January 21, 2020

Joseph M. Otting
Office of the Comptroller of Currency
U.S. Department of the Treasury
400 7th St. SW, Suite 3E-218
Washington, DC 20219

RE: Permissible Interest on Loans That Are Sold, Assigned or Otherwise Transferred [Docket ID OCC-2019-0027; RIN 1557AE73]

Dear Comptroller Otting:

Consumer Reports appreciates the opportunity to comment in response to the Office of the Comptroller of Currency's (OCC) proposed rule regarding permissible interest rates on loans sold, assigned, or otherwise transferred from a national bank.

We have grave concerns that the OCC's proposal could give cover to lenders seeking to evade state usury laws by partnering with national banks to originate loans – commonly called the "rent-a-bank" model. By declaring that the interest rate on a national bank-originated loan is valid with respect to subsequent assignees or purchasers, the OCC is all but encouraging nonbank lenders subject to state oversight to enter into these partnerships and claim state laws will not apply to their loans.

The rent-a-bank model is not a new idea; in fact, it was used by payday lenders in prior decades to engage in risky lending activities. The OCC previously concluded that the model was unsafe and urged member banks to reconsider such partnerships. We urge the OCC to remember the lessons of the past, respect states' longstanding role in regulating interest rates on consumer loans, and rescind this proposal.

Deregulation and the "rent-a-bank" phenomenon worried regulators in prior decades

When federal and state governments have eased restrictions on interest rates in the past, it has typically resulted in negative consequences. After the Vietnam War ended in 1975, inflation rose dramatically and made it difficult for banks to gather enough funds to lend to consumers.[1] Out of concerns that consumer credit might dry up, many state legislatures modified or repealed general usury ceilings in their states in the hopes that

[1] Christopher L. Peterson, *Truth, Understanding and High-Cost Consumer Credit: The Historical Context of the Truth in Lending Act*, 55 FLA. L. REV. 807, 872-73 (2006).

it would encourage banks to continue lending to consumers.[2] Congress also took action to loosen interest rate restrictions by banning state interest rate caps on certain home mortgages.[3] In line with the trend toward deregulation in Congress and state legislatures, the Supreme Court ruled in 1978 that the National Bank Act[4] allowed federally-chartered banks to charge the maximum interest rates allowed in the bank's home state, regardless of the laws in a bank customer's home state.[5] As a result, states feared that national banks would move their headquarters to states with high interest rate caps or no caps at all, and amended state laws to raise or lift interest rate caps for federally-chartered banks so that national banks could charge higher interest rates from an even larger number of states.[6]

In response to the states' concerns that state-chartered banks would not be able to compete with national banks who could charge higher interest rates, Congress also enacted the Depository Institutions Deregulation and Monetary Control Act of 1980 (DIDMCA).[7] The DIDMCA allowed state-chartered banks to export the interest rate caps in their home states to customers in other states, just like federal banks.

These policy changes helped enable the "rent-a-bank" business model, in which large payday lenders partnered with banks subject to lenient interest rate caps in order to issue payday loans with terms that would otherwise be illegal in a customer's home state.[8] While the banks were technically responsible for the loan transaction, the payday lenders would manage all aspects of the business, collect funds from the customer, and provide the bank with a small percentage for each loan sold.[9]

Payday lending grew rapidly during the 1990s using the "rent-a-bank" model. As banks began to close branches in economically-distressed neighborhoods, payday lending

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[2] *Id. at 873.*

[3] *Id.*

[4] 12 U.S.C. § 85 (2018 & Supp. I).

[5] Marquette Nat'l Bank v. First Omaha Serv. Corp., 439 U.S. 299 (1978).

[6] Michael Kenneth, *Payday Lending: Can Reputable Banks End Cycles of Debt?*, 42 U.S.F. L. REV. 659, 667 (2008).

[7] Pub. L. No. 96-221, 94 Stat. 132 (1980) (codified at scattered sections of 12 U.S.C.).

[8] URIAH KING, LESLIE PARRISH, & OZLEM TANIK, CTR. FOR RESPONSIBLE LENDING, FINANCIAL QUICKSAND: PAYDAY LENDING SINKS BORROWERS IN DEBT WITH $4.2 BILLION IN FEES EVERY YEAR 2 (2006), *available at* http://www.responsiblelending.org/payday-lending/research-analysis/rr012-Financial_Quicksand-1106.pdf.

[9] Kenneth, *supra* note 6, at 676.

stores quickly took their place.[10] By 2000, however, federal regulators began to take notice of these partnerships and voiced grave concerns about the risks associated with payday lending. In a joint effort from the OCC and the Office of Thrift Supervision (OTS),[11] the two agencies issued advisory letters warning their member banks that they might face regulatory action if they were caught renting their charters to payday lenders.[12] The OCC and OTS considered the risks of payday lending uncertain and dangerous, and also recognized the potential for payday loans to harm consumers.[13] Furthermore, the agencies expressed concerns that banks would tarnish their reputations once the public found out that they partnered with payday lenders who tried to circumvent state laws by renting bank charters.[14]

In addition to issuing an advisory letter in 2000, the OCC was the first agency to take enforcement actions against banks that were renting their charters to payday lenders. For example, in 2002 the OCC pursued and obtained a consent order against one of its member banks to stop it from renting its charter to payday lenders.[15] The OCC stated that the bank had "risked its financial viability" by focusing on payday lending, and had violated multiple standards of sound banking, as well as compliance requirements and OCC guidance in the process.[16] Eventually, the OCC began to assign negative ratings to any member bank that engaged in payday lending, thereby causing its member banks to leave the industry in order to avoid losing their charters.[17] The OTS and the

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[10] SHEILA BAIR, ANNIE E. CASEY FOUND., LOW-COST PAYDAY LOANS: OPPORTUNITIES AND OBSTACLES 8 (2005), *available at* http://www.aecf.org/upload/publicationfiles/fes3622h334.pdf.

[11] The Office of Thrift Supervision oversaw federal savings banks until 2010. The Dodd-Frank Act repealed the agency and transferred its functions were transferred to the OCC. *See* Section 312, Pub. L. No. 111-203, 124 Stat. 1376, 1521 (codified at 12 U.S.C. § 5412) (transfer of powers to OCC); Section 313, 124 Stat. at 1523 (codified at 12 U.S.C. § 5413) (abolishment of OTS).

[12] Kenneth, *supra* note 6, at 676. The OCC regulates federally-chartered banks, and the OTS regulates federally-chartered thrifts (savings and loans).

[13] *See* U.S. Office of the Comptroller of Currency, Advisory Letter, Payday Lending 1 (2000), *available at* http://www.ffiec.gov/ffiecinfobase/resources/retail/occ-al-2000-10_payday_lending.pdf; U.S. Office of Thrift Supervision, Memorandum to Chief Executive Officers, Payday Lending 1 (2000), *available at* http://files.ots.treas.gov/25132.pdf.

[14] Kenneth, *supra* note 6, at 676.

[15] *See* COMPTROLLER OF THE CURRENCY, U.S. DEP'T OF THE TREASURY, FACT SHEET: EAGLE NATIONAL BANK CONSENT ORDER (Jan. 3, 2002), http://www.occ.treas.gov/ftp/release/2002-01a.doc.

[16] *Id.*

[17] *See* Steven M. Graves & Christopher L. Peterson, *Predatory Lending and the Military: The Law and Geography of "Payday" Loans in Military Towns*, 66 OHIO ST. L.J. 653, 706-07 (2005).

Federal Reserve Board (FRB) followed suit and began to assign negative ratings to their member banks, causing the banks they regulated to leave the industry as well.[18] Despite these efforts to prevent banks from enabling risky lending, payday lenders still managed to find partners in a handful of smaller banks regulated by the Federal Deposit Insurance Corporation (FDIC).[19] However, in 2005, the FDIC also began to take action in response to its member banks' widespread participation in payday lending. In the introductory letter to its Revised Examination Guidance, the FDIC stated that member banks who partnered with payday lenders were acting in a manner "inconsistent with prudent lending practices."[20] The letter also discussed the risks associated with payday lending, including credit, legal, reputational, and compliance risks.[21] The Guidance document enforced limits of six payday loans per year per borrower, after which point the bank would be required to offer a borrower longer-term loans.[22] These new guidelines caused almost all FDIC-member banks to leave the payday lending industry within a year.[23] With this last piece of regulation, the rent-a-bank model fell out of favor.

It is troubling to think that the OCC would ignore its past experience and help revive a risky lending model that is all but certain to harm consumers yet again.

The lenders that pursue these partnerships pose grave risks to consumers and communities

The problems with payday and other high-interest, high-cost loans are well-documented. High-cost lenders' business models rely on keeping people in debt, not helping them build assets. These lenders have made profits based on predatory business practices that endanger consumers' economic security.

According to past research from the Consumer Financial Protection Bureau, payday loan borrowers tend to have low or moderate incomes and most are working at least part-time.[24] One in four also have access to public assistance or retirement benefits.[25]

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[18] KING, PARRISH & TANIK, *supra* note 8, at 4-5. The Federal Reserve Board regulates most state-chartered banks.

[19] *Id.* at 5.

[20] FED. DEPOSIT INSURANCE CORP., PAYDAY LENDING PROGRAMS REVISED EXAMINATION GUIDANCE, (March 1, 2005), *available at* http://www.fdic.gov/news/news/financial/2005/fil1405.html.

[21] *Id.*

[22] *Id.*

[23] KING, PARRISH AND TANIK, *supra* note 8, at 5.

[24] *See* CONSUMER FIN. PROTECTION BUREAU, PAYDAY LOANS AND DEPOSIT ADVANCE PRODUCTS 18 (2013), *available at* http://files.consumerfinance.gov/f/201304_cfpb_payday-dap-whitepaper.pdf (finding median income of $22,476, with three quarters of all customers working full- or part-time).

Pew research has also found that payday loan borrowers are largely female, white, and between ages 25-44.[26] However, certain demographic traits are more predictive of loan usage. Renters are slightly more likely to turn to payday loans than homeowners; those who are separated or divorced are twice as likely as those with another marital status to have payday loans; and those who are Black are also twice as likely as people of other ethnicities to have payday loans.[27] Payday lenders tend to concentrate more in communities of color, even when controlling for income.[28]

Once a person takes out that first high-cost loan, odds are high they'll come up short and end up with more loans. A typical two-week payday loan can come with APRs of 300% or higher.[29] Repeat lending is not an anomaly – it's a feature of the payday lending business model. The Center for Responsible Lending estimates that roughly three-quarters of all payday loan volume comes from "loan churn," defined as borrowing a loan and then having to borrow again within two weeks.[30] The Bureau's research has uncovered high levels of repeat borrowing. Four out of every five payday loan borrowers – or 80% – have to reborrow from the same lender within 14 days, and

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[25] *See id.*

[26] Pew Charitable Trusts, Payday Lending in America: Who Borrows, Where They Borrow, and Why 8 (2012), *available at* http://www.pewtrusts.org/~/media/legacy/uploadedfiles/pcs_assets/2012/pewpaydaylendingreportpdf.pdf.

[27] *Id.* at 9.

[28] *See, e.g.*, Ctr. for Responsible Lending, Perfect Storm: Payday Lenders Harm Florida Consumers Despite State Law 6-8 (2016), *available at* http://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/crl_perfect_storm_florida_mar2016.pdf (Florida payday lenders are more highly concentrated in communities of color, even when accounting for income); Howard Univ., Ctr., on Race & Wealth, The Economic Impact of Payday Lending in Economically Vulnerable Communities 4 (2014), *available at* https://consumermediallc.files.wordpress.com/2015/01/crw-report-on-payday-lending-in-the-srabc-states.pdf (examining trends in Alabama, Florida, Louisiana and Mississippi); Ctr. for Responsible Lending, Predatory Profiling: The Role of Race and Ethnicity in the Location of Payday Lenders in California 2 (2009), *available at* http://www.responsiblelending.org/california/ca-payday/research-analysis/predatory-profiling.pdf (payday lenders nearly eight times as concentrated in Black and Latino neighborhoods compared with White neighborhoods).

[29] *See* Consumer Fin. Protection Bureau, Payday Loans and Deposit Advance Products 9 (2013), *available at* https://files.consumerfinance.gov/f/201304_cfpb_payday-dap-whitepaper.pdf.

[30] Ctr. for Responsible Lending, The State of Lending in America and its Impact on U.S. Households: Payday Lending Abuses and Predatory Practices 3 (2013), *available at* http://www.responsiblelending.org/sites/default/files/uploads/10-payday-loans.pdf.

almost 90% end up reborrowing within 60 days.[31] More likely than not, a person with a loan will end up taking out ten loans in a sequence.[32]

Short-term auto-title loans are equally troubling, and come with the added risk of losing one's car. The Bureau's research on auto-title lending from 2016 showed that approximately one in every five people who takes out an auto-title loan with a balloon payment ends up carless due to eventual repossession.[33] Losing a car could put many working Americans at risk of losing a job, or struggling to meet other obligations that require a car for transportation.

The Bureau also found troubling trends with payday installment and auto-title installment loans. Though there are fewer car repossessions associated with auto-title installment loans compared with single-payment options, 22% still end up in default.[34] For payday installment loans, 24% end up in default – and for consumers stuck in a series of online payday installment loans, 55% end up in default.[35] A default rate of *more than half* should give anyone serious pause.

In response to these negative outcomes, states have stepped in to regulate interest rates on consumer loans. At present, 16 states and the District of Columbia cap interest rates on payday loans, and most states cap interest rates on larger installment loans.[36] California just became the latest state to reinstate rate caps[37] on larger loans by passing Assembly Bill 539, which applies a 36% rate cap (tied to the Federal Funds Rate) on

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[31] Consumer Fin. Protection Bureau, Supplemental Findings on Payday, Payday Installment, and Vehicle Title Loans, and Deposit Advance Products 111 (2016), *available at* http://www.consumerfinance.gov/data-research/research-reports/supplemental-findings-payday-payday-installment-and-vehicle-title-loans-and-deposit-advance-products/.

[32] *Id.* (55% of loans end up in a loan sequence of 10 or more).

[33] Consumer Fin. Protection Bureau, Single-Payment Vehicle Title Lending 4 (2016), *available at* http://files.consumerfinance.gov/f/documents/201605_cfpb_single-payment-vehicle-title-lending.pdf.

[34] Consumer Fin. Protection Bureau, Supplemental Findings, *supra* note 31, at 22.

[35] *Id.*

[36] *See* Ctr. for Responsible Lending, Map of U.S. Payday Interest Rates, https://www.responsiblelending.org/research-publication/map-us-payday-interest-rates; Nat'l Consumer Law Ctr., Factsheet, State Annual Percentage Rate (APR) Caps for $500, $2,000, and $10,000 Installment Loans (2019), *available at* https://www.nclc.org/images/pdf/high_cost_small_loans/fact-sheet-apr-caps-for-installment-loans.pdf.

[37] California had strong rate caps until 1985, when legislators decided to narrow their application to only smaller-dollar installment loans. *See* Taryn Luna & Maloy Moore, *California trails in regulating high-interest loans. This bill could finally rein them in*, L.A. Times, June 25, 2019, *available at* https://www.latimes.com/politics/la-pol-ca-california-predatory-lending-062519-story.html.

installment loans of $2,500-$10,000.[38] Troublingly, before the legislation had even gone into effect, three lenders began publicly declaring to their shareholders that they intended to partner with national banks for the specific purpose of evading California's new law.[39] Assemblymember Monique Limón, the bill's author, has sent letters to the CEOs of all three companies informing them that they must comply with state law.[40]

The OCC's proposal could further embolden these lenders to partner with banks in order to maintain a business model that charges consumers triple-digit rates and strips wealth from low- and moderate-income communities, defying the will of states like California to protect their residents.

The OCC's proposal does not clarify a legitimate conflict in recent caselaw; rather, it props up a disputed legal theory that provides cover to predatory lenders seeking to evade state law

The OCC is conducting this rulemaking in an attempt to effectively overturn a Second Circuit decision, *Madden v. Midland Funding LLC*, on the grounds that it impermissibly conflicts with the "valid when made" doctrine, which would enable a nonbank assignee to continue charging whichever interest rate the original bank was allowed to charge. However, the "valid when made" doctrine is not settled legal precedent;[41] rather, it is a theory that the OCC and the banking industry are advancing in order to argue that the National Bank Act broadly preempts state laws applicable to nonbank assignees when they partner with banks to make loans.[42]

The *Madden* decision is good law; the Supreme Court declined to review it; and it appropriately applied the standard set forth in the Dodd-Frank Act for determining whether a state law is preempted by the National Bank Act.

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[38] Assem. B. 539, 2019-2020 Reg. Sess. (Cal. 2019).

[39] Hannah Wiley, *California made triple-digit interest illegal on these loans. Lenders have found a loophole*, SACRAMENTO BEE, Dec. 18, 2019, *available at* https://www.sacbee.com/news/politics-government/capitol-alert/article238501288.html.

[40] *See id.*

[41] For an extensive discussion of the "valid when made theory," *see* Brief of *Amicus Curiae* Adam J. Levitin, Rent-Rite Super Kegs West Ltd. v. World Business Lenders, LLC, Case No. 19-01552 (filed D. Colo. Sept. 19, 2019), *available at* https://www.creditslips.org/files/levitin-amicus-brief-rent-rite-super-kegs-west-ltd-v-world-business-lenders-llc.pdf.

[42] *See, e.g.*, Brief of Amicus Curiae The Clearing House Ass'n et al., Madden v. Midland Funding, LLC, Case No. 14-2131 (filed 2d. Cir. June 26, 2015); Brief of Amici Curiae Fed. Deposit Ins. Corp. and Office of the Comptroller of the Currency, Rent-Rite Super Kegs West Ltd. v. World Business Lenders, LLC, Case No. 19-01552 (filed D. Colo. Sept. 10, 2019), *available at* https://www.consumerfinancemonitor.com/wp-content/uploads/sites/14/2019/09/Amicus_Brief.pdf.

The *Madden* case involved the following issue: whether a debt buyer charging interest on debts purchased from a national bank could assert National Bank Act preemption, and thereby disregard state usury laws. The Second Circuit held that the National Bank Act did not govern the interest rates that nonbank assignees may charge, because the nonbank lender did not act on behalf of the bank when collecting on the debts it had purchased – they acted on their own behalf, as current owners of the debt.[43] The court concluded that based on these facts, the state usury law at issue was not preempted because there was "no mechanism" by which applying state usury laws to a third-party debt buyer would prevent or significantly interfere with a bank's ability to exercise its powers under the NBA.[44] The Supreme Court declined to review the decision,[45] and congressional legislation to overturn *Madden* has also stalled.[46] Therefore, *Madden* remains good law and should be acknowledged as such.

The OCC cannot ignore the fact that Dodd-Frank explicitly crafted a presumption against preemption under the National Bank Act

The *Madden* decision correctly applied the standard for determining whether state usury laws were preempted under the National Bank Act, as amended by Dodd-Frank in 2010, when it concluded that the debt buyer in that case was obligated to comply with state law when charging interest on loans it purchased from the bank. The OCC's characterization of NBA's preemptive scope, by contrast, is incorrect and fails to acknowledge how courts are supposed to evaluate such claims in a post-Dodd-Frank world.

Before Dodd-Frank, the OCC used a broad interpretation of NBA's preemptive effect to stop state attorneys general from enforcing state law against national banks – especially in the decade leading up to the 2008 financial crisis.[47] For example, state attorneys general conducted inquiries into subprime mortgage lending in the 2000s that revealed potentially risky and illegal practices;[48] if they had been allowed to pursue enforcement actions, they might have provided earlier public warning signs of the mortgage crisis to come. However, courts deferred to the OCC's interpretation of NBA preemption, and

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[43] Madden v. Midland Funding LLC, 876 F.3d 246, 251 (2d. Cir. 2015).

[44] *Id.* (citing Barnett Bank v. of Marion County N.A. v. Nelson, Florida Ins. Comm'ner et al., 517 U.S. 25, 33) (1996).

[45] *Id.* (cert. denied, 136 S. Ct. 2505 (2016)).

[46] Modernizing Credit Opportunities Act, H.R. 4439, 115th Cong. (2018) (died in committee).

[47] *See* Bank Activities and Operations; Real Estate Lending and Appraisals, 69 Fed. Reg. 1904, 1904 (Jan. 13, 2004).

[48] *See, e.g.*, Cuomo v. Clearing House Ass'n LLC, 557 U.S. 519 (2009); Watters v. Wachovia Bank, N.A., 500 U.S. 1 (2007).

held that state attorney general investigations could not interfere with the OCC's visitorial powers, as the primary regulator of national banks.[49] Courts did so despite the Supreme Court's *Barnett Bank* decision,[50] which had indicated a more nuanced analysis was required.

Congress corrected the OCC's interpretation in 2010, to ensure that courts would preserve states' general authority to conduct investigations and enforce consumer protection laws against national banks. Dodd-Frank Section 1044 clarified the scope of NBA preemption as follows: a state consumer protection law is preempted "*only if*" it "prevents or significantly interferes" with a national bank's activities, in accordance with *Barnett Bank*.[51] Furthermore, OCC, which still administers NBA, must make such a determination on a case-by-case basis and in consultation with the CFPB before declaring a state law to be preempted.[52]

The OCC here asserts that national banks' authority under NBA Section 85's was "expressly preserved" in 2010[53] under Dodd-Frank; however, it fails to note that Dodd-Frank created a presumption *against* preemption unless the above conditions are met.

States have longstanding authority to enact and enforce interest rate caps

State usury caps are nothing new; in fact, for many decades prior to financial industry deregulation as discussed above, states across the nation had interest rate caps on consumer loans.[54] At present,16 states and the District of Columbia cap interest rates on payday loans,[55] and three-quarters of all states cap rates on installment loans.[56] The

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[49] *See* Smiley v. Citibank, 517 U.S. 735 (1996); Marquette Nat'l Bank v. First of Omaha Corp., 439 U.S. 299 (1978).

[50] Barnett Bank of Marion County N.A. v. Nelson, Florida Ins. Comm'ner et al., 517 U.S. 25 (1996).

[51] 12 U.S.C. §§ 25b(b)(1)(A-B) (2018 & Supp. I).

[52] *Id.*

[53] 84 Fed. Reg. 64229, 64231.

[54] For more information on the history of state usury laws and payday lending, *see* Christopher L. Peterson, *Usury Law, Payday Loans, and Statutory Sleight of Hand: Salience Distortion and American Credit Pricing Limits*, 92 MINN. L. REV. 1110 (2008).

[55] *See* Ctr. for Responsible Lending, Map of U.S. Payday Interest Rates, https://www.responsiblelending.org/research-publication/map-us-payday-interest-rates.

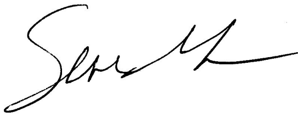
[56] *See* Nat'l Consumer Law Ctr., Factsheet, State Annual Percentage Rate (APR) Caps for $500, $2,000, and $10,000 Installment Loans (2019), *available at* https://www.nclc.org/images/pdf/high_cost_small_loans/fact-sheet-apr-caps-for-installment-loans.pdf.

OCC's proposal could substantially threaten states' ability to enforce their own laws and protect their residents by encouraging state-regulated nonbank lenders to partner with national banks for the sole purpose of making high-cost loans in defiance of state interest rate caps.

Conclusion

For the reasons stated above, we respectfully oppose the OCC's proposal and urge that it be rescinded.

Sincerely,



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