United States Senate
WASHINGTON, DC 20510

September 17, 2020

The Honorable Brian Brooks
Acting Comptroller of the Currency
Office of the Comptroller of the Currency
400 7th Street, SW
Washington, D.C. 20219

Dear Acting Comptroller Brooks:

We write to express our strong opposition to the "true lender" rule proposed by the Office of the Comptroller of the Currency (OCC), which would eviscerate state laws that limit the interest rates on loans and allow unregulated predatory lending across the nation. We demand that you withdraw this proposed rule.

Currently, a supermajority of states and the District of Columbia limit the amount of interest that lenders can charge on many loans. For example, 44 states and the District of Columbia have capped the interest rate for a $500 six-month loan, and 42 states and the District of Columbia have capped the interest rate for a $2,000 two-year loan.[1] The clear trend is toward more protections for borrowers, with new bipartisan laws capping interest rates on payday and other personal loans in Montana in 2010, South Dakota in 2017, Colorado and Ohio in 2019, and going into effect in California in 2020.[2]

The OCC's proposed rule runs contrary to this trend and would gut these state laws by enabling payday and other non-bank lenders to evade state interest limits by funneling high-interest, predatory loans through national banks, which are not subject to these state laws.[3] In these "rent-

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1 National Consumer Law Center, State Annual Percentage Rate (APR) Caps for $500, $2,000 and $10,000 Installment Loans, *available at* https://www.nclc.org/images/pdf/high_cost_small_loans/fact-sheet-apr-caps-for-installment-loans.pdf.

2 *See* https://www.ksfy.com/content/news/South-Dakota-voters-approve-interest-rate-cap-on-payday-loans-400489561.html; https://www.cincinnati.com/story/money/2019/04/26/ohio-payday-loan-law-what-it-means-what-changes/3585952002/; https://www.cnbc.com/2019/09/13/california-passes-new-rules-that-cap-payday-loan-interest-at-36percent.html.

3 National banks are subject to state usury laws. But under the "exportation doctrine," the Supreme Court held that nationally-chartered banks can "export" the interest rate of the state in which they are located to other states. *Marquette Nat'l Bank of Minneapolis v. First of Omaha Serv. Corp.*, 439 U.S. 299 (1978).

a-bank" arrangements, the bank plays a nominal role as the formal lender of the loan.[4] The non-bank lender, however, does all the work, bears all or nearly all of the economic risk, and collects most of the profit. It markets and advertises the loan, conducts the underwriting (or licenses its underwriting software to the bank), collects payments from consumers, services the loan, and is either the assignee of or purchases the predominate economic interest in the loan.[5] Consumers have no direct interaction with the bank; they apply to and deal with the non-bank lender, which arranges and collects payments on the loan.[6]

Under President George W. Bush's administration, the OCC cracked down on rent-a-bank schemes. In 2001, the OCC issued guidance making it clear that it is an "abuse of the national bank charter" for national banks to enable non-bank lenders to make loans that violate state laws.[7] In 2003, then OCC Comptroller John D. Hawkes, Jr. explained:

> We have been greatly concerned with arrangements in which national banks essentially **rent out their charters** to third parties who want to evade state and local consumer protection laws. The preemption privileges of national banks derive from the Constitution and are not a commodity that can be transferred for a fee to nonbank lenders.[8]

The OCC also brought several enforcement actions to end these arrangements.[9] There is no reason for the OCC to now reverse its position and enable these types of abusive schemes that prey on consumers with high-interest, predatory loans.

The proposed rule is also contrary to longstanding legal precedent that considers the substance of a transaction, not its form, to determine whether state usury laws apply. Since the earliest days of

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4 *See CFPB v. CashCall, Inc.*, 2016 WL 4820635 (C.D. Cal. Aug. 31, 2016) (payday lender indemnified bank and had a contractual obligation to purchase the loans funded by the bank that were underwritten based on the payday lender's guidelines).

5 *See*, *e.g.*, Elevate, Inc. 2018 10-K at 17, (Mar. 8, 2019) (non-bank lender conducts marketing and licenses its website, technology platform, proprietary credit and fraud scoring models to bank to originate loans), *available at* http://www.snl.com/Cache/c397055303.html.

6 For example, FinWise Bank, one of the FDIC-regulated banks that rents its charter to non-bank lenders, does not offer small dollar loans directly to consumers. Instead, the bank's website includes links to non-bank lenders' websites, like Opploans, where consumers can "learn more" about these "[p]artner offers." *See* https://www.finwisebank.com/lending/.

7 OCC Bulletin 2001-47, available at https://ithandbook.ffiec.gov/media/resources/3557/occ-bul_2001_47_third_party_relationships.pdf.

8 https://www.occ.gov/news-issuances/news-releases/2003/nr-occ-2003-6.html (emphasis added); *see also* Remarks by Comptroller John D. Hawke, Jr., Before the Women in Housing and Finance, (Feb. 12, 2002) (same), *available at* https://www.occ.gov/news-issuances/speeches/2002/pub-speech-2002-10.pdf.

9 *See, e.g.*, *In re Eagle National Bank*, No. 2001-104 (Dec. 18, 2001); *In the Matter of Peoples National Bank*, No. 2003-02 (Jan. 30, 2003). The FDIC and the Consumer Financial Protection Bureau have also brought enforcement actions to end similar rent-a-charter arrangements between non-bank lenders and banks. *See CFPB v. CashCall, Inc.* Case No. 1:13-cv-13167, (C.D. Cal. Filed Dec. 16, 2013); *In re CompuCredit Corp.*, Case Nos. FDIC-08-139b, FDIC-08-140k, FDIC-07-256b, FDIC-07-257k, FDIC-07-228b, FDIC-07-260k (Dec. 19, 2018).

this nation, high-cost lenders have attempted to evade usury laws. The Supreme Court and numerous state courts have consistently held that, to prevent evasions of usury laws, courts may look beyond the technical form of a transaction to its substance.[10]

In recent years, courts have closely scrutinized new non-bank arrangements with banks to determine which entity—the non-bank or the bank—is the "true lender." To make this determination, courts consider a variety of factors to determine which entity is the de facto lender or has the predominant economic interest.[11] In other words, the courts look at substance over form to determine whether the non-bank lender is the "true lender" and thus subject to state usury laws.

The proposed rule turns this analysis on its head, elevating form over substance. Instead of closely scrutinizing the relationship and respective economic interests of the non-bank and the bank, the proposed rule looks only at whether technical formalities have been met—namely, whether, as of the date of the origination, the bank is named as the lender in the loan agreement or funds the loan. This is no standard at all. The proposed rule is not only contrary to longstanding common law principles, but it also considers none of the relevant factors reviewed by courts and invites the very "abuse of the national charter" that the OCC previously cracked down on.

The OCC's proposed rule also fails to meet the requirements Congress put in place for the preemption of state consumer financial laws.[12] Under the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank Act), the OCC can preempt a "state consumer financial law" by regulation, order, or determination if the Comptroller, him or herself without delegation, determines, on a "case-by-case basis," considering the impact of a "particular" state law, that it "prevents or significantly interferes with the exercise by the national bank of its

[10] *See, e.g.*, *Scott v. Lloyd*, 34 U.S. 418, 446-47 (1835) ("[I] if giving this form to the contract will afford a cover which conceals it from judicial investigation, the [usury] statute would become a dead letter. Courts, therefore, perceived [sic] the necessity of disregarding the form, and examining into the real nature of the transaction. If that be in fact a loan, no shift or device will protect it."); *Miller v. Tiffany*, 68 U.S. 298, 310 (1863) (courts look beyond the form of a transaction to its "real character" to determine whether there is an attempt to evade a usury statute); *CashCall v. Morrissey*, 2014 WL 2404300 (W.Va. May 30, 2014) (court looked beyond loan agreement to determine whether the bank was the true lender); Bankwest v. Oxendine, 266 Ga.App. 771, 598 S.E.2d 343 (Ga. App. 2004) (same); *Community State Bank v. Strong*, 651 F.3d 1241, 1260 (11th Cir. 2011) (same).

[11] *See, e.g.*, CFPB *v. CashCall, Inc.*, 2016 WL 4820635; *Pennsylvania v. Think Fin., Inc.*, No. 14-cv-7139, 2016 WL 183289, at *18 (E.D. Pa. Jan. 14, 2016) (denying motion to dismiss where plaintiff alleged facts that nonbank entity was the true lender and did not enjoy the privilege of the exportation doctrine); *CashCall, Inc. v. Morissey*, No. 12-1274, 2014 WL 2404300, at *12 (W. V. May 13, 2014) (affirming trial court's finding that nonbank lender was the de facto lender and not entitled to preemption of state usury law);

[12] In passing the Dodd-Frank Act, Congress restricted the OCC's ability to preempt state consumer financial laws based on the agency's role enabling predatory lending that led to the 2008 financial crisis *See, e.g.*, Nicholas Bagley, *The Unwarranted Regulatory Preemption of Predatory Lending Laws*, 79 N.Y.U. L. Rev. 2274 (2004); Kathleen C. Engel & Patricia McCoy, *Federal Preemption and Consumer Financial Protection: Past and Future*, 3 Banking and Fin. Services Pl'y Rep. 25 (2012).

powers."[13] In addition, the Dodd-Frank Act requires that the Comptroller "shall first consult with the [Consumer Financial Protection Bureau] and shall take the views of the Bureau into account when making the determination."[14]

The OCC has not met the statutory requirements to preempt state usury laws. The proposed rule contains no evidence or determination by the Comptroller, him or herself without delegation, that a search for the true lender and an application of state usury laws to nonbanks that are the true lender "prevents or significantly interferes with the exercise by the national bank of its powers." Nor does the proposed rule indicate that the Comptroller has consulted with the CFPB or taken the CFPB's views into account in making that determination.[15]

The OCC's proposed true lender rule represents a disturbing return to its pre-financial crisis role in broadly applying federal preemption to undermine state consumer protection laws. For over two centuries, states have taken the lead in addressing interest rates within their borders. Now is not the time to overturn this system. We urge you to reverse course on this path, which enabled predatory lending practices and contributed to the 2008 financial crisis, and which would cause even greater financial harm to American families struggling through an even worse crisis.

Sincerely,

Chris Van Hollen
United States Senator

Sherrod Brown
United States Senator

Jack Reed
United States Senator

Elizabeth Warren
United States Senator

13 12 U.S.C. § 25b(b)(1)(B).JF
14 12 U.S.C. § 25b(b)(3)(B).
15 12 U.S.C. § 25b(f) does not relieve the OCC of the substantive and procedural requirements to preempt state consumer financial law under Section 12 U.S.C. § 25b(b). That section merely restates the power of a "national bank" to export the interest allowable in the state, territory, or district in which the national bank is located. By its express terms, the exportation privilege of 12 U.S.C. § 25b(f) is limited to "national banks." This is also consistent with 12 U.S.C. § 25b(e), which makes clear that state consumer financial laws apply to a subsidiary or affiliate of a national bank (other than a subsidiary of affiliate that is chartered as a national bank).

Brian Schatz
United States Senator

Catherine Cortez-Masto
United States Senator

Tina Smith
United States Senator

Dianne Feinstein
United States Senator