Consumer Federation of America

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Comments Submitted to the Office of the Comptroller of the Currency on National Banks and Federal Savings Associations as Lenders, Docket ID OCC-2020- 0026 [RIN 1557-AE97]

Submitted by:
Consumer Federation of America | Rachel Weintraub and Rachel Gittleman
1620 I Street, NW - Suite 200 | Washington, DC 20006 |
202-387-6121| rweintraub@consumerfed.org

The Consumer Federation of America is a nonprofit association of more than 250 national, state, and local consumer groups that was founded in 1968 to advance the consumer interest through research, advocacy, and education. For over 50 years, CFA has been at the forefront of ensuring that our marketplace is fair and safe through advancing the consumer interest. CFA has a broad portfolio of issues including financial services, investor protections, privacy, food safety, product safety, telecommunications, energy efficiency, housing, insurance, and saving. CFA's non-profit members range from large organizations, such as Consumer Reports and AARP, to small state and local advocacy groups, as well as unions, co-ops, and public power companies. CFA appreciates the opportunity to submit comments in response to the Office of the Comptroller of the Currency's (OCC) proposal on National Banks and Federal Savings Associations as Lenders. We strongly oppose the OCC's proposed rule, which will gut the longstanding "true lender" anti-evasion doctrine.

Since the American Revolution, states have enacted interest rates to protect their consumers from predatory lenders, and interest rates have proven to be the simplest and most effective way to do that. However, non-bank predatory lenders have sought to evade state interest rate caps by laundering loans through banks, taking advantage of banks' exemption from state caps. These lenders charge triple-digit interest rates, target the financially vulnerable and communities of color, and trap consumers in devastating cycles of debt. States have long challenged these rent-a-bank lenders with the "true lender" doctrine, an anti-evasion doctrine that allows courts to look beyond the fine print to determine which party has the predominant economic interest in the loan. By gutting this long-standing doctrine, the OCC's proposal would eviscerate the power of state governments to independently regulate interest rate limits and would unleash predatory lending in all 50 states with horrible consequences for consumers, small businesses, and especially, communities of color.
We strongly urge the OCC to withdraw its proposed rule, "National Banks and Federal Savings Associations as Lenders."

I. Interest Rates are Effective Tools to Protect Consumers from Predatory Lending.

Interest rates are the most effective tool states have to protect their residents from predatory loans. At least 45 states and the District of Columbia (DC) have rate caps on installment loans. For these caps, the median annual rate including all fees is 38.5% for a $500, six-month loan and 31% for a $2,000, two-year loan.[1] Sixteen states and DC—representing about a third of the U.S. population—enforce interest rates of 36% or less that keep all high-cost loans out of their state. In addition, in recent years, voters in many states, including Arizona, Colorado, Montana, and South Dakota, have approved rate cap ballot initiatives—illustrating the public's support for these usury laws.

CFA has long supported a federal interest rate cap and worked closely with Congress to pass the Military Lending Act (MLA) in 2006, which capped the annual percentage rate (APR) on loans offered to military servicemembers and their families at 36 percent. Today, CFA supports passage of the Veterans and Consumers Fair Credit Act, a bill that would extend protections for servicemembers granted by the MLA to all consumers and veterans by establishing a federal interest rate cap. However, in the absence of a federal interest rate cap, we support the states' power to enact interest rate caps. And should a federal interest rate cap be enacted; we support legislation that would not preempt any provision of State law that provides greater protections to consumers.

Additionally, interest rate caps have overwhelming public support. Polling data and every ballot referendum held on the subject prove that a super-majority of Americans, across party lines, support establishing usury laws to curb predatory, high-cost lenders. For example, the 2016 ballot initiative in South Dakota was supported by more than 75% of voters.[2] Further, a 36% interest rate cap on small loans has proven to result in payments that consumers can afford,[3] protecting consumers from the debt trap created by predatory loans with exorbitant interest rates.

II. Rent-A-Bank Schemes Evade State Interest Rate Caps

Non-bank predatory lenders have sought to evade state interest rate caps by laundering their loans through banks, generally exempt from state usury limits. In this rent-a-bank scheme, the bank serves as a conduit by which the non-bank lender can evade state interest rate caps, even though the non-bank lender interfaces with the consumer and has the predominant economic interest in the loan.

Loans made through rent-a-bank schemes are some of the most predatory on the market with interest rates of 100% and higher. For example, the OCC currently permits Stride Bank to pilot

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[1] National Consumer Law Center, *State Rate Caps for $500 and $2,000 Loans,* February 2020, https://www.nclc.org/images/pdf/high_cost_small_loans/payday_loans/FactSheet-StateRateCap.pdf, (last visited September 2, 2020).

[2] Dakota News Now, *South Dakota voters approve interest rate caps on payday loans*, November 8, 2016, https://www.dakotanewsnow.com/content/news/South-Dakota-voters-approve-interest-rate-cap-on-payday-loans-400489561.html.

[3] Lauren Saunders, National Consumer Law Center, *Why 36%? The History, Use, and Purpose of the 36% Rate Cap,* April 2013, https://www.nclc.org/images/pdf/pr-reports/why36pct.pdf.

loans up to 179.99% for CURO's Verge Credit in a plan to expand to states that do not permit those rates for non-banks.[4] Further, World Business Lenders uses the OCC-supervised Axos Bank to offer predatory small business loans at 138% APR. Beyond that, the OCC filed an amicus brief in support of this predatory small business lender, about which we expressed our deep disappointment.[5,6]

Currently, there are only a few of these rogue, predatory lenders—at least seven online lenders are using five banks to offer high-cost installment loans to consumers and small businesses. But, their use of online platforms allows them to offer predatory loans across the United States. For example, EasyPay Finance offers high-cost credit (consumer examples of APR as high as 188.99) through FDIC-supervised Transportation Alliance Bank in 30 states plus DC that may not allow that rate.[7]

However, state regulators, state attorneys general, and consumers have had success in the courts stopping these schemes and protecting the effectiveness of state interest rate caps.[8]

III. States have Protected Their Interest Rates with the "True Lender" Doctrine

Many of these state regulators, state attorneys general, and consumers have utilized the "true lender" doctrine, arguing that the true lender of a loan is the party with the predominant economic interest in the loan. State regulators argue that in rent-a-bank schemes, the true lender is always the predatory non-bank lender—which means that the lender is not provided safe harbor through its relationship with the bank, and the loan should be subject to state interest rate limits.

Most recently, in June 2020, the District of Columbia Attorney General filed suit against Elevate Credit, Inc. alleging that it is the true lender of loans made in DC, well in excess of the District's rate cap. Elevate sold two short term loan products to District residents that carried interest rates between 99 and 251%, up to 42 times the legal limit in DC. In two years, Elevate made 2,551 loans to residents well above the maximum interest rate of 24% for lenders that disclose

[4] Verge Credit, *Rates and Terms*, 2020, https://www.vergecredit.com/rates-and-terms/, (last visited September 2, 2020).
[5] *Amicus Brief of the [FDIC] and the [OCC] in Support of Affirmance and Appellee, In Re: Rent-Rite Super Kegs West Ltd.*, Sept. 10, 2019, https://www.consumerfinancemonitor.com/wp-content/uploads/sites/14/2019/09/Amicus_Brief.pdf.
[6] Letter to the OCC and FDIC from CFA, 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.
[7] National Consume Law Center, *High-Cost Rent-a-Bank Loan Watch List*, https://www.nclc.org/issues/high-cost-small-loans/rent-a-bank-loan-watch-list.html, (last visited September 2, 2020).
[8] National Consumer Law Center, Consumer Credit Regulation § 3.9.1 (2d ed. 2015), *updated at* https://library.nclc.org. Includes a few of the hundreds of cases that illustrate that the substance-over-form doctrine remains the universal rule today and that emphasize the importance of looking to the truth in preventing evasion of usury laws.

their rate in contracts and 6% for those that do not.[9,10]

However, the OCC proposal seeks to eliminate the "true lender" doctrine. Its proposal will prohibit courts from looking past the fine print of loan paperwork to what is true in these agreements; that the non-bank lender has the predominant economic interest in the loan. This proposal would dictate that by merely putting the bank's name on the paperwork, the bank becomes the true lender. The non-bank lender could control all interaction with the borrower, take on virtually all of the risk, reap the vast majority of the profits, and still, the bank would be the lender as long as, as of the date of origination, the bank "is named as the lender in the loan agreement."[11] Once the bank is named the lender, the usury laws that govern the non-bank lender would be preempted and the interest rate would be controlled by the rate exportation provisions of the National Bank Act.

The OCC proposed rule would take away a critical enforcement tool against usury evasions, leaving states with no ability to protect their interest rate caps and paving the way for these exploitive and predatory rent-a-bank schemes. Without this significant enforcement tool, rent-a-bank schemes will become far more prevalent, eviscerating state interest rate caps, and drastically limiting states' authority to protect consumers from predatory lending.

IV. Predatory Lenders Target Communities of Color and Leave Borrowers Worse Off

The proposed rule was drafted with a stated goal to address the legal uncertainty that "may discourage banks and third parties from entering into relationships… which may restrict access to affordable credit."[12] Some believe that these rent-a-bank relationships increase access to affordable credit and financial inclusion of underserved communities and communities of color,[13] but this proposal does the opposite.

This proposal would pave the way for more non-bank lenders to enter into rent-a-bank schemes with banks in order to offer loans with interest rates where such rates are illegal. The harms of predatory loans have been more thoroughly documented in recent years than ever before,[14,15] and

[9] 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.
[10] Consumer Federation of America, *CFA Commends D.C. Attorney General Racine for Filing Lawsuit Against Predatory Lender that Utilized Rent-A-Bank Scheme to Evade D.C.'S Rate Cap*, June 8, 2020, https://consumerfed.org/press_release/cfa-commends-d-c-attorney-general-racine-for-filing-lawsuit-against-predatory-lender-that-utilized-rent-a-bank-scheme-to-evade-d-c-s-rate-cap/.
[11] Proposed 12 C.F.R. § 7.1031(a), 85 Fed. Reg, pg. 44223.
[12] Proposed 12 C.F.R. § 7.1031(a), 85 Fed. Reg, pg. 44224.
[13] Claire Williams, Morning Consult, *New Acting Banking Comptroller Plans Rapid Pace on Fintech Agenda,* July 6, 2020, https://morningconsult.com/2020/07/06/occ-brian-brooks-interview-true-lender-fintech/.
[14] Consumer Federation of America, Comments to the Consumer Financial Protection Bureau on Payday Lending Abuses, Docket No. CFPB-2012-0009, April 23, 2012, https://consumerfed.org/wp-content/uploads/2012/04/4-23-12-CFPB-Payday-Loans_Comments.pdf.
[15] Consumer Federation of America, Proposed Rule on Payday, Vehicle Title, and Certain High-Cost Installment Loans, Docket No. CFPB-2016-0025, October 7, 2016, https://consumerfed.org/wp-content/uploads/2016/10/10-7-16-Payday-Rule_Comment.pdf.

it has become clear that these loans are structured to create long-term debt traps. They are marketed to borrowers as short-term fixes to cover unexpected emergencies, but the products' structure and high-cost result in the borrower taking out more loans to pay off the original loan. These predatory lenders target financially distressed individuals and disproportionately prey on communities of color.[16] These loans result in long lasting financial harm for consumers, especially consumers of color, stripping them of hard-earned wealth, exacerbating the racial wealth gap, and leading to further financial exclusion. These high-cost loans do not provide access to credit. Instead, they trap borrowers in destructive debt cycles, leaving borrowers with ruined credit and unable to borrow at lower interest rates in the future.

V. Conclusion

For the reasons outlined above, CFA urges the OCC to withdraw its proposal. This proposal will eviscerate the power of state interest rate caps, rid state regulators of the single most effective tool to protect consumers from predatory lending, and unleash rent-a-bank lenders on consumers in all 50 states.

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[16] Claire Williams, Morning Consult, '*It's Call Reverse Redlining:' Measuring the Proximity of Payday Lenders, Pawn Shops to Black Adults*, July 23, 2020, https://morningconsult.com/2020/07/23/black-consumers-payday-loan-banking-services/;
Wei Li, et al., Center for Responsible Lending, *Predatory Profiling: The Role of Race and Ethnicity in the Location of Payday Lenders in California*, March 26, 2009, http://www.responsiblelending.org/payday-lending/research-analysis/predatory-profiling.pdf;
Brandon Coleman and Delvin Davis, Center for Responsible Lending, *Perfect Storm: Payday Lenders Harm Florida Consumers Despite State Law*, March 2016;
Delvin Davis and Lisa Stifler, Center for Responsible Lending, *Power Steering: Payday Lenders Targeting Vulnerable Michigan Communities*, August 21, 2018, https://www.responsiblelending.org/research-publication/power-steering-payday-lenders-targeting-vulnerable-michigan-communities;
Delvin Davis, Center for Responsible Lending, *Mile High Money: Payday Stores Target Colorado Communities of Color*, Aug. 2017; amended Feb. 2018, https://www.responsiblelending.org/research-publication/mile-high-money-payday-stores-target-colorado-communities-color.