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Before the Senate Committee on Banking, Housing, and Urban Affairs

"The Reemergence of Rent-a-Bank?"

April 28, 2021

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

C. State Enforcement Against Rent-a-Bank Schemes

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

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

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

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

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

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

A. Consumer High-Cost Installment Loans

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

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

B. Auto title loans

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

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

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

C. Payday lenders disproportionately harm communities of color.

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

Storefront lenders, which often offer both short-term and longer-term loans, target borrowers of color, in part by concentrating their locations in communities of color.[50] Indeed, the communities most affected by redlining are the same who are saturated by payday lenders today. Multiple studies have found that payday lenders are more likely to locate in more affluent communities of color than in less affluent white communities.[51] In light of this targeting, it is unsurprising that a disproportionate share of payday borrowers come from communities of color, even after controlling for income.[52] The disparity in payday loan borrowing is especially significant given that African Americans and Latinos are much less likely to have checking accounts, typically a requirement for a payday loan, than whites.[53] In its newer form, rent-a-bank has become more sophisticated yet, retained its old partnerships. LoanMart, who

participates in rent-a-bank lending with Capital Community Bank, partners with CVS, grocery stores as well as traditional payday lenders via Money Gram to allow for proceeds of its loans to be dispersed *(see Appendix A).*

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

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

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

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

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

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

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

or “account” and only to sell receivables. The bank may retain a share of the receivables, but the nonbank company typically has a far larger share of the economic interest in the program.

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

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

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

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

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

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

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

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

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

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

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

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

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

chartered out-of-state bank.[86] Likewise, the Rule would prevent California, Nebraska, and Illinois from enforcing their hard-fought new rate cap laws.

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

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

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

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

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

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

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

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

In 2010, Congress rebuked the OCC and other federal banking agencies for their broad preemption of state laws, "which [Congress] believed planted the seeds 'for long-term trouble in the national banking

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

In the past two decades, in the wake of the deregulation of bank interest rates, payday lenders and other high-cost lenders have tried to hide behind banks to evade state usury laws. Consistent with the

longstanding substance-over-form approach to usury cases, courts have looked beyond the name on the loan agreement to search for the "true lender" (or "actual lender," "de facto lender" or "real party in interest"). This approach has been endorsed by several federal courts of appeals and nearly every lower court that has addressed the issue.

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

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

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

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

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

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

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

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

The OCC's primary rationale for the fake lender rule is that it is necessary to address "uncertainty." But as discussed above, there is no such uncertainty. The substance-over-form rule is nearly universally accepted, including by federal courts of appeals and in cases assessing who the true lender is for purposes of application of the NBA and other federal banking laws. The only uncertainty comes not from ambiguity in the statute but from the "infinitely varied" contrivances of usurious lenders and their

"ingenuity" in the "many contrivances" they have developed to evade usury laws.[117] Cases "only vary as they follow the detours through which they have had to pursue the money lender."[118]

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

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

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

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

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

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

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

accountable for their failure to provide equitable access to responsible instead of facilitating or further entrenching a dual financial system.

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

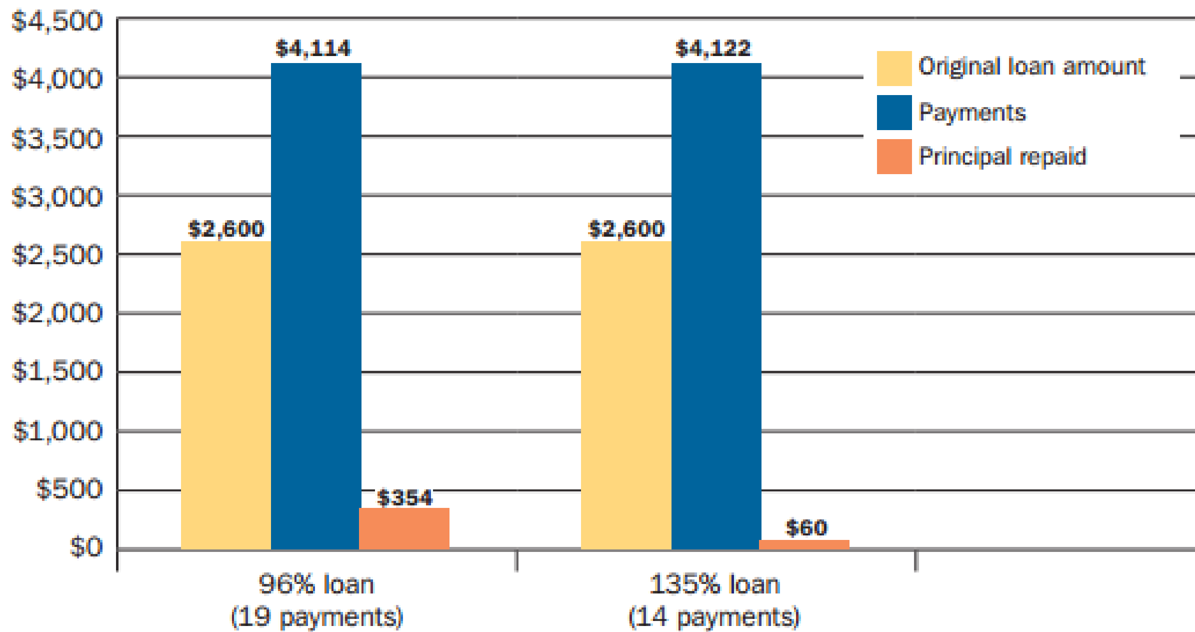
C. The OCC fails to meaningfully consider that high-cost lending is fundamentally different than responsible lending and inflicts severe harm on financially vulnerable consumers.

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

SPEEDY CASH (Unsecured)
INSTALLMENT LOAN PROMISSORY NOTE

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

Your Payment Schedule will be:

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

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

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

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

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

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

VII. Conclusion

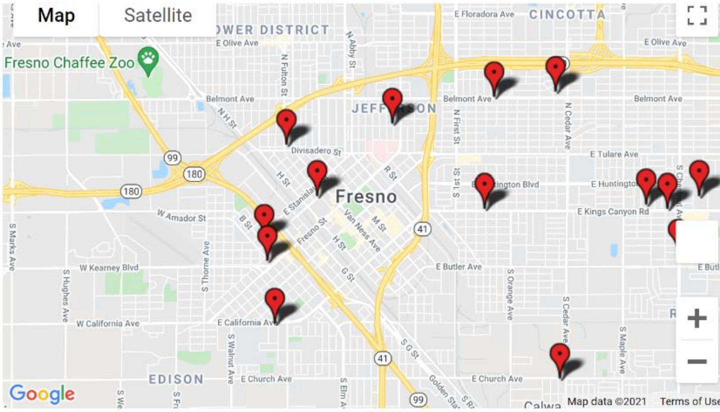
While the OCC Rule discusses principles of safety and soundness, the agency is at the same time supporting or permitting predatory lending through rent-a-bank schemes and dramatically undermining state usury limits. These actions, ultimately encouraging banks to be bolder about engaging with predatory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

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

__APPENDIX A: Loan Mart Choice Cash Products Partnering with Payday Lenders to distribute proceeds__

559-314-1371 APPLY NOW LOGIN

About ChoiceCash Loan Types Service Areas Resources Español



Addresses shown display closest MoneyGram locations. Map displays all MoneyGram locations in general vicinity.

(559) 266-8540

- **SHOP N QUICK**
  3564 E BELMONT AVE
  FRESNO, CA, 93702
  (559) 486-8245
- **ACE CASH EXPRESS - #4195**
  2425 E MCKINLEY AVE
  FRESNO, CA, 93703
  (559) 495-6598
- **ADVANCE AMERICA - #1215**
  4195 E BELMONT AVE
  FRESNO, CA, 93702
  (559) 266-1848

LOCATIONS NEAR FRESNO, CALIFORNIA

216-358-9289 APPLY NOW LOGIN

About ChoiceCash Loan Types Service Areas Resources Español

Addresses shown display closest MoneyGram locations. Map displays all MoneyGram locations in general vicinity.

(216) 228-9296

- **CVS - #3314**
  4240 PEARL RD
  CLEVELAND, OH, 44109
  (216) 398-6900
- **ACE CASH EXPRESS - #1024**
  5311 MEMPHIS AVE
  CLEVELAND, OH, 44144
  (216) 661-1036
- **ACE CASH EXPRESS - #1066**
  11648 LORAIN AVE
  CLEVELAND, OH, 44111
  (216) 251-3169

LOCATIONS NEAR CLEVELAND, OHIO

choicecash.com

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

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

[3] James M. Ackerman, Interest Rates and the Law: A History of Usury, 1981 Ariz. St. L.J. 61 (1981).
[4] *See Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) (stating that federalism "assures a decentralized government that will be more sensitive to the diverse needs of a heterogenous society" and "allows for more innovation and experimentation in government").
[5] National Consumer Law Center (NCLC), *State Rate Caps for $500 and $2,000 Loans (Mar. 2021),https://www.nclc.org/images/pdf/high_cost_small_loans/payday_loans/FS_State_Rate_Caps_2021.pdf; NCLC, A Larger and Longer Debt Trap? Analysis Of States' APR Caps For A $10,000 5-year Installment Loan (Oct. 2018), overview http://bit.ly/2QOp6AG and full report, http://bit.ly/instloan1*
[6] *See* Diane Standaert and Brandon Coleman, *Ending the Cycle of Evasion: Effective State and Federal Payday Lending Enforcement* (2015), Center for Responsible Lending, *available at* http://www.responsiblelending.org/payday-lending/research-analysis/crl_payday_enforcement_brief_nov2015.pdf.
[7] *BankWest, Inc. v. Baker*, 411 F.3d 1289, 1295 (11th Cir. 2005) ("To avoid this direct prohibition, however, payday stores have entered into agency agreements whereby the stores procure such payday loans for out-of-state banks …"), *reh'g granted, op. vacated*, 433 F.3d 1344 (11th Cir. 2005), *op. vacated due to mootness*, 446 F.3d 1358 (11th Cir. 2006); *Flowers v. EZPawn Oklahoma, Inc*., 307 F.Supp.2d 1191, 1196, 1205 (2004) ("Defendants assert that they acted as servicers for the loan made by County Bank… Defendants submit that County Bank developed the loan product at issue, approved and made the extension of the loan to the Plaintiff and all others similarly situated, funded the loan …"); *Colorado ex rel. Salazar v. Ace Cash Express*, 188 F.Supp.2d 1282 (D. Colo. 2002) ("Defendant admits that it is a 'loan arranger/agent.'"); *Commonwealth v. Think Finance, Inc*., 2016 WL 183289 (E.D. Pa. Jan. 14, 2016).
[8] *BankWest, Inc. v. Baker*, 411 F.3d 1289 (11th Cir. 2005) ("To avoid this direct prohibition, however, payday stores have entered into agency agreements whereby the stores procure such payday loans for out-of-state banks …"), *reh'g granted, op. vacated*, 433 F.3d 1344 (11th Cir. 2005), *op. vacated due to mootness*, 446 F.3d 1358 (11th Cir. 2006).
[9] *See* Jean Ann Fox, Consumer Federation of America, *Unsafe and Unsound: Payday Lenders Hide Behind FDIC Bank Charters to Peddle Usury*, 17-19, (Mar. 30, 2004) (identifying rent-a-bank schemes in Texas, Florida, and California), https://consumerfed.org/pdfs/pdlrentabankreport.pdf.
[10] *BankWest,* 411 F.3d 1289; *see In re Advance America, Cash Advance Centers of North Carolina, Inc.,* 05:008:CF, NC OCOB Final Order against Advance America, December 22, 2005, https://www.nccob.org/public/docs/AboutUs/43_AANCFINALORDER122205.pdf.
[11] *Id.*
[12] OCC Advisory Letter No. AL 2000-10 (Nov. 27, 2000), https://occ.gov/news-issuances/advisory-letters/2000/advisory-letter-2000-10.pdf.
[13] *Id.* ("Contractual agreements with third parties that originate, purchase, or service payday loans may increase the bank's credit risk due to the third party's inability or unwillingness to meet the terms of the contract . . .").
[14] *Id.* ("Because payday loans may be underwritten off-site, there is the risk that agents or employees may misrepresent information about the loans or increase credit risk by failing to adhere to established underwriting guidelines.")
[15] *Id.* ("Banks face increased reputation risk when they enter into arrangements with third parties to offer payday loans with fees, interest rates, or other terms that could not be offered by the third party directly.")
[16] *Id.*
[17] *Id.* (citing OCC AL 2000-7 on Abusive Lending Practices). *See also* OCC AL 2002-3 on Predatory and Abusive Lending Practices.
[18] Remarks by John D. Hawke, Jr., Comptroller of the Currency, Before the Women in Housing and Finance at 10 (Feb. 12, 2002), https://www.occ.treas.gov/news-issuances/speeches/2002/pub-speech-2002-10.pdf.
[19] https://www.occ.treas.gov/news-issuances/news-releases/2002/nr-occ-2002-10.html.

[20] Remarks by John D. Hawke, Jr., Comptroller of the Currency, Before the Women in Housing and Finance at 10 (Washington, D.C. Feb. 12, 2002), https://www.occ.treas.gov/news-issuances/speeches/2002/pub-speech-2002-10.pdf.
[21] *Id.* (emphasis added).
[22] *Id.*
[23] Remarks by John D. Hawke, Jr., Comptroller of the Currency, Before the Women in Housing and Finance at 10 (Washington, D.C. Feb. 12, 2002), https://www.occ.treas.gov/news-issuances/speeches/2002/pub-speech-2002-10.pdf.
[24] OCC, Annual Report, Fiscal Year 2003, p. 17*; see also*, Jean Ann Fox, "Unsafe and Unsound: Payday Lenders Hide Behind FDIC Bank Charters to Peddle Usury," Consumer Federation of America, March 30, 2004 at 17
[25] https://www.occ.gov/news-issuances/news-releases/2003/nr-occ-2003-3.html. The Office of Thrift Supervision also issued an advisory, noting "Associations should not 'lease' their charter out to nonthrift entities through an agreement that allows the nonthrift entity to circumvent state and local law." OTS Bulletin 82, Aug. 18, 2003, at 8.
[26] The OCC rescinded that guidance in 2017.
[27] *See*, *e.g.*, Testimony of Steve Abbot, former President of the Navy-Marine Corps Relief Society, Before the U.S. Committee on Banking, Housing and Urban Affairs (Nov. 3, 2011) (noting bank payday loans among the "most egregious trends"); Comments of Michael Archer, Director of Military Legal Assistance, Marine Corps Installations East, to CFPB (April 4, 2012): "Most ominously, a few large banks have gotten into the business of payday loans through the artifice of calling the loans open ended credit," http://www.regulations.gov/#!documentDetail;D=CFPB-2012-0009-0056.
[28] Hundreds of groups urged the prudential regulators to stop banks from trapping borrowers in payday loans. Letters from approximately 250 groups to FDIC, OCC, FRB and CFPB, March 13, 2013, (http://ourfinancialsecurity.org/blogs/wp-content/ourfinancialsecurity.org/uploads/2013/03/Bank-Payday-Sign-On-Letter-3-13-13-Final.pdf) and February 22, 2012, (http://www.responsiblelending.org/payday-lending/policy-legislation/regulators/Dear-Regulators.pdf). Thousands of individuals and many community groups filed comments with the OCC urging that Wells Fargo's Community Reinvestment Act rating be negatively impacted because it makes payday loans, including CRL and NCLC (http://www.responsiblelending.org/payday-lending/policy-legislation/regulators/cra-comment_wells-nov-29-2012_final.pdf).
[29] *See*, *e.g.*, Letter from Benjamin Todd Jealous, President and Chief Executive Officer, NAACP, to FDIC, OCC, FRB, and CFPB opposing bank payday lending (Feb. 21, 2013), http://www.responsiblelending.org/payday-lending/policy-legislation/regulators/NAACP-redatory-Pay-Day-Loans-to-regulators-BTJ.pdf.
[30] *See*, *e.g.*, Elaina Ramsey, Faith Groups Take On Payday Lenders, Sojourners, https://sojo.net/magazine/stub/faith-groups-take-payday-lenders (discussing a National Day of Action among faith leaders in early 2013 to address payday lending). In connection with this National Day of Action, Rev. DeForest B. Soaries, jointly with other nationally prominent African American ministers, called for "an end to enslavement to both payday lenders and the banks now offering equally dangerous products" in *An Emancipation Proclamation from Payday Lending.* Center for Responsible Lending, *Bank Payday Lending: Overview of Media Coverage and Public Concerns*, CRL Issue Brief, March 7, 2013, http://www.responsiblelending.org/payday-lending/tools-resources/BPD-media-coverage-3-7-13.pdf
[31] For proxy year 2013, investors filed shareholder resolutions with the four largest banks making payday loans expressing concern about the product and requesting data, which none of the banks agreed to provide. Wells Fargo (https://trilliuminvest.com/shareholder-proposal/payday-lending-wells-fargo-2013/); Fifth Third Bank (http://www.trilliuminvest.com/resolutions/payday-lending-fifth-third-bancorp-2013/); U.S. Bank; (https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2013/dominisocial012513-14a8.pdf); and Regions (https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2013/congregationsisters011413-14a8.pdf).
[32] *See*, *e.g.*, "Legislative Black Caucus slams Regions Bank over payday-style loans," Raleigh News and Observer "Under the Dome," Oct. 11, 2012, http://www.cashcowadvances.com/paydayblog/legislative-black-caucus-slams-regions-bank-over-payday-style-loans.html (quoting letter from N.C. Senator Floyd McKissick, Jr., chairman of the N.C. Legislative Black Caucus, to Regions Bank, which stated: "We are deeply concerned about recent reports of Regions Bank offering its 'Ready Advance' payday loans in North Carolina . . . . High-cost, short-term balloon loans

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[46] CFPB Single-Payment Vehicle Title Lending at 4 (2016). CRL estimates that approximately 340,000 auto title borrowers annually have their car repossessed, well exceeding the population of St. Louis. For calculation, *see* CRL, Public Citizen, NCLC et. al comments on CFPB's proposed repeal of the ability-to-repay provisions of the payday rule at 26, n.90 (May 15, 2019), https://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/comment-cfpb-proposed-repeal-payday-rule-may2019.pdf.
[47] Virginia Bureau of Financial Institutions." 2017 Annual Report," page 57, http://bit.ly/2UOkDj1
[48] One finds that access to payday loans substantially increased suicide risk—including by over 16% for those ages 25-44. Jaeyoon Lee, *Credit Access and Household Welfare: Evidence From Payday Lending* (SSRN Working Paper, 2017. Another finds that short-term loans, including payday loans, are associated with a range of negative health outcomes, even when controlling for potential confounders. Elizabeth Sweet et al., *Short-term lending: Payday loans as risk factors for anxiety, inflammation and poor health,* 5 SSM—Population Health, 114–121 (2018), *https://doi.org/10.1016/j.ssmph.2018.05.009.* These outcomes include symptoms of physical health, sexual health, and anxiety, as well as higher levels of C-reactive protein, which is an indicator of many long-term diseases, including cardiovascular disease, and an indicator of psychological stress. *Id.* Another study finds that restrictions on payday lending reduced liquor sales. Harold E. Cuffe & Christopher G. Gibbs, *The Effect of Payday Lending Restrictions on Liquor Sales,* 85(1) J. Banking & Fin. 132–45 (2017). In one study of qualitative data, respondents revealed symptoms of "allostatic load," a health psychology term that describes how compounding stress can lead to wear and tear on the body. Elizabeth Sweet et al., *Embodied Neoliberalism: Epidemiology and the Lived Experience of Consumer Debt*, 48(3) International Journal of Health Services (2018). The authors describe the respondents as having "embodied" their debt through idioms like "drowning in debt" and "keeping [their] head above water," which illustrated that the participants "experienced debt as a bodily sensation, not only a socioeconomic position or emotional stressor." *Id.* One payday borrower has reported that after being a "a pretty healthy young person," she "became physically sick, broke out in hives . . . [and] had to go to urgent care" as a result of her high-cost loan. Health Impact Partners and Missouri Faith Voices, *When Poverty Makes You Sick: The intersection of health and predatory lending in Missouri* (Feb. 2019), https://humanimpact.org/wp-content/uploads/2019/02/HIP-MFV_PayDayLending_2019.02fin1.pdf. Another expressed feeling, "[i]f I died, my debt would die with me. At least I could give my family that." *Id.*
[49] *See* CFPB Payday Rule, 82 Fed. Reg. at 54556-57.
[50] *See*, *e.g.*, Delvin Davis, *et al*., *Race Matters: The Concentration of Payday Lenders in African-American Communities in North Carolina*, Center for Responsible Lending (2005), http://www.responsiblelending.org/north-carolina/nc-payday/research-analysis/racematters/rr006-Race_Matters_Payday_in_NC-0305.pdf (finding that, even when controlling for a variety of other factors, African-American neighborhoods had three times as many payday lending stores per capita as white neighborhoods in North Carolina in 2005); Assaf Oron, *Easy Prey: Evidence for Race and Military Related Targeting in the Distribution of Payday Loan Branches in Washington State*, Department of Statistics, University of Washington (2006) (concluding based on a study of Washington State payday lenders that "payday businesses do intentionally target localities with a high percentage of African Americans.").
[51] Li, *et al*., *Predatory Profiling: The Role of Race and Ethnicity in the Location of Payday Lenders in California,* Center for Responsible Lending (2009), http://www.responsiblelending.org/payday-lending/research-analysis/predatory-profiling.pdf; Brandon Coleman and Delvin Davis, *Perfect Storm: Payday Lenders Harm Florida Consumers Despite State Law*, Center for Responsible Lending at 7, Chart 2 (March 2016); Delvin Davis and Lisa Stifler, *Power Steering: Payday Lenders Targeting Vulnerable Michigan Communities*, Center for Responsible Lending (Aug. 2018), https://www.responsiblelending.org/research-publication/power-steering-payday-lenders-targeting-vulnerable-michigan-communities; Delvin Davis, *Mile High Money: Payday Stores Target Colorado Communities of Color*, Center for Responsible Lending (Aug. 2017; amended Feb. 2018), https://www.responsiblelending.org/research-publication/mile-high-money-payday-stores-target-colorado-communities-color.
[52] CFPB Payday Rule, 82 Fed. Reg. at 54556. African-Americans are payday borrowers at three times the rate, and Hispanics at twice the rate, of non-Hispanic whites. 82 Fed. Reg. at 54556-57 (citing 2015 FDIC National Survey of

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[68] See Section VI.D.i.

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

[70] *Id.*

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

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

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

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

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

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

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

[78] https://www.firstelectronic.com (last visited September 8, 2020). First Electronic Bank is a "wholly owned subsidiary of Fry's Electronics" which is based in Silicon Valley. https://www.firstelectronic.com/about-us (last visited September 8, 2020).

[79] https://www.personifyfinancial.com (last visited June 30, 2020). Those states are Alaska, Arizona, Delaware, Florida, Hawaii, Indiana, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Mississippi, Montana, Nebraska, North Carolina, Ohio, Oklahoma, Tennessee, Texas, and Washington. In early 2020, this list included California and Rhode Island, but those states no longer appear on Personify's website.

[80] https://www.applieddatafinance.com (last visited June 30, 2020).

[81] *Id.*

[82] Comments of Center for Responsible Lending, National Consumer Law Center (on behalf of its low income clients), and several additional consumer and civil rights organizations, on the OCC's proposed rule at Appendix, Personify Financial, last bullet, Sept. 3, 2020, https://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/comment-occ-true-lender-3sep2020.pdf.

[83] Press Release, Office of the Attorney General for the District of Columbia, *AG Racine Sues Predatory Online Lender for Illegal High-Interest Loans To District Consumers*, June 5, 2020, https://oag.dc.gov/release/ag-racine-sues-predatory-online-lender-illegal.

[84] Press Release, Office of the Attorney General for the District of Columbia, *AG Racine Sues Online Lender for Making Predatory and Deceptive Loans To 4,000+ District Consumers*, April 6, 2021, https://oag.dc.gov/release/ag-racine-sues-online-lender-making-predatory-and.

[85] Press Release, Elevate Credit, Inc., *Elevate Statement on the OCC Proposed True Lender Rule*, July 21, 2020, https://www.marketscreener.com/quote/stock/ELEVATE-CREDIT-INC-25805249/news/Elevate-Credit-Statement-on-the-OCC-Proposed-True-Lender-Rule-30971600/.

[86] Press Release, California Department of Business Oversight, *DBO Launches Investigation Into Possible Evasion of California's New Interest Rate Caps By Prominent Auto Title Lender, LoanMart*, September 3, 2020 ("starting in 2020, rather than continuing to make loans with rates that comply with the Fair Access to Credit Act, LoanMart stopped making state-licensed auto title loans in California. Instead, using its existing lending operations and personnel, LoanMart commenced "marketing" and "servicing" auto title loans purportedly made by CCBank . . ."), https://dbo.ca.gov/2020/09/03/dbo-launches-investigation-into-possible-evasion-of-californias-new-interest-rate-caps-by-prominent-auto-title-lender-loanmart/.

[87] OCC, National Banks and Federal Savings Associations as Lenders, Final Rule, 85 Fed. Reg. 68742, 47 (Oct. 30, 2020).

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

[89] *Lusnak*, 883 F.ed 1189 (quoting The Creation of a Consumer Financial Protection Agency to Be the Cornerstone of America's New Economic Foundation: Hearing Before S. Comm. On Banking, Hous., and Urban Affairs, 111th Cong. 82 (2009) (Statement of Travis Plunkett, Legislative Director, Consumer Federation of America)).

[90] *Lusnak*, 883 F.ed 1189 (9th Cir. 2018) (quoting S. Rep. No. 111-176, at 2 (2010)). *See also* Testimony of Eric Stein, Center for Responsible Lending, Before the Senate Committee on Banking, Housing and Urban Affairs Hearing (2008).

[91] Testimony of Martin Eakes, Center for Responsible Lending, Before the Senate Committee on Banking, Housing and Urban Affairs Hearing On The Office of the Comptroller of the Currency's Rules on National Bank Preemption and Visitorial Powers (2004), https://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/20040407_testimony_eakes_preemption.pdf.

[92] *The Financial Crisis Inquiry Commission, The Financial Crisis Inquiry Report*, pgs. xxiii, 111-113, 126. In 2006, national banks, federal thrifts, and their subsidiaries made 32% of subprime loans, 40% of Alt A loans, and 51% of interest-only and option ARM loans. *See* Lauren Saunders, National Consumer Law Center, *Restore The States' Traditional Role As 'First Responder'* (Sept. 2009), available at http://www.nclc.org/images/pdf/preemption/restore-the-role-of- states-2009.pdf.A total of over $700 billion in risky loans were made by entities that states could not touch.

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

[94] 12 U.S.C. § 25b(h)(2).
[95] Proposed 12 C.F.R. § 7.1031(a), 85 Fed. Reg. at 44228.
[96] *De Wolf v. Johnson*, 23 U.S. 367 (1825).
[97] *Scott v Lloyd*, 34 U.S. 418, 446-47 (1835) (emphasis added).
[98] *Id.* at 447.
[99] 68 U.S. 298, 310 (1863).
[100] *Id.*
[101] 84 Fed. Reg. 64229, 64231 (Nov. 21, 2019). While we opposed the "OCC's rule on "Permissible Interest on Loans That Are Sold, Assigned, or Otherwise Transferred" and disagreed with its characterization of the so-called "valid-when-made" rule, we agree that longstanding legal principles are relevant in interpreting, and may be incorporated into, the NBA. Our quarrel was not whether cases such as *Nichols* and *Gaither* are relevant, but rather with how the OCC characterized and interpreted them. Neither *Nichols* nor *Gaither* had anything to do with the permissible rate on a loan assigned to an entity covered by a different set of laws, nor with the ability of a bank to assign its legal privileges. But both cases do recognize that courts may look beyond devices to prevent evasions of usury laws, which the OCC's proposed rule would prevent.
[102] *See* Fed. Reg. at 64231 n.16, n.17.
[103] 32 U.S. 103 (1833).
[104] 26 U.S. 37, 44 (1828) (quoting *Harrison & Hamell*, 5 Taunton, 780).
[105] *Anderson v. Hershey*, 127 F.2d 884, 886 (6th Cir. 1942) (rejecting the purported form of the transaction as a "device" to collect usury because courts "look behind the form of the transaction to its substance"); *Daniel v. First National Bank of Birmingham*, 227 F.2d 353, 355 (5th Cir. 1956) ("That public policy [against usury] cannot be defeated by the simple expedient of a written contract, but the real substance of the transaction must be searched out... 'No disguise of language can avail for covering up usury, or glossing over an usurious contract. The theory that a contract will be usurious or not, according to the kind of paper bag it is put up in, or according to the more or less ingenious phrases made use of in negotiating it, is altogether erroneous. The law intends that a search for usury shall penetrate to the substances.'") (quoting *Pope v. Marshall*, 78 Ga. 635, 4 S.E. 116, 118 (1887)); *First Nat'l Bank v. Nowlin*, 509 F.2d 872, 876 (8th Cir. 1975) ("'The [NBA usury] section has regard to substance, not merely to form ….'" (*quoting Evans v. Nat'l Bank of Savannah*, 251 U.S. 108, 118 (1919) (Pitney, J., dissenting); *First Nat'l Bank v. Phares*, 174 P. 519, 521 (Okla. 1918) ("In deciding whether any given transaction is usurious or not, the courts will disregard the form which it may take, and look only to the substance of the transaction in order to determine whether all the requisites of usury are present. *** If all these requisites are found to be present, the transaction will be condemned as usurious, whatever form it may assume and despite any disguise it may wear.") (quoting 39 Cyc. 918); *see also FDIC v. Lattimore Land Corp*., 656 F.2d 139, 148 n.15 (5th Cir. 1981) (agreeing that in enforcing the NBA's usury provision, courts can look beyond disguises that conceal "the actual lender," but in the instant case there was no dispute about which party "was the lender in fact").
[106] For a long list of some of the hundreds of cases that emphasize the importance of looking beyond form to substance, *see* Comments of Center for Responsible Lending, National Consumer Law Center (on behalf of its low income clients), and several additional consumer and civil rights organizations, on the OCC's proposed rule at 17, n.36, Sept. 3, 2020, https://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/comment-occ-true-lender-3sep2020.pdf; *see also* National Consumer Law Center, Consumer Credit Regulation § 3.9.1 (2d ed. 2015), *updated at* https://library.nclc.org.
[107] *Daniel et al*., 227 F.2d at 355.
[108] 2014 WL 2404300 (W.Va. May 30, 2014).
[109] 2014 WL 2404300 at *14 (*quoting Carper v. Kanawha Banking & Trust Co*., 157 W.Va. 477, 207 S.E.2d 897 (1974)); *see Crim v. Post*, 23 S.E. at 616 (notwithstanding "the various shifts and devices that are often used to cover up the usury[,]… the law requires the lender on oath to discover the money really lent, and all bargains, contracts, or shifts relative to such loan; and makes them ineffectual, no matter how complicated such contracts may be. The law evidently intends that the search for usury shall penetrate to the substance").
[110] 266 Ga.App. 771, 598 S.E.2d 343 (Ga. App. 2004).

[111] *Oxendine*, 598 S.E.2d at 348 (*quoting Pope v. Marshall*, 78 Ga. 635, 640, 4 S.E. 116 (1887); *accord Daniel*, 227 F.2d at 355; *Georgia Cash America, Inc. v. Greene*, 318 Ga.App. 355, 734 S.E.2d 67, 73 (2012) (finding triable issue of whether true lender was the payday lender or was a bank exempt from the Georgia usury statute).
[112] Comments of CRL, NCLC et. al., on proposed fake lender rule at 26-27, https://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/comment-occ-true-lender-3sep2020.pdf
[113] For detailed discussion, see *id.* at 28, https://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/comment-occ-true-lender-3sep2020.pdf.
[114] 85 Fed. Reg. at 44224.
[115] *Beechum v. Navient Solutions, Inc*., No. EDCV 15–8239–JGB–KKx, 2016 WL 5340454 at *4 (C.D. Cal. Sept. 20, 2016) ("Because the Court finds Plaintiffs' loans are exempt from California's usury prohibition, the Court does not reach the question of whether Plaintiffs' claims are preempted by the National Bank Act.")
[116] The *Beechum* court acknowledged the substance-over-form doctrine, but claimed that the cases plaintiffs cited did not apply when "assessing whether the transaction or a party to the transaction fall under a constitutional or statutory exemption from the usury prohibition." 2016 WL 5340454 at *5. The court's rationale for this distinction was dubious, and the court was apparently unaware of many cases that did in fact look to substance in those situations.
[117] *Scott v. Lloyd*, 34 U.S. at 447.
[118] *DeWolf*, 23 U.S. at 385.
[119] *See, e.g., Morrisey*, 2014 WL 2404300 at *15 *("*The 'federal law test' advocated by CashCall examines only the superficial appearance of CashCall's business model. Further, if we were to apply the 'federal law test' as CashCall advocates, we would always find that a rent-a-bank was the true lender of loans such as those at issue in this case.").
[120] *Id*.
[121] 12 U.S.C. § 25b(b)(5)(A); *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944) (explaining that an agency's views are "entitled to respect" only to the extent that they have the "power to persuade"); *Lusnak v. Bank of Am., N.A.,* 883 F.3d 1185, 1192 (9th Cir.), *cert. denied,* 139 S. Ct. 567, 202 L. Ed. 2d 403 (2018).
[122] 85 Fed. Reg. at 68744.
[123] 85 Fed. Reg. at 44224.
[124] OCC Website, https://www.occ.treas.gov/about/index-about.html (last visited on 9/3/20); OCC News Release 2020-69, Brian P. Brooks Statement on Becoming Acting Comptroller**,** May 29, 2020, https://www.occ.gov/news-issuances/news-releases/2020/nr-occ-2020-69.html.
[125] Robin Howarth, Delvin Davis, & Sarah Wolff, *Shark Free Waters: States Are Better Off without Payday Lending*, Center for Responsible Lending, at 4 (Aug. 2016), https://www.responsiblelending.org/research-publication/shark-free-waters-states-are-better-without-payday-lending.
[126] 85 Fed. Reg. 44224.
[127] 85 Fed. Reg. at 44224 ("Banks can also work with third parties to develop responsible lending programs to help customers meet credit needs, including small-dollar lending programs designed to assist with cash-flow imbalances, unexpected expenses, or income shortfalls.").
[128] Moody's Investor Services, Press Release, *Moody's: Unique risks in marketplace versus traditional lending* (May 5, 2015), https://www.moodys.com/research/Moodys-Unique-risks-in-marketplaceversus-traditional-lending--PR_324544; *see also* Michael Corkery, *Pitfalls for the Unwary Borrower Out on the Frontiers of Banking*, New York Times (Sept. 13, 2015), https://www.nytimes.com/2015/09/14/business/dealbook/pitfalls-for-the-unwary-borrower-out-on-the-frontiers-of-banking.html?mcubz=0, ["Pitfalls, NY Times"]. Moody's credit-rating firm likens this industry to mortgage lending in the years leading up to the 2008 financial crisis in that "the companies that market the loans and approve them quickly sell them off to investors," relieving themselves of the risk of the loan later going bad.
[129] One finds that access to payday loans substantially increased suicide risk—including by over 16% for those ages 25-44. Jaeyoon Lee, *Credit Access and Household Welfare: Evidence From Payday Lending* (SSRN Working Paper,

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

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

[131] *Id.*

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

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

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

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

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

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

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

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

[140] These cases were collected and summarized by the National Consumer Law Center.
[141] Complaint, *Speer v. Danjon Capital et al.*, No. 3:19-cv-01778 (D. Conn. filed Nov. 12, 2019), *available at* https://www.nclc.org/images/Speerv.DanjonCapital.pdf.
[142] Complaint, *Vincent Deramo Jr. et al. v. World Business Lenders, LLC and WBL SPE II, LLC* (filed May 16 2017 in Cir. Ct., Sarasota, FL, removed to federal court June 16, 2017 as No, 8:17-cv-1435-RAL-MAP), *available at* https://www.nclc.org/images/Deramov.WBL_.pdf.
[143] Complaint, *B&S Medical Supply, Inc., N.Y. and Boris Simon v. World Business Lenders, LLC and Liberty Bank, Inc.*, No. 1:17-cv-03234 (S.D.N.Y. filed May 31, 2017), *available at* https://www.nclc.org/images/BandSMedSupplyv.WBL_.pdf.
[144] Complaint, *Kaur et al v. World Business Lenders et al.* (removed to D. Mass. June. 19, 2019 as 1:19-cv-11364), *available at* https://www.nclc.org/images/Kaurv.WBL_.pdf.
[145] *Id.* at 21.
[146] Complaint, *Adoni et al. v. World Business Lenders, LLC et al* (removed to E.D.N.Y. Dec. 12, 2019 as No. 2:19-cv-06971), https://www.nclc.org/images/Adoni-v.-World-Business-Lenders.pdf.
[147] *Id.* at 5.
[148] *Quantum-Mac Int'l, Inc., Okwu v. World Business Lenders, LLC et al*., No. 1:20-cv-02353-WMR (N.D. Ga. Filed June 2, 2020), https://www.nclc.org/images/pdf/legislation/Quantum-Mac-v.-WBL-complaint.pdf.
[149] *Koffel et al. v. World Business Lenders, LLC, et al*., No. CACE-20-009401 (17th Jud'l Cir. For Broward Co., FL filed June 7, 2020), https://www.nclc.org/images/pdf/legislation/Koffel-et-al-v-WBL-complaint.pdf.
[150] *See* Letter from small business, consumer and civil-rights groups to Comptroller Joseph M. Otting re FDIC and OCC support for predatory small business lender (Oct. 24, 2019), https://www.nclc.org/issues/ltr-opp-rent-a-bank.html.
[151] *See, e.g.,* Zeke Faux, *Wall Street Finds New Subprime With 125% Business Lo*ans, Bloomberg (May 22, 2014), https://bloom.bg/2WLWRYG; Gretchen Morgenson, *New Trump Admin Rule Makes it Easier for Lenders to Charge Small Businesses Super-High Interest Rates*, NBC News (Dec. 8, 2020), https://www.nbcnews.com/business/economy/new-trump-administration-rules-make-it-easier-lenders-charge-small-n1250023.
[152] Complaint to Avoid and Recover Transfers Pursuant to 11 U.S.C. §§ 547, 548 and 550 and for Damages Pursuant to Applicable Law, Straffi, Ch. *Trustee v. Retail Capital, LLC et al*., No. 15-19010 (Bk. Ct. D.N.J. filed Mar. 23, 2017), https://www.nclc.org/images/pdf/legislation/Straffi-v.-Retail-Capital-complaint.pdf.
[153] Plaintiff's Original Petition, Request For Disclosures, First Set of Interrogatories, and Request for Production, No. 067-313281-19 (D.Ct. of Tarrant Co., TX filed Nov. 13, 2019), https://www.nclc.org/images/pdf/legislation/Hamilton-v.-BFS-complaint.pdf.
[154] *See id.*, Exhibit 1.
[155] Previously on Verge Credit's website, on file with author
(emphasis added).
[156] 85 Fed. Reg. at 68745-46.
[157] OCC Proposed Rule, 85 Fed. Reg. 44225.
[158] OCC Bulletin 2013–29, ''Third-Party Relationships: Risk Management Guidance'' (Oct. 30, 2013); OCC Bulletin 2020–10, ''Third-Party Relationships: Frequently Asked Questions to Supplement OCC Bulletin 2013–29'' (Mar. 5, 2020).
[159] Arizona Payday Loan Reform, Proposition 200 (2008), https://ballotpedia.org/Arizona_Payday_Loan_Reform,_Proposition_200_(2008) (60% of voters opposed continuing an exemption from the state's rate cap); Pat Ferrier, Fort Collins Coloradoan, "Colorado election: Proposition 111, capping interest on payday loans, passes" (Nov. 6, 2018) (77% of voters voted to approve a 36% rate cap); Matt Volz, Missoulian, Montana voters approve payday loan, real estate tax initiatives (Nov. 3 2010). http://bit.ly/2KqQ7rb (73% of Montana voters approved a 36% rate cap); Ohio Payday Lender Interest Rate Cap, Referendum 5 (2008) https://ballotpedia.org/Ohio_Payday_Lender_Interest_Rate_Cap,_Referendum_5_(2008)#cite_note-ohsos-1 (63% in favor of a 28% rate cap); South Dakota Official Election Returns and Registration Figures, Primary Election (June

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