases/2002-nr-occ-2002-85.html*); NR 2003-6 (*https://www.occ.gov/news-issuances/news-releases/2003/nr-occ-2003-6.html*); NR 2003-3 (*https://www.occ.gov/news-issuances/news-releases/2003/nr-occ-2003-3.html*).

has the statutory authority to interpret national bank powers. The FDIC, which is not a chartering agency, lacks that authority with respect to State banks. Thus States remain free to set their own true-lender rules for their own chartered banks if they wish to do so.

Third, nothing about the True Lender Rule alters State authority to license, supervise, and enforce laws applicable to nonbank lenders. In fact, nonbank consumer lenders, including virtually all payday lenders today, operate as State-licensed companies and are subject to State supervision. The OCC supports strong State supervision of the nonbank lenders and encourages States to use the full extent of their authority to protect consumer from abuses that occur among these service providers. The point of the companion "valid when made" and True Lender Rules, however, is that it is not an "abuse" for a bank to exercise its statutory authority to export its lawful interest rate to borrowers in other States and to sell loans including such rates in the secondary market.

Finally, it bears emphasis that it was Congress' decision—not the OCC's—to allow both State and national banks to export interest rates. That long-settled decision was not a departure from Alexander Hamilton's view of State–Federal relations in our system of federalism. In the same way that the first Bank of the United States was deemed immune from State taxation because the "power to tax involves the power to destroy" an instrumentality of national economic policy,[21] a State power to constrain interest rates agreed in loans originated by federally chartered banks would impede the functioning of the national banking system—itself one of the most important aspects of national economic policy. But States can set their own "true lender" rules for their banks in the same way that they can charter their own banks, and the existence of the national banking system is not a threat to State sovereignty in either situation.

Thank you for the opportunity to testify today and I look forward to answering the Committee Members' questions.

PREPARED STATEMENT OF CHARLES W. CALOMIRIS

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APRIL 28, 2021

Chairman Brown, Ranking Member Toomey, Members of the Senate Banking Committee, it is a pleasure to be with you today to discuss the economic benefits that arise from allowing financial institutions of various kinds to partner with each other in providing lending services to their customers. This partnering is especially advantageous when it occurs in the context of an integrated national market for loans, which has produced enormous improvements in market efficiency and financial inclusion.

I emphasize that the gains from flexible partnerships among financial intermediaries in providing various aspects of banking services not only result in improvements in aggregate efficiency and better loan pricing for consumers on average; the gains also include greater financial inclusion for our unbanked or underbanked citizens, and that is particularly apparent in the new partnerships that are developing between traditional enterprises and new fintech firms. At the end of my statement I provide an appendix, which I will not present orally, but which I ask you to admit as part of my written statement, which summarizes in detail how fintech firms, in particular, are contributing so much to improvements in financial inclusion.

The understanding that it is advantageous to encourage an integrated national market that permits diverse businesses with different comparative advantages to work together is not new. In the Supreme Court's unanimous Marquette decision in 1978, empirical evidence of these economic advantages informed the Justices' opinions, and since then, over the past four decades, a massive amount of evidence in support of this proposition has been published in top economics journals.

Recently, a nonpartisan group of 47 leading scholars of banking working at America's greatest universities summarized this literature in an amicus brief, which was filed in support of the Office of the Comptroller of the Currency's (OCC's) defense of its "true-lender" rule.[1] My testimony here today will summarize for you that con-

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[21] McCulloch v. Maryland, 17 U.S. 316 (1819).

[1] These scholars are faculty at the following institutions: Babson College, Boston College, Columbia University, Cornell University, Dartmouth College, Fordham University, Harvard University, Indiana University, London Business School, Louisiana State, New York University,

sensus, which is remarkably clear and unequivocal. While economic analysis often provides a mixed and inconclusive picture, in this case, the conclusions about the advantages of an integrated national system are unambiguous and the magnitude of the effects described are large, which explains why a very prominent group of nonpartisan bank scholars found it so easy to reach rapid agreement on their strong conclusions.

Economic Advantages of Banks' Partnering With Others To Provide Loan-Related Services

As background, the OCC's "true lender" rule clarified that a bank that originates a loan retains the consumer protection obligations related to making that loan whether or not it sells the loan to another party. This rule guards against fears of shady origination practices, "rent-a-charter" schemes, or predatory lending for consumer loans that are originated within the Federal banking system and sold to others. The rule adheres to longstanding legal precedents by making it clear that the origination of the loan is the act of lending. The sale of the loan, like the sale of any asset, does not change that fact.

Some State authorities have sought to impose new limits on interstate banking by claiming that the act of selling a loan somehow changes who the original lender was and potentially invalidates the terms of the loan, which were valid when made. A key goal of this legal theory appears to be preserving the ability of the State to enforce usury laws that limit interest rates on loans to its residents. For example, a national or State bank in South Dakota can originate a loan with a borrower in California at a rate above the California usury ceiling, and then sell it to another lender.

Ever since the unanimous Supreme Court Marquette decision in 1978 it has been clear that a federally chartered bank headquartered in one State may originate loans in other States, and when doing so the bank is not bound by the usury laws of the States other than the one in which it is headquartered. The new challenge to interstate banking invents a new theory that somehow the terms of a loan at origination, such as its interest rate, are rendered impermissible as the result of the sale of the loan.

Obviously, if this new theory were upheld in the courts, it would wreak havoc on the national market for loan sales. But why should anyone care? Why does the ability to sell a loan matter to individual consumers?

As I alluded to before, 47 prominent academic economists specializing in banking and bank regulation have just provided the answers to those questions in a brief filed in support of the OCC's position in the case in question.[2] Their cogent analysis, summarizing decades of academic research on the social gains that have been reaped from the growth of the loan sales market that occurred after the Marquette decision, deserves widespread public attention. My summary of their argument includes many direct quotations, which are excerpts from the brief.

Their central insight is that the competitive abilities to originate loans, to hold loans, or to perform other services related to loan, can differ across different financial service providers. One bank may be positioned well to originate a particular loan while a different bank may be better positioned to hold it. The divergence of comparative advantage in origination and holding loans reflects "diverse regulatory frameworks, information processing capabilities and access to capital."

"Therefore, a bank's pool of local loanable funds will not necessarily always match the loan demand generated by the supply of local investable projects. Some markets will have an oversupply of good borrowers that cannot be funded by banks, while other markets will have an excess of funds due to the lack of good borrowers. The ability to transfer loans between institutions improves efficiency and production in both types of markets, by allowing funds to flow across space. Local institutions can exploit local information to make good origination decisions, whereas other institutions having excess local funds are able to hold more good loans than they would otherwise be able to make to (their) local borrowers."

"If . . . the usury law of the loan buyer's State applied to the loan, the market for loan sales would be significantly disrupted: an institution in one State could le-

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Northwestern University, Ohio State University, Stanford University, University of Akron, University of California-Berkeley, University of California-Irvine, University of Chicago, University of Florida, University of Kansas, University of Maryland, University of North Carolina, University of Pennsylvania, University of Texas, University of Virginia, University of Washington, Utah State, Vanderbilt, Washington University in St. Louis.

[2] "Brief of Amicus Curiae in Opposition to Plaintiffs' Motion for Summary Judgment and in Support of Defendants' Cross-Motion for Summary Judgment", U.S. District Court, Northern District of California, Oakland Division, Case No. 20-cv-05200-JSW, Hon. Jeffrey S. White, Filed January 21, 2021.

gally make the loan but institutions in other States may not purchase it with the same pricing. Consequently, the integrated secondary market for loan sales would be reduced and fragmented across groups of States with similar usury laws. Therefore, to preserve a well-functioning market for loan sales, the OCC's Rule should be maintained."

Why does preserving efficiency in the loan market matter? "Economists have found that a well-functioning secondary market for loans has three benefits and these benefits would be mitigated if loan sales are restricted. First, loan sales expand the supply of credit by giving originating banks the opportunity to finance loans less expensively. The expansion of the banking system's aggregate lending capacity and the allocation of capital to the most productive projects regardless of location have important macroeconomic implications, such as greater economic growth."

"Second, loan sales reduce the risk of lending amongst banks by allowing greater diversification of lending portfolios. By buying loans from around the country, banks can reduce their exposure to the geography-specific risk in their immediate area. Banking system risk can also be reduced by sharing it with nonbank buyers of loans."

"Third, the expansion of lending and lowering of risk made possible by loan sales should lead to more financial inclusion and broader access to credit. Studies have shown that loan sales reduce the interest rates that borrowers pay on their loans and increase the likelihood that borrowers will receive a loan. These advantages should, in theory, be especially important for small and risky borrowers, who are often excluded from receiving loans when credit is constrained. Such financial inclusion has been highlighted as important for economic growth and a more equal distribution of wealth and income. Moreover, many innovative new (fintech) lenders rely on loan sales as a means of leveraging their origination capabilities, which can carry particular benefits for less wealthy or higher-risk borrowers. Encouraging loan sales will allow innovative new lenders to originate loans on a larger scale. Limits on the viability of the loan sales market would therefore have adverse effects on the underserved by limiting their ability to receive lower cost loans as well as receive funds through innovative financial inclusion intermediaries."

In other words, if the market for loan sales disappeared, credit supply would be reduced, and banks would become riskier, leading banks to charge more for all loans. Furthermore, the borrowers who would be hardest hit by this change would be those at the lowest rungs of the credit ladder, the "small and risky borrowers," because loan sales are playing a particularly important role in expanding financial inclusion, particularly for new fintech lenders.

The amicus brief points out that interstate loan sales are not a sideshow in our financial system. "The benefits of loan sales are clearly indicated by the fact that loan sales constitute a central component of the banking business. And while some loan sales would remain legal regardless of the court's ruling, the activity and depth of the secondary loan market would be limited if the court required that sold loans conform to the usury laws of the purchaser's State."

So, the benefits of interstate loan sales to consumers, especially the most vulnerable borrowers, are substantial. But shouldn't we worry that allowing loan sales across State lines undermines the effectiveness of usury laws? Doesn't that aspect of loan sales harm consumers? The brief, and the research it references, shows that more than four decades of research on this question provide a clear answer: no.

"The academic literature on the relative benefits and costs of maintaining usury rates provides a useful context for the decision. Usury rates attempt to restrict any potential market power that banks can use to disadvantage borrowers. However, usury ceilings also could differentially curtail loans to riskier and lower-quality borrowers, thus pushing them towards less-regulated types of borrowing. Empirical research quite broadly supports the notion that the latter effect dominates: that riskier-looking borrowers (who are often minorities or others with limited financial access) are hurt when usury ceilings are binding and benefited when they are loosened or eliminated. Interpreting the National Bank Act in a way that, contrary to the statutory scheme and the OCC's interpretation, allows usury laws from States not connected to the original loan transaction to frustrate loan sales, therefore, is likely to reduce the economic advantages of the secondary loan market in ways that adversely affect income and wealth distribution within the economy."

As I noted at the outset, rarely does economic analysis provide such clear, unambiguous conclusions. But in this case, scores of academic studies over many years repeatedly have reached the same conclusions. Well-intentioned advocates of limiting the interstate loan sales market in the interest of helping the poor need to read this amicus brief and the studies it cites.

To the many insightful points made in the amicus brief I want to close with two of my own observations. First, advocates of usury laws sometimes point to borrowers' lack of information as a rationale for usury laws. For example, a borrower that would qualify for a loan at 8 percent may not be aware that he or she would qualify for that loan, and a lender might trick him or her into agreeing to a loan with a much higher interest rate. This sort of trickery is possible when loan markets lack competition, and when borrowers lack information about their own credit risk. As the appendix to my testimony shows, the role of new fintech entrants in strengthening competition and empowering borrowers with new sources of information are precisely the reasons that fintech firms are making important contributions to financial inclusion. Rather than rely on usury laws and try to limit fintech-bank partnerships and thereby reduce the supply of credit, the right approach to dealing with potentially abusive credit practices is to encourage new partnerships with these new borrower empowering fintech providers.

Finally, there is a broader point that also deserves emphasizing, which the authors of the brief did not make. The Federal banking system was created in part to guarantee that Americans can participate in a national credit market by virtue of their status as American citizens. By maintaining a Federal banking system, we ensure that citizens have the economic freedom to enter into contracts with federally chartered banks if they wish to do so. When they do so, they are aware that Federal bank regulators, such as the OCC, maintain a strong and credible commitment to monitor those banks to ensure that credit and other banking services are provided in a manner consistent with safe and sound banking, as well as ethical treatment of consumers. In my experience as a public servant, and in my research as a historian of the OCC, I can affirm that this commitment is real, and that it should be a great source of pride to our country. It makes the economic freedom to engage in a Federal banking system especially meaningful and beneficial for consumers. The Federal banking system is not just a collection of banks, it is and always has been a source of economic freedom that empowers individuals and in doing so keeps our financial system, economy, and Nation strong.

Appendix: Fintechs as Levers for Financial Inclusion

Not only are new unbundled fintech providers more profitable and efficient than traditional banks, their technologies are proving to be very promising for improving access to financial services for many people who have not been served well by traditional banks, especially lower-income people. They can do so either as stand-alone service providers or acting in partnerships with other banks.

The U.S. banking system serves about 80 percent of American families' needs to make payments, save, and borrow. But what about the other 20 percent, the so-called unbanked and underbanked? What barriers explain why the normally reliable pressure of market competition has not led banks to compete for the business of such a large fraction of the population? How are fintech banks (a term I will use to refer both to chartered and nonchartered, "shadow" fintech banks) breaking down some of those barriers?

Historically, the barriers that have kept the unbanked or underbanked from becoming fully integrated into the formal financial sector consist of several supply-side and demand-side factors. On the supply side, these include challenges lenders face in differentiating borrowers' risks, the high transaction costs of serving small-dollar customers, and the costs of regulatory uncertainty (which are often defined on a per-customer basis, and therefore, disproportionately disadvantage small dollar customers). On the demand-side, factors such as the limited financial resources of low-income customers, their limited experience with financial service providers, and their preferences for particular kinds of products can limit access.

With respect to demand-side factors, how have fintech banks improved financial access for the unbanked or underbanked? According to an FDIC survey, 13 percent of unbanked households state that banks do not offer products or services that they need. For example, a majority of unbanked or underbanked households live paycheck to paycheck, cannot afford the high standard minimum balances or account fees banks require, and do not live near branches. [3] To meet some of these demands, fintech banks have developed different products that may be particularly attractive to unbanked or underbanked households. In particular, fintech banks provide novel products with low-cost fees or and smaller minimum small dollar amount loans. For example, some offer free overdraft protection (typically limited to up to $100) [4] or 0 percent APR cash advance that requires no credit check and no monthly fee (lim-

[3] Indeed, about 9 percent of unbanked household cite inconvenient location or inconvenient hours as the reason for not having a bank account.

[4] Chime.com; Varomoney.com; Dave.com.

ited to $250).[5] Many now offer bank accounts with no monthly fees, no overdraft fees for limited overdraft protection, and no minimum balance fees, as well as no ATM fee access for in-network ATMs.[6] The common denominator of these products is that physical cost savings from operating as a fintech provider make it more economical to serve small-dollar amount customers, which is particularly advantageous to low-income customers.

Other fintech banks have designed products to smooth spending in the face of high frequency fluctuations in customers' incomes. Because there is a lag between the days wages are earned and the day that employees are paid, some fintech banks have attracted unbanked and underbanked customers by offering "paycheck deposits."[7] Instead of depositing paycheck funds into a customer's account with the traditional delay (waiting for the funds to clear from the employer's bank), these fintech banks deposit the funds as soon as the transfer instructions are received, taking on the minimal risk that the employer's bank is unable to fund the transaction. This decreases the customer's waiting time by 2 days. Other fintech banks offer customers access to their wages in advance of the pay day on terms that are generally far superior to payday lenders or to the costs of paying traditional bank overdraft fees.[8]

Fintech banks also cater to unbanked and underbanked customers' demands by designing innovative and convenient means for customers to access services through mobile phones, therefore obviating the need to be near a branch. Because the majority of unbanked and underbanked households have mobile phones, fintech banks have been able to attract many low-income customers by offering mobile phone access.

Consumers with limited financial experience sometimes make financial decisions that damage their credit record and leave high-cost lenders as their only option. Financial education and counseling services can reduce these costly mistakes. While academic evidence regarding the impact of financial education and counseling has been mixed, there is evidence that certain approaches provide benefits. In particular, education appears to be most effective when it is targeted to a particular borrower's needs and is delivered at the time the knowledge can be used.[9] For example, research has shown that mortgage counseling conducted at the time a mortgage is originated can reduce default rates.[10]

Many fintech banks provide precisely this form of financial counseling as part of the loan products they offer. They use a wide range of educational services to build relationships with customers that have limited experience with financial transactions. One online lender offers lower rates for completing their online courses on managing debt,[11] while another online lender prominently advertises "community support" whereby borrowers are connected with free and trusted financial counselors.[12] Other fintech banks produce free content for customers or potential customers to help explain when and how their products fit into a well-managed financial plan or to instruct customers on managing finances and debt more generally.[13] Finally, many comparison shopping fintech banks provide free tools for consumers to evaluate alternative debt scenarios, such as debt consolidation, or to create a plan to reach a savings goal.[14] To reduce confusion or misunderstandings that can undermine trust, some fintech providers have developed products that alert customers when they are at risk of being charged a fee, thus helping to reduce fees and improve their decision making.[15]

With respect to supply-side factors, many innovative fintech business models are reducing the costs of serving customers. These costs consist of physical costs and information costs. Physical costs are lower for fintechs because they avoid the high overhead costs of traditional banks, which is especially beneficial to small-dollar account customers.

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[5] Moneylion.com.
[6] Chime.com; Varomoney.com; Dave.com; Moneylion.com.
[7] Chime.com; Varomoney.com; Dave.com; Moneylion.com.
[8] Even.com and Payactiv.com.
[9] Fernandes, D., Lynch, J.G., Jr., and Netemeyer, R.G. (2014) "Financial Literacy, Financial Education and Downstream Financial Behaviors". *Management Science* 60: 1861–83.
[10] Agarwal, S., Amromin, G., Ben-David, I., Chomsisengphet, S., and Evanoff, D. (2020) "Financial Education Versus Costly Counseling: How To Dissuade Borrowers From Choosing Risky Mortgages?" *American Economic Journal: Economic Policy* 12: 1–32.
[11] Lendup.com.
[12] Oportun.com.
[13] Personifyfinancial.com; Saverlife.org.
[14] Nerdwallet.com; Lendingtree.com.
[15] Opportunities for mobile financial services to engage underserved consumers (FDIC 2016).

With respect to information costs, many unbanked and underbanked customers are "credit invisibles"—people without formal credit scores. That lack of information makes it challenging to lend to them. For an estimated 26 million Americans, traditional credit products remain out of reach because they lack a credit score.[16] These "credit invisibles" often turn to payday lenders, pawn shops, or auto-title lenders, or end up paying high overdraft fees at traditional banks. Such borrowing is expensive, with APRs as high as 300 percent.[17] What's more, repayment of these loans often doesn't establish a credit score so experience in these markets brings borrowers no closer to cheaper credit. Instead, they end up in cycles of accumulating debt. Such borrowing amounts to over 280 million transactions per year and roughly $78 billion in revenue.[18]

An important aspect of fintech banks' ability to provide improved access to credit for consumers comes from their use of new sources of information.[19] By using information not traditionally found in a credit report, lenders are able to safely and affordably lend to customers with little or no credit history. Fintech banks such as Oportun and Upstart have advertised that using alternative data has allowed them to successfully provide credit to households who lack the formal credit scores required by most financial institutions. Some fintech lenders have started to use consumers' cash flow history—how much income flows into the person's bank accounts and how much spending draws out of them—to underwrite credit, while other fintech lenders use utility and telecom payment data to inform their risk-scoring. One study finds that roughly half of credit invisibles interested in obtaining credit have stayed current on all of their bills in the past 12 months.[20] By using such alternative credit data to approve loans, fintech lenders can offer lower prices than their traditional counterparts. A LexisNexus study finds that of the 24 percent of consumers in their sample without a credit bureau score,[21] 86 percent became scorable using RiskView, a credit score that uses alternative data. However, the proportion of unbanked and underbanked consumers who would benefit from such a score or other applications of alternative data is hard to estimate precisely.

We are seeing only the beginning of what fintech banks can do to improve the efficiency of the financial system and promote financial inclusion. The industry continues to evolve as new and better approaches enter the market. As with traditional lending, fintech lending entails safety, soundness, and fairness risks. But the financial services industry and its regulators are well equipped to handle these risks.

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[16] *https://files.consumerfinance.gov/f/201505—cfpb—data-point-credit-invisibles.pdf*

[17] *https://www.urban.org/sites/default/files/publication/57871/410935-analysis-of-alternative-financial-serviceproviders.pdf*

[18] *https://www.urban.org/sites/default/files/publication/57871/410935-analysis-of-alternative-financial-serviceproviders.pdf*

[19] See Jagtiani, J., and John, K. (2018) "Fintech: The Impact on Consumers and Regulatory Responses". *Journal of Economics and Business* 100: 1-6.

[20] *https://www.fdic.gov/householdsurvey/2017/2017report.pdf*

[21] Consumers who did not have enough credit history to be scorable because it either did not have recent activity on their credit, only nontradeline data, or no credit obligations open for a long enough duration.

RESPONSES TO WRITTEN QUESTIONS OF SENATOR CORTEZ MASTO FROM JOSH STEIN

Q.1. A 2018 audit[1] by Nevada's Division of Financial Institutions found that nearly one-third of payday lenders in Nevada had failed to abide by State laws and regulations each year. Does the OCC's Rule allow payday lenders to evade State laws outside of interest rate caps?

A.1. The OCC Rule will predictably spur the proliferation of rent-a-bank schemes by nonbank lenders in order to evade both State interest rate caps and other State consumer protection laws. When nonbank lenders hide behind rent-a-bank subterfuges, the nonbank lenders typically claim they are exempt from licensing by and examination from State banking regulators. This refusal by lenders using rent-a-bank schemes to comply with State licensing laws profoundly undercuts the ability of States to regulate these lenders' activities, including ensuring that the lenders comply with State laws outside of interest rate caps.

In North Carolina's experience in the early 2000s, multiple nonbank payday lenders turned to rent-a-bank subterfuges after North Carolina's law authorizing payday lending for an experimental period sunset in 2001. The nonbank payday lenders largely continued their payday lending business as they had before the sunset, but the banks' names were instead placed on the loan documents in order to evade North Carolina's interest rate caps. These nonbank payday lenders contended that they were merely the "marketing, processing and servicing agents" of the banks and that they were exempt from regulation by financial regulators in our State. The North Carolina Commissioner of Banks and then-Attorney General Roy Cooper rejected that argument as contrary to the true lender doctrine recognized by North Carolina law. The OCC's Rule undercuts my ability to defend against such arguments in the future.

Q.2. If the OCC's Rule remains in place, what impact can we expect on communities of color who are disproportionately impacted by the pandemic?

A.2. The OCC's Rule will promote predatory lending in the substantial number of States that have enacted State interest rate caps. Studies have shown that such high-cost lending disproportionally affects communities of color. For example, FDIC surveys have reported that in 2013–2017, 12–14 percent of African-Americans and 8–10 percent of Latinos used a form of high-cost credit (payday loans, refund anticipation loans, rent-to-own services, pawn shop loans, and auto title loans), compared with only 6 percent of Whites.[2] Therefore, I expect the OCC's Rule would have a disproportionate impact on communities of color and other populations whose financial vulnerability increased because of the pandemic.

Q.3. Does the OCC's Rule limit the ability of State bank regulators to identify and prosecute fair lending violations?

[1] *https://www.leg.state.nv.us/Division/Audit/Full/BE2018/LA%2018-18%20Division%20of%20Financial%20Institutions%20Report.pdf*

[2] FDIC National Survey of Unbanked and Underbanked Households: 2017, appendix table D.3, *https://www.fdic.gov/analysis/household-survey/2017/2017appendix.pdf.*

A.3. The OCC's Rule will predictably limit the ability of State bank regulators and other State enforcement agencies to identify and prosecute fair lending violations. For the reasons explained in response to your first question, the OCC's Rule will embolden nonbank lenders that would otherwise be subject to licensing and examination by State financial regulators to claim an exemption from such State requirements. It is significantly more difficult for State financial regulators to identify and prosecute violations of fair lending against entities that they do not license and examine.

Q.4. Under its current authorities, is the OCC capable of appropriately supervising rent-a-bank arrangements?

A.4. Under long-standing statutory and case law, nonbank lenders, including payday lenders, are subject to State law and historically have been regulated at the State level. Rent-a-bank arrangements are initiated by nonbank lenders to evade State interest rate laws in States with strong interest rate caps. These schemes are typically not used by nonbank lenders in States that authorize payday lending. The OCC, as a Federal banking regulator, does not supervise or regulate nonbanks. Therefore, where nonbank lenders use rent-a-bank arrangements as a shield, there exists a regulatory vacuum, as these nonbank lenders contend they are not subject to State regulation, at the same time that the OCC does not examine or regulate them. Currently, there are several OCC-supervised banks that have entered into arrangements with nonbank lenders that are making predatory triple-digit interest rate loans to consumers and businesses that are illegal under many States' lending laws. However, the OCC has not only failed to take any recent enforcement actions against the nonbank lenders, but it has also ignored the banks it supervises, refusing to stop these rent-a-bank arrangements and these lending activities. Under this so-called "True Lender" Rule, these rent-a-bank arrangements are tacitly, if not explicitly, approved, so the OCC will have no incentive to take action against these arrangements; and State Attorneys General and State banking regulators will have substantially less authority to do so—leaving these sham arrangements to flourish and their predatory loans to harm our consumers in violation of States' laws.

RESPONSES TO WRITTEN QUESTIONS OF SENATOR CORTEZ MASTO FROM LISA F. STIFLER

Q.1. If the OCC's Rule remains in place, how would it affect the use of payday lending in Nevada, which has no State interest rate cap on payday loans?

A.1. If the OCC's "fake lender" rule remains in place, States, like Nevada, that currently allow payday lending or other high-cost lending will see more predatory lending come to the State, and future efforts to address predatory lending will be incredibly difficult. Additionally, beyond payday lending, Nevada will see high-cost installment loans that are currently illegal under State law expand via rent-a-bank schemes. Although Nevada allows payday loans, the State caps the interest rate on a $2,000, 2-year loan at about 40 percent. The OCC's rule will allow nonbank lenders to partner with banks to make similar sized loans at rates over 200 percent APR.

Q.2. A 2018 audit[1] by Nevada's Division of Financial Institutions found that nearly one-third of payday lenders in Nevada had failed to abide by State laws and regulations each year. Does the OCC's Rule allow payday lenders to evade State laws outside of interest rate caps?

A.2. Yes, the OCC's rule will not only allow nonbank lenders, like payday and other high-cost lenders, to evade the interest rate caps. They will also be able, in many States, to evade licensing and oversight laws and related regulations, as well as other consumer protections in State law, including fair lending laws.

Q.3. During the COVID–19 pandemic, have you seen an increase in the number of payday loans made to borrowers?

A.3. According to a Veritec report[2] of 7 States, there was a decrease in payday lending during COVID–19. Overall, payday lending transaction volumes have trended downward. During the pandemic, the report showed "a decline of roughly 20 percent for the week ending March 21. Transaction activity progressively trended downward between the week ending March 14 and early May 2020 when compared to the same periods in 2019." We also have seen in SEC filings from large high-cost lenders that they have decreased originations during the pandemic. Volumes have also decreased due in part to moratoriums and stimulus relief; however, as the country reopens, we anticipate seeing originations increase.

Q.4. If the OCC's Rule remains in place, what impact can we expect on communities of color who are disproportionately impacted by the pandemic?

A.4. Communities of color have been disproportionately impacted by the pandemic. They are also disproportionately targeted by high-cost lenders. Rather than help communities of color, high-cost lending disproportionately harms communities of color, exploiting and fueling the racial wealth gap. We can expect more of the same if this rule remains in effect.

Online lenders often promote their models as expanding economic inclusion, which will often put borrowers of color among their target borrowers. Communities of color have historically been disproportionately left out of the traditional banking system, a disparity that persists today. Some defend the high-cost "fintech" loans as bringing communities of color into the economic mainstream. But high-cost loans, particularly with their high association with lost bank accounts, drive borrowers out of the banking system and exacerbate this disparity. By sustaining and exacerbating an existing precarious financial situation, high-cost lending reinforces and magnifies existing income and wealth gaps—legacies of continuing discrimination—and perpetuates discrimination today.

Q.5. Does the OCC's Rule limit the ability to identify and prosecute fair lending violations?

[1] *https://www.leg.state.nv.us/Division/Audit/Full/BE2018/LA%2018-18%20Division%20of%20Financial%20Institutions%20Report.pdf*

[2] *https://www.veritecs.com/wp-content/uploads/2020/07/Veritec-COVID-study-rev.pdf*

A.5. The OCC's Rule will impede the ability of States to identify and especially prosecute fair lending violations. Because the Rule will give nonbank lenders the ability to hide behind a national bank charter so long as that bank's name is on the paperwork, attempts by States to enforce their laws against the nonbank lenders will be challenged as being preempted by Federal law. And yet, the OCC will not oversee or examine the nonbank lenders for fair lending or other violations because the OCC only oversees national banks. As a result, a potentially large group of high-cost lenders will be able to evade oversight by both State and Federal financial regulators, making enforcement of State, and potentially even Federal, fair lending laws quite challenging.

Q.6. Under its current authorities, is the OCC capable of appropriately supervising rent-a-bank arrangements?

A.6. The OCC does not need the Rule to appropriately supervise and take action against banks that engage in predatory rent-a-bank schemes. The agency already has that authority. It took action in the early 2000s to crack down on illegal schemes that were intended to evade State interest rate laws, and it can do so now. However, the agency has chosen not to act, despite being fully aware of predatory small business loans being made at rates as high as 268 percent by World Business Lenders (WBL), assisted by OCC-supervised Axos Bank. Additionally, the OCC defended WBL in court.[3]

[3] *https://morningconsult.com/opinions/new-fdic-occ-proposal-puts-small-businesses-in-the-path-of-loan-sharks/*

ADDITIONAL MATERIAL SUPPLIED FOR THE RECORD

LETTER IN SUPPORT OF S.J. RES. 15 AND H.J. RES. 35

138 scholars support repeal of OCC true lender rule

April 20, 2021

Senator Chris Van Hollen
U.S. Senate
Washington, DC 20510

The Hon. Jesus "Chuy" Garcia
U. S. House of Representatives
Washington, DC 20515

RE: Support S.J. Res. 15 (Van Hollen) and H.J. Res. 35 (J. Garcia), disapproving OCC's Rule on National Banks and Federal Savings Associations as Lenders

Dear Member of Congress,

The 138 undersigned academics from 43 states and the District of Columbia, including professors of banking law and consumer financial regulation, write in strong support of S.J. Res. 15 (Van Hollen) and H.J. Res. 35 (J. Garcia), joint resolutions providing for congressional disapproval under the Congressional Review Act of the Office of the Comptroller of the Currency's ("OCC's") final rule, *National Banks and Federal Savings Associations as Lenders* (the "Rule"). The Rule usurps the critical role of states in limiting the interest charged to their citizens by nonbank lenders—a role that states have held since the founding of this country.

The Rule, enacted in October 2020, is a direct reversal of well-established case law. This short-sighted reversal effectively circumvents the long-standing principle of applying a "substance over form" analysis to prevent evasions of usury laws, a principle that has been endorsed by the Supreme Court and state courts since the earliest days of our nation.

Since the time of the American Revolution, states have had usury laws to protect people from the harms of usurious lending. After 1776, all of the states in the new union adopted usury laws.[1] Over the past two centuries, those laws have been amended and exceptions have been carved out in some states for short-term payday loans. More recently, the trend is for voters and legislators to reinstate interest rate caps, which have been broadly popular with voters on a bipartisan basis.[2] Today, forty-five states and the District of Columbia impose interest rate caps on at least some installment loans, depending on the size.[3]

Attempts to evade usury laws are as old as the laws themselves. From the earliest days of this country, courts have looked beyond the form of a transaction to its substance to assess whether usury laws are being evaded. In 1825, the Supreme Court remarked:

[1] *See* James M. Ackerman, *Interest Rates and the Law: A History of Usury*, 1981 ARIZ. ST. L.J. 61, 85 (1981).
[2] *See, e.g.,* Megan Leonhardt, *Nebraska becomes the latest state to cap payday loan interest rates*, CNBC (Nov. 4, 2020, 12:44 PM), https://www.cnbc.com/2020/11/04/nebraska-becomes-the-latest-state-to-cap-payday-loan-interest-rates.html.
[3] *See* NAT'L CONSUMER L. CTR, STATE RATE CAPS FOR $500 AND $2,000 LOANS (2021), http://bit.ly/state-rate-caps.

> Usury is a mortal taint wherever it exists, and no subterfuge shall be permitted to conceal it from the eye of the law; this is the substance of all the cases, and they only vary as they follow the detours through which they have had to pursue the money lender.[4]

In 1835, Chief Justice Marshall explained in greater length in *Scott v. Lloyd*:

> The ingenuity of lenders has devised many contrivances, by which, under forms sanctioned by law, the [usury] statute may be evaded. Among the earliest and most common of these is the purchase of annuities, secured upon real estate or otherwise . . . . The purchase of an annuity therefore, or rent charge, if a bona fide sale, has never been considered as usurious, though more than six per cent profit be secured. Yet it is apparent, that if giving this form to the contract will afford a cover which conceals it from judicial investigation, the [usury] statute would become a dead letter. Courts, therefore, preceived [sic] the necessity of disregarding the form, and examining into the real nature of the transaction. If that be in fact a loan, no shift or device will protect it.[5]

Justice Marshall noted that "[t]hough this principle may be extracted from all the cases, yet as each depends on its own circumstances, . . . those circumstances are almost infinitely varied . . . ."[6]

Usury laws, and substance-over-form analysis, originally applied to all lenders, including banks. When the National Bank Acts were passed in 1863 and 1864, they gave national banks the choice of two alternative usury caps—a state one or a federal one—both of which were true usury caps.[7] Well into the mid-20th century, courts were applying substance-over-form doctrine when assessing whether national banks were attempting to evade usury laws:

> That public policy [against usury] cannot be defeated by the simple expedient of a written contract, but the real substance of the transaction must be searched out. . . . "No disguise of language can avail for covering up usury, or glossing over an usurious contract. The theory that a contract will be usurious or not, according to the kind of paper bag it is put up in, or according to the more or less ingenious phrases made use of in negotiating it, is altogether erroneous. The law intends that a search for usury shall penetrate to the substances."[8]

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[4] De Wolf v. Johnson, 23 U.S. 367, 385 (1825).
[5] Scott v Lloyd, 34 U.S. 418, 446–47 (1835) (emphasis omitted).
[6] *Id.* at 447.
[7] *See* 12 U.S.C. § 38 (2018).
[8] Daniel v. First Nat'l Bank of Birmingham, 227 F.2d 353, 355 (5th Cir. 1955) (citations omitted) (quoting Pope v. Marshall, 78 Ga. 635, 4 S.E. 116, 118 (1887)); *see also* Anderson v. Hershey, 127 F.2d 884, 886 (6th Cir. 1942) (rejecting the purported form of the transaction as a "device" to collect usury because courts "look behind the form of the transaction to its substance"); First Nat'l Bank v. Nowlin, 509 F.2d 872, 876 (8th Cir. 1975) ("The [NBA usury] section has regard to substance, not merely to form . . . .)" (*quoting* Evans v. Nat'l Bank of Savannah, 251 U.S. 108, 118 (1919) (Pitney, J., dissenting); *see also* FDIC v. Lattimore Land Corp., 656 F.2d 139, 148 n.15 (5th Cir. 1981) (agreeing that in enforcing the NBA's usury provision, courts can look beyond disguises that conceal "the actual lender," but in the instant case there was no dispute about which party "was the lender in fact").

But after a Supreme Court decision in 1978 allowed national banks to charge, nationwide, any rate permitted in their home state,[9] and amidst the impacts of high inflation, a wave of deregulation resulted. In the 1980s and 1990s, law changes at the federal and state levels and a race to the bottom among states trying to retain their banks resulted in virtually no banks—federally or state chartered—being subject to any usury cap.[10]

Beginning in the late 1990s and early 2000s, payday lenders began trying to take advantage of banks' exemption from usury caps. Through "rent-a-bank" schemes, payday lenders formed superficial arrangements with banks, put the bank's name as a lender on the loan agreement, and used the bank as the nominal originator of the loan. In doing so, these high-cost lenders tried to charge borrowers interest rates that were otherwise illegal if the lender made the loan itself.

Applying traditional substance-over-form doctrine, courts analyzed whether the bank or the payday lender was the *true lender*. If the payday lender was the true lender, then state usury laws applied. For example, in *Bankwest v. Oxendine*,[11] the Court of Appeals of Georgia rejected the idea that it should look only at the form of the contract, and instead applied traditional substance-over-form doctrine to determine whether the nonbank was the "true lender":

> To determine if a contract is usurious, we critically examine the substance of the transaction, regardless of the name given it, or, stated another way, "[t]he theory that a contract will be usurious or not[,] according to the kind of paper-bag it is put up in, or according to the more or less ingenious phrases made use of in negotiating it, is altogether erroneous. The law intends that a search for usury shall penetrate to the substance."[12]

Courts continued to apply longstanding substance-over-form true lender analysis as high-cost installment lenders began trying to use rent-a-bank schemes to evade state usury laws. In *CashCall v. Morrisey*,[13] for example, the Supreme Court of Appeals of West Virginia quoted an earlier usury case and cited the 1895 case on which it relied:

> "The usury statute contemplates that a search for usury shall not stop at the mere form of the bargains and contracts relative to such loan, but that all shifts and devices intended to cover a usurious loan or forbearance shall be pushed aside, and the transaction shall be dealt with as usurious if it be such in fact."[14]

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[9] *See* Marquette Nat'l Bank of Minneapolis v. First Omaha Serv. Corp., 439 U.S. 299, 318-19 (1978).

[10] New Jersey is one state that retains a usury cap on its state-chartered banks, but that cap does not apply to out-of-state banks operating in New Jersey or those with federal charters.

[11] *See* BankWest, Inc. v. Oxendine, 266 Ga.App. 771, 779 (2004).

[12] *Id.* at 776 (quoting Pope v. Marshall, 78 Ga. 635, 640, 4 S.E. 116 (1887)) (refusing to follow an earlier decision that held that the bank "was the true lender despite the fact that ACE [Cash Express] was required to purchase a 95 percent participation interest in loans [the bank] made to ACE's customers"); *accord* Ga. Cash Am., Inc. v. Greene, 734 S.E.2d 67, 73 (Ga. Ct. App. 2012) (finding a triable issue as to whether the true lender was the payday lender or a bank exempt from the Georgia usury statute).

[13] CashCall, Inc. v. Morrisey, 2014 WL 2404300 (W.Va. May 30, 2014).

[14] *Id.* at *14 (quoting Carper v. Kanawha Banking & Tr. Co., 157 W.Va. 477, 478, 207 S.E.2d 897, 901 (1974)); *see* Crim v. Post, 23 S.E. 613, 616 (W. Va. 1895) (notwithstanding "the various shifts and devices that are often used to cover up the usury[,]... the law requires the lender on oath to discover the money really lent, and all bargains, contracts,

Federal courts of appeals have regularly endorsed looking beyond form to substance to assess whether a bank is the true lender, and thus exempt under federal banking law from the consumer's state interest rate cap, or whether a nonbank is the true lender.[15]

Rejecting this overwhelming history that courts can ignore contrivances and search instead for the truth in order to prevent evasions of usury laws, the OCC's Rule establishes two hard and fast rules that make the bank the lender for interest rate purposes regardless of other evidence:

> [A] bank makes a loan when the bank, as of the date of origination:
> (1) Is named as the lender in the loan agreement; or
> (2) Funds the loan.[16]

The Rule thus establishes that the bank is to be treated as the "true lender" irrespective of the economic realities of the transaction. The Rule allows nonbank lenders to engage in the same rent-a-bank schemes in which the nonbank lender would "rent" a bank's charter to evade state usury laws. Online nonbank companies accomplish this by partnering with a bank that serves as the nominal originator of the loan, even though the nonbank has designed, marketed, underwritten, and funded the loan product and holds the predominant economic risk on the loan.

The Rule signs off on this favored technique of high-cost online lenders. Under this Rule, so long as a national bank or federal savings association is indicated as the lender of record for the loan, it is the bank that functions as the entity of reference for application of state usury laws—and banks are largely exempt from state usury laws. As a result of this nominal involvement of a bank, the nonbank online lender can effectively be exempted from the usury laws designed to rein in usurious loan practices, thereby making usury laws obsolete.

These schemes enable unduly expensive loans. When nonbanks are allowed to charge uncapped interest rates, they often charge well over 100% APR on their loans, which are rarely underwritten based on borrowers' actual ability to repay and which frequently result in defaults. Households facing an acute financial crisis are targeted for these destructive forms of credit on these high-cost terms. These pricey loans often result in growing balances, default, and even bankruptcy—all of which have devastating long-term impacts on families who already struggle to make ends meet.

The practical effect of the OCC Rule is, however, to appropriate states' long-standing role in regulating interest rates. Under the Rule, as long as a bank's name is on the loan agreement, the

or shifts relative to such loan; and makes them ineffectual, no matter how complicated such contracts may be. The law evidently intends that the search for usury shall penetrate to the substance.").

[15] *See, e.g.*, BankWest, Inc. v. Baker, 411 F.3d 1289 (11th Cir. 2005), *reh'g granted, op. vacated*, 433 F.3d 1344 (11th Cir. 2005) (en banc), *op. vacated due to mootness*, 446 F.3d 1358 (11th Cir. 2006); *accord* Cmty. State Bank v. Strong, 651 F.3d 1241, 1260 (11th Cir. 2011) (denying motion to dismiss RICO claim because plaintiff could "plead facts demonstrating that the Bank was not the actual lender"); Cmty. State Bank v. Knox, 523 Fed. Appx. 925, 929 (4th Cir. 2013) (rejecting complete preemption because the Federal Deposit Insurance Act "cannot apply" where the claims are "substantively aimed" at the payday lender and the plaintiff "disputes that [the bank] had authority over the loan terms and was the 'real lender.'").

[16] 12 C.F.R. § 7.1031(b) (2019).

interest rate laws of the state in which that bank is headquartered will govern the terms of the loan. A borrower in California can contract with a nonbank lender in California, for funds from California, and yet, under the Rule, if a bank in Utah is listed as the lender of record, the nonbank lender can charge whatever interest rate it desires, even if it is well in excess of the 36% allowed to nonbank lenders in California.

The result of the OCC Rule will be to strip states of their agency in regulating usurious lending by nonbanks to their citizens. Over 200 years of legal precedent from states and the U.S. Supreme Court will be eliminated by this ill-conceived and overreaching Rule.

It is critically important that Congress overturn the Rule in order to uphold the well-established doctrine of examining the substance of a usurious loan instead of the mere form, as well as the proper and legitimate role of the states in making their own decisions about high-cost lending. If this Rule is not undone, it will spell disaster for untold numbers of Americans who are trying to recover from this time of unprecedent health and economic disaster.

Therefore, we commend you for introducing the resolutions to disapprove of the OCC's true lender Rule, which will eviscerate the power of state interest rate caps and deprive state financial regulators and attorneys general of their most effective tool in combating usurious lending.

Yours very truly,

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Michaela White, Professor of Law, Creighton University School of Law
Catherine Lee Wilson, Associate Professor, University of Nebraska-Lincoln College of Law

Nevada

Keith A. Rowley, William S. Boyd Professor of Law, William S. Boyd School of Law, University of Nevada at Las Vegas

New Jersey
Amy Widman, Assistant Clinical Professor, Rutgers Law School
Linda E Fisher, Professor of Law, Seton Hall Law School
Jon Romberg, Associate Professor, Seton Hall Univ. School of Law, Center for Social Justice

New Mexico
Richard Alderman, Professor Emeritus, Director-Center of Consumer Law, University of Houston Law Center
Nathalie Martin, Frederick M. Hart Chair in Consumer and Clinical Law, University of New Mexico School of Law

New York
David Reiss, Professor of Law, Brooklyn Law School
Winnie Taylor, Professor of Law, Brooklyn Law School
Kathryn Judge, Harvey J. Goldschmid Professor of Law, Columbia University
Saule Omarova, Beth and Marc Goldberg Professor of Law, Cornell University
Susan Block-Lieb, Cooper Family Professor in Urban Legal Issues, Fordham Law School
Martha Rayner, Clinical Associate Professor of Law, Fordham Law School
Norman Silber, Professor of Law, Maurice A. Deane School of Law, Hofstra University
Jeff Sovern, Professor of Law, St. John's University School of Law
Ann Goldweber, Professor of Clinical Education, St. John's University school of Law
Marianne Artusio, Associate Professor of Law, retired, Touro College, Jacob D. Fuchsberg Law Center

North Carolina
Eric M. Fink, Associate Professor of Law, Elon University School of Law
Kate Sablosky Elengold, Assistant Professor of Law, UNC School of Law
Melissa B. Jacoby, Graham Kenan Professor of Law, University of North Carolina at Chapel Hill

North Dakota
Alexandra Sickler, Associate Professor of Law, University of North Dakota School of Law

Ohio
Cathy Lesser Mansfield, Professor, Case Western Reserve University
Mark Cassell, Professor, Kent State University
Creola Johnson, President's Club Professor of Law, The Ohio State Univ. Michael E. Moritz College of Law
Emily Houh, Gustavus Henry Wald Professor of the Law and Contracts, University of Cincinnati College of Law
Kristin Kalsem, Charles Hartsock Professor of Law, University of Cincinnati College of Law

Oregon
David Friedman, Professor of Law, Willamette University

Pennsylvania
James J. Pierson, Chair, Program Director & Assistant Professor, Chatham University
Richard Frankel, Professor of Law, Drexel University Thomas R. Kline School of Law
Susan L DeJarnatt, Professor of Law, Temple University Beasley School of Law
Len Rieser, Program Coordinator, Sheller Center for Social Justice, Temple University Beasley School of Law
Amelia Boss., Trustee Professor of Law, Thomas R. Kline School of Law, Drexel University
Camille Z. Charles, Professor of Sociology and Africana Studies, University of Pennsylvania
Camille Zubrinsky. Charles Professor of Sociology, Africana Studies, & Education, University of Pennsylvania
Louis S. Rulli, Practice Professor of Law, University of Pennsylvania Carey Law School

South Dakota
Reynold F. Nesiba, Professor of Economics, Augustana University

Texas
Mary Spector, Professor of Law, SMU Dedman School of Law
Mark E. Steiner, Professor of Law, South Texas College of Law Houston
Neil L. Sobol, Professor of Law, Texas A&M University School of Law
Angela Littwin, Ronald D. Krist Professor of Law, University of Texas at Austin

Utah
Jacob S. Rugh, Associate Professor, Brigham Young University
Christopher Peterson, John J. Flynn Professor of Law, University of Utah
Robert N Mayer, Professor Emeritus, University of Utah
Linda F. Smith, Professor Emerita, University of Utah, S.J. Quinney College of Law

Virginia
Irene E. Leech, Associate Professor, Consumer Studies, Virginia Tech

West Virginia
Charles R. DiSalvo, Woodrow A. Potesta Professor of Law, West Virginia University
Nicole McConlogue, Associate Professor and Clinic Director, West Virginia University College of Law

Wisconsin
Sarah Orr, Director, Consumer Law Clinic, University of Wisconsin Law School

Wyoming
Dee Pridgen, Emeritus Professor of Law, University of Wyoming College of Law

LETTER IN SUPPORT OF CRA CHALLENGE TO OCC PREDATORY LENDING RULE

April 20, 2021

The Honorable Nancy Pelosi Speaker of the House U.S. House of Representatives Washington, D.C. 20515	The Honorable Kevin McCarthy Minority Leader U.S. House of Representatives Washington, D.C. 20515
The Honorable Chuck Schumer Majority Leader United States Senate Washington, D.C. 20510	The Honorable Mitch McConnell Minority Leader United States Senate Washington, D.C. 20510

Re: Support CRA challenge to OCC "fake lender" predatory lending rule

Dear Speaker Pelosi, Majority Leader Schumer, Minority Leader McCarthy and Minority Leader McConnell:

The undersigned 375 civil rights, community, consumer, disability rights, faith, housing, labor, legal services, senior rights, small business, and veterans organizations representing all 50 states and the District of Columbia write to urge you to support the Congressional Review Act challenge (S.J.Res.15/H.J.Res.35) to the OCC's final rule, "National Banks and Federal Savings Associations as Lenders," which will unleash predatory lending in all fifty states.

The final rule, enacted by the OCC in October 2020, overturns 200 years of caselaw endorsed by the Supreme Court that allows courts to look beyond contrivances to prevent usury evasions. The rule replaces the longstanding "true lender" anti-evasion doctrine with a "fake lender" rule that **allows lenders charging rates of 179% or higher to evade state and voter-approved interest rate caps merely by putting a bank's name on the paperwork – just as payday lenders were doing in the early 2000s**. The rule has already been challenged by eight Attorneys General.

Interest rates caps are the simplest and most effective way to protect consumers from predatory lenders. States have had the power to enact these caps since the American Revolution. At least 45 states and the District of Columbia (DC) have rate caps on at least some installment loans, depending on the size of the loan. While many states permit short-term payday loans, 17[1] states and DC—representing about a third of the U.S. population—enforce interest rates of 36% or less that keep all high-cost loans out of their state.

American voters strongly support state rate caps on a bipartisan basis. In November 2020, 83% of voters in Nebraska enacted a rate cap ballot initiative to place a 36% interest rate cap on payday loans. Nebraska thus joins states like Arizona, Colorado, Montana, and South Dakota where strong bipartisan votes in recent years illustrate the public's overwhelming support for these usury laws. According to recent polling, 70% of voters across party lines support a 36%

[1] Following submission of this letter, the Predatory Loan Prevention Act in Illinois was signed into law, making it the 18th state to cap loans at 36% or lower interest rates.

rate cap, and during the coronavirus pandemic, 81% of Americans support prohibiting high-interest loans.

However, non-bank predatory lenders have sought to evade state usury laws by entering into "rent-a-bank" schemes with a few, rogue banks. Banks are largely exempt from state rate caps, and through these schemes, the non-bank predatory lender launders loans through the bank in order to claim that state interest rate limits do not apply. These lenders charge triple-digit interest rates, target the financially vulnerable and communities of color, and trap consumers in devastating cycles of debt.

Payday lenders first tried using rent-a-bank schemes in the early 2000s, putting a bank's name on the paperwork, just as the OCC rule now allows, claiming the payday lender was just a "servicer" for a bank loan. State attorneys general, courts, and federal bank regulators shut down these early payday loan rent-a-bank schemes. Relying on a centuries-old anti-evasion doctrine, courts "followed the money" to find that the payday lender, not the bank, was the "true lender."[2] But rent-a-bank lending is back, now being used to make longer-term installment loans at rates that exceed voter- and legislature-approved rate caps.

High-cost installment loans are an even bigger and deeper debt trap than short-term payday loans. The amounts are bigger, the interest charges are higher, they go on for a longer period of time, and they are harder to escape with help from friends or family.

OCC-regulated banks are already helping to make some of the most predatory installment loans on the market with interest rates of 100% and higher. For example, after California adopted an interest rate cap on loans above $2,500, CURO – which operates the SpeedyCash and RapidCash brand of payday loans and high-cost installment loans – brazenly announced that "bank partnerships are great" and would allow CURO to ignore the new law.[3] OCC-regulated Stride Bank is now piloting loans up to 179.99% for CURO's Verge Credit in a plan to expand to states that do not permit those rates for non-banks.[4]

Another OCC-regulated bank, Axos Bank, launders loans for the predatory, subprime small business lender World Business Lenders. WBL loans – in the tens and even hundreds of thousands of dollars – carry rates of 139% APR or higher, and are often secured by the small business owner's home, putting many into foreclosure.

In June 2020, the District of Columbia Attorney General filed suit against yet another rent-a-bank lender, Elevate Credit, Inc.. The DC Attorney General argued that Elevate is the true lender of loans made in DC, well in excess of the District's rate cap. Elevate sold two short term loan products to District residents that carried interest rates between 99 and 251%, up to 42 times

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[2] National Consumer Law Center, Consumer Credit Regulation § 3.9.1 (3d ed. 2020), *updated at* https://library.nclc.org. Includes a few of the hundreds of cases that illustrate that the substance-over-form doctrine remains the universal rule today and that emphasize the importance of looking to the truth in preventing evasion of usury laws.

[3] National Consumer Law Center, Payday Lenders Plan to Evade California's New Interest Rate Cap Law Through Rent-A-Bank Schemes (October 2019), https://www.nclc.org/issues/ib-rent-a-bank.html.

[4] Verge Credit, *Rates and Terms,* 2020, https://www.vergecredit.com/rates-and-terms/, (last visited September 2, 2020).

the legal limit in DC. In two years, Elevate made 2,551 loans to residents well above the maximum interest rate of 24% for lenders that disclose their rate in contracts and 6% for those that do not.

Currently, there are only a few of these rogue, predatory lenders, but they will spread to all 50 states if the OCC rule is not overturned. Lenders' use of online platforms allows them to inundate markets across the United States. By gutting the long-standing anti-evasion doctrine, the OCC's rule will eviscerate the power of state governments to independently regulate interest rate limits and will have horrible consequences for consumers, small businesses, and especially, communities of color.

The OCC's "fake lender" rule protects rent-a-bank schemes by making them exempt from state interest rate caps as long as a bank is "named as the lender in the loan agreement" [5] **– that's it!** The non-bank lender could control all interaction with the borrower, take on virtually all of the risk, reap the vast majority of the profits, but could ignore state laws that apply to non-bank lenders. The OCC final rule will leave states with no ability to protect their interest rate caps, leaving usury laws – in the words of Chief Justice Marshall – a "dead letter."[6]

States must be able to protect their residents from the harms of predatory lending, especially amidst a global pandemic that has hit low- and moderate-income families and communities of color, especially Black, Latinx, and Native American communities, particularly hard due to underlying health and socioeconomic disparities. These high-cost loans do not promote financial inclusion. Instead, they exacerbate financial exclusion. They cannot be justified as providing "access to credit." Instead, they trap borrowers in destructive debt cycles, leaving borrowers with ruined credit and unable to borrow at lower interest rates in the future.

Therefore, we urge you to support the Congressional Review Act challenge to the OCC's true lender rule, which will eviscerate the power of state interest rate caps and rid state regulators of the single most effective tool to protect consumers from predatory lending.

Sincerely,

National

Accountable.US
American Association for Justice
AFCPE (Association for Financial Counseling and Planning Education)
American Atheists
American Civil Liberties Union
American Family Voices

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[5] 12 C.F.R. § 7.1031(b)(1) (effective Dec. 29, 2020).
[6] Scott v. Lloyd, 34 U.S. (9 Pet.) 418, 446-47 (1835) (Marshall, C.J.) ("The ingenuity of lenders has devised many contrivances by which, under forms sanctioned by law, the [usury] statute may be evaded. . . . [I]f giving this form to the contract will afford a cover which conceals it from judicial investigation, the [usury] statute would become a dead letter. Courts, therefore, perceived the necessity of disregarding the form, and examining into the real nature of the transaction.").

American Friends Service Committee
American Sustainable Business Council
Americans for Financial Reform
Appleseed Foundation
Better Markets
Blue Star Families
Bob Barker Company Foundation
CAARMA
Capital Good Fund
Center for Economic Justice
Center for LGBTQ Economic Advancement & Research (CLEAR)
Center for Responsible Lending
Center for Survivor Agency and Justice
Change Machine
Children's Advocacy Institute
Coalition on Human Needs
Color of Change
Congregation of Our Lady of Charity of the Good Shepherd, U.S. Provinces
Consumer Action
Consumer Federation of America
Consumer Reports
Consumers for Auto Reliability and Safety
CornerSquare Community Capital, Inc.
Credit Builders Alliance
Demos
Fahe
Hispanic Federation
Jesuit Social Research Institute
Justice in Aging
League of United Latin American Citizens (LULAC)
Local Initiatives Support Corporation (LISC)
Main Street Alliance
Minority Veterans of America
NAACP
National Action Network (NAN)
National Advocacy Center of the Sisters of the Good Shepherd
National Association for Latino Community Asset Builders
National Association of Consumer Advocates
National Association of Consumer Bankruptcy Attorneys (NACBA)
National Association of Social Workers
National Center for Law and Economic Justice
National Coalition for the Homeless
National Community Reinvestment Coalition
National Consumer Law Center (on behalf of its low income clients)
National Consumers League
National Disability Institute

National Disability Rights Network (NDRN)
National Fair Housing Alliance
National Housing Resource Center
National Partnership for Women & Families
National Resource Center on Domestic Violence
National Rural Social Work Caucus
National Urban League
Partnership for America's Children
Prosperity Now
Public Advocacy for Kids (PAK)
Public Citizen
Public Counsel
Public Good Law Center
Public Justice
Reinvestment Partners
RESULTS
Revolving Door Project
Small Business Majority
Student Borrower Protection Center
Tax March
The Forum for Youth Investment
The Leadership Conference on Civil and Human Rights
Union for Reform Judaism
Upsolve
U.S. PIRG
UnidosUS
United Church of Christ, Justice and Witness Ministries
Woodstock Institute

Alabama

Alabama Appleseed Center for Law & Justice
Alabama Arise
Black Belt Community Foundation
Building Alabama Reinvestment
Community Foundation of Greater Birmingham
The Alabama Asset Building Coalition
The Women's Fund of Greater Birmingham
YWCA Central Alabama

Alaska

Alaska PIRG
Alaska Poor People's Campaign
Northern Justice Project, LLC

Arizona

Arizona PIRG
Center for Economic Integrity
Community Action Human Resources Agency
Community Renewal
Gila County Community Services
Mesa Community Action Network
NACOG
Primavera Foundation
Society of St. Vincent de Paul, Tucson Diocesan Council
Southeastern Arizona Community Action Program, Inc.
Southwest Fair Housing Council
United Food & Commercial Workers Local 99
Wildfire: Igniting Community Action to End Poverty in Arizona
William E. Morris Institute for Justice (Arizona)

Arkansas

Arkansans Against Abusive Payday Lending
Arkansas Community Organizations

California

California Community College CalWORKs Association
California Low-Income Consumer Coalition
California Reinvestment Coalition
CALPIRG
Center for Public Interest Law
CHC
Consumer Federation of California
Eastern Sierra Legal Assistance Program
Housing and Economic Rights Advocates
KGACLC
Mission Asset Fund (MAF)
New Economics for Women
Public Law Center
Western Center on Law and Poverty

Colorado

Arapahoe Young Dems
Bell Policy Center
CoPIRG
Office of Financial Empowerment and Protection
Towards Justice

Connecticut

CCAG
Connecticut Legal Services, Inc.
ConnPIRG

Delaware

Delaware Community Reinvestment Action Council, Inc.
Housing Alliance Delaware

District of Columbia

Legal Aid Society of the District of Columbia
Tzedek DC

Florida

Florida Consumer Action Network
Florida Legal Services, Inc.
Florida PIRG
Florida Prosperity Partnership
Florida Silver Haired Legislature Inc
Jacksonville Area Legal Aid, Inc.
Legal Aid Service of Broward County, Inc.
Mid-Pinellas (Florida) Coalition of Neighborhood Associations
The Legal Aid Society of Palm Beach County

Georgia

Georgia Advancing Communities Together, Inc.
Georgia PIRG
Georgia Watch
Step Up Savannah, Inc.
New Georgia Project

Hawaii

Hawaii Appleseed Center for Law and Economic Justice

Idaho

United Vision for Idaho

Illinois

Chicago Consumer Coalition
Chicago Urban League
Housing Action Illinois
Housing Choice Partners
Illinois Asset Building Group, a project of Heartland Alliance
Illinois Conference of Churches
Illinois People's Action
Illinois PIRG
Legal Action Chicago
Metropolitan Family Services
Preservation of Affordable Housing
Unitarian Universalist Advocacy Network of Illinois

Indiana

Brightpoint
Fair Housing Center of Central Indiana
GCC Foundation
Habitat for Humanity of Indiana, Inc.
HomesteadCS
Indiana Assets & Opportunity Network
Indiana Association of Area Agencies on Aging
Indiana Catholic Conference
Indiana Coalition Against Domestic Violence
Indiana Community Action Association
Indiana Friends Committee on Legislation
Indiana Institute for Working Families
Indiana PIRG
Indiana United Ways
LifeStream Services
LifeTime Resources, Inc.
MCCOY (Marion County Commission on Youth)
Prosperity Indiana
Sisters of Notre Dane de Nsmur
Thrive Alliance
Unite Indy

Iowa

Iowa Citizens for Community Improvement
Iowa PIRG

Kansas

Kansas Appleseed Center for Law and Justice, Inc.

Kentucky

Kentucky Equal Justice Center

Louisiana

Greater New Orleans Housing Alliance
Louisiana Budget Project
THE MIDDLEBURG INSTITUE

Maine

CA$H Maine
Coastal Enterprises, Inc.
Maine Center for Economic Policy
Maine Equal Justice
Maine Small Business Coalition
New Ventures Maine

Maryland

CASH Campaign of Maryland
Maryland Consumer Rights Coalition
Maryland PIRG
Public Justice Center
RESULTS DC/MD

Massachusetts

CNAHS
Massachusetts Affordable Housing Alliance
MASSPIRG

Michigan

Community Economic Development Association of Michigan (CEDAM)
Michigan Poverty Law Program
Michigan State University College of Law - Housing Law Clinic
PIRG in Michigan (PIRGIM)

Minnesota

Exodus Lending
Legal Services Advocacy Project
Minneapolis Area Synod, ELCA

Minnesota Main Street Alliance

Mississippi

Hope Policy Institute
Mississippi Center for Justice
Mississippi Community Financial Access Coalition

Missouri
Heartland Center for Jobs and Freedom
Missouri Faith Voices
MoPIRG

Montana

Montana Housing Coalition
MontPIRG
Rural Dynamics, Inc.

Nebraska

CUES Fund
Heart Ministry Center
Lending Link
Lozier Foundation
Nebraska Appleseed Center for Law in the Public Interest
Nebraska Chapter of the National Association of Social Workers
NeighborWorks Lincoln
RISE
Voices for Children in Nebraska
Women's Fund of Omaha

Nevada

Legal Aid Center of Southern Nevada

New Hampshire

AHEAD Inc.
New Hampshire Legal Assistance
NHPIRG

New Jersey

Consumers League of New Jersey
Legal Services of New Jersey

New Jersey Appleseed Public Interest Law Center
New Jersey Citizen Action
New Jersey Coalition for Financial Education
New Jersey Main Street Alliance
New Jersey Peace Action
NJPIRG

New Mexico

Adelante Progressive Caucus of the Democratic Party of New Mexico
Credit Union Association of New Mexico
Democratic Party of New Mexico Veterans and Military Families Caucus
Indivisible of Santa Fe
Lutheran Advocacy Ministry - New Mexico
New Energy Economy
New Mexico Appleseed
New Mexico Center on Law & Poverty
NMPIRG
New Mexico Conference of Churches
New Mexico Voices for Children
Ocamora Retreat Center
Prosperity Works
Retake Our Democracy
Rio Grande Valley Broadband, Great Old Broads for Wilderness
Santa Fe Lodge, Independent Order of Odd Fellows
Silver City Indivisibles
Southern New Mexico New Progressives
Think New Mexico

New York

Chinese-American Planning Council (CPC)
Empire Justice Center
Genesee Co-op Federal Credit Union
Long Island Housing Services, Inc.
New Economy Project
New York Legal Assistance Group (NYLAG)
New York Public Interest Research Group (NYPIRG)
NYC Network of Worker Cooperatives
Public Utility Law Project of New York
Safe Horizon
STEPS to End Family Violence
We All Rise
WESPAC Foundation, Inc.

North Carolina

Charlotte Center for Legal Advocacy
Children First/Communities In Schools of Buncombe County
Community Empowerment Fund
Community Link
Eastern Carolina Board of Realtist
Episcopal Diocese of North Carolina
Financial Haven, Inc
Financial Pathways of the Piedmont
Financial Protection Law Center
FIRST
Goodwill Industries of the Southern Piedmont
Haywood Habitat for Humanity
Independent Financial Solutions Group
Lexington Area Habitat for Humanity
NC Conference of the United Methodist Church
NC Rural Center
NCPIRG
North Carolina Coalition on Aging
North Carolina Conference, United Methodist Church
North Carolina Council of Churches
The Collaborative of NC
Thread Capital
Youth Education for Savings Consortium

North Dakota

High Plains Fair Housing Center

Ohio

COHHIO
Ohio Main Street Alliance
Ohio Poverty Law Center
Ohio PIRG
Policy Matters Ohio

Oklahoma

Catholic Charities of the Archdiocese of Oklahoma City, Inc.
Fellowship Congregational UCC
Prospect Church
VOICE-OKC

Oregon

CASA of Oregon
Neighborhood Partnerships
Oregon Main Street Alliance
Oregon PIRG (OSPIRG)
Oregon's Stop the Debt Trap Alliance
Our Children Oregon

Pennsylvania

Bucks County Women's Advocacy Coalition
Community Justice Project
Harrisburg Center for Peace & Justice
Just Harvest
Neighborhood Allies
PennPIRG
Pennsylvania Council of Chapters, Military Officers Association of America (MOAA)
Pennsylvania Council of Churches
Pennsylvania Legal Aid Network, Inc.
Pennsylvania Utility Law Project, on behalf of our low income clients
Pennsylvania War Veterans Council, Inc
Philadelphia Solar Energy Association
Pittsburgh Community Reinvestment Group
Post 9264, Department of Pennsylvania, Veterans of Foreign Wars
Commission on Economic Opportunity
Community Legal Services, Inc. of Philadelphia
The One Less Foundation

Rhode Island

NeighborWorks Blackstone River Valley
RIPIRG

South Carolina

Columbia Consumer Education Council
South Carolina Appleseed Legal Justice Center
South Carolina Association for Community Economic Development

South Dakota

Bread for the World- South Dakota chapter
Disability Rights South Dakota
First Peoples Fund
South Dakota Chapter of the National Association of Social Workers

Tennessee

Tennessee Justice Center

Texas

BCL of Texas
Brazos Valley Financial Fitness Center
Helping Hands Ministry of Belton
RAISE Texas
Texas Appleseed
TexPIRG
The Women's Resource
United Way of Metropolitan Dallas
United Way of Southern Cameron County

Utah

Fair Credit Foundation

Vermont

Vermont Legal Aid, Inc.
Vermont Main Street Alliance
Vermont Public Interest Research Group

Virginia

Legal Aid Justice Center
Virginia Citizens Consumer Council
Virginia Organizing
Virginia Poverty Law Center

Washington

Columbia Legal Services
Statewide Poverty Action Network
WashPIRG

West Virginia

Communications Workers of America - West Virginia
Covenant House of WV
Mountain State Justice
National Association of Social Workers West Virginia Chapter
West Virginia Association for Justice
West Virginia Center on Budget and Policy

West Virginia Council of Churches
West Virginia Main Street Alliance
WV Citizen Action

Wisconsin

Metropolitan Milwaukee Fair Housing Council
Urban Economic Development Association of Wisconsin, Inc.
Wisconsin Faith Voices for Justice
Wisconsin Main Street Alliance
WISPIRG

Wyoming

Wyoming Trial Lawyers Association

cc: Members of the U.S. House of Representatives
Members of the United States Senate

STOP THE DEBT TRAP

Congress Must Protect Consumers from Predatory Lending

Since the American Revolution, states have limited interest rates to stop predatory lending. But predatory lenders are starting to launder their loans through banks to **evade state laws that make loans up to 179% APR illegal.** (Bank loans are generally exempt from state rate caps.) A rule by the Office of the Comptroller of the Currency (OCC), the regulator of the nation's largest banks, effective last December protects these predatory lending "rent-a-bank" schemes and overturn centuries of caselaw allowing courts to look beyond ruses to the truth.

At least 10 high-cost consumer lenders, many of which operate payday or auto title brands—**American First Finance, Axcess Financial (Check 'n Go, Allied Cash Advance), Check Into Cash, CURO (Speedy Cash, Rapid Cash), Duvera Billing Services (EasyPay), Elevate (Rise, Elastic), Enova (CashNet USA, NetCredit, OnDeck), Wheels Financial (LoanMart, ChoiceCash), OppLoans (OppFl), Applied Data Finance (Personify)**—are using five FDIC-supervised banks and one OCC-supervised bank to make high-cost rent-a-bank loans to consumers. ***Consumers from every state have submitted more than 6,000 complaints about these companies to the Consumer Financial Protection Bureau.***[1] Consumers are asked to provide details about their complaint and can opt to disclose those narratives publicly. Stories from consumers in most states are listed below. Other complaints are evident from lawsuits. (One other predatory lender, World Business Lenders, uses OCC-supervised Axos bank to offer high-cost small business rent-a-bank loans that result in foreclosures of the owner's home.) Below is just a sampling of these complaints.

Congress must overturn the OCC "fake lender" rule to prevent state usury laws in at least 45 states from becoming a "dead letter."

* * * * * * * * * * * *

Alabama Borrower, Elevate's Rise: *"This company has extremely high interest fees and should be illegal. I quickly found myself in a situation I couldn't afford so the account was charged off. I was called within a couple of months with a settlement offer of less than {$600.00} which I accepted. The company offered to delete the charged-off account from my credit history if I accepted and paid the debt that day which I did. I am still showing the debit is unpaid on my history as well as that I still owe the full balance. This company not only takes part in predatory lending, but they also take part in predatory collecting of debts. Please delete this from my credit history ASAP."* [#382674]

Arizona Borrower, Opportunity Financial, LLC: *"I applied for a loan with XXXX who denied me then referred me to XXXX who took all info my then OppLoan popped up saying congratulations with the most outrageous option for a XXXX loan ever. The option was XXXX a month for 3 years at 160 % interest... I did not complete the app because that is extreme predatory lending!"* [#3575692]

Arizona Borrower, EasyPay: *"Had to get our transmission fixed. . .Applied for credit for {$1500.00} ... The manager said if we pay off everything by XX/XX/XXXX everything should be fine. He let us know that the payments would be {$200.00} a month. Come to find out it was at a 151.99 % interest rate for the next 24 months. We have now paid {$1400.00} and only {$91.00} of that has gone to the principle, leaving {$1300.00} paid in interest. I feel that in our time of need, XXXX took advantage of us and we will pay more than double the amount of which we borrowed. We have paid on-time continuously and are left in debt because of it."* [#2789482]

[1] Consumer Financial Protection Bureau, Complaint Database search, (March 19, 2021). https://www.consumerfinance.gov/data-research/consumer-complaints/.

California Borrower, CURO Intermediate Holdings: *"In 2018 I got a loan from " SPEEDY CASH " in XXXX, CA fro {$5000.00} which I was making monthly payments on it ; then I lost my job and I couldn't pay the amount I was told, I went to their office to try and making a new payment arrangement but they denied me that help, they told me to wait and the more I waited the more interests it accumulated, this company charges ridiculous interests very very high ; which is 131.571 % annual. . .I noticed they put me on collection with adding {$1500.00} more to the interests ; I called the collection company... and I try to do a arrangement and they also denied me help after that this collection tried to cash a check for {$6300.00} from the account without my autorization ; I truly ignore the very high annual interests, Speedy Cash Loans is a very bad company I will never recommend this to anybody ; for {$5000.00} you will end up paying the ridiculous amount of {$23000.00} after you are done with all the payments, meaning that the Financial charge is {$18000.00} plus the {$5000.00}."* [#3820950]

California Borrower, Elevate's Rise: *"I am a single mother who is living . . . below the poverty level. I have had my share of credit problems and have owed more than I make for quite some time. I was misled by Rise Credit to believe that they were unlike other predatory loan companies. By the time I understood what I had [signed], I had paid them thousands of dollars in interest. I have recently become temporarily unemployed and called them to ask for help during my time of financial hardship. They refused any solution and my account is headed to collections now . . . [T]he total paid is far over the amount I initially borrowed from Rise . . . This is robbery and all of the necessities I have for myself and my children are suffering because of it . . . How is it that they can do this? I am asking for help for not only my family, but for all of the families targeted by these predatory loans meant to target those living in poverty and struggling to live paycheck to paycheck."* [#1487339]

Colorado Borrower, CURO Intermediate Holdings: *"I renewed a payday loan with a company in Colorado called Speedy Cash. The payday loan agreement clearly stated the terms of the loan were to be a total of 4 monthly payments. . .In XXXX they debited XXXX 3 times and XXXX 1 time for a total of {$470.00}. The only transaction that should have happened was XXXX ONE TIME until XXXX. This seems illegal and predatory. They clearly violated the terms of the loan. Now I'm having to work with the bank and the company to clarify the errors."* [#3448538]

Connecticut Borrower, Personify Financial: *"This company is operating in predatory practices and its operation is more analogous to the practices of a loan shark! Unfortunately, as a recent XXXX student, I was put in a predicament that forced me to either apply for this particular loanor be homelessand I chose the former. Within this timeframe that I applied for the loan, I was working and anticipated to pay back the loan before the loan terms indicated. However, a global pandemic called Covid-19 happened to the world. Shortly after, I was laid off from work and was unable to get a job for months. As such, it made it extremely difficult for me to pay my bills, rent, and expensesincluding to Personify Financial. When I gain employment, I made a total payment of {$3000.00} for a loan in the amount of {$4700.00}, and currently, Personify has only applied {$360.00} towards my principal and {$2600.00} towards the interest of this loan. The current interest rate is 93.50 %, at this rate ; by the time this load is paid off, Personify would profit close to {$15000.00} or more on a {$4700.00} loan. Of this {$4700.00}, I was only issued {$4500.00} because I was also charged another fee before the money was issued....Personify Financial is nothing short of a loan shark. This is a predatory loan. It is unfair and unethical. This company needs to be under investigation for its immoral practices. To add insult to injury, this company preys on the most vulnerable population, those who are in desperate need of survival. Living in a country where you must decide whether to buy groceries or pay your bills. . .I feel that this company is not engaging in fair business practices and they are taking advantage of consumers. . ."* [#3810980]

Delaware Borrower, Enova International Inc. (Net Credit): *"This company practices in predictory lending practices during the pandemic. They advertise on their website the following (https : //netcredit.com/blog/how-cares-act-impact-credit-score/) : " During the CARES Act, if your finances are affected by COVID-19, you can make an agreement with your creditor to update or change your payment terms, which may include temporarily skipping or reducing payments. As long as you maintain the new terms, youll be able to keep your account up-to-date without any damage to your credit score ". I had to miss a couple of payments during COVID-19, and I communicated with netcredit from XX/XX/2020 to XX/XX/2020 and instituted repayment plan. During the CARES Act, my finances are affected by COVID-19. I made agreements to change my payment terms. I have maintained the new terms, but Netcredit is still reporting me as late...and damaging my credit score. I called and wrote a letter, asked to speak to suupervisor and was unable to. This company is currently being sued in VA for predictory lending practice. Horrible company."* [#3886726]

Georgia Borrower, Enova International Inc. (Net Credit): *". . .I made a payment of {$2000.00} and I was told by the agent that I still needed to pay {$2800.00} to payoff this loan. This company is a ripoff. I have already paid over {$6000.00} for a {$3300.00} loan. I would like for the account to be paid in full for the loan principal remaining which is {$1100.00}. Im not paying anything other than that"* [#3793095]

Kentucky Borrower, America First Finance: *"i purchased furniture from XXXX XXXX. The loan amount was for {$3000.00}. I was never explained that American First Finance APR was 144.60 % As of XX/XX/XXXX, i have paid back {$4400.00}. I have called and asked for the disclosure and they did not provide me with it. I have called and complained numerously to the company. American First Finance refuse to help me, instead they kept withdrawing money out of my Bank account."* [#3555449]

Idaho Borrower, Enova International Inc.: *"This is a predatory loan. The interest rates and cash advance fees they charge people that are struggling make it impossible to pay back. The rates are predatory and don't fall under the Fair Lending Act. The interest rate is 299 % with a cash advance fee that is 25 % of the advance amount. Due to the predatory acts or this company, I was unable to pay my loan and it went to collections."* [#3694858]

Illinois Borrower, Personify Financial: *". . .the rates are staggering and they never check to see if I could afford these loans . . . And, I have been paying on a total of (XXXX) Payday loans for well over 9 months in succession with much difficulty . . .. the huge charges were destroying our ability to live after deducting well over 90 % of my take home income for well over 3 months and I have not paid my mortgage since XX/XX/XXXX and XX/XX/XXXX for both the first and second mortgages and I am in jeopardy of foreclosure as of this date, XX/XX/XXXX . . . . several Companies did not tell me of their extremely high rates they were and some also withdrew from my bank account even though I asked them to STOP future via EFT Revocation Letters. A Couple withdrew funds directly from my account even after it was Bank closed causing me to incur heavy bank fees per day of even {$50.00} or {$60.00} at certain intervals. This was a very stressful time . . . causing us to be fragmented and close to homeless situation."* [#2291555]

Indiana Borrower, Personify Financial: *"I started this loan on XX/XX/2019. I financed XXXX I have made 15 payments . . . . My interest rate is 98.98 % I will never pay off my balance at this rate, we are talking about 65 payments of XXXX totaling XXXX. For the consumer looking for a small personal loan, this is outstanding and incredibly insane. How can this be legal? This is getting people in trouble financially."* [#3326027] (appears to be a rent-a-bank loan)

Kansas Borrower, EasyPay: *"I entered a loan with XXXX (Duvera). . .when purchasing a puppy. . .The details were {$2500.00} loan with $XXXX monthly payments with no interest. However as I look at my account there is an interest rate of 151% and they have put my balance at {$2400.00} while I have paid {$1500.00} and they have charged me for {$1400.00} in interest. This is not correct and I was informed multiple times there was no interest. I have called XXXX and they have said they can do nothing about the interest accumulated and were very difficult to even talk to. I told them that I was told there was no interest when agreeing and asked what can I do to finish paying off my loan with no interest like we agreed upon. I am unsure what to do now. I want to pay off the remaining {$900.00} I owe on my loan but will not pay the {$1500.00} plus in interest that was never talked about or agreed upon."* [#2826629]

Louisiana Borrower, CURO Intermediate Holdings: *"The debt collector threatened to call my job and find out where i was to arrest me on site."* [#3758960]

Maryland Borrower, Opportunity Financial, LLC: *"I have been paying this loan for more than a year and the principal has not changed. I borrowed $2000.00 and have paid $4600.00 into this loan to date. . ."* [#3106431]

Michigan Borrower, Opportunity Financial, LLC: *"I contacted this firm opp loans several times . . . regarding the high interest[] rates being charged on my loan. I informed them that [we are] military spouses and famil[ies] . . . that we are protected against high interest rates. They informed me that they needed proof to review my interest rate. They then informed me that spouse loans are not covered under the military lending act and was notified by their legal department. My current interest rate is 159 % on short term installment loan. Please assist"* [#3354050] (appears to be a rent-a-bank loan)

Minnesota Borrower, Personify Financial: *". . .I am currently paying an unbelievable interest rate. My loan details are as follows : Account Type Installment Loan Original Annual Percentage Rate (APR) 98.90 % Original Term 72 Months...Current Interest Rate 93.50 % Current Payment Amount {$410.00} Current Payment Frequency Monthly Amount Financed {$5000.00} Outstanding Principal Balance {$4800.00} Accrued Interest {$510.00} Unpaid Fees {$270.00} Total Outstanding* {$5600.00} I have been paying for over a year on this loan and now owe more than what the original loan was for."* [#3579172]

Mississippi Borrower, CURO Intermediate Holdings: *"Speedy Cash stopped the payday loans and changed to the installment loans . . . If your payment is due on a certain day they could move it up by 4 days but it [doesn't] help if that 4th day is not a payday. I have paid so many overdraft and bank fees until I feel ashame[d] and stupid. I needed the money but once you get it [it's] hard to get rid of it. I [don't] understand [what's] hard about reasonable payment arrangements. Your 4 day extension is not realistic to customers."* [#2718087]

Missouri Brorrower, CURO Intermediate Holdings: *"Speedy Cash took money from my . . . debit card without my authorization. I receive my social security SSI payments in the amount of $730.00 on this card . . . my card was debited by Speedy Cash for the amount of $520.00. When I called them they stated that my account was past due . . . and that it had gone into collections. . . They also said that there was nothing they could do because the third party collector was involved . . . When I called [the third party], the representative told me that they were not involved in collecting on this account any longer because Speedy Cash had taken the loan back. I am confused by the back and forth. Now, I am in a horrible position. My account was basically drained which leaves me with no money for the entire month. No money for rent, utilities, doctor visit, or prescriptions. I . . . have no idea what I am going to do."* [#2657445]

Montana Borrower, Opportunity Financial, LLC: *"Payday loan struggling to pay off and they helped by refinancing and now I have more to pay off."* [#3383392]

Nebraska Borrower, EasyPay: *". . .They are not letting me pay within the interest free period of 90 days. First they said my card was returned. I dont have a card on file. I told them to take directly out of my account they have my routing and account number. They said they would take the payment out of bank account I have it in writing and they still have not taken the payment. I believe this is a stall tactic so I miss the payoff date and am forced to pay interest. They also told me a bank transfer takes 10days to process? Hello its 2019. These people must be stopped and reported 58 % finance charges??? Please help! . . ."* [#3426200]

Nevada Borrower, LoanMart: *"I needed money to pay for my moving expenses. I took a title max car loan. I 've tried to keep up with the payments but fall short so my payments are late and include a hefty penalty payment in addition to interest . . . . My plan is to pay the entire bill with large lump sum payments. The problem is the amount that is added to the principal balance makes it difficult to pay the loan off. My car was reposed this morning. In order to get my car back, I must pay them $900.00 which includes towing, paying for personal property left in the car and making a trip to the police department to obtain a [repossession] receipt. This is robbery."* [#2157776]

New Jersey Borrower, EasyPay: *"I purchased a living room set. . . I made a down payment of {$460.00} ... Financing the remaining {$1500.00}. . . The agreement was {$180.00} per month for 3 months only to pay a {$40.00} fee if loan ({$1500.00}) is paid off in it 's entirety. I made 2 payments ({$180.00} each) .... I realized I was unable to pay the remaining balance of {$1100.00} in it 's entirety within the 90 days. I go back to my contract to review terms and conditions to realize I 'm going to Incur an exuberant interest rate of 130 % on the remaining balance. I did contact the lending company to verify this rate being accurate as the representative confirmed it was and that it was ok for them to charge me this ridiculous interest rate. [The store] where I purchased the set from actually filled out information online (sight unseen) on my behalf only asking me to confirm certain basic information such as name address bank account info [etc.]. I would have never guessed I was being set up for usury, because I would have never signed up for a 130 % interest agreement. This was never brought to my attention quite naturally because they wouldn't have gotten the sale. I communicated with the owner of [the store] and he completely denied any responsibility for the situation. . ."* [#2774318]

New Mexico, CURO Intermediate Holdings: *"I took a loan with Speedy Cash. . . it was my third loan, as I am lower income and needed cash. I couldn't pay it back in full after other financial hardships, and stopped them from taking the excessive payments from my bank account by closing my account. The two previous loans I had paid in excess of 300 % interest on {$300.00} loan. This last loan I believe was {$350.00} or {$500.00}, but I no longer have access to their login to see my account. In XX/XX/XXXX, they sent me a summons from my county courthouse. I responded timely, but asked them to provide me proof of the loan and the balance due. They were asking for over {$1800.00}. Per the Fair Debt Credit Protection Act, they had thirty days to provide me proof of the loan debt and the balance owed. They did not. on XX/XX/XXXX, I get an email from XXXX (no last name was given) at XXXX, stating I was to appear in court via phone (due to Covid-19 I assume) and a copy of the summons was attached, showing I had a phone court date for XX/XX/XXXX. No time given, and still no requested documentation was given to me. . . I now have to take a day off work to deal with this, and i still have not received the documentation I asked for, as provide by law (FDCPA), and I am not about to give thousands of dollars to this predatory payday loan company. I am considering taking legal action in the form of a class-action lawsuit, which by an online search, they have had several against them. I feel that after paying off two prior loans with them at astronomical, predatory interest rates, and falling victim to hard times shortly after this loan was taken, i should not have to pay back anything more than the original loan amount plus the annual normal interest rate of 18 %. . ."* [#3725391]

New York Borrower, CURO Intermediate Holdings: *". . . I took out a loan for {$1500.00} (possibly went up to {$1800.00}), and I somehow now owe collections (on my credit report) {$2300.00} for Speedycash. They started taking out {$500.00} payments every two weeks, and I'm sure I paid over {$4000.00} in payments to them over the course of months, maybe even more. How can I owe {$4000.00} + {$2300.00} for a {$1800.00} loan?! I guess I didn't understand the paperwork but this ruined months of my life and forced me to take out another payday/installment loan with someone else to pay my rent. And of course that snowballed into a disaster. One point it got so bad I had to put a stop payment on an autopayment from them to pay my rent and they somehow got my debit card number (I never gave it to them) and made a payment to them on that. . . I still owe them money somehow. So depressing. Now I can't get apartment because my credit score is too low and this is the only bad thing on there except for {$270.00} for my old cable box I think? Please help me figure out how to settle with them without paying them even more money. I feel so taken advantage of."* [#3122930]

North Carolina Borrower, Personify Financial: *"I was approved for a loan for {$3500.00} . . . My payments are {$140.00} biweekly. To date I have paid over {$1800.00} on time. However, my current balance is . . . over the amount I borrowed. I am being told that my interest rate 98 % and if I pay according to the terms of the loan, I will pay out over {$10000.00}. I want to pay what I owe plus a fair interest rate for someone with my credit profile but I am not able to comply with the current terms of the loan. I need assistance in making sure that XXXX is fair in their loan terms and updating the current terms which are clearly predatory."* [#3224776] (appears to be a rent-a-bank loan)

North Dakota Borrower, Elevate's Rise: *"On XX/XX/17 I needed to pay for a major repair on my vehicle and had to refinance an existing loan I had with Rise credit to an amount of $2500.00. Since that date I have been making regular payments twice a month of $230.00 and it has all been interest. I have made 21 payments, so over $4000.00 in interest and my principal balance has not gone down at all. I am at a loss of what to do, because I was in a tight spot but had I known id be living this nightmare I never would have taken out this loan."* [#2942998]

Ohio Borrower, Personify Financial: *"I am a mother of 4. During a hard time, I took out an {$8400.00} loan from Personify Financial on XX/XX/XXXX. The original interest rate is 78.69 %. 36 month term. I have paid to date {$8500.00}. Only {$1500.00} of those payments have gone to the principal balance. The other {$7000.00} have gone to interest. I am on an automatic payment plan bi-weekly. {$260.00} comes directly out of my bank account every 2 weeks. I have never been late on a payment to this company.... My interest rate is currently 71 %. This is a predatory loan. This is unethical. This company is charging exceptionally high interest rates. I have paid OVER the amount that I asked for. At this point, I am throwing money out the window. I can not afford this any longer. . . I will have paid them OVER {$20000.00} for a {$8400.00} loan. This is absolutely 100 % predatory."* [#3519412]

Oklahoma Borrower, CURO Intermediate Holdings: *"I received a letter from speedy cash debt collection dept threatening to sue me over old debt and also said that if I didn't respond wuthin seven days my bank accounts would be seized thru major credit bureaus and that I was under investigation. They are asking for way more money than the orginal supposed debt."* [#3907374]

Oregon Borrower, CURO Intermediate Holdings: *"I got a payday loan...for {$300.00} then again a day later. . . for {$300.00} and then another one...for about {$250.00}. . . Well there was no way I could pay those back and made a poor discion and the fact that it's legal is beyonf me. They probably ran my debit card 25 different times and some occasions they got money and the rest been insufficient. I have gotten collections letters numerous times...they some how got my other checking account information and it said it was debit card that was charged. They ran it 3 different times for {$350.00}, {$350.00} and {$330.00}. where they got the amounts in do not know and how they got my card information I do not know but when I logged in my account they had multiple cards on file when I've only gave them one. They took over 1,000 of my unemployment money that I have been waiting almost 2 months for. I was gon na use it to try and catch up my already behind rent. I never authorized them to use that card and they shouldn't have to right to just run it 8 months later. And give no warning or receipt or even answer me.... I'm just sick and tired of businesses making me feel so helpless because they always win. Banks can take and hold your money whenever they want and never help you and it's just okay"* [#3659266]

Pennsylvania Borrower, EasyPay: *"The amount of money going toward the principal was really low and quite unexpected. I paid {$1200.00} over 3-4 months and only {$400.00} went toward the interest. Now it is after the first 100 days and the interest rate went up to 114 %. I will be paying this loan forever and keep getting deeper in. They take {$140.00} every other Friday on a XXXX loan! The final payback amount is {$3800.00} at this rate. No one told me when I went to the mechanic shop that I should just go sell my car. Even after the repair my car ended up having another $ XXXX repair a few months later and with more knowledge, I went right to a dealership and sold it as it. No repair. No additional loan. So now I have a new car and new car note of {$400.00} but have to pay {$310.00} a month on this ({$700.00} a month if I want to avoid the predatory interest)."* [#3573868]

South Carolina Borrower, Enova International Inc. (Net Credit): *"On XX/XX/2016 I was approved for a personal loan with NetCredit. I was unaware of the future circumstances and took out a very high interest loan, 99 % interest on a $2000.00 [loan]. I have become a XXXX veteran and unemployed at the moment due to my condition. The total amount that I will be paying back on a $2000.00 loan is $7800.00. I have been paying on this loan since that date."* [#3229883]

South Carolina Borrower, Enova International Inc. (Net Credit): *"I took a loan from NetCredit in the amount of $1200.00. To date I have made 11 payments at the payment amount of $100.00 each for a total paid of $2000.00 plus a check payment of $100.00 which has not been cashed or applied to my account. NetCredit states I still have fourteen more payments of $100.00 each to make. For a $1200.00 loan, I will end up paying $3600.00, more than THREE TIMES the loan amount!!"* [#3324359]

Tennessee Borrower, Opportunity Financial, LLC: *"I am being contacted everyday, with the exception of Sunday, for a month. The[y] want the loan paid but, I am unemployed and a [] veteran. I have tried to explain this to the company. However, they continue to contact me. It's the same thing everyday."* [#2812101] (appears to be a rent-a-bank loan)

Texas Borrower, Elevate's Rise: *"Due to COVID 19 I am not receiving a paycheck and my account is currently overdrawn. I have explained this to them however they will not offer any assistance and have reported me to the credit bureaus. They continue to try withdrawing different payment amounts. The last one that was returned to them from my bank was {$56.00}. I would like for them to help me since this is a hardship situation and also remove the report to the credit bureaus."* [#3739037]

Utah Borrower, Elevate's Rise: *"I went to check my balance today and the history and it turns out all the payments have gone to interest, nothing is being applied to principle, . . . with everything going on with covid my checks are a lot less and I have asked for help prior and was told they still could not do anything. I asked if we could lower the payment because they offered that prior and now I am told that they will not...i've paid over {$4500.00} i was told i have another year from today to finish paying off the loan...{$10000.00} in interest is a lot and for the company to not work with you when you have been making payments."* [#3902816]

Virginia Borrower, Enova International Inc. (Net Credit): *"I am disputing this loan based on that it is impossible to pay it off at 98.8 %. . . I will pay over $7000.00 for a $3900.00 loan at 98.8 %. . . I have called and spoke with them about 10 times within the last 3 1/2 weeks. NETCREDIT WILL NOT WORK WITH ME OR DISCUSS ANY OPTIONS WITH ME. All I am asking for is to take the interest away from this loan and allow me to make monthly payments that I am able to handle. I understand my responsibility of the balance of the loan but they do not work with their consumers, instead make a profit with predatory lending practices."* [#2183667]

Washington Borrower, Personify Financial: *". . . I obtained a loan through Personify Financial in the amount of {$1500.00} ...What caused this issue, was that I ran into financial trouble soon after the loan was given. I contacted the company to ask about a delay in payment, and they denied. While doing some research, I found out that this company is not licensed in my state of WA, and it is required to be in order to offer loans. Further research showed that Personify Financial says that it does business with a XXXX XXXX XXXX in Utah. My loan would be given and serviced through them as I am in WA. When I phone the XXXX XXXX XXXX in Utah, I was informed that they had no account with my name, and do not have any information of me. Looking back on my paperwork, that name was mentioned in my loan documents, however Personify Financial deposited the money into my bank account, Personify Financial sent the invoices and all payments were made to them-never to XXXX XXXX XXXX. Additionally, my interest rate with Personify Financial for this loan was at 175.35 % which is a huge amount higher than that of WA allowed legal rate of 12 %. I understand now that they are using XXXX XXXX XXXX in Utah to simply be a front bank that allows them to make loans to people in states with licensing requirements and with percentage limits. This is what I believe to be illegal predatory lending...I asked that they simply lessen my APR to the legal amount in WA, especially since they are not licensed in this state to lend. They refused to budge and subsequently began charging me late fees and higher interest as I was in dispute with them....The total amount was {$2600.00}, from an original loan amount of {$1500.00} only 5 months before.... I contest that since Personify Financial is not legally allowed to lend in my state, and they are conducting some sort of back end scheme with a national bank in order to charge predatory lending rates at almost 200 % this should not be on my credit report.... I am sure other consumers-and good, upstanding consumers, are being bullied with these tactics..."* [#3696514]

Wisconsin Borrower, Enova International Inc.: *"They charged 299 % interest . . . I had no idea this is Robbing me ... I have payed the loan off however because of the interest rates I have barley paid the principle and I am still getting ridiculous interest charges of 299 %"* [#3689776]

West Virginia Borrower, CURO Intermediate Holdings: *"For one thing they didn't tell me when I took the loan out that there was 300 % interest on this loan. Didn't tell me as you go everyday that the loan grows interest everyday. Also I'm on public assistance. And I only get ssi every month. I can't afford payments of {$300.00} to {$400.00} a month. I tried to explain this but no one wanted to help me when I called. Now it's put agaisist my credit. If I could make a small payment a month I have no problem paying for the money I got but the interest is way too much"* [#3359939]

STOP THE DEBT TRAP

Repeal the OCC's Fake Lender Predatory Lending Rule to Protect Small Businesses

April 2021

Since the American Revolution, states have limited interest rates to stop predatory lending. Some states only limit rates on consumer loans, but some have usury laws, including criminal usury laws, that protect small businesses. But predatory lenders are starting to launder their loans through banks to **evade state laws that make 73% to 268% APR small business loans illegal.**

A new rule by the Office of the Comptroller of the Currency (OCC), the regulator of the nation's largest banks, protects these predatory lending "rent-a-bank" schemes. The "fake lender" rule allows predatory lenders to ignore state interest rate laws merely by putting a rogue, out-of-state bank's name in the fine print. (Bank loans are generally exempt from state rate caps.) The rule overturns centuries of caselaw in virtually every state allowing courts to look beyond the fine print to the truth in order to prevent usury evasions.

The fake lender rule protects **lenders that not only destroy small businesses – they even take the owner's home.** World Business Lenders (WBL) currently launders loans through OCC-supervised Axos Bank (fka BOFI Federal Bank) in states where WBL's high interest rates are **prohibited**. (In other states, WBL lends directly.) Though a bank's name is on the loan, borrowers deal only with WBL. Axos Bank also enables loans by another predatory small business lender, BFS Capital. Features of these rent-a-bank loans include:

- Rates of 73% to 268% APR on loans of tens and even hundreds of thousands of dollars, in violation of state usury law;
- Deception about the rate (i.e., quoting a 0.35% daily rate instead of 268% APR);
- Gigantic prepayment penalties;
- Shockingly little underwriting beyond ensuring security it can seize (i.e., the business owner's home).

The OCC's rule is being actively used to defend a $67,000 loan at 268% APR (with a huge pre-payment penalty) that violates state usury laws. Axos denies that WBL is renting its charter, but adds "as recently made clear by the Office of the Comptroller of the Currency, even such arrangements are proper," and even if the loan were immediately assigned to WBL, "the OCC's final rule would permit the same interest rates and fees to be charged by WBL as by Axos Bank."

Businesses in multiple states have been targeted by predatory rent-a-bank loans. Nearly a third of WBL's real-estate secured result in default, more than 10% result in foreclosure, and even more small businesses owners **lose not only their business but their home.**

Congress must overturn the OCC "fake lender" rule to protect small businesses and to prevent state usury laws in at least 45 states from becoming a "dead letter."

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Below are descriptions of several cases filed against World Business Lenders (WBL) that illustrate this predatory rent-a-bank business model.

Restaurant owner in New York facing $67,000 in loans at about 268% APR with a 30% pre-payment penalty. Markisha and Carlos Swepson, the owner and chef of a southern-inspired restaurant, fell victim when they found themselves stuck in an unexpectedly long renovation process while needing income after having a baby. A loan broker connected them to WBL and they planned to repay the loan quickly once the restaurant was reopened. Axos Bank was listed as the lender. They did not realize that the .3575% daily rate quote to them amounted to 268% APR. The criminal usury rate in New York is 25%. They fell behind with the high payments and were trying to do a workout plan when the COVID crisis hit. In June 2020, as restaurants began to reopen, they reached out to WBL, which refused to work with them, and then used Axos Bank to file a foreclosure action against the property securing the loan, seeking an exorbitant pre-payment penalty of 30% of the loan. Axos is arguing that the OCC rule permits that rate and preempts state law challenges.

Massachusetts couple in Indian food distribution business lost home over $175,000 loan at 92% APR. In *Kaur et al. v. World Business Lenders et al.*, filed in Massachusetts in April 2019, a married couple was threatened with foreclosure after borrowing $175,000 at 92% APR from WBL for their business, New England Distributors, secured by a mortgage on their house. The loan paperwork listed BOFI/Axos Bank as the lender, but the loan was presented by WBL, all the forms were WBL forms, and the application discussed WBL's role including ordering a valuation of the collateral. The mortgage was assigned from BOFI to WBL and that assignment by BOFI "was signed by World Business Lenders, LLC, as attorney-in-fact for BOFI Federal Bank." The court is considering whether the loan was "doomed to fail."

New York realtor facing foreclosure threats on $90,000 loan at 138% APR. In *Adoni et al. v. World Business Lenders, LLC, Axos Bank and Circadian Funding*, filed in New York in October 2019, Jacob Adoni has been threatened with threats to foreclose on his home after receiving a $90,000 loan at 138% APR secured by his personal residence. Adoni was contacted by Circadian Funding with an offer of a personal loan that would be funded by WBL and Axos Bank. He was told that the loan documents would be provided to him at 12:00 pm and he must execute them by 6:00 pm or the offer would no longer be valid. Adoni was told by Circadian that the loan was meant to be a personal loan to him, but it was necessary for the loan documents to make reference to his business. The defendants "have inundated Mr. Adoni with multiple threats to foreclose on his home and on the mortgage."

Georgia engineering services owner threatened with foreclosure over $55,000 loan at 88% APR. In *Quantum-Mac Int'l v. World Business Lenders, et al.*, a Georgia small business owner was given a $50,000 loan at 88% APR, despite Georgia's 60% usury cap. WBL prepared all of the documents with BOFI Federal Bank (known known as Axos Bank) listed as the lender, and then an officer of WBL used a power of attorney for the bank to assign the loans to WBL. WBL is seeking $133,519 in interest and is threatening to foreclose on the owner's home.

Florida realty company challenging 100% APR loan. In *Koffel et al. v. World Business Lenders et al.*, filed in Florida in June 2020, a realty company challenged a loan at rate of over 100%. WBL prepared all loan documents but only BOFI Federal Bank (Axos Bank) was named, though the borrowers never communicated with the bank. The complaint alleges that when WBL was "confronted with the fact that the loans were outrageous and criminally usurious, WBL replied that was because Nevada does not have such laws and that WBL agreed they were using BofI [Axos Bank] solely for the purpose as a 'rent a bank.'"

General contractor in Florida deceived into 73% APR for $400,000 loan. In *Vincent Deramo Jr. et al. v. World Business Lenders, LLC*, filed in Florida in 2017, a general contractor and his wife allege that WBL contacted them, saying they were an agent for a bank, and offered a $400,000 loan, secured by their home and later refinanced. Despite the promise of a 15% APR, they allege that WBL actually charged them 72-73% APR. The documents were prepared by WBL and were mailed to WBL and the plaintiffs had no contact with the bank. The mortgage was assigned from the bank to WBL through a signature of the vice president of WBL as power of attorney for the bank.

Medical supply business in New York facing 73% APR on $28,000 loan. In *B&S Medical Supply et al v. World Business Lenders et al.*, filed in New York in 2017, WBL solicited Boris Simon, the owner of B&S Medical Supply, for a $28,000 business loan at 73% APR, provided by Liberty Bank, that was secured by Simon's home. The business loan application contained both the business logo and contact information of WBL and Liberty. The loan was immediately assigned from Liberty to WBL. WBL corresponded with Simon, referring to itself as the "Lender" and saying that it would service the loan and have the right to collect payments.

Foreclosure on home in Connecticut over $20,000 and $30,000 loan at 121%, 400% APR. In *Speer v. Danjon Capital et al.*, Elissa Speer of Connecticut alleged that she was facing a civil action in Nevada and a foreclosure of a residential property in Connecticut after taking out a $30,000 loan alleged to be at 400% and a second loan of $20,000, alleged to be at 121% APR. The loans were offered by Danjon Capital in collusion with WBL, but were purportedly on funds lent by Bank of Lake Mills (WBL's partner before Axos Bank). After executing the first note and mortgage, Danjon refused to release the funds unless Speer executed a lease agreement for "restaurant equipment" despite the fact that Speer was never in the restaurant business and she alleged that the equipment referenced, including two backpack leaf blowers, had no practical restaurant use. The complaint alleges that the defendants disguised residential mortgage loans made to consumers primarily for personal, family, or household uses, as commercial loans in order to avoid Connecticut's licensure and other laws.

Warehouse business in Colorado faced 120% APR on $550,000 loan; OCC defended the rate despite Colorado's 40% business interest cap. The loan was secured by a warehouse. After the warehouse owner ended up in bankruptcy, the debtor challenged the 120% rate as usurious. The OCC and FDIC filed an amicus brief supporting that rate because a bank's name was on the paperwork and the loan was subsequently assigned to WBL.

Design studio in Texas caught in $42,000 loan at 274% APR. Tammy Laurie Hamilton owned The Design Studio. According to a lawsuit, she entered into a loan with BFS Capital, but the loan agreement named Axos Bank as the lender. The loan quoted a "factor rate" of 1.3475, which equated to a 274% APR, which the lawsuit alleged violated Texas's 24% usury cap for commercial loans.

For more information, visit StoptheDebtTrap.org

STOP THE DEBT TRAP

Congress Must Protect Veterans from Predatory Lenders

Since the American Revolution, states have limited interest rates to stop predatory lending. But predatory lenders are starting to launder their loans through banks to **evade state laws that make loans up to 179% APR illegal** (Bank loans are generally exempt from state rate caps). Although, active-duty service members and their families are protected by the Military Lending Act, which caps rates on consumer loans, **veterans are already being targeted by predatory lenders** that take advantage of evasion schemes. A rule by the Office of the Comptroller of the Currency (OCC), the regulator of the nation's largest banks, effective last December protects these predatory lending "rent-a-bank" schemes and overturn centuries of caselaw allowing courts to look beyond ruses to the truth.

At least 10 high-cost consumer lenders, many of which operate payday or auto title brands—**American First Finance, Axcess Financial (Check 'n Go, Allied Cash Advance), Check Into Cash, CURO (Speedy Cash, Rapid Cash), Duvera Billing Services (EasyPay), Elevate (Rise, Elastic), Enova (CashNet USA, NetCredit, OnDeck), Wheels Financial (LoanMart, ChoiceCash), OppLoans (OppFl), Applied Data Finance (Personify)**—are using five FDIC-supervised banks and one OCC-supervised bank to make high-cost rent-a-bank loans to consumers. ***Consumers from every state have submitted more than 6,000 complaints about these companies to the Consumer Financial Protection Bureau, and more than 650 of those complaints come from servicemembers***.[1] Military, veterans, and their family can self-identify in complaints. In addition, consumers are asked to provide details about their complaint and can opt to disclose those narratives publicly. Below is just a sampling of these complaints from military and veteran families.

Veterans are speaking out against these predatory lenders beyond the consumer complaint database. One disabled veteran surviving on a fixed income got stuck in a 160% APR loan in California where the rate cap is about 36%. Veterans are not protected by the Military Lending Act and are targeted by predatory lenders. This new "fake lender" rule prevents state rate caps from protecting veterans from predatory lenders as well.

Congress must overturn the OCC "fake lender" rule to prevent state usury laws in at least 45 states from becoming a "dead letter" and protect Veterans.

* * * * * * * * * * * * *

California Borrower, Elevate's Rise: *"I received a loan of {$4000.00} to be paid back @ {$250.00} every 2 weeks. Instead of the loan going down after XXXX payments my loan amount went up to {$4500.00} I was informed that they charge a " Per Diem " fee of anywhere from {$16.00} to {$20.00} per day till the loan is paid off. My APR was set at 148.03 %. I was also told some people are charged up to 299 % APR fee. Is this legal? I believe this company is offering predatory loans.If I pay them according to the way they are charging me the loan pay back is {$11000.00}. Please Help before they ruin my credit!"* [#3491904]

South Carolina Borrower, Enova International Inc. (Net Credit): *"They went against the Military Lending Act and charged me 64.54 % annual percentage rate from XX/XX/XXXX-XX/XX/XXXX. {$4000.00} quickly became {$7500.00}."* [#3642402]

[1] Consumer Financial Protection Bureau, Complaint Database search, (March 19, 2021). https://www.consumerfinance.gov/data-research/consumer-complaints/.

Georgia Borrower, Enova International Inc.: *"I applied for this loan-I don't recall the dates specifically, XXXX or XXXX to pay up my car insurance, after an injury, and being off work. I believe I asked for {$3200.00} or {$3500.00} for the loan amount. I received the interest rate information, but I was in desperate need, so I agreed to it.... I... lived for awhile on a monthly annuity. Well, the year is up and my annuity amount has changed DRASTICALLY. I'm now trying to get Social Security XXXX Insurance, and have to wait. In the meantime, I can't continue to pay for this NETCREDIT loan TWICE per month. I've written, them, I've called them... I KNOW the loan is mine, I've been paying it off, AND the exorbitant interest rates. It's terrible that company 's like this can do this to the working poor. I waited for a long time before actually accepting the money, and they " hunted " and quickly agreed to send it, but I knew THEN, I was in trouble. I'm NEVER gon na be able to pay this loan off! And it's ridiculous and unfair. I've worked 43 years of my life, and never needed one of these loans, and now I know I was right in my feeling of acceptance. PLEASE, TELL THESE PEOPLE TO JUST TAKE ONE PAYMENT PER MONTH. It's gon na prolong the loan, but at least I won't be afraid my necessary bills won't suffer as a result of this loan. NOW I pay my mortgage, car insurance, and bills. This is SURVIVAL MODE. I'm just asking for some assistance. And PLEASE, ask them to send me the TIME when the loan WILL BE PAID OFF! ...PLEASE HELP ME."* [#3728257]

Minnesota Borrower, Personify Financial (AKA Applied Data Finance, LLC): *"...I am currently paying an unbelievable interest rate. My loan details are as follows : Account Type Installment Loan Original Annual Percentage Rate (APR) 98.90 % Original Term 72... Current Interest Rate 93.50 % Current Payment Amount {$410.00} Current Payment Frequency Monthly Amount Financed {$5000.00} Outstanding Principal Balance {$4800.00} Accrued Interest {$510.00} Unpaid Fees {$270.00} Total Outstanding* {$5600.00} I have been paying for over a year on this loan and now owe more than what the original loan was for."* [#3579172]

Nevada Borrower, EasyPay (aka Duvera): *"Utilized small loan service Duvera to assist purchasing a puppy with an understanding I would have until XX/XX/2020 to satisfy the amount due. Duvera assigned the loan to XXXX. XXXX applied an appalling amount of interest to the loan. In my constant calls they were unwilling the allow me to satisfy the account so that they could continue to charge insane and illegal amount of interest daily. Once I finally had satisfied the account, they continue to report me as having a monthly payment and balance due. I have called and again they are unwilling to assist by updating their reporting to the bureaus. I am requesting all interest refunded, and credit reporting updated to reflect as paid in full/satisfied. This reporting continues to negatively impact on my ability to receive credit. This company is engaged in continual predatory lending practices, and are acting maliciously against me. They need to be closed down! Where are consumer protections?"* [#4078227]

Texas Borrower, CURO Intermediate Holdings: *"I have two installment loans. One with SpeedyCash.com... I took out the loans in XXXX after starting a new job. I have made all of my automate payments as scheduled. Today I called for a payoff and settlement of the loans. That's when I found out that I have been paying primarily interest on the loans. I have already paid back the principal on both these loans. SpeedyCash.com loan was for {$820.00} and I have paid back {$1400.00} with a payoff of {$730.00}...There was no way of getting off or this cycle. I called and told the companies that my wife had lost her job because of the COVID-19 I was offered to extend my payment by 5 days or make half of the scheduled payment. I asked if it was a way to settle the loan I was told no."* [#3601712]

Utah Borrower, Enova International Inc.: *"I called the company this morning to pay off my loan. They would not take a payment as my account is " under review " (as it has been for at least three weeks) and I can not access the website due to this " under review " status. However, while my account has been under review, they have continued to charge daily interest and take payments without issue every two weeks. When I asked if they could suspend interest charges until they allow me to pay off my account, I was told that I could request for them to refund all the accumulated interest once my account was no longer " under review, " a status which has an indeterminate timeline. In the meantime, they will continue to collect payments every two weeks and keep my account " under review " and continue to make money off a loan that I attempted to pay off."* [#3761105]

LETTER FROM THE FAITH FOR JUST LENDING COALITION

For Immediate Release
March 30, 2021
Press Contact: Katie Thompson katie.thompson@cpjustice.org 908-472-8820

Faith Leaders Applaud Congress' Decision to Challenge OCC's 'True Lender' Rule

National Faith Organizations Urge Congress to Prevent Loopholes that Harm Borrowers

WASHINGTON — On March 25, Members in both chambers of Congress took steps to protect borrowers from predatory payday loans. Senator Chris Van Hollen (D-MD), Senator Sherrod Brown (D-OH), and Representative Jesús "Chuy" García (D-IL) introduced a Congressional Review Act (CRA) resolution to challenge the Office of the Comptroller of the Currency (OCC)'s "National Banks and Federal Savings Associations as Lenders" rule.

The OCC's rule threatens existing state protections against predatory payday lending and emboldens lenders by encouraging non-bank lenders to partner with banks as the "true lender", thus evading state interest rate caps. The rule allows lenders charging interest rates of 179% or higher to evade state rate caps.

Over several decades, high-cost lending to those in need has increased significantly. Nearly 16,000 payday and car title loan stores operate nationwide. Taking advantage of loopholes and a weakening of traditional usury laws, many of these lenders now offer loans at 300% APR and higher. Far too often, the result is families trapped in a cycle of debt with even less ability to pay the bills, keep food on the table, save for the next emergency, or provide for their children. Currently 18 states and the District of Columbia have enacted rate caps to protect borrowers from usurious interest rates and fees.

The **Center for Public Justice**, **Cooperative Baptist Fellowship**, **National Latino Evangelical Coalition**, **National Association of Evangelicals**, **National Baptist Convention**, **USA, Inc.** and the **Southern Baptist Ethics & Religious Liberty Commission** – members of the Faith for Just Lending coalition – applaud the introduction of the Congressional Review Act in both chambers.

In a March 24 letter to Members of Congress urging the introduction of the Congressional Review Act, the coalition noted:

> Now, more than ever, we should also prohibit usury and economic exploitation. Collectively our organizations and denominations represent millions of Christians across the country. Our churches and charities are actively engaged in efforts to end poverty, alleviate suffering and promote opportunities for all people to flourish. We are deeply concerned about how the OCC's rule will impact the working families and vulnerable communities we serve.

Stephen Reeves, Director of Advocacy at the Cooperative Baptist Fellowship, said,

> Predatory payday and auto title lenders are notorious for exploiting loopholes in order to offer debt-trap loans to families struggling to make ends meet. People of faith have worked for decades on the state and federal level to close such loopholes and return our laws to a traditional understanding that usury and exploiting the vulnerable in their time of need is wrong. The OCC's "True Lender" rule creates a loophole big enough to drive a truck through and demolishes years of advocacy. No state should be forced to offer less protection for borrowers in their state due to short-sighted federal regulations. In fact, federal regulators should be ensuring better basic protections nationwide, not worse.

The introduction of the Congressional Review Act is a step in the right direction to respect the authority and responsibility of states to enact strong consumer protections without providing a loophole for predatory lenders to subvert existing state rate caps.

The Faith for Just Lending coalition also calls upon Congress to extend the protections of the Military Lending Act, including a 36% rate cap, to all Americans.

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THE ETHICS & RELIGIOUS LIBERTY COMMISSION OF THE SOUTHERN BAPTIST CONVENTION

National Latino Evangelical Coalition

cbf Cooperative Baptist Fellowship

NAE | National Association of Evangelicals

National Baptist Convention, USA, Incorporated

THE CENTER FOR PUBLIC JUSTICE

LETTER FROM KWAME RAOUL, ATTORNEY GENERAL, STATE OF ILLINOIS

OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Kwame Raoul
ATTORNEY GENERAL

April 21, 2021

VIA ELECTRONIC MAIL

Hon. Charles E. Schumer
Majority Leader
U.S. Senate

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

Hon. Mitch McConnell
Minority Leader
U.S. Senate

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

Hon. Sherrod Brown
Chairman
U.S. Senate Committee on Banking, Housing and Urban Affairs

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

Hon. Pat Toomey
Ranking Member
U.S. Senate Committee on Banking, Housing, and Urban Affairs

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

Re: Use of Congressional Review Act to Invalidate OCC True Lender Rule That Facilitates Predatory Lending

Honorable Congressional Leaders,

On behalf of the 25 undersigned State Attorneys General (the "States"), we write to express our strong and bipartisan objections to the so-called "True Lender Rule"[1] (the "Rule") finalized by the Office of the Comptroller of the Currency ("OCC") on October 30, 2020. That

[1] *See* 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.

Rule would sanction high-cost lending schemes devised to evade state usury laws. A growing number of states continue to pass state usury interest-rate caps on high-cost small-dollar loans in an effort to protect their consumers from predatory financial products. The OCC's Rule would be exploited by lenders seeking to circumvent these state interest-rate caps and invite, indeed welcome, predatory consumer-lending partnerships between banks and lightly regulated non-depository lenders. We urge you to use the Congressional Review Act, 5 U.S.C. §§ 801-808 ("CRA"), to rescind the OCC's True Lender Rule and safeguard states' fundamental sovereign rights to protect their citizens from financial abuse.

The Rule would sanction the use of so-called "rent-a-bank" schemes in which banks, regulated by federal agencies like the OCC, enter into sham relationships with non-bank entities for the principal purpose of allowing the non-banks to evade state usury laws. To facilitate these arrangements, the Rule heedlessly licenses non-bank entities to preempt state usury laws, notwithstanding the fact that Congress delegated this privilege exclusively to banks. Such sham rent-a-bank schemes have been widely scrutinized by courts to determine whether the bank is, in fact, the "true lender" of the loans. In order to identify the true lender, courts look to the substance rather than the form of the loan, examine the relationship between the bank and the non-bank and the totality of the circumstances surrounding the transaction.

Numerous courts across the United States have held that non-banks cannot escape state usury prohibitions under the guise of rent-a-bank schemes.[2] Courts have not hesitated to apply the "true lender doctrine" when a bank is named as the nominal principal party to a loan transaction but the transaction involves a non-bank participant attempting to skirt state usury limits.[3] For example, in applying the doctrine, the West Virginia Supreme Court of Appeals, relying on a long line of federal circuit court holdings, held that the "predominant economic interest" test is the proper standard to use when determining who *is* the "true lender" and thus whether state law is preempted.[4] This test examines which party (be that the bank or non-bank

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[2] See, e.g., *Cmty. State Bank v. Strong*, 651 F.3d 1241, 1260 (11th Cir. 2011) (concluding that federal banking law does not immunize a bank from state usury law "if it is not the true lender of the loan"); Think Fin., 2016 WL 183289, at *13 (same); *Spitzer v. Cnty. Bank of Rehoboth Beach*, 45 A.D.3d 1136, 1138 (3d Dep't 2007) (holding that "the true lender," rather than "the written characterization that the parties seek to give" the transaction, determines whether a bank or a non-bank would be treated as the lender); cf. *CashCall, Inc. v. Morrisey*, No. 12-1274, 2014 WL 2404300, *7, 14-15 (W. Va. 2014) (affirming judgment finding that unlicensed entity "was the de facto or true lender" and thus violated state licensing and usury laws).

[3] *See Daniel v. First Nat'l Bank of Birmingham*, 227 F.2d 353, 357 (5th Cir. 1955) (holding a National Bank was liable for usury because the transaction involved "a loan or extension of credit to which the Bank was privy throughout" even though the contract was assigned to the bank after the transaction closed); *Ubaldi v. SLM Corp*., 852 F. Supp. 2d 1190, 1203 (N.D. Cal. 2012) (denying motion to dismiss in case alleging that Sallie Mae, not a National Bank, was the true lender); *Goleta Nat'l Bank v. O'Donnell*, 239 F. Supp. 2d 745, 747, 755 (S.D. Ohio 2002) (concluding that if a non-bank was the "true lender," then it would "unquestionably [be] subject to" state usury law, even though a different entity "is clearly listed as the lender on the loan documents"); *Goleta Nat'l Bank v. Lingerfelt*, 211 F. Supp. 2d 711, 717-18 (E.D.N.C. 2002) (same); *Salazar v. Ace Cash Exp., Inc*., 188 F. Supp. 2d 1282, 1285 (D. Colo. 2002) (same); *Eul v. Transworld Sys*., No. 15 C 7755, 2017 WL 1178537, at *6 (N.D. Ill. Mar. 30, 2017) ("Because Plaintiffs allege that [a National Bank] was not the true originator of their loans, the Court is not persuaded that NBA preemption applies here.").

[4] *Cashcall* at 14-15; citing *Goleta Nat. Bank v. Lingerfelt*, 211 F.Supp.2d 711(E.D.N.C.2002); *Colorado ex rel. Salazar v. Ace Cash Exp., Inc*., 188 F.Supp.2d 1282 (D.Colo.2002); *Flowers v. EZPawn Oklahoma, Inc*., 307 F.Supp.2d 1191(N.D.Okla.2004).

entity) has the predominant economic interest in loans "made" by a bank, considering factors such as which party uses its own money to fund the transaction and who holds the ultimate financial risk.[5] The predominant economic interest test, employed by courts across the country, examines the substance, not just the form, of rent-a-bank lending agreements.[6] Moreover, scrutinizing a transaction for the "true lender" in order to determine if parties are attempting to evade state usury limitations is a modern application of the *centuries* old anti-evasion doctrine.[7] Recently, Georgia codified this test in state law to prevent rent-a-bank schemes from violating that state's usury cap.[8]

In direct contradiction to this reasoned judicial analysis, the OCC has issued a harmful Rule that establishes a simplistic standard to *redefine* the meaning of "true lender". Under the OCC's Rule, regardless of the totality of the circumstances surrounding a bank and non-bank relationship, the national bank will be viewed as the true lender "when, as of the date of origination, it (1) is named as lender in the loan agreement or (2) funds the loan." This superficial approach allows free rein for the predatory rent-a-bank lending artifice to expand into and thrive within every state regardless of state consumer protection laws.

In an attempt to halt the application of the Rule, the State Attorneys General from New York, California, Colorado, District of Columbia, Massachusetts, Minnesota, New Jersey and North Carolina[9] have filed a multistate lawsuit against the OCC for its wholesale disregard of regulatory law and administrative procedure in promulgating the Rule.[10] While that litigation remains pending, and may take years to resolve, a high cost will be borne in needless consumer

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[5] *Cashcall* at 14, footnote 19:

> Courts have also applied the "predominant economic interest" test in deciding cases on the merits. For example, in *Spitzer v. County Bank of Rehoboth Beach*, 846 N.Y.S.2d 436 (N.Y.App.Div.2007), New York's Attorney General brought an enforcement action against payday lenders who had entered into rent-a-bank arrangements. In *Spitzer*, the Attorney General alleged that the payday lenders were the true lenders and that their agreements with a rent-a-bank were a scheme to circumvent New York's usury laws. The *Spitzer* court noted that the payday lenders purchased ninety-five percent of each of the bank's loans, assumed all risks of the loans, and indemnified the bank against any loss arising from a loan transaction. The *Spitzer* court then found that a totality of the circumstances must be used to determine the identity of the "true lender," with the key factor being who had the predominant economic interest in the transactions. *Id.* at 438–39. Ultimately, the bank and the payday lender in *Spitzer* entered into a $5.2 million settlement agreement with New York's Attorney General. *See also Andrews v. Cramer*, 256 Ill.App.3d 766, 195 Ill.Dec. 825, 629 N.E.2d 133, 136 (Ill.App.1993) (quote omitted); *Ghirardo v. Antonioli*, 8 Cal.4th 791, 35 Cal.Rptr.2d 418, 883 P.2d 960, 965 (Cal.1994) (citations omitted) (stating that the trier of fact must look to the substance of the transaction, rather than its form, and must determine whether such form was a mere sham and subterfuge to cover up usurious transactions); *Williams v. Powell*, 216, 214 Ga.App. 216, 447 S.E.2d 45, 48 (Ga.App.1994) (quote omitted).

[6] Id at 15, relying on *Carper v. Kanawha Banking & Trust Co.*, 157 W.Va. 477, 207 S.E.2d 897 (478, 901) (1974).

[7] See, *De Wolf v. Johnson*, 23 U.S. 367 (1825) ("Usury is a mortal taint wherever it exists, and no subterfuge shall be permitted to conceal it from the eye of the law; this is the substance of all the cases, and they only vary as they follow the detours through which they have had to pursue the money lender."); see also *Scott v Lloyd*, 34 U.S. 418, 446-47 (1835).

[8] *See*, e.g., Ga. Code. Ann. § 16-17-2(b)(4) (creating totality of the circumstances test to determine when "a purported agent shall be considered a de facto lender" for purposes of state usury laws);

[9] These states are also signatories to this letter.

[10] See *New York v. OCC*, Case No. 1:21-Civ.-00057-SHS (S.D.N.Y.), complaint available at https://ag.ny.gov/sites/default/files/01.05.21_complaint_doc._no._1.pdf.

hardship and waste of precious time, during which predatory lenders, under cover of the OCC's Rule, will propagate their rent-a-bank schemes.

The most efficient course to prevent unrestrained abuse and avert immediate and ongoing consumer harm would be for Congress to invalidate the Rule pursuant to its remedial oversight powers under the Congressional Review Act.[11]

Americans spanning all political alignments are demanding that lenders who impose unconscionably exorbitant interest rates be subject to more, not less, regulation.[12] Currently, 45 states and the District of Columbia cap interest rates on installment loans, depending on the size, at a median rate of 38.5% for a $500, 6-month loan and 32% for a $2,000, 2-year loan.[13] During an unprecedented economic downturn, brought on and exacerbated by Covid-19, the OCC seeks to *expand* the availability of exploitative loans that trap borrowers in a never-ending cycle of debt. We urge Congress to use its powers under the Congressional Review Act to invalidate the OCC's True Lender Rule and safeguard the right of sovereign states, and the ability of an independent judiciary, to safeguard our citizens from rent-a-bank schemes designed to work end-runs around essential consumer protections.

Respectfully submitted,

LESLIE RUTLEDGE
Arkansas Attorney General

MATTHEW RODRIGUEZ
California Acting Attorney General

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[11] 5 U.S.C. §§ 801-808.

[12] For example, when South Dakota voted on an interest rate cap in 2016, the payday loan industry spent over a million dollars lobbying against the measure, which was ultimately approved by 76% of voters in what one opponent of the cap conceded was a "landslide." *See* Bart Pfankuch, *Payday Loans Gone, But Need for Quick Cash Remains*, Capital Journal (Pierre, S.D.), Mar. 23, 2018. *See also* Megan Leonhardt, *Nebraska becomes the latest state to cap payday loan interest rates*, CNBC.com., Nov. 4 2020. Roughly 83% of Nebraska voters approved Measure 428 supporting a ballot initiative that caps rates on payday loans at 36% throughout the state. https://www.cnbc.com/2020/11/04/nebraska-becomes-the-latest-state-to-cap-payday-loan-interest-rates.html

[13] *See* National Consumer Law Center, State Rate Caps for $500 and $2,000 Loans (March 2021), http://bit.ly/state-rate-caps. These states include Nebraska, where a 36% rate cap passed by ballot measure on November 3, 2020, with 83% of the vote. Nebraska Initiated State Statute 45-901 *et seq.*, 2020 Initiative 428. Montana passed its 36% consumer loan rate cap in 2010. Montana Deferred Deposit Loan Act, Mont. Code Ann. 31-1-701. Arkansas set a 17% interest rate cap in 2010, even including this rate cap in its state constitution. Ark. Const. Amend. 89 § 3. South Dakota passed a 36% interest rate cap on consumer loans, including title loans, in 2016. S.D. Codified Laws 54-4-36 *et seq.* Other states with a rate cap of 36% or lower include: Colorado, Connecticut, Illinois, Massachusetts, North Carolina, New Hampshire, New Jersey, New York, Pennsylvania, Vermont. Several other states cap the interest rate at 36% but allow a fee that can increase the APR on smaller loans: Arizona, Georgia, Maryland, Virginia and West Virginia. On Jan. 13, 2021, the Illinois General Assembly passed SB1792, the Predatory Loan Prevention Act. The legislation passed with a bipartisan vote in both chambers. This measure, signed into law on March 23, 2021, is largely mirrored on the Federal Military Lending Act, 10 U.S.C. 98, implemented by the Department of Defense, that protects active-duty military, their spouses and their dependents, with a 36 percent rate cap referred to as the Military Annual Percentage Rate. The Illinois Predatory Loan Prevention Act extends that same protection to veterans and all Illinois consumers who use financial products of under $40,000 in value, including payday and car title loans.

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TOM MILLER
Iowa Attorney General

AARON M. FREY
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BRIAN E. FROSH
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MAURA HEALEY
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DANA NESSEL
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LETTER FROM NACA

April 27, 2021

U.S. Senate
Washington, DC 20510

Re: **Re: Support S.J.Res. 15 (Van Hollen)/H.J.Res. 35 ("Chuy" Garcia) disapproving OCC's Rule on National Banks and Federal Savings Associations as Lenders**

Dear Senator:

The undersigned state chairs of the National Association of Consumer Advocates (NACA) represent individuals who have been harmed by unfair, deceptive, abusive, and fraudulent practices, including illegal debt collection, violations of mortgage servicing and credit reporting laws, and predatory lending. On behalf of our colleagues and working families across the country, we urge you to support the Congressional Review Act resolution (S.J. Res. 15 and H.J. Res. 35) to repeal a federal rule that severely infringes on our respective state laws that help shield residents from usury and other financial abuses.

Last year, the Office of the Comptroller of the Currency (OCC) proposed and finalized a sweeping and extreme regulation that preempts state interest-rate limits as applied to non-bank entities outside the OCC's authority. The rule allows non-bank lenders charging up to 179% APR or more to ignore state usury laws merely by putting a bank's name on the loan agreement and claiming that it is a "bank loan" permitted to charge interest above rates permitted by state law. These non-bank lenders would benefit from the federal law that exempts national banks and federal savings associations holding federal charters from state rate laws. The rule does not require any more bank involvement than having a bank's name as the lender in the fine print.

This is not a theoretical concern. The current activities of OCC-regulated banks to enable predatory lending belie the OCC's protestations that it will prevent abuses. OCC-regulated Stride Bank has been helping CURO to pilot an online rent-a-bank installment loan program called Verge Credit at 179% APR.[1] CURO's other brands include the payday lenders Speedy Cash and Rapid Cash. CURO told investors that the Stride Bank program "will help us expand geographically, online and in some states where we — where we don't operate right now"[2] – in other words, in states that do not permit such high rates.

Similarly, OCC-regulated Axos Bank has enabled high-interest small business loans through World Business Lenders.[3] The OCC's rule is being used to back World Business Lenders' right to charge 268% APR on $67,000 in loans to a restaurant owner.[4] The WBL small business loans enabled by Axos Bank are often secured by the owner's home. Discovery in litigation has shown that 30% of WBL's real-estate secured loans default.[5]

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[1] https://www.vergecredit.com/rates-and-terms/ (visited Jan. 20, 2021), archived site at https://www.nclc.org/images/pfiles/litigation/Verge_Site_2021_01_20.pdf.

[2] CURO Group Holdings Copr. (CURO) Q4 2019 Earnings Call Transcript, Feb. 6, 2020, https://www.fool.com/earnings/call-transcripts/2020/02/06/curo-group-holdings-corp-curo-q4-2019-earnings-cal.aspx.

[3] *See* Stop the Debt Trap, Repeal the OCC's Fake Lender Predatory Lending Rule to Protect Small Businesses,April 2021, https://consumerfed.org/wp-content/uploads/2021/04/Small-Business-RAB-Brief-FINAL-1.pdf.

[4] *Compare* [PROPOSED] ANSWER, COUNTERCLAIMS, AND THIRD PARTY CLAIMS, Axos Bank v. Swepson et al., No. F0993531-20 (Sup. Ct. N.J. filed Nov. 5, 2020), http://bit.ly/Swepson-compl, *with* Letter Brief of Plaintiff (Nov. 24, 2020), http://bit.ly/Swepson-reply.

[5] See Public Comment of Shane R. Heskin, Esq. on behalf of Ramanjeet Kaur, Kulwinder Singh Uppal, and New England Distributors, "National Banks and Federal Savings Associations as Lenders," Docket ID: OCC-2020-0026 RIN 1557-AE97, Sept. 3, 2020, http://bit.ly/Heskin-comment.

Non-bank lenders have long attempted to pass their loans through banks that would permit them to make costly loan products with triple-digit interest rates in states that have usury rate limits. Even though lenders argued in the past that their product is a "bank loan" exempt from state rate caps, courts over the years had determined that banks had little involvement with these loans. Through thoughtful analyses, courts, relying on a substance-over-form anti-evasion doctrine endorsed by the Supreme Court and the courts of nearly every state, have found the non-bank lender was the *true* lender of the loan, and therefore subject to the respective state usury law.[6]

A group of state attorneys general which sued the OCC challenging the rule's validity, called the regulation a "federal overreach."[7] We agree. The OCC rule preempts years of similar state actions and judicial decisions related to non-bank lender collaborations. The rule asserts that banks are the "true lender" and the loans are exempt from state interest rate caps simply if the bank is "named as the lender in the loan agreement." Meanwhile, in reality, it is the non-bank entity that actually designs, markets, processes, and collects on these high-interest loan products. The OCC rule facilitates these risky "rent-a-bank" schemes, helps lenders to evade state laws, and disregards well-established judicial decisions that consider the substantive administration of the loans.

Not only does the rule interfere with usury laws in at least 45 states,[8] it also goes against the will of voters. Recently, bipartisan majorities supported state interest rate limits in Arizona, Colorado, Montana, Ohio, and South Dakota. Last November, 83% of Nebraska voters supported a 36% interest rate cap.[9]

This rule will hurt borrowers in our states. High-cost lenders are already targeting specific groups, including veterans[10] and small businesses,[11] who now cannot rely on the limits their states put in place to protect them from overcharging on installment and payday loans. We have observed consumers pay for years on these predatory loan products, but still end up owing exceedingly more than the amount of the original loan.

Further, in the wake of the COVID-19 health and financial emergency when families are struggling to make ends meet and small businesses are fighting to survive, state governments should be able to enforce their more protective policies to shield residents and small businesses from usurious loans. Congress should send a clear message that the OCC's dubious effort to block state protections and threaten states' authority to safeguard their residents' financial wellbeing is improper.

We urge you to take immediate steps to rescind this rule. Thank you for considering our views.

Sincerely,

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[6] See, e.g., *CashCall, Inc. v. Morrisey*, 2014 WL 2404300 (W.Va. May 30, 2014).
[7] Complaint, *People of the State of California et al v. The Office of the Comptroller of the Currency,* Case 4:20-cv-05200, N.D. Cal., filed July 29, 2020, https://oag.ca.gov/system/files/attachments/press-docs/OCC%20Non-bank%20Interest%20Rule%20Complaint%20%28as%20filed%29.pdf.
[8] National Consumer Law Center, *State Rate Caps for $500 and $2,000 Loans*, March 2021, https://www.nclc.org/images/pdf/high_cost_small_loans/payday_loans/FS_State_Rate_Caps_2021.pdf.
[9] Megan Leonhardt, *Nebraska becomes the latest state to cap payday loan interest rates*, CNBC, Nov. 4, 2020, https://www.cnbc.com/2020/11/04/nebraska-becomes-the-latest-state-to-cap-payday-loan-interest-rates.html.
[10] See e.g., Complaint, *Sims v. Opportunity Financial, LLC, d/b/a OPPLOANS, Finwise Bank*, Case No.: 4:20-cv-04730-PJH, N. D. Cal., filed Sept.1, 2020.
[11] Gretchen Morgenson, *New Trump admin rules make it easier for lenders to charge small businesses super-high interest rates,* NBC NEWS, Dec. 8, 2020, https://www.nbcnews.com/business/economy/new-trump-administration-rules-make-it-easier-lenders-charge-small-n1250023

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LETTER FROM NAFCU

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National Association of Federally-Insured Credit Unions

April 27, 2021

The Honorable Sherrod Brown	The Honorable Pat Toomey
Chairman	Ranking Member
Committee on Banking, Housing, & Urban Affairs	Committee on Banking, Housing, & Urban Affairs
U.S. Senate	U.S. Senate
Washington, D.C. 20510	Washington, D.C. 20510

Re: Tomorrow's Hearing, "The Reemergence of Rent-a-Bank?"

Dear Chairman Brown and Ranking Member Toomey:

I write to you today on behalf of the National Association of Federally-Insured Credit Unions (NAFCU) in conjunction with tomorrow's hearing, "The Reemergence of Rent-a-Bank?." As you are aware, NAFCU advocates for all federally-insured not-for-profit credit unions that, in turn, serve over 124 million consumers with personal and small business financial service products. We thank you for holding a hearing on this important topic. We have serious concerns with the reemergence of rent-a-bank schemes, and we would like to share our support for S.J.Res.15, which would repeal the rule submitted by the Office of the Comptroller of the Currency (OCC) relating to "National Banks and Federal Savings Associations as Lenders" (the "True Lender rule"). This issue also raises important questions regarding non-bank lending activity, including that of fintechs, and their lack of federal safety and soundness oversight. To that end, we urge you to examine the presence of fintechs and technology firms in the market for consumer financial services and the risks they pose to consumers and the stability of the financial system.

OCC True Lender Rule and the Reemergence of Rent-a-Bank

The OCC finalized its True Lender rule in October 2020, which became effective in December 2020, allowing banks and federal savings and loans to provide their charter for online lenders to deliver high-cost loans with annual rates exceeding 100 percent that evade State consumer protections and usury caps. In this scheme also known as "rent-a-bank," online lenders essentially rent bank charters and documentation to originate their loans in the name of the OCC-chartered banking institution, arguing that it is now a "bank loan" exempt from state rate caps.

As you know, these schemes are not new. State attorneys general, courts, and federal bank regulators had effectively shut down earlier payday loan rent-a-bank schemes. Relying on a centuries-old anti-evasion doctrine, courts followed the money to find that the payday lender, not the bank, was the true lender. The OCC's True Lender rule enables and authorizes this type of lending arrangement. Contrary to statements made under the previous administration, the OCC's rule will add to, rather than relieve, the burdens of high-cost lending. As Hope Enterprise Corporation/Hope Credit Union/Hope Policy Institute (HOPE) highlighted in their September 2020 letter in opposition to the OCC's rule, their members paid over $54,000 in payments to rent-a-bank lenders in the previous 90-day period alone. Such usurious behavior undermines consumer protection laws and puts hard-working Americans at risk during the ongoing difficulties associated with the economic recovery from the COVID-19 pandemic. It is notable that 8 states have filed suit against the OCC to try to overturn this rule (*New York v. The Office of the Comptroller of the Currency*, No. 1:21-Civ.-00057 (S.D.N.Y. Jan. 5, 2021). It is unfortunate that the acting Comptroller of the Currency does not appear to be inclined to revisit the rule and that is why we think it is important for Congress to further examine the issue.

These predatory payday lenders are operating on an uneven playing field, relying upon the benefits of the OCC's federal preemption to circumvent consumer protections and place borrowers in harms' way. What is most concerning is the lasting damage this form of wealth extraction has on household financial security and on communities. Given the damage caused by these high-cost, unaffordable loans to borrowers' balance sheets, it limits the ability for legitimate and responsible lenders to support those households and communities with productive credit.

Credit unions have been on the frontlines during the pandemic, working to ensure their members stay afloat financially with consumer-friendly financial products. Credit unions have voluntarily implemented programs to protect their members' financial health, including skipping payments without penalty, waiving fees, low or no-interest loans, loan modifications and no interest accruals. Moreover, credit unions are able to meet their members' demands for short-term, small dollar loans, while ensuring accessibility, safety, and affordability. Often times, credit unions offer short-term, small-dollar loans as a service to members with the associated fees solely covering the expenses of loan servicing.

The *Federal Credit Union Act* (FCU Act) establishes an interest rate ceiling cap of 15 percent on loans and provides the National Credit Union Administration (NCUA) with flexibility to establish a higher interest rate for up to 18 months after considering certain statutory criteria. The current interest rate is set at 18 percent and has been in place since 1987. The NCUA has authorized a program referred to as payday alternative loans (PALs) to enable credit unions to offer their members a reasonable alternative to high-cost payday loans. The FCU Act establishes the interest rate ceiling for PALs at an additional 1000 basis points above the prevailing interest rate, so the current maximum allowable interest rate for a PAL is 28 percent. This maximum interest rate is far from the exorbitant interest rates charged by payday lenders and provides a safe, affordable option for consumers in need of a quick, short-term, small-dollar loan. The Consumer Financial Protection Bureau (CFPB) and CFPB Director-nominee Rohit Chopra have previously recognized the benefit credit union PALs provide to their communities.

Rather than pursuing problematic options like the OCC's True Lender rule to increase access to credit, we would suggest Congress consider consumer-friendly alternatives such as expanding credit unions' ability to offer PALs. Too many Americans are unbanked, underbanked, or underserved by financial institutions, and do not have the access that they need to financial services. Credit unions stand ready to help with financial literacy education and access to loans and other financial products, including PALs, but many are limited in their ability to add underserved areas to their fields of membership. Allowing all credit unions to add underserved areas to their fields of membership is one way to help those who need it most have access to capital without burdening the federal government. This request has bipartisan NCUA Board support.

At a time when low-income consumers can least afford it, the OCC's rule is enabling high-cost lenders to prey on consumers that are on even more precarious financial footing, which could threaten COVID-19 economic recovery efforts and the good work of consumer-friendly financial institutions like credit unions. We urge you to support S.J.Res.15 to overturn the True Lender rule and stop this harmful practice.

NAFCU Concerns About the Growth of Novel Charters Used by Fintechs

The "rent-a-bank" issue raises the larger concern about how new chartering options that have emerged with the growth of fintech can also present new threats and challenges as novel entities emerge in an underregulated environment. That is why NAFCU believes that Congress and regulators must ensure that when technology firms and fintechs compete with regulated financial institutions, they do so on a level playing field where smart regulations and consumer protections apply to all participants. NAFCU has outlined some of the challenges and opportunities in this area in a white paper which proposes regulatory recommendations for oversight of fintech companies.[1]

Financial Regulators Should Exercise Greater Oversight and Coordination to Supervise Fintechs

NAFCU believes financial regulators have a role to play in the supervision and regulation of fintechs under their existing authorities. However, Congress should also be willing to step in and clarify the role of regulators when necessary, such as with the OCC's True Lender rule. Another example would be for the CFPB to utilize its "larger participant" authority under the *Dodd-Frank Wall Street Reform and Consumer Protection Act* (Dodd-Frank Act) to regulate and supervise technology firms and fintech companies that enjoy access to the financial services marketplace without the same supervisory expectations that apply to banks and credit unions. If the CFPB determines that supervision of fintech companies cannot be accomplished through its "larger participant" authority under the Dodd-Frank Act, then Congress should consider granting the Bureau explicit authority to supervise and examine fintech companies.

Congress should also consider creating a Federal Financial Institutions Examination Council (FFIEC) subcommittee on emerging technology (the subcommittee) to monitor the risks posed by fintech companies and develop a joint approach for facilitating responsible innovation. We would envision the subcommittee having the following under its charge:

a. Report its findings to Congress annually;
b. define the parameters of responsible innovation to ensure consistent examination of emerging technologies;
c. identify best practices for responsible innovation; and,
d. recommend regulatory improvements to allow FFIEC-regulated institutions to adopt new technologies with greater legal certainty.

[1] NAFCU, Regulatory Approaches to Financial Technology, available at https://www.nafcu.org/fintech-whitepaper.

Technology Companies Pursuing Financial Charters

Recently, fintech companies are enjoying unprecedented liberalization of bank chartering rules to either acquire or become banks. Recent developments with both the OCC's new chartering options and the Federal Deposit Insurance Corporation's (FDIC) approval of deposit insurance for Industrial Loan Company (ILC) applicants also present problems. In each case, a nonbank company can potentially evade regulation under the *Bank Holding Company Act* (BHCA), either because of a statutory loophole unique to ILCs, or because the entity does not accept deposits. Lack of BHCA coverage raises serious concerns regarding the quality and extent of supervision for these specialized or limited purpose banking entities. Chartering additional ILCs or granting new licenses to payments companies could also weaken the safety and soundness of the wider financial system.

In certain cases, specialized, limited purpose bank charters may allow a fintech to operate with national bank privileges but without the same prudential safeguards that apply to traditional banks and credit unions. While some may characterize these chartering schemes as innovative, they are ultimately loopholes which invite unnecessary risk into the financial system and create an uneven playing field.

Special Purpose Fintech Charter

The emergence of new, fintech-powered business models has accelerated the disaggregation of bank services. This has not only increased competitive pressure but also challenged depository-centric models of financial supervision. The diversity of fintech companies and their role in the broader financial sector may necessitate reconsideration of existing models of regulation in the long run; however, an immediate focus for regulators and Congress must be to ensure that fintech companies are operating on a level playing field, and that new chartering options are presented transparently by banking regulators through full notice and comment rulemaking procedures. Furthermore, a level playing field encompasses more than just consistent application of federal consumer financial law. The appropriate application of prudential and supervisory expectations is an equally important consideration.

Research suggests that fintech mortgage lenders may enjoy structural advantages as nonbanks; in essence, benefiting from reduced regulatory burden which corresponds with relaxed federal safety and soundness standards. One report presented at the FDIC's April 2019 Fintech Symposium posited that 60 to 70 percent of "shadow bank" (i.e., nonbank lender) growth is likely due to regulatory arbitrage, and the rest due to advances in technology.[2] Other fintech companies may be enjoying reduced supervisory oversight even if they are subject to federal consumer financial law.

NAFCU recognizes that innovation depends on a fair, but flexible, regulatory regime for financial technology. Many credit unions partner with fintech companies to improve member service and historically these partnerships have proven invaluable to the growth

[2] *See* Piskorski, Tomasz, Fintech and Shadow Banking (April 2019), available at https://www.fdic.gov/bank/analytical/fintech/presentations/piskorski.pdf.

and competitiveness of our industry. Accordingly, NAFCU has advocated for expanding opportunities for credit unions to access pilot programs or regulatory sandboxes to test new products or services. At the same time, we have cautioned that frameworks designed to encourage innovation must not favor certain market participants at the expense of others.

When the OCC first introduced its general plan for a special purpose charter for fintech companies, NAFCU recommended that the OCC retain the core features of a national bank charter; namely, capital and liquidity requirements. Our position then assumed what we believe now, which is that the recipient of a specialized charter must be supervised as if it were a *bank*. The OCC's fintech charter should not serve as an occasion to offload traditional banking activities in exchange for comparatively lighter regulatory treatment.

In order to maintain safety and soundness within the broader financial sector, Congress should ensure that a fintech charter recipient is supervised as if it were a bank, regardless of whether its particular business model places greater emphasis on services other than deposit-taking or lending. Congress should also clarify that any special purpose fintech charter that confers the benefits of national preemption, or other privileges that have traditionally supported banks' deposit taking and lending roles, is bound by the same capital, liquidity, and consumer protection rules applicable to traditional banks and credit unions.

Payments Charter

In 2020, the OCC bypassed normal notice and comment rulemaking procedures to invite payments companies to apply for a limited purpose "payments charter." The payments charter has since drawn significant criticism from banks and credit unions alike and has inspired new litigation based on its core premise: that an entity choosing not to accept deposits can obtain the same privileges as a national bank.

One significant risk associated with the payments charter is the potential for reduced supervision of the bank applicant's holding company. By not accepting deposits, a payments charter recipient might not be regarded as BHCA bank, and its parent could avoid consolidated federal supervision by the Federal Reserve. Depending on the scale or risk of the holding company's activities—which might involve facilitating cryptocurrency transactions or issuing stablecoins per recent OCC guidance—lack of comprehensive Federal Reserve oversight could create additional risks for the American taxpayer if a specialized charter recipient fails because of weaknesses deriving from its parent's activities. Furthermore, the potential for a payments charter recipient to apply for master account access at the Federal Reserve could compromise the stability of our nation's payments systems. A payments charter recipient that does not accept deposits will not be clearly bound to the same capital and liquidity standards applicable to banks that receive federal deposit insurance. Easing or "tailoring" these important standards for entities that might access Federal Reserve payments systems could create new risks for our nation's financial infrastructure.

The OCC's payments charter has been marketed as one way to bring payments companies within the supervisory fold, an idea premised on the assumption that payments companies are willing to subject themselves to OCC supervision in exchange for certain privileges. While preventing "leakage" of financial services activities into unregulated areas is a commendable goal, the reality of a specialized payments charter may be the same as with the OCC's general fintech charter; namely, an occasion for fintech companies to engage in regulatory arbitrage.

We believe that Congress must ensure that payments charter recipients do not take advantage of the BHCA loophole and are subject to the same capital safety and soundness standards applicable to FDIC-insured banks.

Industrial Loan Companies

An ILC charter can offer certain nonbank parent companies the opportunity to skirt registration as a bank holding company and avoid consolidated supervision by the Federal Reserve.[3] This reduced oversight is further exacerbated by the fact that the FDIC lacks a complete range of statutory authority to fully supervise certain parent companies of ILCs.[4] As a result, the relationship between a nonbank parent and its ILC subsidiary lacks the degree of transparency and accountability intended by the BHCA while at the same time inviting potentially hazardous comingling of banking and commercial activities. In other words, the ILC charter frustrates a core principle of prudential regulation: that a bank's parent company should serve as a transparent source of strength rather than an opaque source of risk.

NAFCU believes that the FDIC approving new ILC deposit insurance applications at this time could severely weaken the stability of the financial system, and we have urged the FDIC to suspend further chartering activity for at least three years so that a fully informed analysis of supervisory risks can be conducted. Furthermore, given technology companies' interest in acquiring banks, the FDIC should also take heed of the unique privacy risks that might exist should consumer financial records find their way into the hands of nonbank parent companies through affiliate data sharing arrangements. A moratorium would also give Congress appropriate time to consider whether the ILC charter is conducive to advancing the goals of financial inclusion given the nonbank parent's limited accountability to its banking subsidiary.[5]

The FDIC should be focused on helping ordinary consumers instead of devoting analytical and legal resources towards advancing the financial ambitions of technology giants. To that end, we believe Congress must take decisive action to stop chartering of new ILCs,

[3] Cocheo, Steve, "Fintech Charters Signal a Tectonic Realignment in Banking," July 22, 2020.
[4] Under Section 10(b)(4) of the FDI Act, the FDIC is permitted to examine any insured depository institution, including an ILC, to examine the affairs of any affiliate, including the parent holding company, "as may be necessary to disclose fully (i) the relationship between the institution and the affiliate; and (ii) to determine the effect of such relationship on the depository institution." 12 U.S.C. § 1820(b)(4). However, this limited grant of authority is no substitute for the full range of examination powers necessary for consolidated supervision.
[5] In contrast to BHCA banks, a non-BHC parent company would not be prohibited from commencing "new activities" if a subsidiary depository institution has a CRA rating that falls below satisfactory. *See* 12 CFR § 225.84.

eliminate the BHCA loophole for current ILCs, and solidify a core principle of banking regulation: that a bank's parent company should serve as a transparent source of strength rather than an opaque source of risk.

National Trust Banks

Recently, the OCC issued novel interpretations of its rules for national trust charters, without soliciting public input through normal rulemaking procedures.[6] In essence, the OCC has paved the way for banks to engage in a novel type of fiduciary activity: cryptocurrency custodial services. The OCC has also taken the position that a permissible fiduciary activity for a national trust bank is any activity that state law permits for a state trust company which comes into competition with a national bank. Previously, the OCC had taken the more prudent approach of first examining whether the proposed fiduciary activity was in fact 'fiduciary' within the meaning of 12 U.S.C. § 92a.[7] The practical consequence of this new interpretation is to relax standards for conversions of state trust companies into non-depository, national trust banks. Already the consequences of this arrangement are apparent—the OCC has already received applications from state trust companies that are heavily engaged in digital asset-related activities. While there may be a role for this, we believe Congress should not allow the OCC to promulgate new chartering standards for trust banks through legal interpretations that bypass normal notice and comment rulemaking processes.

In conclusion, credit unions look forward to continuing to experience growth in the technology space as a way for them to better serve their members. However, as technology companies expand, and new companies emerge, to compete in the financial services area, it is important that they compete on a level playing field of federal regulation—from data privacy and security to consumer protection. Finally, it is important that Congress ensures laws are modernized to allow regulated financial institutions, such as credit unions, to keep up and compete with technological advances.

We thank you for your leadership on this important topic and appreciate the opportunity to share our thoughts on the reemergence of rent-a-bank schemes, the True Lender rule, as well as the growing role of fintechs in the financial services marketplace. We look forward to continuing to work with you on these issues, as well as pandemic relief and economic recovery. Should you have any questions or require any additional information, please contact me or Sarah Jacobs, NAFCU's Associate Director of Legislative Affairs, at sjacobs@nafcu.org or (571) 289-7550.

Sincerely,

Brad Thaler

Brad Thaler
Vice President of Legislative Affairs

cc: Members of the U.S. Senate Committee on Banking, Housing and Urban Affairs

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[6] OCC, Interpretive Letter #1176 (January 2021), available at https://occ.gov/topics/charters-and-licensing/interpretations-and-actions/2021/int1176.pdf.
[7] *See id.* at 4, fn. 5.

LETTER FROM NICK BOURKE, DIRECTOR, CONSUMER FINANCE, THE PEW CHARITABLE TRUSTS

THE PEW CHARITABLE TRUSTS

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April 27, 2021

The Honorable Sherrod Brown, Chairman
The Honorable Patrick Toomey, Ranking Member
United States Senate Committee on Banking, Housing, and Urban Affairs
534 Dirksen Senate Office Building
Washington, D.C. 20510

Via Electronic Submission

RE: Comments for Hearing, "The Reemergence of Rent-a-Bank?"

Chairman Brown, Ranking Member Toomey, and Members of the Committee:

Thank you for meeting to address this critical issue. I am providing short comments on behalf of The Pew Charitable Trusts, where I direct our consumer and home financing program and lead an expert team of researchers and analysts. **In our view, based on Pew's extensive research, it is critical to stop "rent-a-bank" partnerships immediately, before they take root in our banking system, and to do so in a way that fosters more beneficial partnerships between banks and non-banks.**

"Rent-a-bank" arrangements occur when a bank partners with a non-bank lender to target customers who have little or no other relationship with the bank. The bank typically does not hold the loan on its books or carry the risk associated with the loans. The non-bank typically lends at an annual percentage rate that is substantially higher than the bank otherwise charges or that the law of the borrower's state of residence allows. These arrangements are fairly characterized as a way for a non-bank to form contracts that provide the benefits of national bank preemption even when the non-bank's customers are not subject to the same policies or oversight as the bank's own customers, which is why the arrangements are known as "rent-a-bank" or "rent-a-charter" arrangements. Though rent-a-bank partnerships remain uncommon, they have grown rapidly in recent years.[1]

[1] While only a handful of federally regulated banks currently engage in this practice, they have expanded rapidly into more than a dozen states, including states where payday or other high-cost loans are otherwise prohibited. Pew is aware of at least seven states where unlicensed payday lenders use bank partnerships to charge *more than state-licensed payday lenders charge* in those states. These states are: Colorado, Maine, New Mexico, Ohio, Oregon, Virginia, and Washington. One example, from Ohio, is OppLoans, which partners with FinWise Bank, First Electronic Bank, and Capital Community Bank, all Utah-chartered banks supervised by the FDIC: As of April 26, 2021, a $1,000, 9-month loan from Opploans which is originated by one of these banks carried charges resulting in 160% APR, while the same loan from Advance America (the largest payday lender, which operates under an Ohio non-bank lender license according to the state's payday loan law as revised in 2018) has an APR of 88%. The rent-a-bank loan in this example has an APR that is 72 percentage points higher than the equivalent loan from the state-licensed payday lender and costs nearly double in dollar terms. See: https://www.advanceamerica.net/store-locations/ohio#rates; https://www.opploans.com/rates-and-terms/ohio/.

Conversely, partnerships between banks and non-banks that have the potential to be beneficial occur when a non-bank service provider joins with a bank to help serve the bank's own customers. Often, the non-bank partner provides technological platforms that increase the speed and reduce the cost of underwriting and originating loans to the bank's checking account customers. While the cost of the loans may in some cases exceed what a non-bank lender could charge under the laws of the state where the customer resides, the principles of preemption apply because the bank is serving its own customers across state lines, holding the risk of loss, and generally operating within the well-established framework of federal regulation and supervision.

In short, rent-a-bank partnerships create grave risk to consumers and the banking system by enabling non-banks to circumvent state usury and consumer protection laws, lending at sometimes exorbitant cost to borrowers who have little or no connection with the bank or the bank's system of federal regulation and supervision.[2] Conversely, true partnerships between banks and non-banks help improve service to the bank's own customers on fair rates and terms that are subject to federal oversight.[3]

Pew's research shows that millions of Americans who use payday and similar high-cost loans could save billions of dollars annually if the nation's banks offered safe, affordable installment loan alternatives.[4] Considerable progress has occurred toward this goal in recent years, as federal regulators issued joint guidance encouraging banks to offer this type of credit and millions of consumers gained access to new offerings from U.S. Bank, Bank of America, and others.[5] Though these types of loans may have annual percentage rates that are higher than credit cards or other mainstream types of credit, they cost far less than comparable loans from payday lenders—and they are overwhelmingly popular with both borrowers and the general public. In a recent letter to the Office of the Comptroller of the Currency (OCC), Pew explained these developments and noted that regulators should make careful distinctions between potentially beneficial partnerships between banks and non-banks versus "rent-a-bank" arrangements that risk putting this progress at grave risk.[6]

American families need access to safer, more affordable small-dollar loans from the country's banks. Major success is on the horizon. But it will only continue if federal regulators continue to nurture it (by

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[2] This is not to say that rent-a-bank customers are unbanked. The FDIC has found only about 5.4% of American households are unbanked, and every payday loan customer has a bank account because that is a precondition of getting the loan. Instead, rent-a-bank partnerships often target customers who have checking accounts at other banks.

[3] Indeed, leveraging technology and expertise from non-bank service providers who can improve the speed and cost of small-dollar lending may be the key to ensuring access to safe and affordable small installment loans within the banking system. For example, Pew recently encouraged the CDFI Fund to concentrate its efforts on supporting these types of partnerships when they are focused on serving the bank's own customers. See: https://www.pewtrusts.org/en/research-and-analysis/speeches-and-testimony/2020/09/10/pew-encourages-efficiency-in-treasury-departments-small-dollar-loan-program-investments.

[4] The Pew Charitable Trusts, "Standards Needed for Safe Small Installment Loans From Banks, Credit Unions," 2018, https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2018/02/standards-needed-for-safe-small-installment-loans-from-banks-credit-unions.

[5] Federal regulators issued joint guidance in 2020 that encourages small installment loans to bank customers. See: https://www.pewtrusts.org/en/research-and-analysis/articles/2020/08/12/federal-regulators-greenlight-small-installment-loans-from-banks.

[6] The Pew Charitable Trusts, "OCC Proposed Rule on National Banks and Federal Savings Associations as Lenders, Docket OCC-2020-0026," (September 3, 2020), https://www.pewtrusts.org/en/research-and-analysis/speeches-and-testimony/2020/09/03/pew-expresses-concern-about-efforts-to-codify-bank-partnerships.

continuing to encourage banks to make safe small installment loans available to their own customers, with assistance if needed from non-bank service providers); and it will only survive if federal regulators decisively stop rent-a-bank partnerships.

Sincerely,

Nick Bourke
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AMICUS BRIEF: PEOPLE OF THE STATE OF CALIFORNIA V. THE OFFICE OF THE COMPTROLLER OF THE CURRENCY AND BRIAN P. BROOKS

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

PEOPLE OF THE STATE OF CALIFORNIA, *et al.*, Plaintiffs, v. THE OFFICE OF THE COMPTROLLER OF THE CURRENCY, and BRIAN P. BROOKS, in his official capacity as Acting Comptroller of the Currency, Defendants.	ECF Case CASE NO.: 4:20-cv-05200-JSW **BRIEF OF *AMICI CURIAE* IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT** Hearing Date: March 19, 2021 Hearing Time: 9:00 a.m. Judge: Hon. Jeffrey S. White Courtroom: Courtroom 5, 2nd Floor

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I. SUMMARY OF ARGUMENT

Diverse regulatory frameworks, information processing capabilities and access to capital mean that U.S. financial institutions differ greatly in their ability to originate, fund, and service loans. A bank's local market deposits are usually a low cost, but limited, source of funding loans. Additional funding sources are more costly, and along with capital requirements and other regulations, can make lending unprofitable. Therefore, a bank's pool of local loanable funds will not necessarily always match the loan demand generated by the supply of local investable projects. Some markets will have an oversupply of good borrowers that cannot be funded by banks, while other markets will have an excess of funds due to the lack of good borrowers. The ability to transfer loans between institutions improves efficiency and production in both types of markets, by allowing funds to flow across space. Local institutions can exploit local information to make good origination decisions, whereas other institutions having excess local funds are able to hold more good loans than they would otherwise be able to make to (their) local borrowers.

State usury laws limit the interest rate that can be charged on certain types of loans, typically consumer or small business loans, by significantly penalizing lenders who violate the limit. The OCC's Rule seeks to clarify the prior practice that a loan's interest rate is subject to the usury law of the state where the loan originator is located, not the state of the loan buyer. If, instead, the usury law of the loan buyer's state applied to the loan, the market for loan sales would be significantly disrupted: an institution in one state could legally make the loan but institutions in other states may not purchase it with the same pricing. Consequently, the integrated secondary market for loan sales would be reduced and fragmented across groups of states with similar usury laws. Therefore, to preserve a well-functioning market for loan sales, the OCC's Rule should be maintained.

Economists have found that a well-functioning secondary market for loans has three benefits and these benefits would be mitigated if loan sales are restricted. First, loan sales expand the supply of credit by giving originating banks the opportunity to finance loans less expensively. The expansion of the banking system's aggregate lending capacity and the allocation of capital to the most productive projects regardless of location have important macroeconomic implications, such as greater economic growth.

Second, loan sales reduce the risk of lending amongst banks by allowing greater diversification of lending portfolios. By buying loans from around the country, banks can reduce their exposure to the geography-specific risk in their immediate area. Banking system risk can also be reduced by sharing it with non-bank buyers of loans.

Third, the expansion of lending and lowering of risk made possible by loan sales should lead to more financial inclusion and broader access to credit. Studies have shown that loan sales reduce the interest rates that borrowers pay on their loans and increase the likelihood that borrowers will receive a loan. These advantages should, in theory, be especially important for small and risky borrowers, who are often excluded from receiving loans when credit is constrained. Such financial inclusion has been highlighted as important for economic growth and a more equal distribution of wealth and income. Moreover, many innovative new ("fintech") lenders rely on loan sales as a means of leveraging their origination capabilities, which can carry particular benefits for less wealthy or higher-risk borrowers. Encouraging loan sales will allow innovative new lenders to originate loans on a larger scale. Limits on the viability of the loan sales market would therefore have adverse effects on the underserved by limiting their ability to receive lower cost loans as well as receive funds through innovative financial inclusion intermediaries.

The benefits of loan sales are clearly indicated by the fact that loan sales constitute a central component of the banking business. And while some loan sales would remain legal regardless of the court's ruling, the activity and depth of the secondary loan market in would be limited if the court required that sold loans conform to the usury laws of the purchaser's state. The academic literature on the relative benefits and costs of maintaining usury rates provides a useful context for the decision. Usury rates attempt to restrict any potential market power that banks can use to disadvantage borrowers. However, usury ceilings also could differentially curtail loans to riskier and lower-quality borrowers, thus pushing them towards less-regulated types of borrowing. Empirical research quite broadly supports the notion that the latter effect dominates: that riskier-looking borrowers (who are often minorities or others with limited financial access) are hurt when usury ceilings are binding and benefited when they are loosened or eliminated. Interpreting the National Bank Act in a way that, contrary to the statutory scheme and the OCC's interpretation, allows usury laws from states not connected to the original loan transaction to frustrate loan sales, therefore, is likely to reduce the economic advantages of the secondary loan market in ways that adversely affect income and wealth distribution within the economy.

II. INTEREST OF *AMICI CURIAE*

The undersigned academics frequently write on matters of public policy and have no financial interest in the outcome of this litigation.

A. Rashad Abdel-Khalik is a Professor of Accountancy and V.K. Zimmerman Professor of International Accounting at the University of Illinois's Gies College of Business. He has published research focusing on risk and accounting in financial reporting.

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Robert Stambaugh presently serves as the Miller Anderson & Sherrerd Professor of Finance and Professor of Economics at the University of Pennsylvania's Wharton School. His research deals primarily with investments and asset pricing. He edited the Journal of Finance for six year and has served as president of the American Finance Association.

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III. ARGUMENT

A ROBUST SECONDARY MARKET WHERE BANKS CAN BUY AND SELL LOANS EXPANDS THE SUPPLY OF CREDIT, SUPPORTS ECONOMIC GROWTH, REDUCES THE RISK OF LENDING, PRODUCES BETTER RESULTS FOR CONSUMERS AND SMALL BUSINESSES, AND PROMOTES MORE INCLUSIVE ACCESS TO CREDIT

The *amici* respectfully submit this brief in support of the OCC's *Opposition to Plaintiffs' Motion For Summary Judgment and Defendant's Cross Motion-Motion for Summary Judgment.* The undersigned support the OCC's Rule[1] and urge the Court to grant the OCC's motion for summary judgment. As set forth below, the existence of a robust secondary market where banks and non-banks can buy and sell loans is important for a number of reasons. First, it expands the supply of available credit and supports strong economic growth. Second, ready access to secondary markets reduces the risk of lending, promoting a safer banking system. Third, the OCC's Rule will especially benefit consumers and small businesses by fostering more inclusive access to credit.

Economists have found that, in the banking context, there are large economic advantages when the regulatory structure permits the functions of loan origination and holding to be separated. Throughout most of banking history, loans typically were originated and then held by the same entity, but in recent decades the U.S. market for loan sales has developed, through which banks can sell the loans that they originate and buy loans originated by other banks. Banks have played a key role in that process owing to their ability to operate as loan originators and sellers throughout the country. A crucial aspect of the banking system's role is the ability to originate and sell loans across state lines. Loan sales would not be viable if the sale was not possible, or if the terms of the loan (i.e., its interest rate) were subject to change upon sale, depending on the interest rate limits enacted on lending by state authorities in the state of the purchasing bank. This brief highlights the economic advantages of an active market in loan

[1] *Permissible Interest on Loans That Are Sold, Assigned, or Otherwise Transferred*, 85 Fed. Reg. 33,530–36 (June 2, 2020) (to be codified at 12 C.F.R. §§ 7.40001(e) and 160.110(d)) ("OCC Rule").

sales, which would be limited if loan sales to banks in some states were effectively prohibited by requiring that sold loans conform to the usury laws of the purchaser's state.

The practice of selling loans has increased dramatically in recent decades in part because the Supreme Court's *Marquette* decision[2] of 1978 permitted national banks to be subject to the usury limits in their own state rather than in the states where they originate each loan. In addition, advances in information technology have allowed better and more data-driven credit evaluation of loans. However, the separation of the origination and holding of loans is not new in the United States. Its particular usefulness grows out of the nation's fragmented and diverse financial sector. The U.S. has maintained a significantly high number of financial institutions ranging from the few large depository banks that operate branch networks nationally to the many small local banks that operate in individual communities and non-depository financial institutions, such as mutual funds and investment funds. The heterogeneity and geographical fragmentation of institutions leads to clear comparative advantages in different stages of the production process for loans, which includes originating, funding, and servicing.

The differing comparative advantages can stem from various distinctions among financial institutions, including their legal powers (e.g., having the ability to branch), their information advantages (e.g., local information and information collected through relationship banking), or the extent that their equity capital may limit their on-balance-sheet capacity to own loans. To put it another way, the banks that are in the best position to originate loans are not always the best to fund or service them after origination. For instance, small community banks might be able to identify reliable borrowers and originate loans to them but may lack the funding capacity to hold the loans in their own portfolios. Similarly, investment funds or mutual funds might have ample capital to diversify their investment portfolio with loans but may lack the ability to originate them.

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[2] *Marquette Nat. Bank of Minneapolis v. First of Omaha Serv. Corp.*, 439 U.S. 299, 299, 99 S. Ct. 540, 541, 58 L. Ed. 2d 534 (1978).

Studies of loan sellers and buyers provide evidence that both differences in these comparative advantages and the benefits of portfolio diversification motivate participation in the secondary loan market.[3] Banks with profitable lending opportunities but limited or costly forms of financing that constrain their lending capacity (e.g., high costs of uninsured debt and deposits, which in turn may reflect a scarcity of equity capital) are most often the sellers in the market, whereas banks with strong capital positions tend to be buyers of loans. Similarly, those banks with opportunities for diversified originations (e.g., those for whom extensive branching is permissible) are less likely to participate in the loan sales market.

These studies demonstrate that a well-functioning secondary market for loans benefits both loan sellers and buyers as it facilitates the efficient allocation of functions to firms according to comparative advantage, and further increases the social benefits that arise from returns to specialization in those functions. Other research has expanded upon these contributions by identifying in more detail the various advantages to a vibrant market for loan purchases and sales. To summarize this literature, a well-functioning secondary loan market has been shown to have three broad but inter-related economic advantages. First, loan sales increase aggregate credit supply, which in turn promotes higher GDP growth. Second, loan sales improve the stability of the banking system by allowing diversification of investments. Third, loans sales should lead to better outcomes for borrowers along two lines: (1) the increased competition and diversification that come with loan sales leads to lower interest rates and (2) the rise in loan supply and the decrease in interest rates is likely to produce greater financial inclusion. In the remainder of this brief, we summarize the supporting evidence for each of these advantages.

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[3] *See* Christine A. Pavel & David Phillis, Why Commercial Banks Sell Loans: An Empirical Analysis, 152 Federal Reserve Bank of Chicago Proceedings (1987); Allen N. Berger & Gregory F. Udell, "Securitization, Risk, and the Liquidity Problem in Banking", in Michael Klausner & Lawrence White, eds.: Structural Change in Banking (1993); Joseph G. Haubrich & James B. Thomson, Loan Sales, Implicit Contracts, and Bank Structure, 7(2) Review of Quantitative and Financial Accounting 137 (1996); Rebecca S. Demsetz, Bank Loan Sales: A New Look at the Motivations for Secondary Market Activity, 23(2) Journal of Financial Research 197 (2000).

1. Increase the Availability of Credit and Support Economic Growth.

Legal restrictions constrain the ability of originating banks to hold loans on their balance sheets (e.g., minimum cash asset reserve ratio requirements and minimum equity capital ratio requirements). Banks typically target minimum ratios of cash-to-assets and equity capital-to-assets that exceed those minimum regulatory requirements, given the economic desirability of maintaining buffers in excess of these required minimum ratios to ensure continuing compliance in the eventuality of potential losses. Having to maintain these minimum ratios often means that smaller banks have more potential investment opportunities than they are able to fund.[4]

Loan sales give originating banks the opportunity to finance loans less expensively through the sale of the loan than by funding the loan internally on their balance sheets via traditional deposits and equity issues.[5] In essence, the funds received via loan sales help relieve capital constraints. Conversely, the secondary loan market allows a financial intermediary with adequate capital to acquire profitable projects originated by a bank whose own capital is insufficient to support the additional risk. Hence, loan sales use the capital of lenders in other locations to support lending in locations where lenders' capital is scarce. This increases the total volume of lending that can occur in the aggregate.[6]

The expansion of the banking system's aggregate lending capacity has important macroeconomic implications. Studies of both historical and modern periods have found a strong

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[4] *See* Mark Gertler & Ben Bernanke, Banking and Macroeconomic Equilibrium, In New Approaches to Monetary Economics (1987); Katherine A. Samolyk, Banking Conditions and Regional Economic Performance Evidence of a Regional Credit Channel, 34(2) Journal of Monetary Economics 259 (1994).

[5] *See* George G. Pennacchi, Loan Sales and the Cost of Bank Capital, 43(2) Journal of Finance 375 (1988); Charles T. Carlstrom & Katherine A. Samolyk, Loan Sales as a Response to Market-Based Capital Constraints, 19(3-4) Journal of Banking & Finance 627 (1995).

[6] *See* A. Sinan Cebenoyan & Philip E. Strahan, Risk Management, Capital Structure and Lending at Banks, 28(1) Journal of Banking & Finance 19 (2004); Steven Drucker & Manju Puri, On Loan Sales, Loan Contracting, and Lending Relationships, 22(7) Review of Financial Studies 2835 (2009).

positive connection between bank lending activity and economic growth.[7]

2. **Enhance Financial Stability.**

An additional social gain from loan sales is the reduction in financial system risk that they engender. Loan sales allow banks to better diversify their investment portfolios and thus reduce their overall risk of failure. While community or regional banks are well-equipped to judge the quality of loan applicants in their neighborhoods, they generally do not possess the ability to select and originate loans of borrowers outside of their locations. The secondary loan market allows these banks to obtain loans from more distant areas, reducing their exposure to geography-specific risk. For instance, banks active in the loan sales market improve their ability to manage credit risk, operating with greater leverage as a result of lowering the necessary capital and liquidity buffers.[8] As a result of loan sales, banks throughout the country have an enhanced ability to increase loans originated while diversifying their portfolio and lowering overall risk.

3. **Better Results for Consumers and Small Businesses, More Inclusive Access to Credit**

Because an active national market for loan sales expands the supply of credit and reduces the risk of lending, it tends to increase the likelihood that borrowers – especially risky borrowers – will receive a loan, and tends to reduce the interest rates that borrowers – especially risky

[7] *See* Robert G. King & Ross Levine, Finance and Growth: Schumpeter Might be Right, 108(3) Quarterly Journal of Economics 717 (1993); Jith Jayaratne & Philip E. Strahan, The Finance-Growth Nexus: Evidence from Bank Branch Deregulation, 111(3) Quarterly Journal of Economics 639 (1996); Matthew Jaremski, National Banking's Role in U.S. Industrialization, 1850-1900, 74(1) Journal of Economic History 109 (2014); Scott Fulford, How Important are Banks for Economic Development? National Banks in the United States, 1870-1900, 97(5) Review of Economics and Statistics 921 (2015); Raghuram Rajan & Rodney Ramcharan, Local Financial Capacity and Asset Values: Evidence from Bank Failures, 120(2) Journal of Financial Economics 229 (2016); Erik P. Gilje, Elena Loutskina & Philip E. Strahan, Exporting Liquidity: Branch Banking and Financial Integration, 71(3) Journal of Finance 1159 (2016); J. David Brown & John S. Earle, Finance and Growth at the Firm Level: Evidence from SBA loans, 72(3) Journal of Finance 1039 (2017).

[8] Cebenoyan, *supra*.

borrowers – pay on their loans. This occurs as a result of an active secondary loan market for two reasons. First, a bank's ability to sell the loan reduces the risk and liquidity premia it charges borrowers to compensate for its own funding cost. Second, the expansion of loan supply means that the market for originating loans is more contested by other lenders, which pushes originating banks to compete more aggressively for borrowers.

Empirical evidence directly links loan sales to an improvement in borrowers' loan terms. Many respondents of the Federal Reserve System's Lending Practices Survey indicated that they offered more attractive interest rates to borrowers in exchange for permission to sell their loans.[9] Furthermore, scholars have found that loan sales lead to lower interest rates on average, that borrowers with loans trading in the secondary market are able to subsequently borrow at lower interest rates, and that loan sales permit the selling bank to maintain valuable relationships, which are profitable to the bank and ease borrowers' future abilities to obtain credit.[10]

The cost advantages of a loan sales market that reflect greater supply, greater diversification and greater competition, should, in theory, be especially important for the riskiest borrowers. That implies that the gains to borrowers from loan sales should also produce greater financial inclusion. Poor and small-dollar borrowers are often a marginal class of borrowers in formal financial systems, and instead they often must seek out higher interest loans through credit cards or predatory lenders. These less regulated forms of lending typically expose borrowers to worse loan terms and fewer consumer protections than bank loans.

If the loan sales market were absent, underserved groups likely would suffer disproportionately from the reduction in the aggregate supply of credit and the increase in the

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[9] Gary B. Gorton & Joseph G. Haubrich, The Loan Sales Market, 2 Research in Financial Services 85 (1990).

[10] A. Burak Güner, Loan Sales and the Cost of Corporate Borrowing, 19(2) Review of Financial Studies 687 (2006); Mark J. Kamstra, Gordon S. Roberts, & Pei Shao, Does the Secondary Loan Market Reduce Borrowing Costs?, 18(3) Review of Finance 1139 (2014); João AC Santos & Peter Nigro, Is the Secondary Loan Market Valuable to Borrowers?, 49(4) Quarterly Review of Economics and Finance 1410 (2009); Drucker, *supra*.

cost of credit. Furthermore, major improvements in financial inclusion have been made possible by new lending technologies that help to improve access to credit by underserved communities in the United States.[11] Many innovative new lenders rely on loan sales as a means of leveraging their origination capabilities for a broader market. Many innovative startups have begun to utilize new technologies that focus on loan origination to reach a broader portion of the population. With limited financing so far, loan sales have been crucial to these firms' operation, and the OCC has begun to grant national charters to these financial technology firms in order to allow them to originate loans on a larger scale. Limits on the viability of the loan sales market would therefore have additional adverse effects on the underserved by limiting the ability of innovative intermediaries to expand their lending businesses.

Studies of financial inclusion have highlighted its importance for growth and the distribution of wealth and incomes. Greater financial inclusion can help achieve inclusive growth and economic development, as well as lower inequality.[12] Moreover, the shifting of payments and transactions from credit cards and predatory lenders into the formal financial sector provides greater protection for consumers in terms of regulation and oversight of lenders.

Despite all the aforementioned advantages of an active loan sales market, which the

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[11] *See* Panagiotis Avramidis, Nikolaos Mylonopoulos, & George Pennacchi, The Role of Marketplace Lending in Credit Markets: Evidence from Bank Mergers, forthcoming Management Science (2021).

[12] *See* Leora Klapper, Mayada El-Zoghbi, & Jake Hess, Achieving the Sustainable Development Goals: The Role of Financial Inclusion (2016), *available at* http://www. ccgap. org.; Robert Cull, Tilman Ehrbeck, & Nina Holle, Financial Inclusion and Development: Recent Impact Evidence, World Bank Working Paper No. 88169 (2014), *available at* https://documents.worldbank.org/en/publication/documents-reports/documentdetail/269601468153288448/financial-inclusion-and-development-recent-impact-evidence; Asli Demirguc-Kunt, Leora Klapper, & Dorothe Singer, Financial Inclusion and Inclusive Growth: A Review of Recent Empirical Evidence, World Bank Policy Research Working Paper 8040 (2017), *available at* https://openknowledge.worldbank.org/handle/10986/26479; Miriam Bruhn & Inessa Love, The Real Impact of Improved Access to Finance: Evidence from Mexico, 69(3) Journal of Finance 1347 (2014); Robin Burgess & Rohini Pande, Do Rural Banks Matter? Evidence from the Indian Social Banking Experiment, 95(3) American Economic Review 780 (2005).

OCC's regulation would protect and perpetuate, one of the fundamental questions that is raised in this litigation is to assess the utility of allowing the usury laws of states not connected to the original loan transaction to upset the interest rate setting mechanism that is contained in the National Bank Act, given that loan sales likely increase the ability of local borrowers to borrow from out-of-state bank loan originators at interest rates above the state usury ceiling. The academic literature also sheds light on this potential concern. Examining the wide-variety of usury laws and rates through time, the empirical studies analyzing the consequences of usury laws cast doubt on the proposition that more binding usury laws actually improve financial market outcomes for borrowers.

Whether usury laws are desirable as a matter of economic theory is not clear. Usury laws will tend to reduce the supply of credit to high-risk borrowers if lenders are unwilling to lend to them at lower interest rates. In theory, however, usury restrictions have the potential to be beneficial in markets with high borrower moral hazard and can be seen as a primitive means of social insurance to guard agains future periods of high interest rates.[13] In practice, empirical evidence so far indicates that usury laws lead banks to supply less credit.[14] Studies have further suggested that when credit-rationing occurs it often results in financial exclusion of the underserved. An empirical study of the effects of the Card Act of 2009[15], for instance, found that

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[13] Giuseppe Coco & David De Meza, In Defense of Usury Laws, 41(8) Journal of Money, Credit and Banking 1691 (2009); Edward L. Glaeser & Jose Scheinkman, Neither a Borrower Nor a Lender Be: an Economic Analysis of Interest Restrictions and Usury Laws, 41(1) Journal of Law and Economics 1 (1998).

[14] *See* Rudolph C. Blitz & Millard F. Long, The Economics of Usury Regulation, 73(6) Journal of Political Economy 608 (1965); James R. Ostas, Effects of Usury Ceilings in the Mortgage Market, 31(3) Journal of Finance 821 (1976); Steven M. Crafton, An Empirical Test of the Effect of Usury Laws, 23(1) Journal of Law and Economics 135 (1980); Daniel J. Villegas, The Impact of Usury Ceilings on Consumer Credit, 56(1) Southern Economic Journal 126 (1989); Oren Rigbi, The Effects of Usury Laws: Evidence from the Online Loan Market, 95(4) Review of Economics and Statistics 1238 (2013).

[15] *Credit Card Accountability Responsibility and Disclosure Act of 2009*, Pub. L. 111-24, 123 Stat. 1734 (May 22, 2009).

states with more binding (lower) usury ceilings saw less migration to consumer installment credit when the Act reduced credit card lending to risky borrowers.[16] The literature on usury laws confirms the view that they are associated with worse terms for high-risk borrowers and have sometimes been enacted to harm underserved communities.[17] Historical usury rate restrictions increased average and minimum loan size and worsened credit access for those with less social capital.[18] And even when usury rates did not reduce the amount of borrowing in an economy, they might cause high-risk individuals to shift from bank lending to less restrictive retail lending such as credit cards.[19] These studies examine the history of usury laws and find that they were used by politically powerful low-risk (incumbent) borrowers as a way to limit competition from high-risk borrowers. In summary, it is not clear that usury laws, on balance, are beneficial to borrowers. For these reasons, it appears that the benefits of usury rates, if any, are small and concentrated on particularly well-connected borrowers when compared with the general gains of an integrated loan market discussed above.

III. CONCLUSION

The *amici* respectfully submit this brief in support of the OCC's *Opposition to Plaintiffs' Motion For Summary Judgment and Defendant's Cross Motion-Motion for Summary Judgment.*

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[16] Gregory Elliehausen & Simona M. Hannon, The Credit Card Act and Consumer Finance Company Lending, 34 Journal of Financial Intermediation 109 (2018).

[17] *See* Efraim Benmelech & Tobias J. Moskowitz, The Political Economy of Financial Regulation: Evidence from U.S. State Usury Laws in the 19th Century, 65(3) Journal of Finance 1029 (2010); Thomas A. Durkin, Gregory Elliehausen, Michael E. Staten, & Todd J. Zywicki, Consumer Credit and the American Economy (2014).

[18] Peter Temin & Hans-Joachim Voth, Interest Rate Restrictions in a Natural Experiment: Loan Allocation and the Change in the Usury Laws in 1714, 118(528) Economic Journal (2008): 743-758.

[19] Richard L. Peterson, Usury Laws and Consumer Credit: a Note, 38(4) Journal of Finance 1299 (1983).

Dated: January 21, 2021

Respectfully submitted,

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LETTER FROM THE ELECTRONIC TRANSACTIONS ASSOCIATION

eta ELECTRONIC TRANSACTIONS ASSOCIATION

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April 28, 2021

The Honorable Sherrod Brown
Chairman
Committee on Banking, Housing,
and Urban Affairs
United States Senate
Washington, DC 20510

The Honorable Pat Toomey
Ranking Member
Committee on Banking, Housing,
and Urban Affairs
United States Senate
Washington, DC 20510

Dear Chairman Brown and Ranking Member Toomey:

On behalf of the members of the Electronic Transactions Association (ETA), I appreciate the opportunity to submit this statement for the record before the Committee's April 28 hearing, "The Reemergence of Rent-a-Bank?"

ETA is the leading trade association for the payments technology industry, representing over 500 companies that offer electronic transaction processing products and services. ETA's members include financial institutions, mobile payment service providers, payment processors, mobile wallet providers, and non-bank online lenders that make commercial loans, primarily to small businesses, either directly or in partnership with other lenders. ETA member companies are creating innovative offerings in financial services, revolutionizing the way commerce is conducted with secure, convenient, and rewarding payment solutions and lending alternatives – employing millions of Americans and enabling over $22 trillion in payments in 2019.

Regulators and Laws that Govern Payments

The payments industry is dedicated to providing consumers and businesses access to safe, convenient, and affordable payment services. Although fintech has received considerable attention as a beneficial and "new" technology, it is not, as some have suggested, an unregulated industry. To highlight these current regulations, ETA has published a white paper[1] that underlines regulators, such as the Federal Reserve Board, the Office of the Comptroller of the Currency (OCC), and the Consumer Financial Protection Bureau, that ETA member companies comply with.

Additionally, the white paper outlines the numerous federal and state laws that apply to payments and related financial products and services. Depending on the circumstances, federal and state laws address money transmission, customer due diligence, credit reporting, information security, data protection, privacy, and prohibitions on unfair, deceptive, or abusive acts or practices. Furthermore, most payments companies work closely with banks and other regulated financial services providers, which means they are oftentimes contractually obligated to comply with bank regulatory requirements.

[1] Electronic Transactions Association (2020). *Overview of Federal and State Laws and Regulations Governing Payments and Related Services.* [online] Available at: https://www.electran.org/wp-content/uploads/ETA-WP-FedStatePayments-1.pdf

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Online fintech lending, for example, involves many of the same steps as traditional commercial lending – the marketing, underwriting, closing, servicing, securitization (in some cases), customer care, and collection of loans. In this regard, online fintech lending is subject to various federal and state laws and regulations. Depending on circumstances, such as the nature of the product and lending model, these laws may include requirements related to fair lending, licensing, interest rates, credit reporting, and debt collection, among other requirements.

Online Small Business Lenders

Small businesses are vital for America, however, these businesses routinely lack access to necessary capital to maintain and expand operations. Such access is particularly important as these small businesses across the country work to recover from effects of the COVID-19 pandemic.

Fortunately for small businesses, ETA's members are expanding access to credit and offering attractive alternatives to traditional loans. As evident of their participation in the Paycheck Protection Program[2], online lenders used sophisticated, data-driven processes to reach funding decisions quickly and efficiently and provided access to capital to traditionally underserved borrowers. This expeditious process allowed the small businesses to cover operational costs during a time it was needed the most.

Expanding this access through the bank partnership has allowed numerous banks to partner with fintech's using their platforms to streamline and automate their loan application process and expedite their underwriting processes. These platforms allow potential lenders to analyze a broad range of financial and operational data to determine an applicant's creditworthiness and to do so quickly. Enabling small business borrowers to apply for loans online reduces processing costs, accelerates decision making, speeds access to funds and improves the overall customer experience. This type of collaboration has already provided numerous benefits for consumers.

Without clarity, small business lending through the bank partnership model would be hampered and could reduce the availability of credit for borrowers with lower FICO scores. According to a study[3] by law professors from Stanford, Columbia, and Fordham Universities, approvals for borrowers, in Second Circuit states, with credit scores under 625 saw a 52% reduction in credit availability. Outside the Second Circuit states, loan volume for those borrowers grew by 124%.

"Rent-a-Charter" Concerns

The OCC's true lender rule specifically addresses the "rent-a-charter" concern. Their rulemaking makes clear that banks are responsible and accountable for the loans they make and prevents any potential arrangements in which a bank receives a fee to "rent" its charter and unique legal status to a third-party with the intent of evading state and local laws.

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[2] As of April 2021, ETA members have helped the SBA process and disburse more than $142 billion in PPP loans to nearly 2.5 million small businesses.
[3] Honigsberg, Colleen and Jackson, Jr., Robert J. and Squire, Richard C., How Does Legal Enforceability Affect Consumer Lending? Evidence from a Natural Experiment (August 2, 2017). The Journal of Law and Economics, Forthcoming, Available at SSRN: https://ssrn.com/abstract=2780215 or http://dx.doi.org/10.2139/ssrn.2780215

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In the words of the final rule, "[i]f a bank fails to satisfy its compliance obligations, the OCC will not hesitate to use its enforcement authority consistent with its longstanding policy and practice."[4]

The true lender rule (and companion "valid when made" rule) allow innovative fintechs to partner with banks and increase access to credit while ensuring strict federal supervision and consumer protections are held in the highest standard during the process. This legal and regulatory certainty facilitates access to responsible credit and clarifies responsibility and accountability in lending involving third-party partnerships. Bank third-party partnerships help financial institutions better serve their communities by expanding access to affordable credit products from mainstream financial service providers.

ETA encourages policymakers to focus on a framework that ensures a positive policy environment – encouraging growth and innovation governed by common principles but tailored appropriately to a company's particular risk profile. Additionally, as companies increasingly offer a wide variety of products and services to reach a broad spectrum of consumers, especially low- to moderate- income consumers, and businesses, we encourage an intentional effort toward harmony. Fintech's are highly regulated at the federal and state level and harmonization between regulatory schemes and prudential regulators and public policy is critical to fostering an environment where companies and consumers can flourish as digital banking continues to evolve. As the industry continues to evolve it is imperative the framework is equipped to embrace the proper safeguards to protect consumers without stifling progress.

We appreciate the opportunity to submit this letter for the record and the Committee's leadership on this topic. If you have any questions, please contact me or ETA's Senior Vice President of Government Affairs, Scott Talbott at stalbott@electran.org.

Sincerely,

Jeff Patchen
Manager of Government Affairs
Electronic Transactions Association

cc: Members of the Committee on Banking, Housing, and Urban Affairs

[4] https://www.occ.gov/news-issuances/federal-register/2020/85fr68742.pdf

STATEMENT SUBMITTED BY ICBA

ICBA
INDEPENDENT COMMUNITY BANKERS of AMERICA®

April 28, 2021

The Importance of "True Lender": The Community Bank Perspective

The Independent Community Bankers of America, representing community banks across the nation with more than 50,000 locations, appreciates the opportunity to provide this statement for the record for today's hearing on the Office of the Comptroller of the Currency's (OCC's) "true lender" rule, "The Reemergence of Rent-a-Bank?" As we explained in our comment letter last August, we believe the OCC rule is critical to bringing clarity and accountability to lending and promoting wider access to credit through national bank and federal savings association partnership arrangements with third parties such as marketplace lenders. We urge your support for the OCC rule and oppose legislative efforts to repeal it using the Congressional Review Act (CRA).

Need for Clear "True Lender" Standard

The OCC's true lender rule creates a clear and simple standard to determine when a bank makes a loan and is a "true lender." Under the rule, a bank is a true lender if one of two conditions is met: (i) on the date of origination the bank is named as the lender in the loan agreement, or (ii) the bank funds the loan.

Without this clear standard, banks would not be able to fully exercise the authority granted to them under Federal law to sell, assign, or otherwise transfer loans. For example, partnering with third party marketplace lenders, securitizations, and even simple sales of loans would pose significant legal risks to community banks if this standard were not in place. As a uniform approach with clear, unambiguous standards, the OCC rule creates certainty, allowing banks to manage their risks and work more effectively with third parties.

True Lender Supports Community Bank Fintech Partnerships

Community banks partner with financial technology companies (fintechs) to offer new and innovative products that reach more consumers and small business borrowers. These partnerships increase competition and product choice to the benefit of all. However, these partnerships cannot function effectively without the clear standard provided by the true lender rule.

True Lender Rule Creates Accountability for Consumer Compliance

A principal benefit of the new OCC rule is to ensure that consumer regulations are not evaded once a national bank is considered the true lender. ICBA remains concerned with "rent-a-bank" schemes that are often set up for the sole purpose of avoiding state usury laws and other state consumer protections. Clarity surrounding the true lender doctrine would promote accountability and should not absolve either a bank or its third-party partners of their regulatory responsibilities.

A True Lender Standard is a Necessary Complement to "Valid When Made" Rules

The OCC has recognized that the "valid-when-made" doctrine cannot be fully implemented without clarification of the "true lender" in any loan transfer.

The 2015 decision of the U.S. Court of Appeals for the Second Circuit in Madden v. Midland Funding LLC created considerable uncertainty about the validity of interest-rate terms after a national or state bank sells, assigns, or otherwise transfers a loan.

In response to this decision, both the FDIC and the OCC issued final regulations in 2020 that clarify that when a bank sells, assigns, or otherwise transfers a loan, interest permissible at the time the loan was made continues to be permissible following the transfer. ICBA strongly supports both the OCC and the FDIC regulations regarding federal interest rate authority. We agree that the bank's power to make loans implicitly carries with it the power to assign loans, and therefore a national or state bank's authority to make loans at particular rates necessarily includes the power to assign the loans at those rates. Denying an assignee – be it a bank or a non-bank – the right to enforce a loan's terms would effectively reduce the salability of loans, make lenders less willing to originate loans, and thereby curtail access to credit, a critical ingredient of the post-COVID economic recovery.

This is the background and context in which the true lender rule must be understood. Valid-when-made cannot be fully implemented – and its benefits cannot be realized – without clarification of the true lender, particularly in the context of a partnership between a bank and third party, such as a marketplace lender.

Congressional Review Act Repeal of True Lender Would Create Legal Uncertainty and Limit Comptroller's Discretion

ICBA opposes efforts to use the CRA to repeal the true lender rule. Repeal would only restore the considerable legal uncertainty that prevailed prior to the rule. A patchwork of court-created standards governed determination of the true lender in bank-third party partnerships. This uncertainty would undermine the creation, continuation, and investment in partnerships that are playing an important role in extending credit and supporting the economic recovery. Clarity, certainty, and accountability are necessary conditions of success.

What's more, CRA is a blunt and counterproductive instrument. If true lender is repealed through CRA, the OCC would be prohibited from issuing any regulation in "substantially the same form." Whatever one's view of the current rule, we should all agree that a true lender rule is needed in some form to create the clarity necessary for a functioning credit market. While courts have not ruled on the scope of the phrase "substantially the same form," CRA repeal of the current rule would unduly limit the discretion of the Comptroller in a way that is harmful to all interested parties.

Closing

Thank you again for convening today's hearing. This is an important opportunity to examine the value of the OCC rule in extending credit and accountability for consumer compliance.