September 3, 2020

Brian Brooks
Acting Comptroller of the Currency
Office of the Comptroller of the Currency
400 7th Street, SW., suite 3E-218
Washington, DC 20219

RE: National Banks and Federal Savings Associations as Lenders [Docket ID OCC-2020-0026; RIN 1557-AE97]

Dear Acting Comptroller Brooks:

Consumer Reports[1] appreciates the opportunity to comment in response to the Office of the Comptroller of Currency's ("OCC") proposed rule regarding National Banks and Federal Savings Associations as lenders.

The OCC's proposed rule comes in the backdrop of an unprecedented health and economic crisis straining the financial resources of many Americans. We are deeply concerned that during these difficult times, predatory lenders are seeking to take advantage of individuals who have few options to pay for basic necessities. Unfortunately, the OCC's proposal would perpetuate these efforts by extending cover to lenders attempting to evade state usury laws by partnering with national banks to originate loans under what is commonly referred to as the "rent-a-bank" or "rent-a-charter" model. By making it easier for banks to be deemed the true lender of a loan, the OCC is all but encouraging nonbank lenders subject to state oversight to enter into these partnerships and claim state laws do not apply to their loans.

[1] Consumer Reports is an expert, independent, non-profit organization whose mission is to work for a fair, just, and safe marketplace for all consumers and to empower consumers to protect themselves. Consumer Reports works for pro-consumer policies in the areas of financial services, as well as telecommunications, health care, food and product safety, energy, telecommunications, privacy and data security, and competition and consumer choice, among other issues, in Washington, DC, in the states, and in the marketplace. Consumer Reports is the world's largest independent product-testing organization, using its dozens of labs, auto test center, and survey research department to rate thousands of products and services annually. Founded in 1936, Consumer Reports has 6 million subscribers to its magazine, website, and other publications.

At its core, the rent-a-bank model is structured to side-step validly enacted state usury laws and other consumer protections laws for the sole purpose of imposing unconscionable interest rates on borrowers. Under no circumstances should rent-a-bank schemes be permitted. The OCC claims that "lending relationships with third parties can help banks meet customers' need for affordable credit, including the needs of unbanked and underbanked individuals."[2] However, the exact opposite is true. These relationships prey upon customers with limited access to mainstream financial services by offering loans with exorbitant triple-digit interest rates. Labeling rent-a-bank schemes as "affordable loan products" that "facilitate expanded access to credit" is not only inaccurate, but it also contradicts the OCC's previously held position that these models are unsafe for consumers.[3] We urge the OCC to acknowledge the dire realities of their proposal, respect states' longstanding role in regulating interest rates on consumer loans, and rescind this proposal.

Deregulation gave birth to the rent-a-bank phenomenon

In 1864, through the National Banking Act ("NBA"), Congress established a national banking system along with a uniform currency to be used throughout the country.[4] Primarily aimed at addressing the shortcomings of a decentralized system, the NBA tasked a new federal agency, the Office of the Comptroller of Currency with overseeing the national banking system.[5] At this point in history, tension between the federal government and states, particularly regarding who regulates banking, was at an all-time high. Yet, shortly after the NBA's enactment, the Supreme Court emphasized that banks are "governed in their daily course of business far more by the laws of the States than of the nation."[6] Section 85 of the NBA, which permits national banks to charge "interest at the rate allowed by the laws of the State … where the bank is located," recognizes the state's traditional role in regulating usury.[7]

However, in the 1978 decision in *Marquette*, the Supreme Court interpreted § 85 of the NBA to permit nationally chartered banks to export the maximum interest rate of the

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[2] 85 Fed. Reg. 44223, 44224.
[3] *Id.*
[4] Angel Rzeslawski, *The National Bank Act and the Demise of State Consumer Laws*, 68 Hastings L.J. 1421, 1428 (2017).
[5] *Id.*
[6] National Bank v. Commonwealth, 76 U.S. 353, 362 (1870); (In regards to banking, the court emphasized that "all their contracts are governed and construed by State laws. Their acquisition and transfer of property, their right to collect their debts, and their liability to be sued for debts, are all based on State law. It is only when the State law incapacitates the banks from discharging their duties to the government that it becomes unconstitutional.").
[7] 12 U.S.C. § 85.

state in which they are located, regardless of the laws in a bank customer's home state.[8] This landmark decision gave rise to the exportation doctrine, now a critical element of rent-a-bank schemes, and prompted a deregulatory race to the bottom. States, fearful that national banks would move their headquarters to states with high interest rate caps or no caps at all, responded by amending their laws to raise or lift interest rates caps for federally-chartered banks.[9]

Deregulation continued after many states became concerned that state-chartered banks would be at a competitive disadvantage with national banks who could charge higher interest rates. To level the playing field, Congress enacted the Depository Institutions Deregulation and Monetary Control Act of 1980 ("DIDMCA").[10] 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 created an environment where rent-a-bank schemes could flourish. As the federal government and states moved away from regulating the financial services industry, large nonbank lenders spotted an opportunity to profit off borrowers and began partnering with banks subject to lenient interest rate caps in order to issue loans with terms that would otherwise be illegal in a customer's home state.[11] Generally, under a rent-a-bank scheme, a partnership is formed between a national bank and most commonly, a high-cost lender. The bank originates the loan and the high-cost lender manages all other aspects of the transaction, including marketing, reviewing, approving and servicing of the loan.[12] The payday lender then buys the loan from the bank and provides them with a small percentage for each loan sold.[13]

Typically, these partnerships are formed with banks located in states without usury caps. By originating the loan with a national bank, high-cost lenders claim they can evade state usury laws and utilize their partner banks' authority under federal law to charge higher interest rates – even though the lender approves the loan before it is originated by the bank.

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

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

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

[11] 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 (2006), *available at* http://www.responsiblelending.org/payday-lending/research-analysis/rr012-Financial_Quicksand-1106.pdf.

[12] Kenneth, supra note 9, at 676.

[13] *Id.*

As deregulation gave birth to the rent-a-bank phenomenon, states and federal regulators were forced to reevaluate their policies. States reinstituted interest rate caps and the OCC took measures to prevent the spread of rent-a-bank schemes. Now, as the OCC attempts to invalidate state consumer protection laws, they should remember lessons learned from the past and rescind the proposal.

Rent-a-bank loans are dangerous, especially for people of color

The dangers associated with payday and other high-interest, high-cost loans are no secret. With annual percentage rates of a staggering 300%, these loans prey on vulnerable communities and trap borrowers in a long-term cycle of debt.[14] Once a person turns to a payday lender for financial assistance, odds are high they'll come up short on repayment and be forced to take out another loan. The Consumer Financial Protection Bureau's ("Bureau") 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 almost 90% end up reborrowing within 60 days.[15] More likely than not, a person with a loan will end up taking out ten loans in a sequence.[16] This leads to an inescapable pattern of financial demise that leaves borrowers having to face delinquency on other bills, negative credit scores, closed checking accounts and worse, bankruptcy. Sadly, as a prominent feature of the payday lending business model, this debt trap bolsters their bottom lines. In fact, payday lenders collect nearly $8 billion in fees every year.[17]

Even worse, studies show that payday lenders strategically locate in low-income communities with predominantly Black and Hispanic populations.[18] This form of predatory targeting disproportionately impacts people of color who are already economically disadvantaged.[19] It perpetuates the racial wealth gap and fuels financial inequality. As a result, people of color suffer the most from high-cost lending and their

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[14] DIANE STANDAERT, DELVIN DAVIS, CHARLA RIOS, CTR. FOR RESPONSIBLE LENDING, PAYDAY AND CAR-TITLE LENDERS DRAIN NEARLY $8 BILLION IN FEES EVERY YEAR (2019), *available at* https://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/crl-statebystate-fee-drain-apr 2019.pdf.
[15] CONSUMER FIN. PROTECTION BUREAU, SUPPLEMENTAL FINDINGS ON PAYDAY, PAYDAY INSTALLMENT, AND VEHICLE TITLE LOANS, AND DEPOSIT ADVANCE PRODUCTS (2016), *available at* http://www.consumerfinance.gov/data-research/research-reports/supplemental-findings-payday-payday-installmenta nd-vehicle-title-loans-and-deposit-advance-products/.
[16] *Id.* (55% of loans end up in a loan sequence of 10 or more).
[17] STANDAERT, supra note 14.
[18] Christopher K. Odinet, *Predatory Fintech and the Politics of Banking*, Iowa Law Review (2021 Forthcoming), *available at* https://ssrn.com/abstract=3677283.
[19] *Id.*

financial hardships will only be exacerbated as the COVID crisis continues to wreak havoc on the economy.

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.[20] 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.[21] 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.[22] A default rate of more than half should give anyone serious pause.

The OCC cannot deny the negative financial consequences and many harms associated with high-cost lending. Hardworking families deserve stronger protections, which is far from what the OCC's proposal accomplishes.

The OCC previously shut down rent-a-bank schemes

Using the rent-a-bank model, payday lending grew rapidly during the 1990s. As banks began to close branches in economically-distressed neighborhoods, payday lenders acted quickly to fill the void. Given the obvious risks associated with high-cost, short term loans mentioned above, the OCC implemented a strong policy prohibiting rent-a-bank schemes in the early 2000s that's been in effect until recently. The OCC previously described such schemes as "an abuse of the national charter" and along with the Office of Thrift Supervision ("OTS")[23] considered the risks of payday lending

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[20] CONSUMER FIN. PROTECTION BUREAU, SINGLE-PAYMENT VEHICLE TITLE LENDING (2016), *available at* http://files.consumerfinance.gov/f/documents/201605_cfpb_single-payment-vehicle-title-lending.pdf.
[21] CONSUMER FIN. PROTECTION BUREAU, SUPPLEMENTAL FINDINGS ON PAYDAY, PAYDAY INSTALLMENT, AND VEHICLE TITLE LOANS, AND DEPOSIT ADVANCE PRODUCTS (2016), *available at* http://www.consumerfinance.gov/data-research/research-reports/supplemental-findings-payday-payday-installmentand-vehicle-title-loans-and-deposit-advance-products/.
[22] *Id.*
[23] 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).

uncertain, dangerous, and harmful for consumers.[24] The two agencies teamed up to issue advisory letters warning their member banks that they would face regulatory action if caught renting their charters to payday lenders.[25] 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.[26]

Beyond advisory orders, the OCC was the first agency to take aggressive enforcement actions to stop national banks from 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.[27] The OCC stated that the bank had "risked its financial viability" by focusing on payday lending "in violation of a multitude of standards of safe and sound banking, compliance requirements, and OCC guidance."[28] Then-Comptroller of the Currency John D. Hawke expressed great concern about "arrangements in which national banks essentially rent out their charters to third parties who want to evade state and local consumer protection laws."[29] The OCC's enforcement actions were based on an understanding that "preemption privileges of national banks derive from the Constitution and are not a commodity that can be transferred for a fee to nonbank lenders."[30]

Eventually, federal regulators, including the OCC, OTS, and the Federal Reserve Board began assigning negative credit ratings to any member bank that engaged in payday lending.[31] To an extent this tactic was effective. Fearful of losing their charters, many banks abandoned their partnerships with payday lenders. However, it did not

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[24] U.S. Office of the Comptroller of Currency, Advisory Letter, Payday Lending (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 (2000), *available at* http://files.ots.treas.gov/25132.pdf.
[25] Kenneth, supra note 9, at 676. The OCC regulates federally-chartered banks, and the OTS regulates federally-chartered thrifts (savings and loans).
[26] Kenneth, supra note 9, at 676.
[27] COMPTROLLER OF THE CURRENCY, U.S. DEP'T OF THE TREASURY, FACT SHEET: EAGLE NATIONAL BANK CONSENT ORDER (Jan. 3, 2002), *available at* http://www.occ.treas.gov/ftp/release/2002-01a.doc.
[28] *Id.*
[29] U.S. Office of the Comptroller of Currency, News Release 2003-6 (Jan. 31, 2003), *available at* https://www.occ.gov/newsissuances/news-releases/2003/nr-occ-2003-6.html. *See also* OCC, News Release 2003-3 (Jan. 31, 2003), *available at* https://www.occ.gov/news-issuances/news-releases/2003/nr-occ-2003-3.html; OCC, Consent Order 2002-93 (Oct. 28, 2002), *available at* https://www.occ.gov/static/enforcement-actions/ea2002-93.pdf.
[30] *Id.*
[31] 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). *See also* KING, PARRISH & TANIK, supra note 11, at 4-5. The Federal Reserve Board regulates most state-chartered banks.

completely eradicate rent-a-bank schemes because payday lenders were still able to rely on charters from smaller banks regulated by the Federal Deposit Insurance Corporation ("FDIC").[32] That ended in 2005, when the FDIC joined other regulators and began taking action in response to its member banks' widespread participation in payday lending. The FDIC declared partnerships with payday lenders as "inconsistent with prudent lending practices" taking note of the various risks associated with payday lending, including credit, legal, reputational, and compliance risks.[33] The FDIC also issued Guidance documents that 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.[34] Within a year, almost all FDIC-member banks left the payday lending industry.[35] With federal regulators acting in concert, rent-a-bank schemes quickly became impractical.

The OCC's proposal represents a departure from a uniform policy prohibiting national banks from participating in rent-a-bank schemes with nonbank lenders. It is troubling to think that the OCC would ignore its past experiences and the wisdom of its sister agencies to help revive a risky lending model that is all but certain to harm consumers yet again.

Furthermore, the OCC has not provided any explanation for why it decided to reverse track and enable rent-a-bank schemes. Proceeding in this manner and undermining agency precedent without justification risks running afoul of the Administrative Procedure Act ("APA").[36] The Supreme Court's interpretation of the APA is explicit – an agency may not "depart from a prior policy sub silentio or simply disregard rules that are still on the books … and of course the agency must show that there are good reasons for the new policy."[37] Nevertheless, the proposal leaves us guessing why the OCC abruptly decided to abolish a two-decade old policy banning rent-a-bank schemes. The OCC cannot simply ignore the fact that it previously identified rent-a-bank schemes as harmful for consumers.

States have a longstanding authority to protect residents against predatory lending

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[32] KING, PARRISH & TANIK, supra note 11, at 5.
[33] 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.
[34] *Id.*
[35] KING, PARRISH & TANIK, supra note 11, at 5.
[36] 5 U.S.C. § 706(2)(A).
[37] FCC v. Fox Television Stations, Inc., 556 U.S. 502, 515 (2009).

State usury caps are nothing new in the U.S.; in fact, they've been around since the founding of our nation and have served as the simplest and most effective method to protect against predatory lending.[38] Inherent in a states' historic police power is the well-recognized authority to regulate and enforce usury laws within its borders.[39] The OCC's proposal attempts to override this longstanding principle by imposing in an area that has traditionally been regulated by the states.

Currently, at least forty-five states, including California, have adopted laws to protect their residents from the dangers associated with high-interest nonbank installment loans and other forms of loans.[40] In addition, 16 states and the District of Columbia cap interest rates on payday loans.[41] These laws have played a critical role in preventing lenders from imposing excessive interest rates that make loans impossible to repay and force borrowers deeper into debt.

Just last year, California became the latest state to reinstate rate caps[42] on larger loans by passing Assembly Bill 539, which applies a 36% rate cap (tied to the Federal Funds Rate) on installment loans of $2,500-$10,000.[43] Previously, there had been no rate cap on loans above $2,500. 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.[44] Industry's glaring intention to defy state law concerned California lawmakers. 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.[45]

The OCC's proposed rule threatens states' historical authority to enforce their usury laws by promoting partnerships between state-regulated nonbank lenders and national

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[38] Nathalie Martin, *Public Opinion and the Limits of State Law: The Case for a Federal Usury Cap*, 34 N. Ill. U. L. Rev. 259, 264 (2014).

[39] Gen. Motors Corp. v. Abrams, 897 F.2d 34, 41-42 (2d Cir. 1990); *See also* Griffith v. State of Conn., 218 U.S. 563, 569 (1910).

[40] Ctr. for Responsible Lending, Diagram of State Rate Caps for $500 and $2,000 Loans, https://www.nclc.org/images/pdf/high_cost_small_loans/payday_loans/FactSheet-StateRateCap.pdf.

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

[42] 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.

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

[44] 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.

[45] *Id.*

banks for the sole purpose of making high-cost loans in defiance of state interest rate caps. By purporting to exempt nonbank entities from state regulation, the OCC is infringing upon a state's valid exercise of power to safeguard its residents from abusive lending practices. Acting in the best interest of their constituencies, state legislatures across the country have invoked this authority and the OCC is exceeding its mandate by displacing state law through the rulemaking process.

Dodd-Frank explicitly crafted procedural and substantive requirements the OCC must abide by

The OCC's efforts to undermine state consumer protection laws are well-documented. After the 2008 mortgage crisis, the Senate Committee on Banking, Housing and Urban Affairs admonished banking regulators for "routinely sacrificing consumer protection for short-term profitability of banks" and "actively creating an environment where abusive mortgage lending practices could flourish without State controls.[46] It became apparent that during the 1990s and 2000s, the OCC and OTC enabled predatory lending by consistently pursuing preemption of state consumer protection laws. Displeased with the OCC and OTS's aggressive efforts to displace these laws, Congress abolished the OTS and enacted the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"), which imposed new substantive and procedural requirements the OCC must follow when seeking to preempt any "state consumer financial law" – including lending laws.[47]

Specifically, under Dodd-Frank, Congress limited the National Banking Act's[48] ("NBA"), preemptive scope on state consumer protection laws as applied to national banks and federal savings associations.[49] In doing so, Congress expressly incorporated *Barnett Bank's* "prevents or significantly interferes with" standard for preemption.[50] A state consumer protection law is preempted "only if"it "prevents or significantly interferes with" a national bank's activity.[51] The OCC must make a case-by-case determination and have "substantial evidence, made on the record of the proceeding, that supports the specific finding regarding the preemption of state law based on the legal standard outlined in *Barnett Bank*.[52]

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[46] Senate Report. No. 111-176, at 15-17 (2010), *available at* https://www.govinfo.gov/content/pkg/CRPT-111srpt176/pdf/CRPT-111srpt176.pdf.
[47] Pub. L. 111-203, 124 Stat. 1376 (2010).
[48] The OCC administers the National Bank Act.
[49]12 U.S.C. §§ 25b, 1465.
[50] Barnett Bank of Marion County, N.A. v. Nelson, 517 U.S. 25 (1996).
[51] 12 U.S.C. §§ 25b(b)(1)(A-B).
[52] 12 U.S.C. § 25b(c); *see also* Lusnak v. Bank of Am., 883 F.3d 1185, 1191-94 (9th Cir. 2018) ("In Dodd-Frank, Congress underscored that *Barnett Bank* continues to provide the preemption standard; that is, state consumer

The OCC's proposed rule has a sweeping preemptive effect on state consumer protection laws. It preempts state usury laws from applying to nonbank entities for loans that are considered to be made by a national bank and would override state usury laws and other state laws involving licensing and examination for nonbank lenders that partner with national banks. As mentioned, the OCC does not have the authority to preempt state usury laws unless it establishes that those laws "prevents or significantly interferes with the "exercise of lawful powers by national banks."[53] The OCC's notice of proposed rulemaking blatantly ignores this clear and unambiguous requirement. Without any mention or attempt to satisfy the standard, the proposal lacks any showing of "substantial evidence" that state usury laws "prevents or significantly interferes with" the authority of national banks.[54]

In addition, Dodd-Frank clarified that when issuing a rule that preempts state law, the OCC must act on a "case-by-case basis."[55] This means the OCC must determine "the impact of a particular State consumer financial law on any national bank that is subject to that law."[56] Again, the OCC's proposal does not reference, or attempt to comply with this requirement. The OCC did not cite, nor consider the countless state laws that would be preempted under their proposed rule. Also, before taking preemptive action, the OCC "shall first consult with the Bureau of Consumer Financial Protection and shall take the views of the Bureau into account."[57] There is no indication within the proposal that the OCC consulted with the Bureau or used their input to formulate this rule.

Regarding preemption, Congress has made it clear that "the operative question is whether a state law prevents a bank from exercising its national bank powers or significantly interferes with its ability to do so. Minor interference with federal objectives is not enough."[58] Here, the primary justification cited for the proposed rule is the "increasing uncertainty associated with the legal framework that applies to loans made as part of a partnership between banks and third parties." Yet, the OCC does not point to any data, research or study showing the detrimental impact the alleged uncertainty has caused. This amounts to mere speculation. Further, absent in the proposal is any support for how customers benefit from lending relationships with

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financial law is preempted only if it prevents or significantly interferes with the exercise by the national bank of its powers.").

[53] Lusnak, supra note 52, at 1193.

[54] *Id.*

[55] 12 U.S.C. §§ 25b(b)(1)(B), 25b(b)(3)(A).

[56] *Id.*

[57] 12 U.S.C. § 25b(b)(3)(B).

[58] Lusnak, supra note 52, at 1194.

third parties. Most importantly, the OCC completely disregards the negative consequences enabling rent-a-bank schemes will have on consumers.

In sum, the OCC has refused to abide by procedural and substantive requirements Congress enacted in recognition of their role in facilitating the 2008 financial crisis. One would think that after Congress stripped the agency of the *Chevron* deference standard to which agency rulemakings are normally entitled, the OCC would make every effort to comply with these requirements.[59] Yet, that is not the case. After repeated regulatory failures, Congress set high standards for the OCC, and this proposal misses the mark by a long shot.

The True Lender Doctrine should be preserved

The true lender doctrine was developed to determine which party, the bank or nonbank lender, was the real party of interest or the true lender of a loan, thus clarifying whether the transaction is entitled to preemptive immunity or, instead subject to state usury laws.[60] Numerous states and courts have used the true lender doctrine to expose and invalidate rent-a-bank schemes. Most recently, the doctrine was successful in a lawsuit against credit firms and banks who partnered together under a rent-a-bank scheme to avoid Colorado's interest rate caps.[61] This anti-evasion doctrine has proven to be an effective tool for states to combat these schemes and enforce their interest rate caps.

Favoring substance over form, the doctrine examines the totality of circumstances surrounding the transaction and if "the purported agent holds, acquires, or maintains a predominant economic interest in the revenues generated by the loan" then that agent is considered to be the true lender of the loan.[62] By focusing on the economic realities of rent-a-bank schemes, the true lender doctrine effectively ignores the bank's perfunctory involvement and subjects the actual benefactors, the nonbank lenders, to state laws that might otherwise be avoided.

The OCC proposal replaces the true lender doctrine's comprehensive analysis with a two-prong test that makes it exceedingly easier for high-cost lenders to evade state

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[59] Lusnak, supra note 52, at 1192 (citing 12 U.S.C. § 25b(b)(5)(A) and Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)).
[60] Jayne Munger, *Crossing State Lines: The Trojan Horse Invasion of Rent-A-Bank and Rent-A-Tribe Schemes in Modern Usury Law*, 87 GEO. WASH. L. REV. 468 (2019).
[61] Colo. v. Marlette Funding, LLC et al., No. 2017-CV-30376 (D. Ct. Denver Jun. 9, 2020), *available at* https://www.consumerfinancemonitor.com/wpcontent/uploads/sites/14/2020/06/2020.06.09-CO-v.-Marlette.pdf.
[62] Ga. Code Ann. § 16-17-2(b)(4); (Other states and both federal and state courts have used this Georgia statute, adopted in 2011, as a model in developing the true lender doctrine rule.).

consumer protection laws. This simplistic approach turns a blind eye to the actual design and motivation behind rent-a-bank schemes. By gutting the doctrine formulated by states and the courts to protect consumers from excessive interest rates, the OCC is placing a stamp of approval on dangerous banking practices that will inevitably hurt consumers.

The OCC's Madden-Fix rule remains flawed

The OCC's true lender proposal would operate together with the OCC's recently finalized Madden-Fix rule. The OCC conducted 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. The "valid when made" doctrine is not settled legal precedent;[63] rather, it is a theory that the OCC and the banking industry are advancing in order to argue that the NBA broadly preempts state laws applicable to nonbank assignees when they partner with banks to make loans.[64]

The *Madden* decision is good law; the Supreme Court declined to review it;[65] congressional legislation to overturn it stalled;[66] and it appropriately applied the standard set forth in Dodd-Frank for determining whether a state law is preempted by the National Bank Act. Therefore, *Madden* remains good law and should be acknowledged as such.

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[63] 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.
[64] 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
[65] Madden v. Midland Funding LLC, 876 F.3d 246, 251 (2d. Cir. 2015); (cert. denied, 136 S. Ct. 2505 (2016)).
[66] Modernizing Credit Opportunities Act, H.R. 4439, 115th Cong. (2018) (died in committee).

Conclusion

For the reasons indicated above, we respectfully oppose the OCC's proposed rule and urge that it be rescinded.

Sincerely,

Antonio Carrejo
Policy Counsel