

**Center for Responsible Lending
National Consumer Law Center (on behalf of its low income clients)
Americans for Financial Reform Education Fund
Consumer Action
Consumer Federation of America
The Leadership Conference on Civil and Human Rights
NAACP
National Association of Consumer Advocates
National Association for Latino Community Asset Builders
National Coalition for Asian Pacific American Community Development (National CAPACD)
Public Citizen
UnidosUS
U.S. PIRG**

**Comments to the Office of the Comptroller of the Currency
Notice of Proposed Rulemaking
“National Banks and Federal Savings Associations as Lenders”
12 CFR Part 7
Docket ID OCC-2020-026
RIN 1557-AE97**

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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. Over 37 years, Self-Help has provided over \$7 billion in financing through 146,000 loans to homebuyers, small businesses, and nonprofits. It serves more than 145,000 mostly low-income members through 45 retail credit union locations in North Carolina, California, Florida, Greater Chicago, and Milwaukee.

Since 1969, the nonprofit **National Consumer Law Center® (NCLC®)** has used its expertise in consumer law and energy policy to work for consumer justice and economic security for low-income and other disadvantaged people, including older adults, in the United States. NCLC's expertise includes policy analysis and advocacy; consumer law and energy publications; litigation; expert witness services, and training and advice for advocates. NCLC works with nonprofit and legal services organizations, private attorneys, policymakers, and federal and state government and courts across the nation to stop exploitive practices, help financially stressed families build and retain wealth, and advance economic fairness.

Americans for Financial Reform Education Fund (AFREF) works in concert with a coalition of more than 200 consumer, investor, labor, civil rights, business, faith-based, and community groups to lay the foundation for a strong, stable, and ethical financial system. Through policy analysis, public education, and outreach, AFREF works for stronger consumer financial protections and against predatory practices.

Consumer Action has been a champion of underrepresented consumers since 1971. A national, nonprofit 501(c)3 organization, Consumer Action focuses on financial education that empowers low to moderate income and limited-English-speaking consumers to financially prosper. It also advocates for consumers in the media and before lawmakers and regulators to advance consumer rights and promote industry-wide change particularly in the fields of consumer protection, credit, banking, housing, privacy, insurance and utilities.

The Consumer Federation of America is a nonprofit association of more than 250 national, state, and local consumer groups that was founded in 1968 to advance the consumer interest through research, advocacy, and education. For over 50 years, CFA has been at the forefront of ensuring that our marketplace is fair and safe through advancing the consumer interest. CFA has a broad portfolio of issues including financial services, investor protections, privacy, food safety, product safety, telecommunications, energy efficiency, housing, insurance, and saving. CFA's non-profit members range from large organizations, such as Consumer Reports and AARP, to small state and local advocacy groups, as well as unions, co-ops, and public power companies.

The Leadership Conference on Civil and Human Rights is a coalition charged by its diverse membership of more than 200 national organizations to promote and protect the civil and human rights of all persons in the United States. Through advocacy and outreach to targeted constituencies, The Leadership Conference works toward the goal of a more open and just society - an America as good as its ideals. The Leadership Conference is a 501(c)(4) organization that engages in legislative advocacy. It was founded in 1950 and has coordinated national lobbying efforts on behalf of every major civil rights law since 1957.

Founded in 1909, the **National Association for the Advancement of Colored People (hereinafter NAACP)** is our nation's oldest, largest and most widely known grassroots civil rights organization. The

principal objectives of NAACP are to ensure the political, educational, social and economic equality of all citizens; to achieve equality of rights and eliminate racial prejudice among the citizens of the United States; to remove all barriers of racial discrimination through democratic processes; to seek enactment and enforcement of federal, state and local laws securing civil rights; to inform the public of the adverse effects of racial discrimination and to seek its elimination; to educate persons as to their constitutional rights and to take all lawful action to secure the exercise thereof.

The **National Association of Consumer Advocates (NACA)** is a national nonprofit association of private and public sector attorneys, legal service attorneys, law professors and law students committed to representing consumers' interests. NACA's mission is to promote justice for all consumers by maintaining a forum for information-sharing among advocates across the country and to serve as a voice for its members in its work to curb unfair and abusive business practices, including predatory lending and other conduct that adversely affect consumers.

National Association for Latino Community Asset Builders (NALCAB) represents and serves a geographically and ethnically diverse group of more than 120 non-profit community development and asset-building organizations that are anchor institutions in our nation's Latino communities. Members of the NALCAB Network are real estate developers, business lenders, economic development corporations, credit unions, and consumer counseling agencies, operating in 40 states and DC.

National Coalition for Asian Pacific American Community Development (National CAPACD) is a progressive coalition of local organizations that advocate for and organize in low-income AAPI communities and neighborhoods. We strengthen and mobilize our members to build power nationally and further our vision of economic and social justice for all. Our members include more than 100 community-based organizations in 21 states and the Pacific Islands. They implement innovative affordable housing, community development and community organizing strategies to improve the quality of life for low-income AAPI communities.

Public Citizen, Inc., is a consumer-advocacy organization founded in 1971, with members in all 50 states. Public Citizen advocates before Congress, administrative agencies, and the courts for the enactment and enforcement of laws protecting consumers, workers, and the general public. Of particular relevance here, Public Citizen advocates for strong consumer-protection laws to bring fairness to consumer finance and accountability to the financial sector. Public Citizen actively supported establishment of the CFPB to serve as the first federal agency devoted to protecting the financial interests of consumers.

UnidosUS, previously known as NCLR (National Council of La Raza), is the nation's largest Hispanic civil rights and advocacy organization. Through its unique combination of expert research, advocacy, programs, and an Affiliate Network of nearly 300 community-based organizations across the United States and Puerto Rico, UnidosUS simultaneously challenges the social, economic, and political barriers at the national and local levels. For 50 years, UnidosUS has united communities and different groups seeking common ground through collaboration, and that share a desire to make our country stronger.

U.S. PIRG, the federation of state Public Interest Research Groups, is a consumer group that stands up to powerful interests whenever they threaten our health and safety, our financial security, or our right to fully participate in our democratic society. It is part of The Public Interest Network, which operates and supports organizations committed to a shared vision of a better world and a strategic approach to getting things done.

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I. Introduction and Overview

We, the consumer and civil rights groups named above, write to strongly oppose the Office of the Comptroller of the Currency's (OCC) proposed rule preempting the authority of states and courts to look beyond contrivances to the truth to prevent evasions of state usury laws. The proposal would eliminate state interest rate limits for nonbank predatory lenders in every state as long as a bank's name is in the fine print – nothing more – taking us back to the days of the early 2000s when payday lenders used rent-a-bank schemes to evade state laws. States would lose the power they have had since the time of the American Revolution to limit interest rates to prevent predatory lending, and courts would lose the power they have had for just as long to look behind the fine print to the truth to prevent usury laws from becoming a “dead letter,” as the Supreme Court warned in 1835. The OCC is asking us to trust that it will not allow predatory lending. But when the OCC is going out of its way to support the right of a predatory small business lender to charge 120% APR, and is doing nothing to stop a payday lender from using an OCC-regulated bank to launder 179% APR installment loans, a naïve trust is no substitute for state interest rate limits. The proposal would embolden a surge of predatory lending to all 50 states, and cause unconscionable harm to individuals and communities.

The timing of the OCC's embrace of predatory lenders could not be worse. We are in the midst of an unprecedented health crisis and a severe economic crisis, with both crises impacting communities of color more heavily than white communities. The future, on both the health and economic fronts, is profoundly uncertain.

We are, at the same time, at a pivotal moment in our nation's reckoning with its history of structural racism. Systemic racial barriers persist in virtually every sphere, and the banking and credit arenas are no exception. In fact, racist financial practices are among the most well-known and documented in the history of racial exclusion. As we reevaluate structural racism across our society, we should be critically scrutinizing the effects of financial practices, particularly as they impact Black households' efforts to achieve financial stability and advancement. A policy that enables predatory lending to communities of color that have faced centuries of discrimination and wealth stripping from predatory lending is simply racist.

Thus, it is difficult to imagine a more inappropriate time to disrupt longstanding safeguards in place since the founding of this country that have played a fundamental role in protecting consumers from predatory financial practices. Yet that is just what the proposal at issue would do. By making it easier than ever to make high-cost loans above states' interest rate limits, this proposal is a recipe for disaster. And no one will feel the misery worse than the millions of households, disproportionately households of color, who are targeted by the abusive lending the proposal will proliferate.

We deeply object to the claim that this proposal, and the lack of caps on high-interest loans, will help to increase access to “affordable credit” that spurs economic growth, job creation, small businesses or the ability to purchase goods, cars or homes. High-interest loans will never “make poor people rich.”¹ Nor do

¹ See, e.g., Remarks of Acting Comptroller of the Currency Brian Brooks to the Online Lending Policy Institute, June 11, 2020, https://www.youtube.com/watch?v=Ae_SoZeRbxM, at 33:00 (stating “I want to make poor people rich” while addressing financial inclusion, in a conversation where he also states that his personal belief is that “price controls generally create shortages” and that “if we believe in market pricing for hamburgers, for jeans, for

they help with the lack of income and assets caused by centuries of discrimination and growing inequality. Rather, predatory lending only makes poor people poorer. We heard the same claims about predatory subprime mortgage lending until the foreclosure crisis ravaged neighborhoods of color and only widened the racial wealth gap. High-cost, usurious loans represent the worst of financial services. They have no place in America. The suggestion that high-cost lending offers a path toward upward mobility insults those of us who understand that our communities deserve better. For years now, we have been registering our objection to the notion that credit at rates that exceed reasonable state interest rate limits is the answer. Adding the new label “fintech” to high-cost lending may attract investors and make it easier for banking regulators to justify their support, but it doesn’t soften the blow high-cost loans land on struggling families.

This proposal is part of a package of efforts by federal banking regulators in recent years to help high-cost, nonbank lenders evade state interest rate limits. These attacks on states’ authority include the proposed OCC “special purpose” nonbank bank charter, which New York successfully challenged in Federal District Court and which the OCC is appealing to the Second Circuit; the OCC’s and FDIC’s amicus briefing supporting a predatory small business lender that charged 120% on a \$550,000 loan; the so-called “Madden-fix” rules issued by the FDIC and OCC that 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; and the FDIC’s recent friendliness toward the expansion of lightly-regulated industrial loan charters, which can also ignore interest rate limits.

Importantly, none of the OCC’s attacks on state usury limits involve interest charged by *banks* – the entities under the federal banking regulators’ supervision. Rather, these efforts attempt to effectively exempt *nonbanks* from state usury limits. But federal interest rate preemption does not extend to nonbanks.

At the time of the American Revolution, all 13 states had usury caps, and at least 45 states and the District of Columbia still limit rates on installment loans, depending on the size. The ability to “export” a non-existent home state interest rate into other states came only in recent decades – and only for banks. State-regulated nonbank lenders must address state legislatures if they want permission to charge high interest rates; the federal banking regulators have no authority to authorize evasions for them.

The OCC proposal seeks to eliminate the fundamental rule of usury law, and its application through a search for the true lender, that courts may look past the form of transactions to the substance and the truth to prevent evasions. As Chief Justice Marshall stated in 1835:

“The ingenuity of lenders has devised many contrivances, by which, under forms sanctioned by law, the [usury] statute may be evaded.... Yet it is apparent, that if giving [the purported] 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 [sic] the necessity of

automobiles, I’m not sure why we don’t believe in market rates for money; it’s another commodity, and we want it to flow freely”).

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.”²

This longstanding power to search beyond the fine-print form of a transaction to the truth remains fundamental to this day. Virtually every state applies substance-over-form to prevent usury evasions, and the overwhelming weight of the authority, including in federal courts of appeals, is that federal banking laws do not apply if a nonbank lender is the true lender. The proposal would take away a critical enforcement tool against usury evasions – while upending centuries of law holding that, in matters of usury, including in interpretation of the National Bank Act, substance prevails over form. The OCC has no authority to do so.

In its place, the OCC would substitute a contrivance that would make usury laws “a dead letter”: that merely putting the bank’s name on the paperwork makes the bank the lender. Banks could sell use of their names to payday lenders – as they did in the early 2000s – and would not be required to have anything to do with the loans or charge a single dime of interest. Combined with the “Madden-fix” rule that allows an assignee to charge any rate the bank could charge, every penny of interest could be charged by a state-regulated, nonbank lender, and yet federal banking laws would preempt state interest rate caps.

The hypocrisy of this proposal is shown by the second part of the OCC’s “heads we win, tails you lose” proposal. Even if the bank’s name is not on the loan agreement, the OCC proposes a simplistic and overbroad rule that a bank is the lender if it “funds the loan.” Yet the OCC never explains why the name on the agreement should not always control, or why the nonbank lender is not the lender if it, not the bank, funds the loan. The “funds the loan” proposal is also overbroad, as the funder may be the true lender in some circumstances but not all.

The proposed rule is irrational, arbitrary and capricious, and outside the OCC’s authority. The OCC has not even made a pretense of complying with the Dodd-Frank Act’s requirements for preempting state law, nor can it, because it has no authority to preempt state interest rate limits as applied to nonbank lenders.

The OCC’s assurances that the agency will not permit grossly irresponsible and harmful loans are laughable in light of the evidence to the contrary. The OCC has not only directly supported World Business Lenders in court, but has taken no action against WBL’s partner, OCC-supervised Axos Bank, despite extensive litigation, more every day. Numerous lawsuits show the horribly predatory small business loans that the bank is enabling for WBL that are not only ruining small businesses but taking away their owner’s homes. One example is a \$90,000 mortgage at 138% APR. In the consumer area, the OCC is permitting a payday lender, CURO, to partner with Stride Bank to pilot Verge Credit loans at rates up to 179.99% APR in a plan to expand to states that do not permit those rates for nonbanks. Banks supervised by the FDIC are engaged in these schemes as well, providing a broader preview of what we should expect from OCC banks if the OCC finalizes this rule.

² *Scott v Lloyd*, 34 U.S. 418, 446-47 (1835).

The loans peddled by existing rent-a-bank schemes are among the most exorbitantly priced and irresponsible loans on the market. Yet the proposal entirely fails to even mention, let alone consider, the harm the proposal will cause.

Our comment makes the following points in turn:

- The proposal would illegally usurp states' historical and constitutional role in our federalist system by asserting OCC authority over nonbanks.
- The NBA does not preempt, and is consistent with, the longstanding doctrine that courts may look past contrivances to the truth to prevent evasions of usury laws.
- The proposal is arbitrary and capricious, fails to consider alternatives, and fails to satisfy the requirements for preempting state law.
- The proposal fails to consider the severe harm the rule will inflict on consumers and small businesses.
- The proposal is inconsistent with the OCC's obligations under the Community Reinvestment Act.
- The OCC fails to consider the risks the proposal poses to the safety and soundness of banks, despite having long acknowledged those risks.
- The OCC fails to consider the proposal's impact on market participants that comply with state law.

II. The Proposal Would Illegally Usurp States' Historical and Constitutional Role in Our Federalist System by Asserting OCC Authority over Nonbanks.

A. This proposal, together with the so-called "Madden-fix" rule, would preempt state interest rate laws for nonbanks.

The OCC has proposed a rule ("true lender rule" or "proposed rule") that would specify that a national bank or federal savings association "makes" a loan when, as of the date of origination, the bank is either "Named as the lender in the loan agreement" or "Funds the loan." This rule would operate "together with the OCC's recently finalized 'Madden-fix' rule," 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 rule would apply even if the loan is sold immediately after origination.

Under the proposed rule, any loan that meets either of the two conditions 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. This section discusses the impact of the "named as a lender" prong of the proposed rule. The "funds the loan" prong is discussed in Section IV.B below.

Under the proposal, 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 proposal would 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 section, however, the OCC lacks authority to determine the interest rates that nonbanks may charge.

B. Dodd-Frank made clear 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.'"³ "[T]he simple failure of federal regulators to stop abusive lending"⁴ had been "a major cause" of "a financial crisis that nearly crippled the U.S. economy."⁵ 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.⁶ States had been preempted from regulating *any* mortgage lender (bank or nonbank) on the very terms that made many mortgages dangerous: balloon payments, negative amortization, variable rates, and other nontraditional terms.⁷

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."⁸

³ *Lusnak v. Bank of America*, 883 F.ed 1185, 1189 (quoting S. Rep. No. 111-176, at 2 (2010)).

⁴ *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)).

⁵ *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).

⁶ 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.

⁷ See *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.

⁸ *Lusnak*, 833 F.ed at 1189 (quoting S. Rep. No. 111-176, at 17).

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).⁹

Three times Congress declared this rule, 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.

Even before the Dodd-Frank amendments, courts have repeatedly noted that neither the National Bank Act,¹⁰ nor the similar terms of the Federal Deposit Insurance Act,¹¹ apply to the interest rates charged by

⁹ 12 U.S.C. § 25b(h)(2).

¹⁰ See, e.g., [Madden v. Midland Funding, L.L.C.](#), 786 F.3d 246, 252 (2d Cir. 2015) (“extending [the National Bank Act’s] protection to third parties would create an end-run around usury laws for non-national bank entities that are not acting on behalf of a national bank”); *Eul v. Transworld Systems*, 2017 WL 1178537, at *5–6 (N.D. Ill. Mar. 30, 2017) (following *Madden*; NBA does not preempt usury claim that is asserted against bank’s non-bank assignee); [Fulford v. Marlette Funding, L.L.C., et al.](#), No. 17CV30376 (Colo. Dist. Ct., Denver Cty. June 9, 2020), available at www.nclc.org/unreported (agreeing with *Madden* that “the privilege [of rate exportation] is limited to

nonbanks. As we argued at greater length in other comments, the OCC's lack of authority over nonbank interest rates extends to the rates charged by nonbank assignees.¹² That is especially true when the bank's original role is a sham and the bank never was the true lender.

The OCC's attempt to give rate exportation privileges to bank assignees even when the bank is not the true lender would 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.

Indeed, the proposal is so overbroad that it would authorize transactions prohibited by the statute – preemption for subsidiaries, affiliates, and agents – since an immediate assignment of a loan to a subsidiary that controls the loan from the outset is in fact a loan made by the subsidiary, yet the proposal would permit the subsidiary to charge a preemptive rate.

Accordingly, authorizing preemption for nonbanks is clearly outside the OCC's authority.

C. The proposal would usurp States' historic role in regulating nonbanks.

In our federalist system, states have always been the primary regulator of nonbank lenders. Yet the proposed rule threatens to deprive states of their historic power by allowing nonbank lenders to use banks as a fig leaf to avoid state consumer protection laws.

national banks because extending NBA preemption to third parties would be an overly broad application of the NBA”).

¹¹ *Fulford v. Marlette Funding, L.L.C., et al.*, No. 17CV30376 (Colo. Dist. Ct., Denver Cty. June 9, 2020), www.nclc.org/unreported (agreeing with plaintiff that “Section 27 [of DIDA], by its plain language does not apply to non-banks, therefore federal preemption [of usury claims against nonbank assignees] does not apply”); *see also Community State Bank v. Knox*, 523 Fed. Appx. 925, 929 (4th Cir. 2013) (no complete preemption where consumer asserts claims against parties other than the bank, here payday lenders who claimed to be agents of an out-of-state bank; DIDA “cannot apply” where the consumers’ claims are “substantively aimed at the loan servicers to the exclusion of [the bank]”); *In re Community Bank*, 418 F.3d 277, 296 (3d Cir. 2005) (“Section 85 and 86 of the NBA and Section 521 of the DIDA apply only to national and state chartered banks, not to non-bank purchasers of second mortgage loans such as RFC.”); *Meade v. Avant of Colorado, L.L.C.*, 307 F. Supp. 3d 1134, 1144–1145 (D. Colo. 2018) (finding no complete preemption; rejecting argument that “under common law principles the assignee of a loan ‘steps into the shoes of the assignor’” because the statutory language “does not on its face regulate interest or charges that may be imposed by a non-bank, including one which later acquires or is assigned a loan made or originated by a state bank”); *see also Goleta National Bank v. Lingerfelt*, 211 F. Supp. 2d 711 (E.D.N.C. 2002) (abstaining from enjoining state court action against payday lender that was agent of national bank, and observing: “While it is true that the NBA does preempt state efforts to regulate the interest collected by national banks, the NBA patently does not apply to non-national banks.”).

¹² *See* Comments of Center for Responsible Lending, et al., to OCC on Notice of Proposed Rulemaking, Permissible Interest on Loans That Are Sold, Assigned, or Otherwise Transferred, RIN 1557-AE73 (Jan. 21, 2020), <https://www.nclc.org/images/pdf/rulemaking/comments-occ-interest-rates-and-apps.pdf>.

Interest rate limits are the simplest and most effective protection against predatory lending.¹³ Since the time of the American Revolution, states have set interest rate caps to protect their residents from predatory lending.¹⁴ In more recent years, a handful of states eliminated their rate caps, others carved out limited exceptions for short-term payday loans (some since reversed), and a combination of federal and state laws exempt most banks from interest rate limits.¹⁵ But the vast majority of states retain interest rate caps for nonbank installment loans and lines of credit.¹⁶

At least 45 states and the District of Columbia (DC) impose 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; 31% for a \$2000, two-year loan; and 25% for a \$10,000, five-year loan.¹⁷ 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, the large majority of state legislatures have rejected these efforts. In addition, sixteen states plus DC have interest rate caps that prevent short-term payday loans, a number that has grown by several over the last decade.

High-cost lenders are notoriously relentless in their efforts to evade state usury laws (and any other law intended to rein them in).¹⁸ But states are typically successful in enforcing their interest rates against nonbanks.¹⁹ In the late 1990s and early 2000s, lenders attempted to evade the usury laws applying to balloon-payment payday loans through rent-a-bank schemes (see Section V.E below). 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,

¹³ See NCLC, *Misaligned Incentives: Why High-Rate Installment Lenders Want Borrowers Who Will Default* (July 2016), <https://www.nclc.org/issues/misaligned-incentives.html>.

¹⁴ James M. Ackerman, *Interest Rates and the Law: A History of Usury*, 1981 Ariz. St. L.J. 61 (1981).

¹⁵ See generally NCLC, *Consumer Credit Regulation* (2d ed. 2015), updated at www.nclc.org/library.

¹⁶ *Id.*

¹⁷ See NCLC, *State Rate Caps for \$500 and \$2,000 Loans* (Feb. 2020), <http://bit.ly/state-loan-caps>; 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/instloan18>.

¹⁸ 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.

¹⁹ 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.

not the banks, were the true lender.²⁰ Under the proposed 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.

High-cost lenders have tried other schemes over the years and a few are currently engaged in rent-a-bank schemes involving installment loans. As described in these comments, in the last year or so 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.

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.²¹ This proposal aims to foreclose the District's ability to enforce its rate caps against Elevate. Indeed, Elevate has praised this proposal for the "regulatory clarity" it would bring.²² Additionally, on September 3, 2020 (the date of these comments), 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.²³ Likewise, the proposed rule would prevent California from enforcing its hard-fought new rate cap law.

By emboldening predatory lending in states whose laws don't permit it, the proposal would nullify the right of states to set their own policy. These states include several whose voters, in the last ten years,

²⁰ See 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.

²¹ 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>.

²² 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/>.

²³ 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/>.

have overwhelmingly chosen at the ballot box to cap rates at approximately 36%.²⁴ 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.

III. The NBA Does Not Preempt, and Is Consistent With, the Longstanding Doctrine that Courts May Look Past Contrivances to the Truth to Prevent Evasions of Usury Laws

A. Overview

Under the first prong of the OCC's proposed 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."²⁵ (The "funds the loan" prong is discussed in Section IV.B, below.) 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 has 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.

²⁴ See Arizona Payday Loan Reform, Proposition 200 (2008), [https://ballotpedia.org/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](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.

²⁵ Proposed 12 C.F.R. § 7.1031(a), 85 Fed. Reg. at 44228.

B. The centuries-old, universally-accepted rule in usury cases is that courts look beyond form to substance to prevent evasions.

Since the earliest days of this country, the Supreme Court and the courts of every state have routinely done what the proposed 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.”²⁶

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 [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.”²⁷

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”²⁸

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.”²⁹ 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.”³⁰

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

²⁶ *De Wolf v. Johnson*, 23 U.S. 367 (1825).

²⁷ *Scott v Lloyd*, 34 U.S. 418, 446-47 (1835).

²⁸ *Id.* at 447.

²⁹ 68 U.S. 298, 310 (1863).

³⁰ *Id.*

HOLA.³¹ 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.³² 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.”³³ 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.’ ”³⁴

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.³⁵ Virtually every

³¹ 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.

³² See Fed. Reg. at 64231 n.16, n.17.

³³ 32 U.S. 103 (1833).

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

³⁵ *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”).

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.³⁶

³⁶ See National Consumer Law Center, Consumer Credit Regulation § 3.9.1 (2d ed. 2015), *updated at* <https://library.nclc.org>. Just a few of the hundreds of cases that emphasize the importance of looking beyond form to substance include:

ALABAMA: *Austin v. Ala. Check Cashers Ass'n*, 936 So. 2d 1014, 1036–1037 (Ala. 2005) (deferred presentment transactions are covered by small loan act); *Cochran v. State, ex rel. Gallion*, 119 So. 2d 339 (Ala. 1960) (courts will consider form over substance to “discern any artifice, device or scheme to cover up usury;” exorbitant credit insurance premiums, 90% of which were retained by lender, were usurious interest; extensive collection of Alabama cases finding disguised usury).

ALASKA: *Bibi v. Elfrink*, 408 P.3d 809, 818 (Alaska 2017) (citing principle that court will look to form rather than substance; loan that facially complies with interest rate limits may be usurious because of disguised interest; “funding fee” of 37% of principal, payable over life of loan, was disguised interest); *Moran v. Kenai Towing and Salvage, Inc.*, 523 P.2d 1237, 1243 (Alaska 1974) (“sale leaseback with option to purchase” real property was disguised usurious loan; landowner was in financial difficulty, sales price was substantially less than value of the land, parties did not negotiate sales price, lease payments were credited to the purchase price, and buyer was required to reconvey if all payments were made); *Metcalf v. Bertrand*, 491 P.2d 747, 753, 754 (Alaska 1971) (sale-leaseback transaction was really a usurious loan; “in determining whether a transaction is usurious, a court must look to the real nature of the transaction, in order to avoid ‘the betrayal of justice by the cloak of words, the contrivances of form, or the paper tigers of the crafty;” indicia of a loan here included the buyer’s financial distress, the inadequacy of the sales price, and various procedural irregularities).

ARIZONA: *Merryweather v. Pendleton*, 372 P.2d 335, 340–341 (Ariz. 1962) (sale of stock with option to repurchase was disguised loan; criteria for distinguishing loan from bona fide sale: (1) the prior negotiations of the parties; (2) the distress of the “grantor”; (3) the fact that the amount advanced was about the amount that the grantor needed to pay an existing indebtedness; (4) the amount of the consideration paid in comparison to the actual value of the property in question; (5) a contemporaneous agreement to repurchase; and (6) the subsequent acts of the parties); *Britz v. Kinsvater*, 351 P.2d 986, 989 (Ariz. 1960) (“sale-leaseback” entered into after “seller” unsuccessfully sought loan from “buyer” was a disguised loan; noting that “the device of disguising a usurious loan contract as a resale with option to purchase is not new”); *SAL Leasing, Inc. v. State ex rel. Napolitano*, 10 P.3d 1221 (Ariz. Ct. App. 2000) (“sale-leaseback” of cars was usurious loan; noting that sale-leasebacks are often used to disguise loans). See also *In re Thorpe*, 2019 WL 3778359 (B.A.P. 9th Cir. Aug. 9, 2019) (Ariz. law) (looking to the form, not the substance; consumer who resided in home owned by his late father’s trust, and had signed lease as part of sale-leaseback, had standing to assert that transaction was disguised usury). But cf. *Shelton v. Cunningham*, 508 P.2d 55 (Ariz. 1973) (transaction between two unsophisticated parties was a true sale-leaseback); *Weston v. Denny*, 480 P.2d 24 (Ariz. Ct. App. 1971) (transaction was a true sale where vendor was not in distress, funds were not used to pay existing indebtedness, and repurchase price was reasonably proportionate to value).

ARKANSAS: *Jones v. iPawn Rodney Parham, L.L.C.*, 364 F. Supp. 3d 953 (E.D. Ark. 2019) (fact issues whether pawn transactions were disguised loans; citing cases holding that fee to repurchase pawned goods or to extend the repurchase period were interest; noting that here defendant’s advertising and the pawn tickets referred to loans); *Luebbers v. Money Store, Inc.*, 40 S.W.3d 745 (Ark. 2001) (payday loan; “check cashing fee” was disguised usury); *McElroy v. Grisham*, 810 S.W.2d 933 (Ark. 1991) (sale-repurchase); *Smith v. Eisen*, 245 S.W.3d 160 (Ark. Ct. App. 2006) (sale-repurchase agreement for home was loan). See also *McGhee v. Ark. State Bd. of Collection Agencies*, 289 S.W.3d 18 (Ark. 2008) (whether a fee constitutes interest is determined by the facts, not by labels). Cf. *Carter v. Four Seasons Funding Corp.*, 97 S.W.3d 387, 395 (Ark. 2003) (looking to substance, not form, but concluding that factoring arrangement was a sale, not a disguised usurious loan).

CALIFORNIA: *Underwood v. Future Income Payments, L.L.C.*, 2018 WL 4964333, at *2 (C.D. Cal. Apr. 26, 2018) (refusing to dismiss claim that defendants violated UDAP statute by misrepresenting loan as sale of military pension payments; although agreements referred to the product as a sale, they “required pensioners to repay the money in installments over a set period and acknowledged that the lump sum was ‘significantly less’ than the amount the pensioner would pay,” the company “reviewed the borrower’s credit risk and engaged in standard loan underwriting assessment,” the agreements required the pensioner to pay the company legal fees and costs if it pursued a claim against the pensioner, and the pensioners were also subject to late fees); *Ghirardo v. Antonioli*, 883 P.2d 960 (Cal. 1994) (trier of fact must look to substance, not form; “sensitive to the ingenuity and creativity of those entrepreneurs willing to engage in legal brinkmanship to maximize profits, courts have scrutinized the form of seemingly innocuous commercial transactions to determine whether the substance amounts to a usurious arrangement”; but settlement notes executed by sophisticated real estate purchasers at issue were exempt credit sale, not loan or forbearance), later history at 924 P.2d 996 (Cal. 1996); *West Pico Furniture Co. v. Pacific Fin. Loans*, 469 P.2d 665 (Cal. 1970) (fact question “whether the intent of the contracting parties was that disclosed by the form adopted, or whether such form was a mere sham and subterfuge to cover up a usurious transaction”); *Thompson v. 10,000 RV Sales, Inc.*, 31 Cal. Rptr. 3d 18, 27–28 (Cal. Ct. App. 2005) (“[I]n determining whether consumer protection laws such as the [state vehicle finance law] apply to a particular transaction, we look to the substance of the transaction and do not allow mere form to dictate the result.”); *Sheehy v. Franchise Tax Bd.*, 100 Cal. Rptr. 2d 760 (Cal. Ct. App. 2000) (substance prevails over form, but delay in recovering taxes is neither a loan nor a forbearance); *Hernandez v. Atlantic Fin.*, 164 Cal. Rptr. 279 (Cal. Ct. App. 1980) (in determining the applicability of consumer protection laws to particular transactions, substance, not form, dictates the results); see also *Bistro Executive, Inc. v. Rewards Network, Inc.*, 2006 WL 6849825 (C.D. Cal. July 19, 2006) (the labels that parties place on transactions are not dispositive of their true character; “cash advances” made to restaurants were disguised usurious loans). Cf. *Boerner v. Colwell Co.*, 577 P.2d 200 (Cal. 1978) (stating form over substance rule, but finding no disguised loan where developer sold lots on terms dictated by lender and immediately assigned contracts to lender); *Jones v. Wells Fargo Bank*, 5 Cal. Rptr. 3d 835 (Cal. Ct. App. 2003) (in determining whether a transaction is a loan or forbearance or some other sort of transaction not subject to usury law, a court must look beyond the surface of the transaction to its substance, but no sham here where defendant intended to and did fit loan into exception to general usury law).

COLORADO: *State ex rel. Salazar v. The Cash Store Now*, 31 P.3d 161 (Colo. 2001) (“sale” of anticipated tax refunds, for 40–50% of the anticipated amount, with “sellers” being liable for a deficiency if the refund was less than anticipated, was a loan covered by the UCCC); see also *Oasis Legal Fin. Group v. Coffman*, 361 P.3d 400, 406 (Colo. 2015) (to determine whether transactions are loans, “we examine the substance of the transaction”).

CONNECTICUT: *Gilmore v. Pawn King, Inc.*, 98 A.3d 808, 819–822 (Conn. 2014) (concluding that legislature intended to regulate transactions that, “in substance if not in form,” amount to loans).

DELAWARE: *James v. National Fin., L.L.C.*, 132 A.3d 799, 838 (Del. Ch. 2016) (lender sought to use an interest-only, non-amortizing, installment loan to evade the state’s payday loan law, but in substance, the disputed loan was a payday loan designed to roll over twenty-six times).

DISTRICT OF COLUMBIA: *Chen v. Bell-Smith*, 768 F. Supp. 2d 121 (D.D.C. 2011) (“a transaction which is a sale in form is to be treated as a loan when this more accurately reflects the substance of the arrangement;” fact issues here, but claim fails because purchaser not shown to be in the business of loaning money); *Juergens v. Urban Title Services*, 246 F.R.D. 4, 16 (D.D.C. 2007) (substance rather than form determines whether usury laws, criminal or civil, apply; fact issue whether residential loan was disguised as commercial loan); *Browner v. District of Columbia*, 549 A.2d 1107, 1114 (D.C. App. Ct. 1988) (sale-leaseback was “transparent sham which masked an unlawful loan”).

FLORIDA: *In re Cornerstone Tower Serv., Inc.*, 2019 WL 127359, at *4 (Bankr. D. Neb. Jan. 3, 2019) (Fla. law) (applying Florida law, which looks to the substance of the transaction, rather than to the form and the intent of the parties, to determine whether there has been a sale or a loan subject to usury laws; case involved payment rights

purchase and sale of future receipts agreement); *Pinchuck v. Canzoneri*, 920 So. 2d 713 (Fla. Dist. Ct. App. 2006) (“investment profit” was usurious interest); *Oregrund Ltd. P’ship v. Sheive*, 873 So. 2d 451, 457 (Fla. Dist. Ct. App. 2004) (land sale repurchase); *Low Cost Auto Pawn, Inc. v. Greco*, 851 So. 2d 768 (Fla. Dist. Ct. App. 2003) (affirming judgment that vehicle marketing agreement was disguised title pawn loan); *Party Yards, Inc. v. Templeton*, 751 So. 2d 121, 122–123 (Fla. Dist. Ct. App. 2000) (in usury cases, courts look to form rather than substance; commissions in addition to interest may make loan usurious); *Antonelli v. Neumann*, 537 So. 2d 1027, 1029 (Fla. Dist. Ct. App. 1988) (“In determining whether an agreement is usurious, the court may disregard the form of the agreement and consider the substance of the transaction”; payment of additional 2% as consulting fee was “merely a contrivance to conceal a usurious transaction”).

GEORGIA: *Cashback Catalog Sales v. Price*, 102 F. Supp. 2d 1375 (S.D. Ga. 2000) (declining to accept payday lender’s attempt to disguise finance charges as the consumer’s payment for catalog gift certificates); *Khalif v. Khalif*, 308 B.R. 614 (Bankr. N.D. Ga. 2004) (use of terms like “guarantor” and “investors” was contrivance); *Pope v. Marshall*, 4 S.E. 116, 118 (Ga. 1887) (“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 substance.”); *Clay v. Oxendine*, 645 S.E.2d 553, 557 (Ga. Ct. App. 2007) (disregarding form and looking to the totality of the circumstances to conclude that sale-leasebacks of low value personal property were a sham transaction to disguise an illegal payday loan scheme); *BankWest, Inc. v. Oxendine*, 598 S.E.2d 343 (Ga. Ct. App. 2004) (substance, not form, controls question whether payday lender or its rent-a-bank partner is the real lender); *Jackson v. Commercial Credit Corp.*, 83 S.E.2d 76, 78 (Ga. Ct. App. 1954) (car loan structured to conceal usury); cf. *Ruth v. Cherokee Funding*, 820 S.E.2d 704, 711 (Ga. 2018) (acknowledging that a contingent repayment obligation in an agreement can be a sham where it reflects an attempt to evade usury laws; when presented with such a claim, courts should look beyond the text of the agreement to the substance, “perhaps find[ing] an unlawful loan, notwithstanding the contingency” but finding this issue not properly raised in this case involving a litigation funding contract).

HAWAII: *Dang v. F & S Land Development Corp.*, 618 P.2d 276 (Haw. 1980) (“rights and obligations flowing from a transaction are governed by its substance rather than its form or the appellation selected by a party;” advance of construction funds, with the unconditional agreement to pay back twice the amount, was a usurious loan, not an investment in a joint venture).

IDAHO: *Wood v. Sadler*, 468 P.2d 42, 45 (Idaho 1970) (“we will not hesitate to pierce a device or form which is designed to circumvent the usury laws in order to reach the economic substance of a transaction”); *Freedman v. Hendershott*, 290 P.2d 738, 741 (Idaho 1955) (finding sale-repurchase agreement to be usurious loan; “The law looks at the nature and substance of the transaction, and not to the color or form which the parties in their ingenuity have given it. No imaginable act or contrivance to cover up and conceal the usury will avail the parties. They will not be permitted successfully to evade the provisions of the statute by any conceivable scheme or expedient. The courts will follow them through all their shifts and devices, and ascertain the true character and design of the transaction”).

ILLINOIS: *Andrews v. Cramer*, 629 N.E.2d 133, 136 (Ill. App. Ct. 1993) (“the question is determined by considering the nature and substance of the transaction, rather than its form, to guard against a lender violating the statute through use of ingenious schemes or devices”); *Lane v. Fabert*, 533 N.E.2d 546, 552 (Ill. App. Ct. 1989) (pawnbroker transaction constituted a loan; must look behind form to substance); *Saskill v. 4-B Acceptance*, 453 N.E.2d 761 (Ill. App. 1983) (courts look to the nature and substance of the transaction, rather than its form, so that a lender may not evade the statute by labeling its charges as something other than interest; finding various fees and charges to be disguised interest).

KANSAS: *Indian Springs State Bank v. Kelley's Auto Supply, Inc.*, 675 P.2d 379, 382 (Kan. Ct. App. 1984) (noting that, “where the defense of usury is interposed the courts will look to the substance of the transaction to determine whether it is usurious,” but finding this loan not to be usurious).

KENTUCKY: *Grace v. LVNV Funding, Inc.*, 22 F. Supp. 3d 700 (W.D. Ky. 2014) (when a party claims a transaction is usurious, courts look past the form of the transaction to its substance; here, medical service provider’s “service charge,” which resulted in 18% per annum charge on patient’s account, was actually disguised “interest” and thus violated interest and usury statute); *Hamilton v. York*, 987 F. Supp. 953 (E.D. Ky. 1997) (alleged “deferred” presentment of a check really a loan).

LOUISIANA: *Ganus v. Jopes*, 470 So. 2d 237 (La. App. Ct. 1985) (no matter what the form of an agreement for an extra payment on account of delay to perform an obligation to pay money, the extra payment is interest; second note, which debtor signed as a condition of being allowed to defer payment of an installment of his first note was usurious interest).

MARYLAND: *Bednar v. Provident Bank*, 937 A.2d 210 (Md. 2007) (creditor cannot evade usury statutes by labeling a charge as something other than a prepayment penalty); *B&S Marketing Enterprises, L.L.C. v. Consumer Protection Division*, 835 A.2d 215 (Md. Spec. Ct. App. 2003) (“considering all the circumstances” and concluding that “sale-leaseback-repurchase” of low-value personal property was disguise for usurious loan; company advertised quick cash, “purchase price” and “lease payments” were unrelated to value of property, and property was never repossessed).

MASSACHUSETTS: *In re J.G. Wentworth Originations, L.L.C.*, 2017 WL 3573537 (Mass. Super. Ct. Aug. 10, 2017) (where company proposed that consumer take a 34.2% discount on her overall settlement payout and effectively pay interest at a rate of 29.99% per year, the transaction was a loan in function and economic substance—if not nominally in form).

MICHIGAN: *Moore v. Cycon Enterprises, Inc.*, 2006 WL 2375477 (W.D. Mich. Aug. 16, 2006) (substance controls over form; foreclosure rescuer’s sale-leaseback transaction with distressed homeowner was really a loan); *Wilcox v. Moore*, 93 N.W.2d 288, 291 (Mich. 1958) (“court must look squarely at the real nature of the transaction, thus avoiding . . . the betrayal of justice by the cloak of words, the contrivances of form, or the paper tigers of the crafty.”); *Boyd v. Laher*, 427 N.W.2d 593, 596 (Mich. Ct. App. 1988) (agreeing with lower court’s conclusion that “[i]f something walks like a duck, quacks like a duck and swims, covering it with chicken feathers will not make it into a chicken”; purported sale of land contract was usurious loan); *Allan v. M. & S. Mortgage Co.*, 359 N.W.2d 238, 244 (Mich. Ct. App. 1984) (reversing summary judgment for lender on usury claim where it was a fact question whether “the corporate form was used to conceal a usurious loan to an individual borrower made to discharge personal debts and obligations of the individual borrower”); *Matthews v. Aluminum Acceptance Corp.*, 137 N.W.2d 280 (Mich. Ct. App. 1965) (purported time sale of aluminum siding was really usurious loan).

MINNESOTA: *Danger v. Nexstep Funding, L.L.C.*, 355 F. Supp. 3d 796, 814–816 (D. Minn. 2019) (denying motion to dismiss on issue of whether pet leasing contract constituted a lease or a credit sales contract; relying on Minnesota law to look at substance not form); *Miller v. Colortyme, Inc.*, 518 N.W.2d 544, 549 (Minn. 1994) (applying substance-over-form doctrine, rent-to-own contracts were consumer credit contracts).

MISSISSIPPI: *Richardson v. Cortner*, 100 So. 2d 854, 857 (Miss. 1958) (finding “brokerage fee” for small loan to be usurious interest, because “broker” was really the lender; “courts will look to and construe a transaction in its substance and effect, rather than its form, and will permit no scheme or device, however ingenuous, to hide the face of usury”); *see also Galloway v. Travelers Insurance Co.*, 515 So. 2d 678 (Miss. 1987) (if a corporation is formed solely for the purpose of avoiding the usury limit on loans to individuals, the claim or defense is available if the proceeds of the loan are used to meet the borrower’s personal, non-business, needs and obligations).

MISSOURI: *State on Information of Taylor v. Salary Purchasing Co.*, 218 S.W.2d 571, 574 (Mo. 1949) (early form of payday lending was usurious loan; noting that customers were persons of low income, unable to procure credit from banks and other conservative money lenders ... attracted to respondent's office by alluring advertisements and solicitation through the mail, promising easy money, without security and upon the applicant's signature alone; "There is no device or shift to evade the statute under or behind which the law will not look in order to ascertain the real motive of the transaction, and no act, however formal, however solemnly executed, will stand in the way of the court getting at the truth in order to ascertain whether there has been an attempt to evade the statute. And the contract will not be held good merely because upon its face and by its words it appears free from the taint of usury"); *Julian v. Burrus*, 600 S.W.2d 133, 138 (Mo. Ct. App. 1980) (courts "will look to the substance of the transaction under scrutiny rather than its form" to determine usury); *Lucas v. Beco Homes, Inc.*, 494 S.W.2d 417, 422 (Mo. Ct. App. 1973) (the law will not tolerate any camouflage disguising a usurious transaction to make it seem innocent; explaining how to distinguish loan from time-price sale; finding usurious loan where seller and lender were closely intertwined, and buyer was never offered the option of a cash sale at lower price); see also *State v. Sargent*, 256 S.W.2d 265, 271 (Mo. Ct. App. 1953) (affirming criminal usury conviction; "[t]he law is diligent to discern any artifice, device, or scheme to cover up usury and there can be no device or shift used to evade the law of usury behind which the court will not look in order to determine the real transaction"; "loan broker fee" was disguised interest); cf. *Webster v. Sterling Finance*, 195 S.W.2d 509 (Mo. 1946) (applying form over substance rule to conclude that certain non-consumer transactions were non-usurious loans).

MONTANA: *Bowden v. Gabel*, 76 P.2d 334 (Mont. 1937) (lender may charge for services incidental to the loan but may not cloak usurious exactions beneath charges for pretended services or expenses; finding alleged fees to be usurious interest).

NEBRASKA: *Elder v. Doerr*, 122 N.W.2d 528 (Neb. 1963) (in considering whether or not a transaction is a time sale made in good faith or a loan, the court will look through form and examine its substance); *Berg v. Midwest Laundry Equip. Corp.*, 122 N.W.2d 250, 252–253, reh'g denied and op. modified, 124 N.W.2d 699 (Neb. 1963) (transaction to sell laundry equipment was not a time sale; "[i]n determining whether a transaction is a bona fide time sale or a loan, the court will look through the form of the transaction and examine its substance.").

NEVADA: *Pease v. Taylor*, 496 P.2d 757, 759–760 (Nev. 1972) ("The court will look to the substance of the transaction and the intent of the parties in determining whether an agreement is usurious"; "broker's fee" charged by broker who was agent of lender in an amount set by lender, and unrelated to actual costs, was usurious interest); *Robinson v. Durston*, 432 P.2d 75 (Nev. 1967) (if a sale-repurchase agreement is alleged to be disguised usury, the form of the transaction will be disregarded and its substance and the intention of the parties at the time will control); cf. *Swallow Ranches, Inc. v. Bidart*, 525 F.2d 995 (9th Cir. 1975) (Nev. law) ("it is well recognized that a sale subject to an option to repurchase is, in some circumstances, a disguised loan—a device used by lenders to avoid a seller's right of redemption or to circumvent the usury law," but finding this transaction not to be a disguised loan where distressed seller was a sophisticated businessman, price was not disparate, and parties began by discussing a sale).

NEW JERSEY: *Green v. Continental Rentals*, 678 A.2d 759 (N.J. Super. Ct. Law Div. 1994) (the substance of a transaction determines whether it is usurious; finding rent-to-own transactions to be time sales, subject to state law interest limits).

NEW MEXICO: *First National Bank v. Danek*, 556 P.2d 31, 34–35 (N.M. 1976) (adopting principle that court will look to substance and disregard form when determining usury; finding side transaction—a sale of stock for significantly less than its value—to be disguised interest, rendering loan usurious).

NEW YORK: *Aaron v. Mattikow*, 146 F. Supp. 2d 263, 266 (E.D.N.Y. 2001) (when usury is alleged, court will "move beyond the form of the document and determine the true nature of the underlying transaction"), *aff'd*, 2003 WL 1973353 (2d Cir. Apr. 22, 2003); *Schneider v. Phelps*, 359 N.E.2d 1361, 1365 (N.Y. 1977) (reversing judgment for

lender; if borrower, who was required to incorporate, used funds for personal purposes, the defense of usury will be available; “in making loans to individuals, the usury laws could be easily avoided by the simple expedient of establishing a corporation and making the loan directly to it instead of to the ultimate individual user of the proceeds ... If form were to control, the creation of a corporation would, for all practical purposes, result in a waiver of the right to assert the usury defense. The salutary commercial purpose of the corporation exemption would be a shield for the loan shark.”).

NORTH CAROLINA: *In re Jeff Benfield Nursery, Inc.*, 565 B.R. 603, 612 (Bankr. W.D.N.C. 2017) (“Because the law is concerned with the substance rather than the form of a transaction, courts have found that loans disguised as other types of contracts are really just financing arrangements.”); *Carolina Industrial Bank v. Merrimon*, 132 S.E.2d 692, 694 (N.C. 1963) (“if the form of the transaction is a subterfuge to conceal an exaction of more than the legal rate of interest on what is in fact a loan and not a sale, the transaction will be regarded according to its true character and will be held usurious. ... The law considers the substance and not the mere form of outward appearances;” but here finding installment sale of car to be true sale); *Ripple v. Mortgage & Acceptance Corp.*, 137 S.E. 156, 158 (N.C. 1927) (transaction by which defendant financed car dealer’s purchase of vehicles from manufacturer was a loan; “Our courts do not hesitate to look beneath the forms of transactions alleged to be usurious in order to determine whether or not such transactions are in truth and in reality usurious. ... Where a transaction is in reality a loan of money, whatever may be its form, and the lender charges for the use of his money a sum in excess of interest at the legal rate, by whatever name the charge may be called, the transaction will be held to be usurious. The law considers the substance and not the mere form or outward appearance of the transaction in order to determine what it in reality is.”); *Odell V. Legal Bucks, L.L.C.*, 665 S.E.2d 757 (N.C. Ct. App. 2008) (litigation funding transaction was usurious loan); *State ex rel. Cooper v. NCCS Loans, Inc.*, 624 S.E.2d 371 (N.C. Ct. App. 2005) (“rebates” for sale of valueless internet services were thinly disguised payday loans).

OHIO: *Kenty v. Bank One Columbus N.A.*, 1992 WL 170605, at *4 (S.D. Ohio Apr. 23, 1992) (denying motion to dismiss; “Under Ohio law, a court must disregard the form of a transaction and look to the substance in order to determine whether a transaction is usurious.”); *Spalding v. Bank of Muskingum*, 12 Ohio 544, 546 (Ohio 1841) (“Whatever pretense may be set up to retain the amount in controversy, as commissions in the sums allowed, it is very clear it is one of those illegal shifts and devices to which the inordinate money-lender resorts to acquire to himself gains by an evasion of the wholesome provisions of the laws of the state, and it is much to be regretted that such efforts are but too frequently successful.”); *Russell v. Lumbermen’s Mortgage Co.*, 273 N.E.2d 803, 804 (Ohio Com. Pl. 1966) (“A court must disregard the form of the transaction and look to the substance in order to determine whether the transaction is usurious, despite any disguise it may wear”; “discount” and “origination fee,” for which no services were performed, were interest); *cf. Bankers Guarantee Title & Trust Co. v. Fisher*, 204 N.E.2d 103, 106 (Ohio Com. Pl. 1964) (“The question is not what the parties called the transaction herein, but what does the transaction require the Court to call it. It, therefore, is necessary for this Court to scan the transaction carefully to ascertain its real substance with a purpose of determining whether it is a disguised loan or something else”; here finding legitimate purpose for origination fee).

OKLAHOMA: *Aple Auto Cash Express of Okla., Inc. v. State ex rel. Oklahoma Dep’t of Consumer Credit*, 78 P.3d 1231 (Okla. 2003) (sale-leaseback was loan).

OREGON: *Fidelity Security Co. v. Brugman*, 1 P.2d 131, 136 (Or. 1931) (finding disguised usury; “The courts do not permit any shift or subterfuge to evade the law against usury. the form into which parties place their transaction is unimportant. Disguises are brushed aside and the law peers behind the innocent appearing cloaks in quest for the truth.”); *see also Hazen v. Cook*, 637 P.2d 195, 198 (Or. Ct. App. 1981) (where instrument bears legal interest rate on its face, but an additional charge was extracted from the debtor under another form, court must inquire whether the charge is “simply a camouflage for additional interest”).

PENNSYLVANIA: *Brown v. Courtesy Consumer Discount Co.*, 134 B.R. 134 (Bankr. E.D. Pa. 1991) (“[b]ecause of the fertility of the minds of those who would devise schemes to circumvent remedial consumer protection laws, these

laws must be interpreted with a flexibility necessary to preserve their spirit”; RISA disguised as direct loan in order to charge a higher rate in a “body-dragging” case); *Olwine v. Torrens*, 344 A.2d 665, 666 (Pa. Super. Ct. 1975) (“Since usury is often accompanied by subterfuge and circumvention to present the color of legality, it is the duty of the court to examine both the substance and form of a transaction”).

RHODE ISLAND: *Holden v. Salvadore*, 964 A.2d 508 (R.I. 2009) (when determining whether a transaction is a loan or other business transaction, court will focus on the substance over the form of the transaction and examine all the facts and circumstances that reveal the true nature of the transaction; but concluding that this sale-leaseback was not disguised loan).

SOUTH CAROLINA: *Martin v. Pacific Mills*, 158 S.E. 831, 832 (S.C. 1931) (“cunningly devised, but thinly veiled attempt to make what is plainly a loan a bill of sale—an attempted evasion of the usury law); *Income Tax Buyers, Inc. v. Hamm*, 1992 WL 12092431 (S.C. Com. Pleas Jan. 14, 1992) (sale of right to receive tax refund was loan); see also *Brown v. Crandall*, 61 S.E.2d 761, 763 (S.C. 1950) (“The courts will not hesitate to pierce the veil of any plan designed to evade the usury law and in doing so will disregard the form and consider the substance of the transaction,” but finding this non-consumer transaction to be a legitimate time sale).

TENNESSEE: *Pacific E. Corp. v. Gulf Life Holding Co.*, 902 S.W.2d 946, 960 (Tenn. Ct. App. 1995) (courts look to substance, not form; fact issue whether certain credit insurance premiums were interest).

TEXAS: *ECE Technologies, Inc. v. Cherrington Corp.*, 168 F.3d 201 (5th Cir. 1999) (Tex. law) (applying substance over form doctrine; fact question whether commercial transaction was loan); *Kinerd v. Colonial Leasing Co.*, 800 S.W.2d 187 (Tex. 1990) (even if elements of a credit sale with a time-price differential are established, court may evaluate whether transaction is a device to avoid the usury laws; this transaction was a loan, not a credit sale); *Temple Trust Co. v. Sewell*, 126 S.W.2d 943, 947 (Tex. 1939) (“the courts will diligently look through the form of a transaction to discover illegal interest and protect the borrower from its consequences”; here, usurious mortgage was disguised as mechanic’s lien); *Koch v. Boxicon, L.L.C.*, 2016 WL 1254048 (Tex. App. Mar. 30, 2016) (“whether a transaction is usurious depends on its substance rather than its form;” “sale” of future income was a usurious loan, because it required payment of a specific sum, by a specific date, with a specified rate of return); *Bantuelle v. Williams*, 667 S.W.2d 810, 818 (Tex. App. 1983) (sale and repurchase of home constituted a mortgage, not a deed; must look at substance when determining if loan was usurious); cf. *First USA Mgmt., Inc. v. Esmond*, 960 S.W.2d 625 (Tex. 1997) (substance rather than form controls, but arrangement here did not create usurious interest).

UTAH: *Kjar v. Brimley*, 497 P.2d 23, 25 (Utah 1972) (whether lease-purchase is in fact a sale, or is “a loan disguised as a sale to cover up a scheme to collect usurious interest” is a question of fact); accord *Willard M. Milne Investment Co. v. Cox*, 580 P.2d 607 (Utah 1978).

VERMONT: *Crocker v. Brandt*, 293 A.2d 541 (Vt. 1972) (noting the lengths to which lenders will go to disguise any interest charged above the legal limit, and the need to look beyond the form of the transaction; finding fees to be usurious interest); *Brown v. Pilini*, 262 A.2d 479, 482 (Vt. 1970) (transactions between financier and used car dealer were a usurious loan, not a sale of commercial paper; “In determining the question of usury, the transaction is not to be determined from the standpoint of form. The whole transaction and the interest of the parties, particularly the lender, must be gathered from all the circumstances and events which preceded and accompanied their dealings.”).

VIRGINIA: *Skinner v. Cen-Pen Corp.*, 414 S.E.2d 824, 826 (Va. 1992) (wrap-around second mortgage with mortgage fee was disguised usury; “In usury cases, ... we are not bound by the contractual recitations; on the contrary, we look behind the formal documents to discover the true nature of the transaction”); *Radford v. Community Mortgage and Investment Co.*, 312 S.E.2d 282, 285 (Va. 1984) (loan was not exempt business loan where borrowers were required to sign statement that loan was “to pay business taxes” but lender knew part of funds were used for household purposes; “In determining whether a transaction is usurious, the court has both the right and the duty to probe behind the written instruments and to examine all facts and circumstances which shed light

The OCC's proposed rule would 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."³⁷

C. 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. Morrissey*,³⁸ 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

on the true nature of the transaction."); see also *Ruby v. Cashnet, Inc.*, 708 S.E.2d 871 (Va. 2011) ("looking at the substance of the transactions" and concluding that "new loans" made immediately after the repayment of payday loans were really refinancings or renewals, which are forbidden by state payday lending law).

WASHINGTON: *Easter v. Am. West Fin.*, 381 F.3d 948, 957 (9th Cir. 2004) ("Washington courts consistently look to the substance, not the form, of an allegedly usurious transaction"); *Zachman v. Whirlpool Acceptance Corp.*, 841 P.2d 27, 33 (Wash. 1992) (assessing substance of transaction and determining that agreements did not constitute credit card agreements but, rather, retail installment contracts).

WEST VIRGINIA: *Carper v. Kanawha Banking & Trust Co.*, 207 S.E.2d 897, 910 (W. Va. 1974) ("no shift or device nor mere form within the contract shall turn away a court or jury from closely scrutinizing aspects of the contract which may be usurious."); see also *Community Bank & Trust Co., N.A. v. Keysar*, 285 S.E.2d 424 (W. Va. 1981) (noting that form does not control, but upholding jury's verdict that commercial lender's requirement of a savings account as collateral for a loan was not a device to evade usury limits).

WISCONSIN: *State v. J.C. Penney & Co.*, 179 N.W.2d 641, 649 (Wis. 1970) (upholding ruling that revolving charge account was a "forbearance" covered by usury statute; "The court will always look behind the form of the transaction to determine if in substance it is a device to avoid the usury statute."); cf. *ValZimmerman Corp. v. Leffingwell*, 318 N.W.2d 781 (Wis. 1982) (when examining a potentially usurious transaction, this court will look to the substance rather than the form of the transaction, but finding that sale of note at a discount was true sale; noting the lack of coercion or deception in this non-consumer case).

³⁷ *Daniel et al.*, 227 F.2d at 355.

³⁸ 2014 WL 2404300 (W.Va. May 30, 2014).

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).³⁹

Similarly, in *Bankwest v. Oxendine*,⁴⁰ 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.”⁴¹

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.

In *BankWest, Inc. v. Baker*, the Eleventh Circuit upheld a Georgia statute that applied Georgia usury law even if a bank is named the lender on the loan agreement if the facts show that a payday lender is the true lender.⁴² The statute made unlawful any “arrangement by which a de facto lender purports to act as the agent for an exempt entity” and the “entire circumstances of the transaction show that the purported agent holds, acquires, or maintains a predominant economic interest in the revenues generated by the loan.”⁴³ The court observed that the Georgia law “has no application when out-of-state banks act for themselves or act through an in-state agent (even a payday-store agent) who is paid less than 50% of the revenue from a payday loan,”⁴⁴ and that the statute did not conflict with the Federal Deposit Insurance Act (FDIA) because “out-of-state banks acting for themselves are free to charge Georgia borrowers their home state interest rates as authorized by § 27(a) of the FDIA without being subject to any liability under the Act.”⁴⁵

³⁹ 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”).

⁴⁰ 266 Ga.App. 771, 598 S.E.2d 343 (Ga. App. 2004).

⁴¹ *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).

⁴² 411 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).

⁴³ Georgia Code Ann. § 16-17-2(b)(4).

⁴⁴ 411 F.3d at 1299.

⁴⁵ 411 F.3d at 1302.

In *Community State Bank v. Strong*, the Eleventh Circuit relied on its previous opinion in *BankWest v. Baker* and found that a plaintiff could plead a cause of action against a bank for aiding and abetting a state usury law violation under the Racketeering and Corrupt Organizations (RICO) Act because the plaintiff could “plead facts demonstrating that the Bank was not the actual lender.”⁴⁶

In *Community State Bank v. Knox*, the Fourth Circuit found that state-law usury claims were not completely preempted, even though a state-chartered bank was the lender named on the loan agreement, 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.’”⁴⁷ Thus the court refused to treat the claims “as properly brought against [the bank] so as to bring those claims within the scope of the [Federal Deposit Insurance Act].”⁴⁸

In *Krispin v. May Department Stores*, the Eighth Circuit found that a national bank was the “real party in interest,” but not merely because the bank, after an amendment, was named as the creditor on the credit card agreement. Rather the court looked beyond the agreement, analyzed the facts, and found that “it is now the bank, and not the store, that issues credit, processes and services customer accounts, and sets such terms as interest and late fees. Thus, although we recognize that the NBA governs only national banks, ... we find that the real party in interest is the bank, not the store.”⁴⁹

Moreover, in yet another court of appeals case, the Third Circuit found that removal of a case alleging usury claims against nonbanks was improper, and stated: “Section 85 and 86 of the NBA and Section 521 of the DIDA apply only to national and state chartered banks, not to non-bank purchasers of second mortgage loans such as RFC.”⁵⁰ That conclusion is especially compelled if the original transaction was a sham and the assignee was the true lender.

The OCC has not discussed any of these federal court of appeals cases or explained why it should be allowed to prevent courts from looking beyond the face of the loan agreement to assess whether a bank is the true lender.

Moreover, another federal court of appeals, the Ninth Circuit, has also endorsed looking to substance over form to determine which party is the true lender for purposes of usury law. In *Easter v. American West Financial*, the question was whether a mortgage broker or the assignee was the true lender in a table-funding case arising under state law. The court observed that “Washington courts consistently look to the substance, not the form, of an allegedly usurious transaction.”⁵¹ Applying this doctrine, the court found that, despite the loan broker’s name on the loan agreement, a mortgage broker that acts as

⁴⁶ 651 F.3d 1241, 1260 (11th Cir. 2011).

⁴⁷ 523 Fed. Appx. 925, 929 (4th Cir. 2013).

⁴⁸ *Id.* at 929-930.

⁴⁹ 218 F.3d 919 (8th Cir. 2000).

⁵⁰ *In re Community Bank*, 418 F.3d 277, 296 (3d Cir. 2005).

⁵¹ 381 F.3d 948, 957 (9th Cir. 2004).

an intermediary for the true lender that assumes the financial risk of the transaction is not the lender and does not need a state license. (Table-funded loans are discussed in Section IV.B).

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. Courts have recognized the true lender doctrine in cases involving the question whether the lender is a bank or nonbank⁵² and also in cases assessing other types of evasions of usury laws.⁵³

Many courts have focused on which party has the predominant economic interest in the loan as a key factor in determining the true lender.⁵⁴ There is a compelling argument that, using substance-over-form to prevent evasions, a state-regulated entity that is subject to state interest rate limits should not be allowed to receive the bulk of the profits from a loan program that would be illegal to offer directly. But no single factor is determinative, and courts appropriately look at the totality of the circumstances in the search for truth and the fight against the “infinitely varied” contrivances⁵⁵ used to evade usury laws.⁵⁶

⁵² See *In re Rent-Rite Superkegs West Ltd.*, No. 19-cv-01552-RBJ (D. Colo. Aug. 12, 2020), *Meade v. Avant of Colorado, L.L.C.*, 307 F. Supp. 3d 1134, 1150–1152 (D. Colo. 2018); *Eul v. Transworld Sys.*, 2017 WL 1178537 (N.D. Ill. Mar. 30, 2017); *Commonwealth v. Think Fin., Inc.*, 2016 WL 183289 (E.D. Pa. Jan. 14, 2016); *Ubaldi v. SLM Corp.*, 852 F. Supp. 2d 1190 (N.D. Cal. 2012); *Flowers v. EZPawn Oklahoma, Inc.*, 307 F. Supp. 2d 1191 (N.D. Okla. 2004); *Goleta National Bank v. O'Donnell*, 239 F. Supp. 2d 745 (S.D. Ohio 2002); *Goleta Nat'l Bank v. Lingerfelt*, 211 F. Supp. 2d 711 (E.D.N.C. 2002); *BankWest Inc. v. Oxendine*, 598 S.E.2d 343 (Ga. Ct. App. 2004); *Spitzer v. County Bank of Rehoboth*, 846 N.Y.S.2d 436 (N.Y. App. Div. 2007); *CashCall, Inc. v. Morrissey*, 2014 WL 2404300 (W. Va. May 30, 2014); *Dep't of Ins. & Fin'l Svcs. v. Comdata Network, Inc.*, 2019 WL 3857904 (Mich. Dep't of Ins. & Fin'l Svcs. Aug. 7, 2019) (finding that Comdata was the true issuer of credit card program, and thus bank exception to state licensing requirement did not apply), *aff'd in part, rev'd in part by Comdata Network, Inc. v. Michigan Dep't of Ins. & Fin'l Svcs.*, No. 19-747-AV (Mich. Ingham Cty., 30th Jud'l Cir. Ct. May 19, 2020).

⁵³ *Eastern v. Am. West Financial*, 381 F.3d 948, 957 (9th Cir. 2004) (applying the de facto lender doctrine under Washington state law and recognizing that “Washington courts consistently look to the substance, not the form, of an allegedly usurious action”); *Consumer Financial Protection Bureau v. CashCall, Inc.*, 2016 WL 4820635 (C.D. Cal. Aug. 31, 2016) (considering whether tribe is the true lender); *State ex rel. Cooper v. Western Sky Fin'l, LLC*, 2015 WL 5091229 (Sup. Ct. N.C. Aug. 27, 2015) (plaintiffs alleged facts that lenders, not tribal members, were the de facto lender).

⁵⁴ See, e.g., *CashCall, Inc. v. Morrissey*, 2014 WL 2404300 (W. Va. May 30, 2014); *Georgia Cash America, Inc. v. Greene*, 318 Ga.App. 355, 734 S.E.2d 67, 73 (2012) (noting, for loans made prior to enactment of Georgia true lender statute, that lender received a 95 percent interest in the loans and 75 and 95 percent of revenues); *CFPB v. CashCall, Inc.*, 2016 WL 4820635 (C.D. Cal. Aug. 31, 2016); *Kauer v. World Business Lenders, LLC*, 307 F.Supp.3d 1134 (D. Colo. 2018); *Spitzer*, 846 N.Y.S.2d 436. See also *Baker*, 411 F.3d 1289 (upholding statute defining the true lender as the entity that, based on the totality of the circumstances, has with the predominant economic interest).

⁵⁵ *Scott v. Lloyd*, 34 U.S. at 447.

⁵⁶ See, e.g., *Eul v. Transworld Sys.*, 2017 WL 1178537 (N.D. Ill. Mar. 30, 2017); *Ubaldi v. SLM Corp.*, 852 F. Supp. 2d 1190 (N.D. Cal. 2012).

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.⁵⁷ 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.⁵⁸ 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.⁵⁹

Even if one could imagine an application of substance-over-form that inappropriately rejected the bank as the true lender, the OCC cannot preempt a vast swath of traditional state law merely because it could be problematic in a theoretical case. That is exactly why Congress in the Dodd-Frank Act allowed the OCC to preempt state law only if it proceeds by a “case-by-case” evaluation of whether a “particular” state law prevents or significantly interferes with the powers of a national bank, as discussed in Section IV.C below. The OCC’s days of asserting preemption across wide areas rather than proving conflict in particular cases are over.

IV. The proposal is arbitrary and capricious, fails to consider alternatives, and fails to satisfy the requirements for preempting state law.

A. The OCC provides no rational reason for preventing courts from looking beyond form to the truth and fails to consider alternatives to its irrational proposal.

The OCC has given no rational reason – and barely any reason at all – to justify the rejection of the traditional substance-over-form test for assessing usury evasions. The OCC’s primary rationale is that the proposed rule is necessary to address “uncertainty,” “ambiguities,” and a “growing body of case law [that] has introduced divergent standards” for resolving when a bank is the lender.⁶⁰ 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

⁵⁷ 85 Fed. Reg. at 44224.

⁵⁸ *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.”)

⁵⁹ 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.

⁶⁰ 85 Fed. Reg. at 44224.

the “many contrivances” they have developed to evade usury laws.⁶¹ Cases “only vary as they follow the detours through which they have had to pursue the money lender.”⁶²

The OCC has not pointed to a single case identifying any ambiguity in the terms of the NBA. The proposal’s cite to a single, inapposite case, which does not even interpret federal banking law, is not enough to show any ambiguity under the NBA, much less to justify promulgation of a rule that disregards truth in favor of contrivances. The OCC’s claim that the name on the loan agreement is all that matters has been soundly rejected.⁶³

The proposal claims that federal banking law statutes authorize banks to “enter into contracts, to make loans, and to subsequently transfer these loans and assign loan contracts.”⁶⁴ Again, the proposal gives no example of any ambiguity in the statutes that provide for those authorities. The unremarkable right to enter into contracts does not give banks the unilateral right to help a nonbank evade state law simply by naming itself as the lender.

Apart from its general authority to prescribe federal banking rules and regulations,⁶⁵ the only direct source the OCC cites for its authority to resolve “ambiguities” is *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984).⁶⁶ 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.”⁶⁷

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.⁶⁸ 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. See Section C below for further preemption analysis.

⁶¹ *Scott v. Lloyd*, 34 U.S. at 447.

⁶² *DeWolf*, 23 U.S. at 385.

⁶³ 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.”).

⁶⁴ 85 Fed. Reg. at 44224.

⁶⁵ 85 Fed. Reg. at 44224-25 & n.18 (citing 12 U.S.C. § 93a).

⁶⁶ 85 Fed. Reg. at 44224.

⁶⁷ *Id.*

⁶⁸ 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).

The OCC also cites its desire to create a “clear test” and a “predictable, bright-line standard” instead of a “fact-intensive balancing test.”⁶⁹ 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. That is because the “ingenuity of lenders has devised many contrivances,” and “each [case] depends on its own circumstances, and those circumstances are almost infinitely varied”⁷⁰

There is a clear rule, and it is that courts may look beyond the form of transactions to prevent evasions of usury laws. “[N]o subterfuge shall be permitted to conceal [usury] 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.”⁷¹

Under the proposed rule, courts would be prohibited from doing what courts are charged with doing: applying laws to different sets of facts. While the variation in fact patterns may result in different emphases in different opinions, as always happens with caselaw, the OCC has not pointed to a single case that it contends was wrongly decided or poses significant problems for legitimate bank operations. The proposal mentions that banks sell loans and leverage their balance sheets, but the OCC has not argued or provided any evidence that the true lender cases have impacted that ability, as discussed in Section C.2 below.

The OCC also has not given any justification for why its bright-line rule of the name on the loan agreement is the appropriate standard. The OCC merely asserts in a single sentence with no explanation: “If a bank is named in the loan agreement as the lender as of the date of origination, imprimatur as conclusive evidence that the bank is exercising its authority to make loans pursuant to the statutes cited above and has elected to subject itself to the panoply of applicable Federal laws and regulations (including but not limited to consumer protection laws) governing lending by banks.”⁷²

But the OCC does not offer any explanation for why the bank’s name on the agreement should be “conclusive evidence” that a bank is “making” loans in that situation. The OCC offers no support under the NBA, and cites only to the *Beechum* case about the California Constitution and to Black’s Law Dictionary defining “lender” as “A person or entity from which something (esp. money) is borrowed.”⁷³ Even if that simple definition were persuasive authority, the fact that the bank’s name is on the agreement does not show that it is actually the person or entity from which money is being borrowed.

A bank does not “exercise its authority to make loans” merely by renting out its name to a nonbank lender. The OCC has not offered any explanation for a reversal of its view that “[t]he benefit that national banks enjoy by reason of this important constitutional doctrine [preemption] 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.

⁶⁹ 85 Fed. Reg. at 44224.

⁷⁰ *Scott v. Lloyd*, 34 U.S. at 447.

⁷¹ *De Wolf v. Johnson*, 23 U.S. 367 (1825).

⁷² 85 Fed. Reg. at 44225.

⁷³ 85 Fed. Reg. at 44225.

Preemption is not like excess space in a bank-owned office building. It is an inalienable right of the bank itself.”⁷⁴ The proposed rule inappropriately expands the NBA’s preemptive sweep far beyond national banks to nonbank entities that are, in truth, the lender. The NBA does not allow the OCC to ignore that truth or to preempt state laws that require looking for substance over form.

The OCC also fails to consider any alternatives to achieving its purported aim that would, for example, produce a meaningful definition of “true lender” or that would reduce the harms the proposal will cause.⁷⁵ Even if a bright-line test were appropriate, the OCC does not explain why the predominant economic interest test would not be a better test than the farce of a bank’s name on the loan agreement. The proposed rule is so overbroad that it does not require that the bank have even minuscule involvement with the loan, have any significant interest or risk in the loan program, or even be aware of and authorize the use of its name on the agreement. A recent settlement addressing rent-a-bank schemes between the Colorado Attorney General and two online lenders, though it raises serious concerns and should not be a model for other states, shows far more depth of thought than the OCC’s proposed rule.⁷⁶ The proposed rule would not require a single element of that settlement.

B. The “funds the loan” prong of the proposed rule is unreasonably simplistic and demonstrates the “heads I win, tails you lose” irrationality of the “named as the lender” prong.

The second prong of the OCC’s proposal provides that a bank is the lender if, as of the date of origination, it “funds the loan.” The proposal states that there are “circumstances in which a bank is not named as the lender in the loan agreement but is still, in the OCC’s view, making the loan.”⁷⁷ The proposal cites “table funding” arrangements as its example of this scenario.⁷⁸

This prong of the OCC’s so-called “true lender” standard illustrates the hypocrisy of the “named as a lender” prong. Applying the OCC’s reasoning that a bank can be the “true lender” even if its name is not

⁷⁴ 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>.

⁷⁵ See, e.g., *Motor Vehicle Mfrs. Ass’n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 48 (1983) (holding that an “alternative way of achieving the [stated] objectives ... should have been addressed and adequate reasons given for its abandonment”); *Cincinnati Bell Tel. Co. v. FCC*, 69 F.3d 752, 761 (6th Cir. 1995) (“The FCC’s conclusory statements, that its rule is based on ‘common sense’ economic conclusions and that the twenty percent rule is necessary as a bright-line test, wholly fail to provide a reasoned explanation as to why the less restrictive alternatives described above are insufficient.”).

⁷⁶ See Assurance of Discontinuance *In the Matters of: Avant of Colorado, LLC; and*

Marlette Funding, LLC (Aug. 7, 2020), <https://coag.gov/app/uploads/2020/08/Avant-Marlette-Colorado-Fully-Executed-AOD.pdf>

⁷⁷ 85 Fed. Reg. at 44225.

⁷⁸ 85 Fed. Reg. at 44225 n.23.

on the loan document, it should follow that the *nonbank* should also be deemed the true lender if it funds the loan, even with the bank's name on the loan document.

Yet, under the OCC's "heads we win, tails states lose" reasoning, the same rules do not apply to nonbanks. The OCC does not explain why funding the loan means that a bank is the one loaning money or charging interest on a loan within the meaning of the NBA. But if that is a reasonable interpretation of the purported "ambiguity" in the NBA, then a rational application of that interpretation should apply even-handedly to whichever party funds the loan. That is exactly what the substance-over-form and true lender cases say: the name on the document is not determinative if the substance of the transaction shows that another entity is really the lender.⁷⁹ Instead, under the proposed rule, a nonbank is *per se* never the true lender in a bank-nonbank relationship, whether its name is on the document or it funds the loan, so long as the bank does one or the other.

We do not disagree that the bank may be the lender in some situations when it funds the loan even if its name is not on the loan agreement, such as in a legitimate table-funding arrangement. As highlighted in the Interpretive Letter that the proposal references, the OCC has stated that the bank is the lender in a table-funding situation where the loan "is funded at settlement by an advance of loan funds [by the bank] and a contemporaneous assignment of the loan" to the bank.⁸⁰ That is, the bank "provides funding *and takes assignment* of a loan."⁸¹ The mortgage broker does not fund the loan, put any money at risk, charge or collect interest, or have any continuing interest in the loan. Thus, by virtue of not only funding, but also the totality of the circumstances and the likelihood that the bank has the predominant economic interest in the transaction, a table-funded loan is much more indicative of a bank being the lender as compared with the mortgage broker named in the initial settlement documents.⁸²

But that Interpretive Letter also states that if a "non-national bank lender ... establishes the terms of credit *or* provides the funding for the mortgage loan[,] [i]n those circumstances, the national bank is *not* making the mortgage loan"⁸³ Yet the proposed rule would overturn that prior conclusion – with no explanation – making the bank the lender as long as its name is on the loan agreement. This irrational result is not a reasonable interpretation of the NBA.

Moreover, the "funds the loan" prong is too simplistic and overbroad. The OCC does not explain what it means to fund the loan. If the bank's funding comes from a third party, is it funding the loan? What if the purported funding is a contrivance, with another party promising to quickly reimburse the bank and to protect the bank from virtually all of the risk of the transaction? What if the purported broker or

⁷⁹ See *Easter v. American West Financial*, 381 F.3d 948 (9th Cir. 2004) (stating that "Washington courts consistently look to the substance, not the form, of an allegedly usurious transaction," and that in a table-funding situation, a mortgage broker that acts as an intermediary for the true lender, which assumes the financial risk of the transaction, is not the lender).

⁸⁰ OCC Interpretive Letter 1002 (May 13, 2004).

⁸¹ *Id.* (emphasis added).

⁸² There could be circumstances, however, where table-funding is a contrivance, such as if the bank then quickly assigns the loan or the bulk of the economic interest back to the arranger or another entity.

⁸³ Interpretive Letter #1002 at 1 (emphasis added).

“arranger” is itself the entity that effectively sets the terms of credit, purchases the loan or has the predominant economic interest in the loan, and the bank’s only role is to launder the funding? In those situations, a substance-over-form, totality of the circumstances approach could legitimately hold that the bank is not the true lender.

Thus, while the “funds the loan” prong of the proposed rule is not as blatant an effort to hide the truth and the true lender as the “named on the agreement” prong is, the funding prong is still an unauthorized attempt to preempt substance-over-form analysis to prevent evasions of state usury laws. As discussed above, the OCC has not shown any ambiguity in the NBA that supports either prong, and has not explained why it has the authority to preempt traditional analysis of usury laws.

C. The OCC wholly fails to meet the procedural requirements of Section 25b or to show that its proposal is necessary to avoid significant interference with a bank power.

1. The OCC fails to meet the procedural requirements of Section 25b.

Section 25b could not be clearer: “State consumer financial laws are preempted *only if*...in accordance with the legal standard for preemption in the decision of the Supreme Court of the United States in [*Barnett Bank v. Nelson*], the State consumer financial law prevents or significantly interferes with the exercise by the national bank of its powers.”⁸⁴ Moreover, “any preemption determination under this subparagraph may be made ... by regulation or order of the Comptroller of the Currency *on a case-by-case basis*.”⁸⁵ Such case-by-case determination must be made in consultation with the Consumer Financial Protection Bureau (CFPB), taking the views of the CFPB into account.⁸⁶

In particularly stark terms, Congress directed that “No regulation or order of the Comptroller of the Currency ... shall be interpreted or applied so as to invalidate, or otherwise declare inapplicable to a national bank, the provision of the State consumer financial law, unless *substantial evidence, made on the record of the proceeding*, supports the specific finding”⁸⁷ that a particular state law “prevents or significantly interferes with”⁸⁸ the exercise of a national bank power. As noted earlier in Section IV.A, in evaluating the legitimacy of any preemption rule, the OCC is only entitled to the lesser, *Skidmore* deference and thus the reviewing court must consider “the thoroughness evident in the consideration of the agency, the validity of the reasoning of the agency,” among other factors.⁸⁹

The OCC has not even made a pretense of following the requirements of Section 25b. The OCC has not:

- Discussed the *Barnett Bank* prevent/significantly interfere standard;

⁸⁴ 12 U.S.C. sec. 25b(b)(1)(B) (emphasis added); *see also Lusnak*, 833 F.ed at 1191-92 (Dodd-Frank made clear that Barnett is the legal standard for preemption).

⁸⁵ 12 U.S.C. sec. 25b(b)(1)(B) (emphasis added); *see also Lusnak*, 833 F.ed at 1191-92.

⁸⁶ 12 U.S.C. sec. 25b(b)(3); *see also Lusnak*, 833 F.ed at 1191-92.

⁸⁷ 12 U.S.C. § 25b(c) (emphasis added).

⁸⁸ 12 U.S.C. § 25b(b)(1).

⁸⁹ *Skidmore*, 323 U.S. 134; 12 U.S.C. § 25b(b)(5)(A).

- Applied its proposed regulation on a case-by-case basis;
- Consulted with the CFPB;
- Shown substantial evidence to support the proposal;
- Held a proceeding with a record;
- Made a finding that a particular state law prevents or significantly interferes with the exercise of a national bank power.

The OCC may claim that this proposed rule falls under the exemption in Section 25b(f) from these requirements. That provision reads:

(f) Preservation of powers related to charging interest
 No provision of title 62 of the Revised Statutes shall be construed as altering or otherwise affecting the authority conferred by Section 85 of this title for the charging of interest *by a national bank* at the rate allowed by the laws of the State, territory, or district where the bank is located, including with respect to the meaning of “interest” under such provision..⁹⁰

But this proposal does not involve “the charging of interest by a national bank.” It says nothing about interest or the charging of interest, about the rate that applies, or about the meaning of “interest.” The proposal is only about whether or not the bank is deemed to have made a loan.

The proposal also does not impact “the charging of interest by a national bank.” To the contrary, the entire purpose and effect of the proposal is to affect the charging of interest by a *nonbank*. The OCC made clear that “the proposal would operate together with the OCC’s recently finalized *Madden-fix* rule”⁹¹ – which is entirely about the interest charged by entities that are *not* national banks.⁹² The OCC states that the proposed rule, together with the “*Madden-fix*” rule, “permits the loan to be subsequently sold, assigned, or otherwise transferred without affecting the interest term”

Our strong objections to this proposed rule are precisely because the *bank* is not charging the interest, and because it purports to preempt state usury law as applied to nonbank entities. If a bank is actually the entity charging, collecting, and predominantly benefiting from interest payments, then the substance-over-form usury doctrine poses no threats to the bank’s NBA rights. But the OCC claims that merely because a bank’s name is on the loan agreement or a bank funds a loan – even if it does not charge or collect a single dime of interest – then state usury law is preempted. The Section 25b(f) exemption does not cover that situation, and the OCC must comply with the procedural and substantive requirements of the Dodd-Frank Act before it can preempt state law.

The OCC also has no power to preempt the application *to banks* of state laws other than state usury laws, unless it follows the Dodd-Frank procedural and substantive requirements. Thus, to the extent the OCC relies on a notion that state laws interfere with bank activities besides charging interest – namely, banks’ authorities “to enter into contracts, to make loans, and to subsequently transfer these loans and

⁹⁰ 12 U.S.C. §25b(f) (emphasis added).

⁹¹ 85 Fed. Reg. at 44227.

⁹² In *Madden v. Midland Funding*, 786 F.3d 246 (2d Cir. 2015), the court held that the NBA did not preempt state usury law that applied to a debt buyer that bought charged off credit card debt.

assign loan contracts”⁹³ – the OCC must undergo a careful delineation, supported by substantial evidence on the record of a proceeding, that particular state laws significantly interfere with bank powers. The OCC does not even attempt such a showing.

2. The OCC does not show that the traditional state substance-over-form doctrine significantly interferes with authorized banking powers.

Even if the OCC had complied with the procedural preemption requirements of the Dodd-Frank Act, the OCC cannot meet the *Barnett Bank* standard for preempting state usury laws as applied to nonbank entities. The OCC has not shown and cannot show that state usury laws significantly interfere with a bank’s authorized banking powers when a substance-over-form analysis shows that an arrangement is a contrivance and the bank is not the true lender.

The proposal asserts that bank relationships with other market participants “allow banks to manage their risks and leverage their balance sheets to increase the supply of credit available in ways they would not be able to if they were acting alone.”⁹⁴ But the OCC fails to show that state substance-over-form doctrine is interfering with banks’ ability to manage risks or leverage their balance sheets. This doctrine has been in effect since the enactment of the NBA and has been applied to enforce state usury laws against nonbanks that are the true lender ever since payday lender rent-a-bank schemes emerged two decades ago. The only thing that is new is a proliferation of efforts by high-cost lenders to evade state usury laws, as discussed in Section V below. While jurisdictions like the District of Columbia are appropriately challenging this new wave of rent-a-bank schemes, the OCC has not included a single sentence to assert that application of traditional substance-over-form doctrine to sham arrangements is impacting legitimate bank functions.

Banks do not manage the risks of their own lending programs by laundering nonbank loans for third parties. These are the nonbanks’ lending programs; the banks’ only meaningful role in the programs is the sale of its preemption rights.

The proposal references credit card securitization as a leverage mechanism for banks.⁹⁵ But the OCC does not assert, let alone provide evidence, that the true lender doctrine is significantly interfering with credit card securitization. Credit card securitizations are entirely distinct from rent-a-bank schemes where the bank is a front for the true lender running the loan program.⁹⁶

Nor has the OCC argued that other forms of securitization are significantly impacted by state substance-over-form law. The largest securitization market by far is the mortgage market. State usury laws are

⁹³ 85 Fed. Reg. at 44224.

⁹⁴ 85 Fed. Reg. at 44224.

⁹⁵ 85 Fed. Reg. at 44225.

⁹⁶ Credit card securitization trusts, unlike rent-a-bank lenders, do not have employees, are not independent lenders, and do not appear to have a significant role or economic interest in the lending programs other than in securitizing the receivables. The banks that offer the credit cards already have the right to charge the rate permitted by their home state and have no need to create vehicles to evade usury laws

already preempted for all first mortgages. And there is no evidence of any impact on the market for second mortgages by banks. (Yet, as discussed in Section V.G.1 below, the proposed rule could legitimize predatory rent-a-bank second mortgages currently being made by nonbank World Business Lenders through OCC-supervised Axos Bank at rates of 79% to 139% APR.) Auto loans originated by depositories generally are not securitized. To the extent they are or are otherwise sold on the secondary market, there is no evidence that state true lender law has impacted the health of any aspect of the auto loan market. Some private student loans are securitized, but those loans are typically at low rates that do not exceed state usury caps. There is no evidence of any impact on the student loan market.

Indeed, the FDIC candidly stated in its rule attempting to overturn *Madden* that it “is not aware of any widespread or significant negative effects on credit availability or securitization markets having occurred to this point as a result of the *Madden* decision.”⁹⁷ The same is even truer of state true lender law, which to our knowledge has not been raised to challenge securitizations.⁹⁸

The proposal also claims that bank customers benefit from the increased availability of credit generated by third party partnerships – a claim we address in Section V.A below – but it makes only a conclusory statement that “increasing uncertainty about the legal framework” applied to partnerships may discourage such partnerships. It does not even attempt to show that state true lender doctrine is significantly interfering with a bank power in this context.⁹⁹

The real aim of the proposal is to facilitate evasion of state law. But this is not a legitimate bank power. The rent-a-bank programs the rule would promote are not designed primarily to help banks with their liquidity or even their own businesses. In fact, to date, only one federal savings association that we are currently aware of, Axos Bank, has built a business off of this model. And only one other OCC-supervised bank, Stride Bank, is involved in a high-cost rent-a-bank scheme. It would seem very unlikely for a legitimate banking power to be significantly impacted by a hundreds-year old state law doctrine potentially restricting a practice in which only two national banks engage in partnership with predatory lenders.

The OCC not only wholly fails to justify its proposal. It also fails to consider the vast implications of its proposal – the impact on state laws, the consequences for consumers and small businesses, on the safety and soundness of national banks, and on nonbanks that operate in compliance with state law. We address these in turn in the following sections.

⁹⁷ FDIC, Final Rule, “Federal Interest Rate Authority,” 85 Fed. Reg. 44146, 44156 (July 22, 2020).

⁹⁸ A couple of recent challenges to credit card securitizations have been based on *Madden* (though in a very different context than from the charged off credit card debt in *Madden* or from rent-a-bank schemes), not on claims that the bank is not the true lender.

⁹⁹ 85 Fed. Reg. at 44224.

V. The Proposal Fails to Consider the Severe Harm the Rule Will Inflict on Consumers and Small Businesses.

A. The proposal's claim that it will increase access to "affordable" credit is unsupportable and dangerous.

The OCC attempts to justify its proposal as a policy matter as increasing access to credit, including for unbanked or underbanked individuals and including small dollar lending programs.¹⁰⁰ 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 Acting Comptroller has recently emphasized.¹⁰¹

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 Section IV.A above. 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 proposal 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 proposal would promote is 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.¹⁰²

In addition, the proposal suggests that it 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"¹⁰³ or serve their own customers with, for example, small-dollar lending programs.¹⁰⁴ 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. So the OCC has not identified a problem here for its proposal to 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

¹⁰⁰ 85 Fed. Reg. at 44224.

¹⁰¹ See 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>.

¹⁰² 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>.

¹⁰³ 85 Fed. Reg. 44224.

¹⁰⁴ 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.").

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.¹⁰⁵

B. High-cost lending is fundamentally different than responsible lending and inflicts severe harm on financially vulnerable consumers.

In recent years, the harms of high-cost lending have been more comprehensively and thoroughly documented than ever before.¹⁰⁶ 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,¹⁰⁷ high checking account fees and closed accounts,¹⁰⁸ and bankruptcy.¹⁰⁹ These toxic 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.¹¹⁰

¹⁰⁵ See 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-marketplace-versus-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.

¹⁰⁶ See 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, 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).

¹⁰⁷ See, e.g., B. Melzer, *The Real Costs of Credit Access: Evidence from the Payday Lending Market*, (2011), Oxford University Press, <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), <http://bit.ly/RtDsXx>.

¹⁰⁸ 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, www.bostonfed.org/economic/cprc/conferences/2008/payment-choice/papers/campbell_jerez_tufano.pdf.

¹⁰⁹ Paige Marta Skiba and Jeremy Tobacman, *Do Payday Loans Cause Bankruptcy?*, Vanderbilt University and the University of Pennsylvania, 10/10/08, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1266215.

¹¹⁰ 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),

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.¹¹¹ These loans often inflict as much or more harm – creating a deeper, longer debt trap – for borrowers than two-week payday loans.¹¹²

Harm caused by high-rate loans extends far beyond the higher cost itself. Yes, a 150% 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.¹¹³ As shown in the following chart,¹¹⁴ 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

<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.*

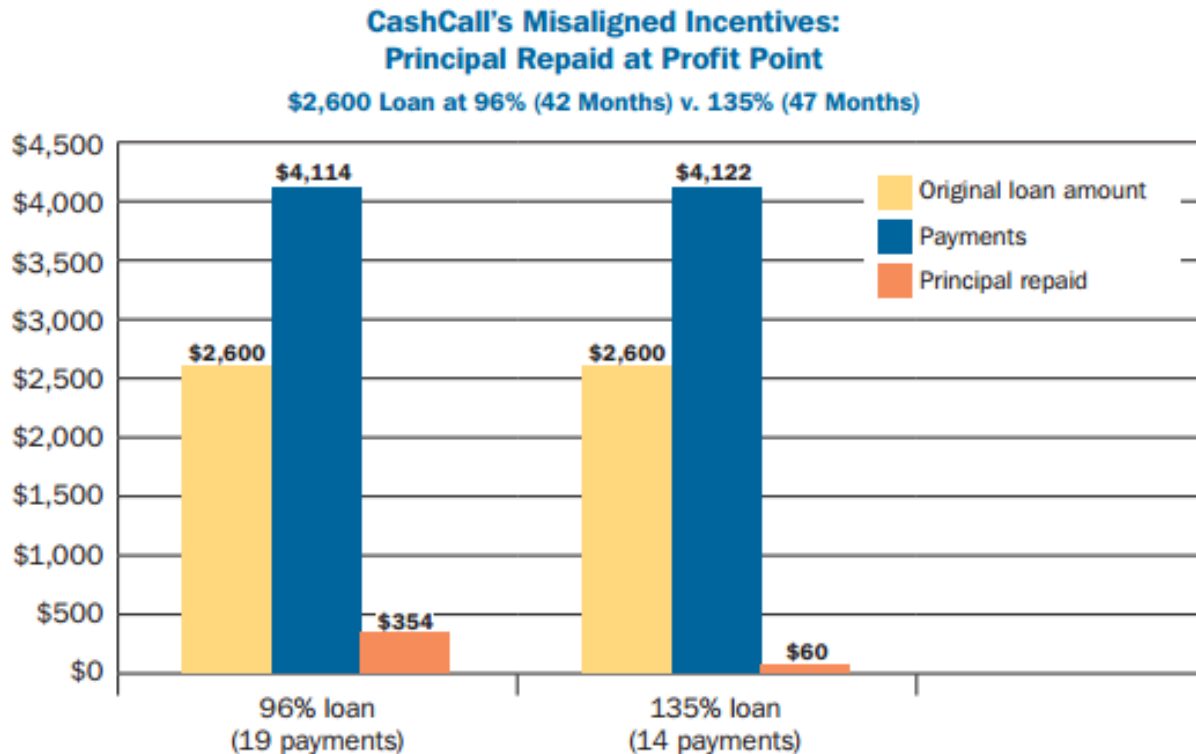
¹¹¹ CRL, NCLC, et al., *Comments on CFPB Payday Rule* at § 2.5 (pp. 31-34) and § 10.1-10.3 (pp. 165-172); see also *CFPB Proposed Rule on Payday, Vehicle Title, and Certain High-Cost Installment Loans, discussion of longer-term high-cost loans*, 81 Fed. Reg. 47864, 47885-92 (July 11, 2016).

¹¹² *Id.*

¹¹³ See generally, NCLC, *Misaligned Incentives: Why High-Rate Installment Lenders Want Borrowers Who Will Default* (July 2016), <https://www.nclc.org/issues/misaligned-incentives.html>.

¹¹⁴ This chart is drawn from NCLC, *Misaligned Incentives, supra*, at 15.

rent-a-bank schemes¹¹⁵ – 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.¹¹⁶ Even with these high refinance rates, defaults on high-cost loans are extraordinarily high. Elevate, one high-cost lender using FDIC-supervised banks to make loans averaging 122% APR,¹¹⁷ has net charge-offs as a percentage of revenues of 50%.¹¹⁸ The CFPB found

¹¹⁵ *CashCall v. Morrissey*, 2014 WL 2404300 (W.Va. May 30, 2014); *Consumer Financial Protection Bureau v. CashCall, Inc.*, 2016 WL 4820635 (C.D. Cal. Aug. 31, 2016).

¹¹⁶ 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.

¹¹⁷ Elevate Form 10K, 2019, at 75.

that Elevate’s charge-off rate as a percentage of outstanding loan volume in 2014 was over 50%.¹¹⁹ Elevate has stated that it does not intend to drive down its charge-off rates.¹²⁰ Essentially, Elevate’s is a high-rate, high-default model that profits while making unaffordable loans.¹²¹

Car title lenders, which are also expanding into rent-a-bank operations, inflict a special kind of pain. Lenders take title to unencumbered cars borrowers previously owned outright. An astounding one in five borrowers have their car repossessed.¹²² The consequences of losing one’s vehicle are dire – both the loss of a valuable asset and the serious disruption of a borrower’s ability to get to work, earn income, and manage their lives.¹²³ 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.¹²⁴

Thus, high-cost lending is not just credit at a higher price. 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.¹²⁵

Consumer narratives of dozens of borrowers of loans made by lenders using rent-a-bank schemes, included in the Appendix to these comments, help to convey the harm these unaffordable loans inflict.

¹¹⁸ *Id.*; CFPB Supplemental Findings on payday, payday installment, and vehicle title loans (June 2, 2016) at 9 (the CFPB found that 55% of online loan sequences ended in default).

¹¹⁹ As calculated by the CFPB, *CFPB Proposed Payday Rule*, 81 Fed Reg. 47886, n.246.

¹²⁰ Elevate Form 10K, 2019, at 81.

¹²¹ For a case study of Elevate, including its “soaring rhetoric,” its sky-high interest rates, and the structure of its rent-a-bank schemes, see Christopher K. Odinet, *Predatory Fintech and the Politics of Banking* 19, 20, 22-28 (Iowa Law Review (2021 Forthcoming)) (Aug. 2020), https://papers.ssrn.com/sol3/Papers.cfm?abstract_id=3677283.

¹²² 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>.

¹²³ See CFPB Payday Rule, 82 Fed. Reg. at 54573, 93.

¹²⁴ *Id.*, n. 592 (internal citations omitted).

¹²⁵ See 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.”).

C. Predatory lending causes particular harm to communities of color.

The undersigned groups deeply object to the attempts that banking regulators, fintech lenders, or others make to justify bank/nonbank partnerships, or preemption of state interest limits more broadly, with claims that these are a path to a more inclusive market.¹²⁶ Rather than help communities of color, which several of the undersigned groups represent, high-cost lending disproportionately harms communities of color, exploiting and fueling 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 racially exclusionary housing policies, experience higher rates of poverty, lower wages, and higher cost burdens to pay for basic living expenses. These disparities have been laid bare of late, as communities of color, and especially Black communities, are experiencing far greater human and economic loss during the COVID-19 pandemic.

High-cost lenders peddling unaffordable loans cause particular harm to these communities,¹²⁷ often in the same geographic areas that experienced redlining. Storefront high-cost lenders have long targeted borrowers of color, more likely to locate stores even in more affluent communities of color than in less affluent white communities.¹²⁸ Online high-cost lenders may focus more on subprime credit score than geography, although we understand that some lenders use zip codes to target online marketing. But historical discrimination against communities of color is also reflected in credit scores.¹²⁹ Lenders that focus on subprime borrowers will inevitably disproportionately target borrowers of color. The

¹²⁶ See, e.g., Remarks of Acting Comptroller of the Currency Brian Brooks to the Online Lending Policy Institute, June 11, 2020, https://www.youtube.com/watch?v=Ae_SoZeRbxM, at 33:00 (stating “I want to make poor people rich” while addressing financial inclusion, in a conversation where he also states that his personal belief is that “price controls generally create shortages” and that “if we believe in market pricing for hamburgers, for jeans, for automobiles, I’m not sure why we don’t believe in market rates for money, it’s another commodity, and we want it to flow freely”).

¹²⁷ See CFPB Payday Rule, 82 Fed. Reg. at 54556-57 (African Americans are payday borrowers at three times the rate, and Hispanics at twice the rate, of non-Hispanic whites (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.*)

¹²⁸ 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>.

¹²⁹ 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.

algorithms and big data that “fintech” lenders use may also result in disparate impacts on these communities.¹³⁰

Moreover, 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.¹³¹ But high-cost loans, particularly with their high association with lost bank accounts,¹³² 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.¹³³

D. The proposal aims to bless and would cause the proliferation of rent-a-bank schemes involving high-cost loans.

This proposal would clearly cause the proliferation of today’s rent-a-bank schemes whereby online lenders otherwise subject to state law rent bank charters to evade those laws. Sanitized as a “bank partnership model,” these arrangements are used by some companies that charge rates that, while below 36%, are still high and may for many loans exceed what states allow, especially for larger loans. Or they are used by predatory lenders charging extraordinary rates, as described in this section.

¹³⁰ 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/>; see also Christopher K. Odinet, *Predatory Fintech and the Politics of Banking* 19-20 (Iowa Law Review (2021 Forthcoming) (Aug. 2020), https://papers.ssrn.com/sol3/Papers.cfm?abstract_id=3677283).

¹³¹ See Remarks of Acting Comptroller of the Currency Brian Brooks to the Online Lending Policy Institute, June 11, 2020, *supra*.

¹³² CFPB found that about half of borrowers with online payday or other high-cost online 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).

¹³³ For more on the undersigned groups’ concerns about the harm predatory consumer loans cause communities of color, and the efforts we have long made to stop that harm, see the sampling of references cited here: <http://stophthetrap.org/wp-content/uploads/2014/11/PayDay-loans.7-2016.pdf>; http://stophthetrap.org/wp-content/uploads/2015/08/lcchr_resolution_payday_deposit_advance_lending_12dec2015.pdf; http://stophthetrap.org/wp-content/uploads/2015/08/naacp_letter_obama_payday_15december2014.pdf; <https://www.unidosus.org/about-us/media/press/releases/NCLR-CFPB-Payday-Lending-Rule-Release>; <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/>; <http://stophthetrap.org/blog/cfpb-payday-lending-rule-will-disrupt-abusive-lending-protect-families-financial-predators/>.

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.¹³⁴ 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.

Predatory lenders’ desire for a rule like this could not be more clear. They have pushed for years for federal authorization of the “bank partnership model.”¹³⁵ High-cost lenders argued that the agency’s proposal to overturn *Madden*, though illegal and extremely harmful in its own right, did not give them the clarity they desired.¹³⁶

Last year, as California was passing a rate cap of approximately 36% on loans of \$2,500-\$10,000, 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.¹³⁷ The lenders were met with strong resistance,¹³⁸ and to our knowledge they have not moved forward.¹³⁹ But this rule would

¹³⁴ 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).

¹³⁵ 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.consumerfinance.com/2018/11/15/fdic-seeks-comments-on-small-dollar-lending/> (emphasis added).

¹³⁶ 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>.

¹³⁷ 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).

¹³⁸ 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

presumably give them the confidence they seek to do so, in California and in additional states. As noted earlier, Elevate praised this proposal for its “clarity.”¹⁴⁰

The proposal cites two cases involving CashCall, a high-cost installment lender, as cases where courts have applied “fact-intensive inquiries.”¹⁴¹ These courts’ inquiries found that CashCall – and not the bank or tribal entity – was the true lender.¹⁴² Applying the proposed rule, however, those courts would have reached the opposite conclusion, blessing bank enablement of a program like CashCall’s based on a high-rate, high-default model of unaffordable lending. In one case, CashCall was using a bank to justify charging 59% APR to 95% APR on loans of \$1,000 to \$5,000; nearly three-quarters of the borrowers eventually defaulted, and CashCall was also held liable for engaging in abusive debt collection practices.¹⁴³ In another state, litigation around CashCall revealed that the lender deliberately sought out borrowers who would eventually default, because they were more profitable than borrowers who had the ability to repay their loans early. The lender raised its interest rates knowing that defaults would increase: “When its interest rates were 59%, CashCall had a 21% charge-off rate, but charge-offs doubled to 44% with the 96% loans.”¹⁴⁴

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 finalized – a reality the proposal fails to meaningfully address. OCC banks are helping predatory small business lenders and high-cost installment loans offered by payday lenders, as discussed in Section V.G.1 below. 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 if this proposal is finalized.

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 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>.

¹³⁹ *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).

¹⁴⁰ 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/>.

¹⁴¹ 85 Fed. Reg. at 44224.

¹⁴² *CashCall v. Morrissey*, 2014 WL 2404300 (W.Va. May 30, 2014); *Consumer Financial Protection Bureau v. CashCall, Inc.*, 2016 WL 4820635 (C.D. Cal. Aug. 31, 2016).

¹⁴³ *Morrissey*, 2014 WL 2404300 at *1.

¹⁴⁴ *See* Lauren Saunders et al., NCLC, *Misaligned Incentives: Why High-Rate Installment Lenders Want Borrowers Who Will Default* at 14 & n.33 (July 2016), https://www.nclc.org/images/pdf/high_cost_small_loans/payday_loans/report-misaligned-incentives.pdf.

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.¹⁴⁵

OppLoans offers \$500 to \$4,000 installment loans through FinWise Bank at 160% APR in 24 states that do not allow that rate.¹⁴⁶ FinWise sells the receivables back to OppLoans or a related entity. OppLoans makes loans directly through a state license in states that allow high rates.

Elevate Credit uses FinWise Bank to originate **Rise** installment loans at 99% to 149% APR in 18 states that do not allow those rates and in other states through a state license.¹⁴⁷ FinWise sells a 96% interest in the loans to an entity controlled by Elevate for which Elevate is the primary beneficiary.¹⁴⁸

Elevate also offers a line of credit called **Elastic** that carries an effective APR of up to 109% in 14 states that do not allow that rate on a line of credit.¹⁴⁹ Elevate uses Republic Bank & Trust of Kentucky to originate the Elastic product. Republic sells a 90% interest in the loans to an entity controlled by Elevate for which Elevate is the primary beneficiary.¹⁵⁰

Republic is also helping **Enova's NetCredit** brand to make \$1,000 to \$10,000 installment loans with APRs up to 99.9% in 23 states that do not allow that rate.¹⁵¹ Enova or a related entity likely purchases the loans or receivables shortly after origination.

Capital Community Bank (CCBank) (of Utah) is helping car title lender **LoanMart** evade state law in a number of states, including California.¹⁵² LoanMart's loans range from 60-222% interest; a typical loan is \$2,500, 18-month loan at 90%, totaling \$2,136 in interest.¹⁵³

¹⁴⁵ 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).

¹⁴⁶ See <https://www.opploans.com/rates-and-terms> (last visited July 1, 2020). Earlier this year, OppLoans was also making loans through FinWise in the District of Columbia; DC is no longer listed on OppLoans's website as of June 30, 2020.

¹⁴⁷ See <https://www.risecredit.com/> (bottom of page) (last visited July 1, 2020).

¹⁴⁸ Elevate Form 10K, 2019, at 87.

¹⁴⁹ *Id.* at 16, 79; NCLC, *High-Cost Rent-a-Bank Loan Watch List*, *supra*.

¹⁵⁰ Elevate Form 10K, 2019, at 77.

¹⁵¹ See <https://www.netcredit.com/> (bottom of page); <https://www.netcredit.com/rates-and-terms> (last visited June 30, 2020).

¹⁵² 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,

In addition, **Transportation Alliance Bank, dba TAB Bank** (Utah)¹⁵⁴ 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**,¹⁵⁵ 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.¹⁵⁶ 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.¹⁵⁷ It claims to “fill[] the void left by traditional financial institutions” while it “makes payday lenders and other sources of short-term financing obsolete.”¹⁵⁸ 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.¹⁵⁹ 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.

Oklahoma, Ohio, Oregon, South Dakota, Tennessee, Texas, and Washington residents are made by Capital Community Bank . . .”).

¹⁵³ See <https://www.800loanmart.com> (accessed January 2020).

¹⁵⁴ 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.”).

¹⁵⁵ See <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).

¹⁵⁶ See <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.

¹⁵⁷ See <https://www.applieddatafinance.com> (last visited June 30, 2020).

¹⁵⁸ *Id.*

¹⁵⁹ Appendix, Personify Financial examples, last bullet point.

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;
- confusion about why “90 days--same as cash” deferred interest plans end up so expensive and long-term;
- distress caused by wage garnishment; and
- stress caused by relentless collection calls to a borrower’s home or workplace.¹⁶⁰

The Appendix provides narratives from the CFPB complaints database describing borrowers’ experiences with high-cost installment loans by lenders currently engaging in rent-a-bank schemes. These lenders include CURO related to its SpeedyCash product. As noted above, CURO is scheming with OCC-supervised Stride Bank for its relatively new Verge product and has also stated intent to use rent-a-bank for its SpeedyCash brand. The narratives also include borrowers of Elevate, OppLoans, Enova (NetCredit brand), Personify Financial, EasyPay, and LoanMart, all facilitated by FDIC-supervised banks. While many of these complaints so far do not involve rent-a-bank loans themselves, they are illustrative of the type of loans these lenders make and will bring to states that do not allow high-cost loans – and that new rent-a-bank lenders may emulate.

E. The proposal fails to consider that it would encourage the return of rent-a-bank schemes involving short-term payday loans.

Some of the lenders that offer or are threatening to offer high-cost rent-a-bank installment loans also offer short-term payday loans. Enova’s CashNetUSA offers both balloon-payment payday loans and long-term payday loans. CURO – which is laundering high-cost installment loans through OCC-regulated Stride Bank – also offers short-term payday loans through its SpeedyCash brand.

Currently, to our knowledge, rent-a-bank schemes are not being used to offer short-term loans, as they were 20 years ago before being shut down by the OCC, FDIC, and state Attorneys General and banking regulators. This is little consolation, however, as the OCC’s proposed rule will allow short-term rent-a-bank payday loans to return, and the OCC has expressed new openness to balloon-payment loans.¹⁶¹

The arrangements between payday lenders and banks 20 years ago, and the arguments they made, were not that different from today’s rent-a-bank lending. Under the proposed rule, payday loan rent-a-bank schemes could be just as simple, or even simpler, as the payday lender would only need to put the

¹⁶⁰ 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.

¹⁶¹ OCC Bulletin 2020-25, Small-Dollar Lending: Joint Statement Encouraging Responsible Small-Dollar Lending in Response to COVID-19 (Mar. 26. 2020) (noting that “appropriately structured single payment loans” may be appropriate).

bank's name on the loan. If the proposed rule is finalized, there is little other than the self-restraint of banks that would prevent short-term rent-a-bank lending from returning.

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:

[S]ome national banks have entered into arrangements with third parties in which the national bank funds payday loans originated through the third party. In these arrangements, national banks often rely on the third party to provide services that the bank would normally provide itself. These arrangements may also involve the sale to the third party of the loans or the servicing rights to the loans.¹⁶²

In the older payday loan rent-a-bank schemes as in the newer ones, lenders argued that they were only the agent, service provider, or assignee of the bank.¹⁶³ 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.¹⁶⁴

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.¹⁶⁵

¹⁶² OCC Advisory Letter No. AL 2000-10 (Nov. 27, 2000), <https://occ.gov/news-issuances/advisoryletters/2000/advisory-letter-2000-10.pdf>.

¹⁶³ *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).

¹⁶⁴ *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).

¹⁶⁵ 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/pdrentabankreport.pdf>.

The bank was only nominally engaged, in ways the OCC proposal would allow – 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.¹⁶⁶ The bank saw significant profit while sharing none of the risk for the loans made.¹⁶⁷

There is nothing in the OCC’s proposed rule that would prevent these short-term payday loan rent-a-bank schemes. The OCC’s assurances that its oversight will prevent predatory lending are belied by the agencies’ actions. In addition to the OCC’s direct support for and lack of action against predatory lenders discussed in Section V.G.1, other recent actions by the OCC raise alarm bells about the risk of rent-a-bank payday loans. The OCC repealed the deposit advance guidance that required banks offering bank payday loans to ensure that the borrower had the ability to repay the loans without reborrowing.¹⁶⁸ The OCC also issued principles for small dollar loans, stating that “Banks can offer such loans through loan structures that may include ... appropriately structured single payment loans.”¹⁶⁹ The OCC even repealed previous small dollar guidance that stated that the OCC discourages “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).” The OCC has no current statement even expressing “disapproval” of these arrangements.

The OCC has failed to consider the risk that the rent-a-bank arrangements of the past will return, or the reputation risk to banks that eventually drove the bank regulators to shut them down. For discussion of the harm consumers experience at the hands of short-term payday loans, see Sections V.B and V.C above.

F. The proposal fails to consider the likely expansion of predatory auto title lending through rent-a-bank schemes.

As noted above, one of the markets where rent-a-bank lending has started to happen is the auto title loan market. Yet the proposed rule fails to consider the impact of legitimizing a rent-a-bank model for this market plagued not only by unaffordable high-cost loans but also by the risk of losing the vehicle.

LoanMart, which lends under a state license in states that permit its high rates but uses FDIC-supervised **CCBank (of Utah)** to evade state law in a number of states. These state include California where, as noted in Section II.C above, the Department of Business Oversight has launched a formal investigation into whether Wheels Financial Group, LLC (which does business as LoanMart), is evading California’s

¹⁶⁶ *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.

¹⁶⁷ *Id.*

¹⁶⁸ See News Release 2017-118, *Acting Comptroller of the Currency Rescinds Deposit Advance Product Guidance*, October 5, 2017, <https://www.occ.treas.gov/news-issuances/news-releases/2017/nr-occ-2017-118.html>.

¹⁶⁹ OCC Bulletin 2020-25, *Small-Dollar Lending: Joint Statement Encouraging Responsible Small-Dollar Lending in Response to COVID-19* (Mar. 26. 2020).

newly-enacted and hard-fought interest rate caps.¹⁷⁰ LoanMart’s website directs borrowers from a number of states to a page for “ChoiceCa\$h serviced by LoanMart,” where the fine print indicates the loans are made CCBank.¹⁷¹ That webpage provides “A loan example: a 3-year \$3,000 loan with an APR of 170% has 36 scheduled monthly payments of \$428.64,” for a total cost of \$15,431.04.¹⁷² Most of the other states where LoanMart uses a bank to originate the loans – for example, Florida and Kentucky – are also ones that impose interest rate caps far lower than 170% APR on auto title loans or have other restrictions on auto title loans.¹⁷³ California was a state where LoanMart made loans directly until soon after its rate cap was imposed; now, LoanMart uses the bank to lend in California.

The dangers of allowing auto title lenders to charge otherwise usurious rates on loans originated by banks are especially great given the serious repercussions of losing one’s car, as described in Section V.B above.

G. 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. As discussed in Sections II.C and V.B above, 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 proposal, have not prevented predatory mortgage lending, bank payday loans, or rent-a-bank schemes by OCC-supervised institutions.

1. The OCC is not cracking down on predatory rent-a-bank schemes in small business and consumer lending.

Even now, the OCC is actively supporting a predatory rent-a-bank scheme in the small business arena. In addition, it has not stopped **OCC-supervised Axos Bank** from its engagement in rent-a-bank schemes involving predatory small business loans despite truly shocking fact patterns. And it also has not stopped **OCC-supervised Stride Bank** from engaging in a rent-a-bank scheme enabling predatory consumer loans. Clearly the OCC’s supervision of these banks is not ensuring sound underwriting or stopping the banks from letting themselves be used by predatory lenders— even when the bank is facing extensive litigation.

¹⁷⁰ 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, <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/>.

¹⁷¹ See <https://www.800loanmart.com/choicecash> (last visited September 3, 2020).

¹⁷² *Id.* (the website also indicates that the interest rate and monthly payment will drop each month if certain conditions are met).

¹⁷³ See generally National Consumer Law Center, *Consumer Credit Regulation*, Chapter 12 (2d ed. 2015), updated at www.nclc.org/library.

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*.¹⁷⁴ 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.¹⁷⁵

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.¹⁷⁶ 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:

- 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.¹⁷⁷ 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

¹⁷⁴ 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.consumerfinance.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>.

¹⁷⁵ See <https://www.wbl.com/>.

¹⁷⁶ Zeke Faux, *Wall Street Finds New Subprime With 125% Business Loans*, Bloomberg (May 22, 2014), <https://bloom.bg/2WLWRYG>.

¹⁷⁷ 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>.

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.¹⁷⁸
- 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.¹⁷⁹
- 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.¹⁸⁰ 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.”¹⁸¹
- 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.¹⁸² Adoni was

¹⁷⁸ 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.

¹⁷⁹ 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.

¹⁸⁰ 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.

¹⁸¹ *Id.* at 21.

¹⁸² 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>.

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.”¹⁸³

- 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.¹⁸⁴ 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%.¹⁸⁵ 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 Bofl [Axos Bank] solely for the purpose as a ‘rent a bank.’”

For nearly a year, we have been raising concerns about the OCC’s support for World Business Lenders.¹⁸⁶ 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 this summer, small businesses continue to sue trying to escape the devastating rent-a-bank loans that Axos is enabling.

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

¹⁸³ *Id.* at 5.

¹⁸⁴ *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>.

¹⁸⁵ *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>.

¹⁸⁶ 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>.

\$132,000 loan at about 76% APR despite New Jersey’s 30% criminal usury cap.¹⁸⁷ 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.¹⁸⁸ The promissory note was given to Axos Bank.¹⁸⁹

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 that is why the OCC has no authority to preempt state usury laws that prevent nonbanks from engaging in predatory lending.

The OCC also has not stopped OCC-supervised Stride Bank (Oklahoma) from enabling predatory lender **CURO**’s newest product, **Verge Credit**. Verge offers loans of \$500-\$5,000, with terms 6-60 months, at APRs of 37% to 179%. As noted above, its “example” loan is a \$2,000, 24-month loan at 94% APR, resulting in total interest of \$2,496. Verge promotes 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.**”¹⁹⁰ 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.

¹⁸⁷ 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>.

¹⁸⁸ 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>.

¹⁸⁹ See *id.*, Exhibit 1.

¹⁹⁰ See Verge Credit website, <https://www.vergecredit.com> (last visited 9/3/20).

(emphasis added).

**SPEEDY CASH (Unsecured)
INSTALLMENT LOAN PROMISSORY NOTE**

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

2. The proposal encourages lending over which the OCC will not have adequate oversight.

This proposal encourages lending programs over which the OCC will have less oversight than if banks were to lend directly, outside of these “partnerships.” The proposal asserts that the OCC is “the prudential regulator of the bank’s lending activities” where banks are considered the lender under this rule. 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 proposal, 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.”¹⁹¹ 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 proposal does not explain when the OCC would view the nonbank as acting on the bank’s behalf. The 2020-10 FAQ has only one question addressing lending (Question 19), which likewise addresses generally the bank’s management of risk with the third party.¹⁹²

¹⁹¹ *Id.*

¹⁹² See, e.g., 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).

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 proposed 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.

3. Existing guidances, including discussion provided in the proposed rule, are insufficient to prevent predatory rent-a-bank schemes.

The proposal includes a number of overtures claiming that OCC supervision of these partnerships ensure they are safe, sound, and fair to consumers. In addition to the third-party guidance just discussed, the proposal explains that the agency's oversight "includes ensuring . . . prudent underwriting standards" on which the proposal elaborates¹⁹³ and that 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 proposal describes its current "routine supervision of a bank's lending relationships with third parties" as including evaluating underwriting criteria. The OCC also states 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, such as whether reduction of debt will be difficult or debt traps are likely to result. And the OCC states – with no citation to any actual guidance – that it will ask whether "returns are reasonably related to the bank's risks and costs of the loans."¹⁹⁴ On the last issue, the proposal provides an example: "e.g., the total credit costs on short term loans, such as 12- to 36- month loans, are not substantial in relation to, or do not exceed, the principal amount of the loan."¹⁹⁵

None of these guidances or statements are replacements for clear usury limits. And all are cold comfort 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 in Section V.G.1 above, as well as (2) the high-cost predatory loans the proposal will invite, as evidenced by the praise the OCC proposal is receiving from clearly predatory lenders.

With respect to cost in particular, as discussed in Section V.G.1 above, the OCC is currently permitting loans in rent-a-bank schemes where the payments far exceed principal. A Verge loan enabled by OCC-supervised Stride Bank of \$2,000 with a 24-month term at 94% APR (a "borrowing example" from Verge's website) incurs interest of \$2,496, again exceeding principal.¹⁹⁶ And its rates go as high as 179%—nearly double the rate in the example.¹⁹⁷

¹⁹³ *Id.*

¹⁹⁴ 85 Fed. Reg. at 44227.

¹⁹⁵ 85 Fed. Reg. at 44227.

¹⁹⁶ See Verge Credit website, <https://www.vergecredit.com/rates-and-terms/> (last visited 9/3/20).

¹⁹⁷ See Verge Credit website, <https://www.vergecredit.com> (last visited 9/3/20).

Nor do the enforcement actions the OCC cites provide any comfort.¹⁹⁸ They all address disclosure-related violations. None address substantive abuses at the heart of predatory lending, like the high, unaffordable costs of high-rate loans, failure to meaningfully determine a borrower's ability to repay considering both income and obligations, or reliance on collateral (or a borrower's incoming paycheck) as a substitute for true underwriting. And even substantive enforcement actions, which many lenders consider a cost of doing business, would not compensate for usury limits that categorically prevent most predatory lending from the start.

The high-cost loans the proposal would invite also dramatically increase the risks of fair lending violations, a risk described further in Section V.C above.

VI. The Proposal Is Inconsistent with the Agency's Obligations under the Community Reinvestment Act.

The objective of the Community Reinvestment Act, which the OCC implements as to national banks, is to ensure that financial institutions meet the banking needs of the communities they are chartered to serve, including low- and moderate-income neighborhoods and individuals.¹⁹⁹ This legal obligation is considered a *quid pro quo* for the valuable public benefits financial institutions receive, including federal deposit insurance and access to favorably priced borrowing through the Federal Reserve's discount window.²⁰⁰

In contradiction to this obligation, the OCC now puts forth a proposal that would encourage banks to facilitate predatory lending. CRA requires that banks serve communities' credit needs.²⁰¹ But the data show that high-cost, unaffordable loans to financial distressed consumers do the opposite, leading to high-cost cycles of indebtedness that not only leave borrowers' needs unmet but leave them affirmatively worse off than before the lending began.

Through rent-a-bank schemes, banks rent out their privileges to entities that spread predatory lending to other communities far and wide. Indeed, through these schemes, banks are involved in scurrilous online lending that they would not do through their own channels or in their own communities. From what we can tell, FinWise Bank, Republic Bank & Trust, and CCBank are not offering the loans that we have described in these comments through their limited number of branches or on their own websites. Yet through rent-a-bank lending, banks can profit through the operations of third parties that do not have CRA responsibilities. The proposed rule would only exacerbate this irresponsible lending that is at the core of what the CRA is designed to prevent.

¹⁹⁸ 85 Fed. Reg. at 44226.

¹⁹⁹ 12 U.S.C. 2901 *et seq.*

²⁰⁰ Federal Reserve Board Chairman Ben S. Bernanke, *The Community Reinvestment Act: Its Evolution and New Challenges*, Speech at the Community Affairs Research Conference, Washington, D.C. (March 30, 2007), <http://www.federalreserve.gov/newsevents/speech/Bernanke20070330a.htm#f2>.

²⁰¹ 12 U.S.C. 2901.

VII. The OCC Fails to Consider the Risks the Proposal Poses to the Safety and Soundness of National Banks, Despite Having Long Acknowledged Those Risks.

The OCC has historically taken very seriously the risks that rent-a-bank schemes pose for national banks. This proposal and other recent agency actions will increase the risks to national banks, yet the proposal does not even so much as mention risks to 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 OTS) issued guidance on payday lending, flagging a number of risks to banks from these arrangements with payday lenders.²⁰² These included credit risk, should the nonbank not meet its terms of the contract;²⁰³ transaction risk, should the nonbank misrepresent information;²⁰⁴ and reputation risk associated with facilitating loans with terms that a nonbank could not make directly.²⁰⁵ 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.”²⁰⁶ 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.²⁰⁷

In 2002, the agency strongly condemned rent-a-bank schemes. As noted earlier, Comptroller John D. Hawke called the schemes “an abuse of the national charter,”²⁰⁸ 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.”²⁰⁹ 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

²⁰² OCC Advisory Letter No. AL 2000-10 (Nov. 27, 2000), <https://occ.gov/news-issuances/advisory-letters/2000/advisory-letter-2000-10.pdf>.

²⁰³ *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 . . .”).

²⁰⁴ *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.”)

²⁰⁵ *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.”)

²⁰⁶ *Id.*

²⁰⁷ *Id.* (citing OCC AL 2000-7 on Abusive Lending Practices). *See also* OCC AL 2002-3 on Predatory and Abusive Lending Practices.

²⁰⁸ 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>.

²⁰⁹ <https://www.occ.treas.gov/news-issuances/news-releases/2002/nr-occ-2002-10.html>.

lender, not the bank.”²¹⁰

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.”²¹¹ 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.”²¹²

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.²¹³ 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.”²¹⁴

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, as noted in Section V above, 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,²¹⁵ was met with sweeping public condemnation from virtually every sphere – the military community,²¹⁶ community organizations,²¹⁷ civil

²¹⁰ 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>.

²¹¹ *Id.*

²¹² 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>.

²¹³ 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

²¹⁴ <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.

²¹⁵ The OCC rescinded that guidance in 2017.

²¹⁶ *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>.

²¹⁷ 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->

rights leaders,²¹⁸ faith leaders,²¹⁹ socially responsible investors,²²⁰ state legislators,²²¹ and members of Congress.²²² Moreover, the rise of online and social media make it faster and easier to garner outrage at a bank that is facilitating predatory lending. Banks that sell their names for use in rent-a-bank schemes are particularly at risk of spiraling criticism, as they have little involvement in the underlying loan programs and may be caught off-guard by problems that develop. The proposed rule discusses none of these harms and requires nothing on the bank's end to ensure that it has meaningful involvement in and oversight over the third-party lender.

[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).

²¹⁸ 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>.

²¹⁹ 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>

²²⁰ 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>).

²²¹ 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.").

²²² 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>.

While the OCC proposal 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.

VIII. The OCC Fails to Consider the Proposal’s Impact on Market Participants that Comply with State Law.

The OCC also has failed to analyze the proposed rule’s impact on other market participants. Such analysis might reveal anti-competitive impacts on other nonbank lenders – those lenders that obtain state licenses and comply with state interest rate limits. Such lenders might face greater difficulty in raising capital if forced to compete for investors with a growing number of nonbank lenders who can offer outsized returns by exceeding state interest rate limits. The OCC has not analyzed the extent to which eliminating rent-a-bank lending would result in a more level playing field on which state-law compliant lenders could compete for investors to fund their loans, thereby increasing access to credit at non-usurious rates.

IX. Conclusion

For all of the reasons discussed above, the undersigned groups urge the OCC to withdraw its proposal. The OCC lacks the authority to issue the proposal, the proposal is unreasoned, and it will likely open the floodgates to predatory lending and result in severe harm to individuals and communities across the country. Thank you for your consideration.

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(See Appendix on following page)

X. Appendix

Below are the CFPB complaints database describing borrowers' experiences with high-cost installment loans by lenders currently engaging in rent-a-bank schemes. These lenders include CURO related to its SpeedyCash product. As noted above, CURO is scheming with OCC-supervised Stride Bank for its relatively new Verge product and has also stated intent to use rent-a-bank for its SpeedyCash brand. The narratives also include borrowers of Elevate, OppLoans, Enova (NetCredit brand), Personify Financial, EasyPay, and LoanMart, all facilitated by FDIC-supervised banks. While many of these complaints so far do not involve rent-a-bank loans themselves, they are illustrative of the type of loans these lenders make that they will bring to states that do not allow high-cost loans, and that new rent-a-bank lenders may emulate.

Note that complaints submitted in the last few months, while their individual narratives may not be included below, convey the desperation borrowers feel from the economic impact of COVID-19. The complaints illustrate how unaffordable high-cost loans only exacerbate financial distress and why now is an especially inappropriate time to gut state usury limits.²²³

CURO (SpeedyCash brand)

- 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.²²⁴
- I have paid \$1600.00 on the account and all payments have gone towards the interest and late fees. I have given seven payments at \$220.00 each month since the loan and I owe at this time \$2800.00 at this rate the loan will cost more than I borrowed. I need help because this is a car title loan and I can't afford losing my car over this. I have called the corporate office and . . . they all say the same thing (–) there is nothing that can be done except keep making the payments . . . It's like I borrowed the monies from [someone] in a street alley.²²⁵
- I borrowed \$750.00First month repayment . . . \$240.00 Remaining balance over \$1000.00. Next installment \$240.00 . . . remaining balance over \$1000.00. Payments increase as

²²³ See, e.g., narratives for complaints #3601712 (4/10/2020, SpeedyCash); #3681408 (6/3/2020, Enova); #3659928 (5/20/2020, LoanMart); #3695753 (6/12/2020, SpeedyCash).

²²⁴ #2657445 (Missouri borrower)

²²⁵ #2792493 (California borrower)

does amounts owed. Decline in principal is offset by increase in fees or 'interest.' . . . Never ending cycle.²²⁶

- [I] borrowed \$1300.00 from speedy cash and the first payment was ok (\$77.00) and after that they were \$140.00 every other week and [I] am now unable to make these ridiculous payments [because] my hours have been cut at [work]. I notified them . . . I am in default and [I] have sent emails . . . [T]hey say to contact them if [you can't] make a payment and they will work with you. All they do is extend it 4-5 days out and [that don't] help either! I am desperate[, I] have called about filing bankruptcy and [I] may have to and [I don't know what else to do].²²⁷
- 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 ashamed[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.²²⁸
- I currently have an installment loan in the amount of \$2600.00 from Speedy Cash . . . At the same time, I also have [x] \$300.00 payday loans from [x] different storefronts in my neighborhood, including Speedy Cash. So basically, I have both a \$300.00 payday loan from Speedy Cash and a \$2600.00 installment loan. Is that legal? I am drowning in debt and I can't handle it anymore. I need some relief. This is very stressful and expensive for me, and I don't know what to do . . . I've been paying about \$140.00 every two weeks on the Speedy Cash installment loan, and I've already paid \$2200.00 . . . but my total balance is still \$2600.00! How is this even possible? Are all my payments going toward interest only? I can't keep paying on all these loans. I need to prioritize my rent (\$1100.00), car payment (\$320.00), insurance (\$180.00) and my other basic needs like food and utilities. After taxes, I only bring home about \$1800.00 a month. So this is really hurting me and I've reached my breaking point . . . I don't want to default on the loan, but at this point I'm not seeing another alternative. I recently received XXXX utility disconnection notices from my gas, water and light companies[.] To make matters worse, I'm also facing being laid off from work in the next few months. I need help.²²⁹
- I could not get Speedy Cash to stop taking payments out of by bank account using my debit card. I called them, I wrote them. I tried to set up payments. I told my bank to not authorize any more payments. Didn't help. Finally I had to shut down all my accounts at my bank and go to another bank. I could not believe it when I when, at my new bank, Speedy Cash withdrew \$100.00, the next day \$60.00. I have no idea what that amount is for. I'm disputing the charges Can you help me?²³⁰

²²⁶ #2772146 (Utah borrower)

²²⁷ #3046440 (Tennessee borrower)

²²⁸ #2718087 (Mississippi borrower)

²²⁹ #1377341 (California borrower)

²³⁰ #2158561 (Kansas borrower)

Elevate

- 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.²³¹
- [T]hey are charging me over \$6000.00 interest on a simple loan for only \$2600.00 i did not foresee such an impact on my monthly income for so long ... that \$500.00 is supposed to be the monies I have left over after bills and survive/live on after all my other bills. They have access to my bank account and automatically take it out I do not know how to stop this madness. How can they charge me over \$8000.00 for a \$2600.00 loan? Is this legal?²³²
- My [] mother was solicited by a predatory lender, RISE for a personal loan. She agreed to \$1300.00 loan but was told the California law stated the minimum loan amount was \$2600.00. Her interest rate is 125 %, how is this legal? She is on a fixed income and RISE has set up an auto pay with her checking account with a monthly payment of \$470.00 This is elder abuse! Please shut this company down.²³³
- To date I have paid well over \$6900.00, almost three times the principle. I still owe close to \$3000.00. Prior to accepting the loan I did read the " fine print " but it was not easy to understand. It was not explicit[ly] stated that the monthly payments would be going to the interest and not to paying down the principle, making the loan impossible to pay off quickly. I called . . . and asked specifically for an amnesty on the remaining balance because I am having a hard time paying on this exorbitantly high interest loan for over 12 months. I also explained to her that to date I had paid almost three times the principle in the end, the total paid before it is satisfied will be over \$9500.00! Paying \$7500.00 in interest for a \$2500.00 loan is outrageous and should be illegal.²³⁴
- I took a loan with rise credit . . . and I was unable to make timely payments. I expected to pay it once I received my tax return. However, it went to collections and then a lawyer and they added

²³¹ #1487339 (California borrower)

²³² #1361463 (California borrower)

²³³ #1584177 (California borrower)

²³⁴ #1962588 (California borrower)

so many penalties and fees. Now I owe XXXX for a XXXX loan. Now, they are garnishing 25 percent of my paycheck and I 'm already struggling as it is.²³⁵

- I am a visually impaired person, with a monthly income of less than \$900. I can surely say that I had no idea that the monthly installment would not be applied to the principal loan amount. After my aid read to me just a few days ago that I was not paying off the loan all of the money was going to interest and only {\$19.00} was applies to the principal. But I do not have that kind of money. I am requesting that you cease deducting {\$520.00} from my bank account I have struggled for the last five moths giving RISE most of my income, and I can not make the rent, utilities, or food.²³⁶
- I have a high interest installment loan through Rise. I pay \$220.00 every 2 weeks with \$16.00 of that going to the principal. I had a medical procedure done that kept me out of work for just a little more than a month. I did not receive a paycheck during that time. This has put me a few payments behind on my loan as they come due every 2 weeks. I am trying to get this all worked out so I can catch up with them over time as I just started back to work today. My issue is when I came back today I was told by my coworkers that this number called (XXXX) so many times a day that they turned off the phone in our office. . . . I am willing to work something out with them but calling my work to harass me and doing multiple attempt debits to my bank account that has no money in it racking up a ton of fees. This is not helping their cause as I have to pay my bank now instead of putting that money towards catching up on my loan. They tried withdrawing twice within a few minutes during XXXX attempt which racked up an instant \$70.00 more to my bank account fees like the money was going to instantly appear in there after the first attempt a few minutes earlier.²³⁷
- We originally signed up for a \$3,000 [loan] with an interest rate of 208%. I have been paying \$520.00 every month and paid a total of \$5500.00 This has been a burden for me and my family. As an [redacted] military member, i have reached out to my chain of command regarding this issue. I have been advised by financial counselors that in accordance with Military Lending Act says that you can't be charged an interest rate higher than 36 % on most types of consumer loans and provides other significant rights. I am currently working with my local Judge Advocate General 's Office to get some help with legal issues.²³⁸
- I received a mail out stating that I was pre-approved for credit and to go online and apply. I did so and entered into a line of credit agreement in the amount of \$2500 The payments are bi-weekly and the second one jumped to \$240.00. My gross income is XXXX per month. I have XXXX child and simply can not afford this high of a payment. My father called . . . and tried to get the company to lower the payment. They said that they could do whatever they wanted to and

²³⁵ #2181870 (California borrower)

²³⁶ #2202311 (California borrower)

²³⁷ #2303749 (Missouri borrower)

²³⁸ #2442651 (U.S. Armed Forces - Pacific borrower)

refused to address my concerns. The APR on this loan was 199 %. I feel this company is operating on an unfair and deceitful basis.²³⁹

- Why are my payments not reducing my principal balance? My statement for month 1 states that my balance is \$3800.00. It said I owed \$430.00. I paid it. The next month my bill was \$540.00 and I paid it. After that payment was applied (?) my total balance owed wasn't \$3800.00. So I asked them why my balance was only reduced by \$3.00 even though I had paid them almost \$1000.00 please help me. This can not be right.²⁴⁰
- I have fallen on hard times I borrowed \$1200.00 and have paid back \$1100.00, however due to the interest rate being so high [I owe a] balance of over \$1000.00 still. I was told when I took this loan that after a period of time I would be able to refinance the loan and lower my payments. This was not true, I have attempted to refinance and the APR is the same 291 %. I would like to cancel my account and come to an agreement that works for both of us. I am a single mother and paying \$160.00 every time I get paid equaling to \$260.00 per month is unbearable. I have also [made] large payments over the past few months hoping this would decrease the balance and it has not.²⁴¹
- 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 I'd be living this nightmare I never would have taken out this loan.²⁴²
- I would have rejected/not accepted the loan if I had realized it was a 238.36% interest rate. They set up ACH installment payments of \$410.00 a month which I can not afford I am on Social Security XXXX (Fixed income) with limited resources I can't believe that this is legal-this is more like loan sharking and preying on people who are not able to defend themselves. I am more than willing to pay the \$2000.00 back at a reasonable interest rate and reasonable monthly payments of \$200.00 a month (ie ... a credit card rate for people with limited resources perhaps 25-28 %?)[.] [N]ot 238.36 %[. H]ow can this even be legal?²⁴³

²³⁹ #2764858 (Kansas borrower)

²⁴⁰ #2816269 (Tennessee borrower)

²⁴¹ #2858004 (Wisconsin borrower)

²⁴² #2942998 (North Dakota borrower)

²⁴³ #3141291 (Wisconsin borrower)

OppLoans

- 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.²⁴⁴
- 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....²⁴⁵
- 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 assist²⁴⁶
- This company calls me 6 times or more a day. I informed them . . . that I had lost my job and I would call them back when I start work again and get my finances back on track. They dont care they have been calling non stop. They have made it harder for my recovery.²⁴⁷
- I had a loan with this company for about \$2000.00[,] now i went on short term [leave or disability] with my job and didn't get paid [and] called the company [and] explained why I couldn't make payment . . . I really dont know what to do but i have arrangements with other companies after they knowingly understood my dilemma. Im upset that i have to pay all the fees and loan with no arrangement and still be a single mom and live. Now they are emailing and calling me saying they will garnish my bank account for 20 years and my check and so on. Im very afraid and dont want to be homeless or behind over 4500 dollars.²⁴⁸
- I work as an [] for my [daughter], who was in the Intensive care unit When my daughter is hospitalized I do not get paid. After being in the hospital for a month I signed an Opp loan for \$2600.00 I have paid them over \$3600.. Today they tell me that I owe them \$2800.00²⁴⁹
- I . . . took out the loan[.] I am not disputing the loan[.] I had a downfall in life and defaulted I . . . received a " Notice of Intent to Assign Wages[.]" I spoke to [a representative] who refused to assist. [H]er only option was for me to pay \$560.00 now and make the original monthly

²⁴⁴ #2812101 (Tennessee borrower) (appears to be a rent-a-bank loan)

²⁴⁵ #3106431 (Maryland borrower)

²⁴⁶ #3354050 (Michigan borrower) (appears to be a rent-a-bank loan)

²⁴⁷ #3371847 (Arizona borrower) (appears to be a rent-a-bank loan)

²⁴⁸ #3015405 (Illinois borrower)

²⁴⁹ #3028087 (California borrower).

payments. I stated to her I do not have that money[.] I really do not[.] I need help[.] [S]he refused to offer me any solution. I currently have \$100.00 in my checking account. I asked to speak to a supervisor and she refused to allow me to speak to a supervisor . . . I think this company has no intentions to help anyone who is struggling.²⁵⁰

- I took a payday installment loan for the sake of building my credits . . . I then told them I am not doing it through debit card anymore . . . as per contract, it doesn't say I have to use my debit card as a routing number was a condition for approval. This week . . . they contacted my employer and decided to garnish my wage. This is unfair to me as I wasn't informed and it is not my fault, I never refused to pay or change my account. They didn't do their responsibility to deduct money while I gave my account information (confirmed today they still have). This is unfair garnishment and punishment to me because of their fault (or their systems) . . . I urge your help to assist me to remove this unfair garnishment on me and let the company comply with their promises. I also ask you to judge this and make Opploans repair my damaged credits that were caused by this unfair transaction. I am not delinquent to this transaction.²⁵¹
- I emailed company . . . and then I also called and rescinded the wage assignment. I sent an email to the CEO office and also spoke to several representatives to try to reach a settlement for the principle amount of the loan. The amount when I asked for the settlement was XXXX. This would have had the company write off about 200 in interest only. There was a los[s] of income in my household. So to prevent a long term impact to my credit and finances, I asked to settle the account. I was informed that I had to be at least 61 days behind and that if I made a minimum payment of XXXX that I would stay in a positive balance. This did not make sense as this would also keep the account in a current status. This would also cause more interest to accrue over time. I wanted to settle the account, close the account and avoid negative impact on my credit, and more fees. The company refused to work with stating the contract was enforceable. This would benefit the company to continue to accrue more interest and fees over a period of time and impact the consumer in a negative light.²⁵²

Enova (NetCredit brand)

- 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. [The complaint was filed on May 2, 2019.]²⁵³
- Netcredit is a company that [is] not interest[ed] in listening to any complaint or trying to work with [] me to help because I can't pay the high amount of interest[,] and the very little amount

²⁵⁰ #3027480 (Illinois borrower)

²⁵¹ #3190625 (Illinois borrower)

²⁵² #3407914 (Illinois borrower)

²⁵³ 3229883 (South Carolina borrower)

going towards the principle [–] that is unfair and wrong for anybody to have to do. I am not trying to not pay them but I have a problem with them trying to lock me in a five year loan which they seek to collect three time the loan amount they gave me. I am a XXXX Veteran that gets a monthly check that all I have to live on[.] [F]or Netcredit to do this is shameful and disgraceful. PLEASE HELP!²⁵⁴

- At the time, I had been struggling financially because . . . I lost the father of my [] children. I lost more than half of our income and could not keep up on my salary alone. I became in over my head with debt to many people . . . I took out the loan through NetCredit for the amount of \$3700.00 . . . I was steadily making payments every two weeks on this loan for \$230.00 . . . I am a XXXX employee who was out of work and without pay for the duration of the XXXX . . . NetCredit deferred my payments without question or hesitation giving me the peace of mind that everything was going to be okay . . . [M]y intent was to pay the balance in full. What NetCredit failed to tell me was that the payments I had made toward the loan did not go to the principle whatsoever . . . By the time the XXXX was over, they had tacked on over \$1000.00 in interest to the loan. Despite almost paying the loan off, they still reported I owed \$3700.00 plus accrued interest at that time. They told me that since I had been in non-pay status for so long . . . that if I didn't make a payment immediately they would send me to collections . . . They have yet to close the account and are continuing to rack up interest and report the balance of the loan increasing every month. They are reporting that I owe 6600.00 . . . I am a single mother of [] children who are not even old enough to be in school yet. I can not afford what they are putting on me and they are making it so I can not provide for my family by destroying my credit.²⁵⁵
- I got a loan in the amount of \$2100.00. [D]ecided to login into my account to see how much principal was left on the loan and its \$2100.00. Only \$57.00 paid to principal in the last year. Ive made all my payments on time, \$58.00 every 2 weeks. Something can not be right with this loan. I feel as though Ive been getting robbed for the past year. I do not understand. My [fiancé] has a loan with NetCredit as well within the same timeframe . . . Loan amount \$3000.00 . . . principal is only down to \$2900.00. Her payments are \$78.00 every 2 weeks, never missed a payment. Please help!²⁵⁶
- I was contacted by netcredit advising that I was pre approved for an installment loan. As I am a single mother of XXXX and have been . . . behind on HOA fees and other bills and decided to take out the loan . . . I checked an account that I used and realized that they were taking out the XXXX every 2 weeks . . . I told them I could not afford the XXXX coming out every 2 weeks as this is not what I [anticipated]. This has brought my checking account seriously negative and my bank is giving me a hard time as well . . . I feel this is very deceptive, [an] installment loan is supposed to be a monthly payment[,], a payday loan is a bi weekly payment. I really need help

²⁵⁴ #3251851 (Georgia borrower)

²⁵⁵ #3370736 (California borrower)

²⁵⁶ #3393212 (Virginia borrower)

with this. I can [make] [monthly] payments[,] I can not make bi weekly payments of XXXX[,] that is too much and it is really creating a hardship for my family.²⁵⁷

- I took out a loan in 2014 with NetCredit for \$2600.00. I paid on the loan for 40 payments I ran into an inability to pay and wanted to work with Net Credit to settle the loan. I even hired a firm to assist. Net Credit was not willing to work with the firm nor myself and an agreement was never reached. My fear is that they are holding back wanting to work with me while late fees and interest continue to accrue at an alarming rate.²⁵⁸
- 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.²⁵⁹
- I offered NetCredit a reasonable settlement amount which they dismissed and demand full payment which is completely insane. I had no idea after I paid \$3000.00 on \$3400.00 loan that I would have to pay an additional \$4000.00 to pay it off or continue making the payment and by the time it was paid off I would have paid many thousands of dollars.²⁶⁰
- 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!!²⁶¹
- [I] [b]orrowed \$1400.00 . . . Paid [x]payments of \$110.00 = \$1100.00 . . . balance is currently \$1400.0 . . . Was unable to keep up with payments due to XXXX income (was unemployed for 10 months- catching up on past debts and medical bills). Several attempts were made to set up payment agreements with NETCREDIT . . . but Net Credit didn't agree I was NOT aware the interest on \$1400.00 would be \$1200.00 (almost the amount of the loan). I would have NEVER agreed to this loan. I am a veteran and XXXX civilian on a tight budget. This interest charged on the loan is hideous. I could have borrowed that amount from a local bank/lender and not have that much in interest. This is a horrible way to take advantage of those that are in need!²⁶²

²⁵⁷ #3053313 (Utah borrower)

²⁵⁸ #2418022 (California borrower)

²⁵⁹ #2183667 (Virginia borrower)

²⁶⁰ #3270880 (California borrower)

²⁶¹ #3324359 (South Carolina borrower)

²⁶² #2144831 (Virginia borrower)

- NetCredit is a company that take advantage of people ... they approve your loan on line then hit you with 98 % interest . . . I took a loan out for \$6000.00 ... once I found out the loan was to be taken out of my checking account 2x a month [] I called and asked them to adjust to 1x a month ... they said they couldn't do ... this was the biggest mistake I have ever made to take a loan out [] with them ... I was unable to pay and got in touch to work something out ... they sent gave me minimal options and then sent a letter saying that I can pay off the balance which now is \$7800.00 . . . I had been paying the monthly for a year at least??? and now I owe XXXX more??? This is a company that the government should look into ... they are sharks!!!! I would recommend that people stay away from this company!!!²⁶³

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.²⁶⁴
- I was referred to this company through XXXX which I took to be a reputable company because of the referral. I was skeptical because I have a chapter XXXX filed 3 years ago and sub par credit. I was granted a XXXX dollar loan which I expected to be a high interest loan. My complaint is that on top of the accrued daily interest they charge me they added XXXX dollars to the balance from day one. In looking at their terms more closely their rates and fees are not fair and are considered predatory in giving loans to someone who frankly cant afford to pay it off and I feel that is their game which ends up in collections where the balance due will balloon with fees.²⁶⁵
- 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.²⁶⁶
- I have been on XXXX since XX/XX/XXXX, I needed this loan to keep current with my bills after XXXX. The loan origination date of my loan is XX/XX/XXXX. I called XXXX today to check on [] my loan balance and it turns out that after making every payment on time every 2 weeks for nearly a year I owe {\$500.00} more than I borrowed. so I pay {\$140.00} every 2 weeks, my original loan amount was {\$3000.00} and I now owe XXXX this doesn't seem fair and due to my XXXX I am

²⁶³ #1998233 (California borrower)

²⁶⁴ # 3224776, 4/27/2019 (North Carolina borrower) (appears to be a rent-a-bank loan)

²⁶⁵ #3309320, 7/17/2019 (Tennessee borrower) (appears to be a rent-a-bank loan)

²⁶⁶ #3326027, 8/1/2019 (Indiana borrower) (appears to be a rent-a-bank loan)

currently unable to work and these payments are strain on my ability to stay current with my other bills. Is there anything I can do about it. Please Help²⁶⁷

- I took out a loan with Personify Financial XXXX, 2017 in the amount of {\$3900.00} not realizing the interest rate was 98.22 %. the pay back would be {\$12000.00}. I was in desperate need of a loan. I feel I was taken advantage of. Personify Financial is nothing short loan sharks. I thought there were laws against this and consumer protection against loan companies charging such ridiculously high fees. I paid them approximately {\$7000.00} then started to realize the balance was not going down. I tried to contact the company to see if this could be looked at but nothing was done. I contact the better business bureau and logged a complaint. I would have even been willing to settle at a lower and fair amount taking into consideration what I had paid already. Paying back {\$12000.00} on a {\$3900.00} loan is terrible business practice. The Dodd-Frank Wall Street Reform act states the lenders must engage in fair lending practices. I feel that this company is not engaging in fair business practices and they are taking advantage of consumers. I would like my case investigated.²⁶⁸
- I can not remember how I heard about XXXX. I applied for a {\$3900.00} loan back in XX/XX/2017 not realizing until the other day just how much the interest rate and finance charges I am paying to them. I borrowed {\$3900.00} and the total amount I will have paid back is {\$12000.00}. I was in total shock. I am paying {\$150.00} per pay period. I know in ignorance I did this to myself but is there a law against someone charging 98.23 % annual percentage rate. This is such an awful rip off. Please advise if there is anything that can be done about this.²⁶⁹
- 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. They offer a 3 % interest rate reduction for every 13 payments. 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 have called numerous times demanding supervisors, and nothing has been accomplished. I offered them {\$500.00} more to close out my loan. Which would put me over {\$9000.00} out of pocket when I only financed {\$8400.00}. IF I pay this loan until the maturity date which is XX/XX/XXXX, I will have paid them OVER {\$20000.00} for a {\$8400.00} loan. This is absolutely 100 % predatory.²⁷⁰

²⁶⁷ 2843920, 3/15/2018 (California borrower)

²⁶⁸ #3476403, 12/23/2019 (Illinois borrower)

²⁶⁹ 3049302, 10/25/2018 (Illinois borrower)

²⁷⁰ #3519412, 2/4/2020 (Ohio borrower) (Personify does not appear to be lending in Ohio, per its website visited on June 18, 2020)

- ...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.²⁷¹

EasyPay

- My transmission needed repair . . . and the cost was {\$3200.00}. I needed financing for {\$1500.00}, and XXXX approved me through the transmission repair company . . . My payments were set to be {\$280.00} which I said I could not afford, and XXXX verbally told me they would work with me after I made a successful payment. My husband then lost his job, and when I called XXXX they would not negotiate and I could not make my payments. In XX/XX/XXXX emailed me with a one time offer of reducing my payments to {\$150.00}. I called and accepted. Although my husband still has not returned to work, I have been saving my money to pay off this debt. I called XXXX today, and was shocked to learn that the {\$150.00} payments I have been consistently making, have not even touched the principal balance. Even worse, the payoff balance is {\$2000.00}. I offered to settle, and the customer service rep told me to " make an offer". I offered {\$1400.00} and that was rejected with their counter-offer of {\$1700.00} which I do not have. I have paid {\$1700.00} in financing fees since last XX/XX/XXXX and I want to get rid of this debt. Attachments are included. This simply can not be legal. Thank you for any help.²⁷²
- i am an XXXX service member, and i had a transmission go out in my vehicle. i took my truck to a local shop to have the transmission fixed. the company had companies that they had that would give you a loan to pay for the repairs since i couldn't afford it at the time, and i got approved with duvera [EasyPay]. after a couple of statements, i saw that i was getting charged nearly 96 % APR and that was outrageous. i call the company and told them i was a service member and that i couldn't get charged that much for APR and they said they would fix it but nothing has happened . . . I 've only been able to pay down about XXXX dollars from my original loan and its been 2 years. i still owe about 80 %.²⁷³
- 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

²⁷¹ #2291555, 1/18/2017 (Illinois borrower)

²⁷² #2634477 (Washington borrower)

²⁷³ #277067 (Virginia borrower)

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. Thank you in advance for your considerate attention in this matter.²⁷⁴

- 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.²⁷⁵
- 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.²⁷⁶
- 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).²⁷⁷

²⁷⁴ #2774318 (New Jersey borrower)

²⁷⁵ #2789482 (Arizona borrower)

²⁷⁶ 2826629, 2/26/2018 (Kansas borrower)

²⁷⁷ #3573868, 3/20/2020 (Pennsylvania borrower)

LoanMart

- I have this loan and ... being a senior citizen the payment[s] are [too] high[.] I am [p]aying \$420.00 each month[,] have not paid for this month[,] and they can take my car at anytime[.] I am trying to work with them[,] my health is now becoming poor as I can not sleep I want to pay them and I will but I need the payment to be [up to] \$320.00 per month[,] which would be a hardship but I could do that had I known I would not have take[n] this loan out and would have just gone homelessat least I would have had a car to sleep in and live not . . . on the street with no car or a place to live[.]²⁷⁸
- I have been paying monthly, often times after . . . my due date, but I get the payment in monthly. On two occasions I was given extensions, but I have paid way more than the \$1500.00 loan amount and expected to be paid off I was told because I was late many times, my loan has been extended for approx 20 more months, unless I can come up with the \$1500.00 original loan amount plus \$680.00 in late fees. Had I paid on time by the 11th if every month I would be paid off. When I told them that was ridiculous that it was still paid in the same month they told me too bad so now I have to pay another \$4000.00 plus dollars ({\$210.00} x 20) on time . . . or it may take longer I [will] never get my title back or get this loan paid off I will be paying over \$8000.00 on a \$1500.00 loan.²⁷⁹
- My Loan charged off after i turned [in] the vehicle They auctioned off the vehicle and sent me a final charge off amount of \$2600.00 . . . I received a payment settlement request in XXXX of XXXX for \$1500.00 . . . As of today, they are reporting that i owe \$7700.00 as the interest is still being charged on a loan they have been " charged off ". They are . . . inflating the amount owed to well over 300 % of what the original loan was They already have my car, now they want to ruin my credit. They are predatory [and] overly punitive with high interest after the charge off.²⁸⁰
- I was in need of a loan to move and the television and radio were [inundated] with advertisements from "1-800- Loan-Mart XXXX[.]" I called and they offered me a " title loan " for \$10000.00 specific to my . . . Toyota Camry. The payment was and remains a staggering \$850.00 per month. Also, my ex-husband bounced a check to me . . . which prevented making a payment so I called for an extension [but] they repossessed my car . . . and charged me almost \$2500.00 to get the car back I have been paying the \$850.00 monthly for over two years and the principle balance or payoff remains just a [little] less than the original loan. What guidelines regulate the loan industry and why are they permitted to be rude, abusive and lend money like . . . loan sharks?²⁸¹

²⁷⁸ #2894498 (California borrower)

²⁷⁹ #3126449 (Wisconsin borrower)

²⁸⁰ #1792457 (California borrower)

²⁸¹ #1867122 (California borrower)

- 1 800 Loan Mart has repeatedly called me 30 times a day for the last 7 months[,] also have incorrectly reported negative things on my credit report, also called and threatened me with imprisonment lawsuit . . . [A]fter I paid them \$4000.00 and they took my vehicle[,] now they're saying I still owe them \$5000.00[.] [T]he original amount of loan was \$2500.00.²⁸²
- 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.²⁸³
- I took out a loan in . . . 2014 for \$5700.00. I've made payments of \$450.00 since then [totaling] about \$8000.00. I just recently got a payment history to see my balance due and almost none of my payments have applied to principal balance, almost all of it has gone towards interest! I spoke with a customer service rep today and they still want \$7000.00 to close [the] account. I told them I no longer have a steady job or income and have been going through health/medical issues and have been in and out of the hospital. I just want to settle amount of another \$1000.00 to close account. I 've already paid back the \$5700.00 and interest of more than \$2000.00 and still going to give \$1000.00 to settle. I 'm trying to be honest with them and get a settlement and close my account.²⁸⁴ (This complaint was submitted on August 12, 2016).

²⁸² #2356677 (California borrower)

²⁸³ #2157776 (Nevada borrower)

²⁸⁴ #2958482 (California borrower)