



September 3, 2020

VIA ELECTRONIC SUBMISSION

Brian P. Brooks
Acting Comptroller
Office of the Comptroller of the Currency
Department of Treasury
400 7th Street S.W.
Washington, D.C. 20219

Re: National Banks and Federal Savings Associations as Lenders
(Docket No. OCC-2020-0026)

Dear Acting Comptroller Brooks:

On behalf of the 24 undersigned State Attorneys General (the “States”), we write to express our strong objections to a rule proposed by the Office of the Comptroller of the Currency (the “OCC”) that would upend the delicate balance of the country’s dual banking system and radically undermine the States’ most effective deterrent against predatory lending – state usury laws.¹

The principal beneficiaries of the OCC’s proposal (the “Proposed Rule”) are participants in business arrangements between National Banks and non-banks that will be permitted to make consumer loans at exorbitant interest rates, notwithstanding state laws that prohibit such excessive interest rates.² Under the Proposed Rule, these arrangements will no longer be subject to inquiries designed to determine whether the purpose of the partnership is evasion of state usury laws, or whether the National Bank is the lender in name only.

The Proposed Rule does not identify these partnerships as such, but they are “rent-a-bank” schemes, in which heavily regulated National Banks partner with largely unregulated non-

¹ See OCC, *National Banks and Federal Savings Associations as Lenders*, 85 Fed. Reg. 44,223 (proposed July 22, 2020) (to be codified at 12 C.F.R. § 7.1031).

² For ease of comprehension and because the concerns expressed herein apply equally to national banks and Federal savings associations, this letter will refer to both types of entities as “National Banks.”

bank entities for the purpose of allowing non-banks to evade state usury laws and state regulation. Such schemes flourished in the late 1990s and early 2000s to facilitate payday lending at interest rates exceeding 300% that was illegal under state law. Although the OCC put an end to rent-a-bank schemes in 2003, it now – without sufficient evidence or authority – breezily asserts that these arrangements benefit the U.S. economy and American consumers in several ways, including expanding the availability of affordable credit to the unbanked and underbanked.³ But the non-bank lenders that will benefit from the Proposed Rule have little interest in making *affordable* loans, because it is far more profitable to make illegal, high interest rate loans to consumers who struggle to repay and that often end in default. Instead of complete repayment, predatory lenders recoup their outlays through high, often triple-digit, interest rate charges. Indeed, the Proposed Rule suggests the OCC would permit effective interest rates on short term loans of up to 100% – hardly an affordable loan under any metric.⁴ Under the guise of addressing “uncertainty” regarding lending relationships between National Banks and non-banks, the Proposed Rule provides a veritable roadmap for structuring myriad rent-a-bank schemes that will be shielded from state scrutiny.

For these reasons and those discussed in detail below, the States urge the OCC to withdraw the Proposed Rule in its entirety.

I. Background

A. The Historical and Sovereign Right of States to Regulate and Prevent Usury by Non-Bank Lenders, Including Those Who Engage in “Rent-A-Bank” Schemes

The states and the federal government have long shared responsibility for regulating lenders and protecting consumers from predatory practices. A key feature of this balance of powers between state and federal governments is the “dual banking system” originating from the National Bank Act of 1864 (“NBA”).⁵ Under this framework, the OCC maintains supervisory authority over National Banks, and the NBA regulates the interest rate that such banks may charge in interstate transactions.⁶ When National Banks originate loans, they are permitted to charge the maximum interest rate permissible in the state in which they are located, to “export” that interest rate to borrowers in other states, and to preempt any state usury laws if the interest

³ See Proposed Rule at 44,223.

⁴ See *id.* at 44,227 (stating that “as part of its routine supervision of a bank’s lending relationships with third parties,” the OCC evaluates, among others, whether “the bank’s overall returns on the loans reasonably related to the bank’s risks and costs of the loans (e.g., the total credit costs on short term loans, such as 12- to 36- month loans, are not substantial in relation to, or do not exceed, the principal amount of the loan)”).

⁵ Jay B. Sykes, Cong. Research Serv., R45081, *Banking Law: An Overview of Federal Preemption in the Dual Banking System* 4 (2018).

⁶ 12 U.S.C. §§ 85, 481. The OCC has the same powers with respect to Federal savings associations under the Home Owners’ Loan Act, see 12 U.S.C. § 1463, so statements herein about the NBA equally apply to Federal savings associations.

rate on the loan exceeds the amount permitted by state law, including state law in the state where the borrower resides.⁷

The NBA does not apply to non-bank entities, however.⁸ Rather, such lenders are generally subject to oversight by state licensing authorities and must comply with state consumer-lending statutes designed to protect the consuming public. These statutes provide bedrock protections that serve important state interests and safeguard borrowers from abuses in the marketplace.⁹ State usury laws, for example, have long prevented non-banks from charging excessive and exploitative interest rates against vulnerable consumers. Lender-licensing laws prevent loan-sharking and ensure that non-banks engaged in the business of lending conduct their business in an ethical, legally compliant, and financially sound manner. With consumer debt at record levels, it is more important than ever for states to exercise their sovereign power to regulate and protect residents from harmful lending practices by non-banks.

Financial products and consumer lending have also become increasingly complex in recent years, which has led to a number of different schemes and maneuvers to avoid compliance with state consumer protections. So-called “rent-a-bank” schemes are one such example.

Although some National Banks attempt to pass on the benefits of NBA preemption to their non-bank partners, the NBA shields National Banks – and only National Banks – from liability under state usury laws. In rent-a-bank scenarios, non-bank lenders looking to charge exorbitant interest rates and seeking to avoid state interest rate caps use National Banks to appear on loan documents as the loan originator. Non-banks use National Banks as the “delivery vehicle”¹⁰ to charge interest at rates the non-banks could not charge on their own.¹¹ The non-bank lender provides the underwriting, marketing, and funding of the loans, often formally purchasing the note immediately after origination. The National Bank is then paid a fee to play the role of originator in name only, bearing little if any risk in the loan’s performance.¹²

⁷ See *Beneficial Nat’l Bank v. Anderson*, 539 U.S. 1, 10-11 (2003). The interplay between NBA provisions regarding interest rates and state usury laws is variously described as interest rate exportation or NBA preemption, both of which refer to the same legal issues.

⁸ 12 U.S.C. § 25b(h)(2) (“No provision of this title [*e.g.*, the NBA] . . . 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).”); 12 U.S.C. § 1 (providing for OCC authority to “the institutions and other persons subject to its jurisdiction” – *i.e.*, national banks, federal savings associations, and other financial institutions that it regulates); *see also* Proposed Rule at 44,225 (acknowledging that “if a third party makes a loan as part of a relationship with a bank, the OCC is not the prudential regulator of the lending activity”).

⁹ *See, e.g.*, N.C. Gen. Stat. § 24-2.1(g) (“It is the paramount public policy of North Carolina to protect North Carolina resident borrowers through the application of North Carolina interest laws.”).

¹⁰ OCC Preemption Determination 01-10, 66 Fed. Reg. 28,593, 28,595 n.6 (May 23, 2001).

¹¹ One court characterized rent-a-bank schemes as attempts by non-banks to “borrow” NBA preemption from National Banks. *See Kaur v. World Bus. Lenders, LLC*, 440 F. Supp. 3d 111, 119 (D. Mass. 2020).

¹² Chris Arnold, *How Some Online Lenders Dodge State Laws to Charge Triple Digit Interest Rates*, NPR, Nov. 12, 2019, available at <https://www.npr.org/transcripts/778632599>; *Pennsylvania v. Think Fin., Inc.*, No. 14-cv-7139, 2016 WL 183289, at *1, *23 (E.D. Pa. Jan. 14, 2016) (describing alleged rent-a-bank scheme subject to enforcement by Pennsylvania Attorney General).

State consumer-lending statutes, however, do not countenance such evasion and have been repeatedly enforced against non-banks engaging in such conduct. Disguised lending by non-banks may be prevented by state law specifically applying consumer-lending laws to non-banks that act as the “true” or “de facto” lender.¹³ As one court has explained, “[i]f the true lender is a non-bank,” then the preemption rights available under federal banking law “cannot attach.”¹⁴

This doctrine is an outgrowth of longstanding decisional caselaw recognizing the application of state statutes to non-banks engaged in lending, regardless of the use of labels and form. As just one variation of an age-old maxim, the New York Court of Appeals stated in 1875:

The [loan] transaction must be judged by its real character, rather than by the form and color which the parties have seen fit to give it. The shifts and devices of usurers to evade the statutes against usury, have taken every shape and form that the wit of man could devise, but none have been allowed to prevail. Courts have been astute in getting at the true intent of the parties, and giving effect to the statute.¹⁵

Indeed, nearly every jurisdiction recognizes this concept in the interpretation and application of state consumer-lending statutes.¹⁶

¹³ See, e.g., Ga. Code. Ann. § 16-17-2(b)(4) (creating totality of the circumstances test to determine when “a purported agent shall be considered a de facto lender” for purposes of state usury laws); *Easter v. Am. W. Fin.*, 381 F.3d 948, 957 (9th Cir. 2004) (applying the de facto lender doctrine under Washington state law).

¹⁴ See *Rent-Rite Superkegs W. Ltd. v. World Bus. Lenders, LLC*, No. 19-cv-01552-RBJ, slip. op. at 12 (D. Col. Aug. 12, 2020) (citing *FDIC v. Lattimore Land Corp.*, 656 F.2d 139, 147 (5th Cir. Unit B Sept. 1981)).

¹⁵ *Quackenbos v. Sayer*, 62 N.Y. 344, 346 (1875).

¹⁶ See, e.g., *Scott v. Lloyd*, 34 U.S. 418, 419 (1835) (“The ingenuity of lenders has devised many contrivances by which, under forms sanctioned by law, the statute may be evaded. . . . Yet it is apparent, that if giving this form to the contract will afford a cover which conceals it from judicial investigation, the 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.”); *Easter*, 381 F.3d at 957 (recognizing that “Washington courts consistently look to the substance, not the form, of an allegedly usurious action”); *BankWest, Inc. v. Oxendine*, 598 S.E.2d 343, 348 (Ga. Ct. App. 2004) (“To determine if a contract is usurious, we critically examine the substance of the transaction, regardless of the name given it . . . The law intends that a search for usury shall penetrate to the substance.”) (footnotes omitted); *Dunn v. Midland Loan Fin. Corp.*, 289 N.W. 411, 413 (Minn. 1939) (“The process involves looking through the form to the substance. No device or shift may be employed to conceal the true character of the transaction.”); *W. Auto Supply Co. v. Vick*, 277 S.E.2d 360, 366 (N.C. 1981) (“The courts of this state regard the substance of a transaction, rather than its form as controlling. Specifically, when there is an allegation that the usury laws have been violated by a particular act or course of conduct, the courts of North Carolina will not hesitate to look beneath the formality of the activity to determine whether such an incident is, in fact, usurious.”) (internal citations omitted); *Carter v. Brand*, 1 N.C. 255, 257 (1800) (“Every case arising upon the Act of Assembly to restrain excessive usury must be viewed in all its circumstances, so as to ascertain the real intention of the parties. If that be corrupt in the substance and design, no pretext however plausible, no contrivance however specious, no coloring however artful, with which the transaction is veiled, will secure it from the

Applying this basic concept of state law, numerous courts across the United States have held that non-banks cannot escape usury prohibitions and licensing oversight under the guise of rent-a-bank schemes.¹⁷ Courts have not hesitated to apply the true lender doctrine even when a National Bank is a nominal party to the transaction.¹⁸

In applying the doctrine, courts carefully scrutinize transactions to see which party – *i.e.*, the National Bank or the non-bank – is the “true lender” of the loan. They usually look to see which party had the predominant economic interest in the loan, considering factors such as which party held the financial risk, and they may also consider other indicia of the parties’ intent to create a transaction where form attempts to trump substance.¹⁹

censure of the law.”); *Crim v. Post*, 23 S.E. 613, 614 (W. Va. 1895) (“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.”).

¹⁷ See, e.g., *Cnty. State Bank v. Strong*, 651 F.3d 1241, 1260 (11th Cir. 2011) (concluding that federal banking law does not immunize bank from state usury law “if it is not the true lender of the loan”); *Think Fin.*, 2016 WL 183289, at *13 (same); *Spitzer v. Cnty. Bank of Rehoboth Beach*, 45 A.D.3d 1136, 1138 (3d Dep’t 2007) (holding that “the true lender,” rather than “the written characterization that the parties seek to give” the transaction, determines whether a bank or a non-bank would be treated as the lender); cf. *CashCall, Inc. v. Morrissey*, No. 12-1274, 2014 WL 2404300, *7, 14-15 (W. Va. 2014) (affirming judgment finding that unlicensed entity “was the de facto or true lender” and thus violated state licensing and usury laws).

¹⁸ See *Daniel v. First Nat’l Bank of Birmingham*, 227 F.2d 353, 357 (5th Cir. 1955) (holding a National Bank was liable for usury because the transaction involved “a loan or extension of credit to which the Bank was privy throughout” even though the contract was assigned to the bank after the transaction closed); *Ubaldi v. SLM Corp.*, 852 F. Supp. 2d 1190, 1203 (N.D. Cal. 2012) (denying motion to dismiss in case alleging that Sallie Mae, not a National Bank, was the true lender); *Goleta Nat’l Bank v. O’Donnell*, 239 F. Supp. 2d 745, 747, 755 (S.D. Ohio 2002) (concluding that if a non-bank was the “true lender,” then it would “unquestionably [be] subject to” state usury law, even though a different entity “is clearly listed as the lender on the loan documents”); *Goleta Nat’l Bank v. Lingerfelt*, 211 F. Supp. 2d 711, 717-18 (E.D.N.C. 2002) (same); *Salazar v. Ace Cash Exp., Inc.*, 188 F. Supp. 2d 1282, 1285 (D. Colo. 2002) (same); *Eul v. Transworld Sys.*, No. 15 C 7755, 2017 WL 1178537, at *6 (N.D. Ill. Mar. 30, 2017) (“Because Plaintiffs allege that [a National Bank] was not the true originator of their loans, the Court is not persuaded that NBA preemption applies here.”).

¹⁹ See, e.g., *Kaur*, 440 F. Supp. 3d at 122 (“In determining the true lender, courts have looked to which institution had the predominant economic interest, for which the key and most determinative factor is which entity placed its own money at risk at any time during the transactions.”) (internal quotation marks and alterations omitted); *Bank of Rehoboth Beach*, 45 A.D.3d at 1138 (“[A]n examination of the totality of the circumstances surrounding this type of business association must be used to determine who is the true lender, with the key factor being who had the predominant economic interest in the transactions.”); *Minnesota v. Cashcall, Inc.*, No. 27-CV-13-12740, 2013 WL 6978561, at *4 (Minn. Dist Ct. Sep. 6, 2013) (denying dismissal where state sued for violations of state law by “de facto” lender and where “the loans are inextricably linked to the Defendants’ funding mechanism and operational support”), *aff’d*, 2014 WL 4056028 (Minn. Ct. App. Aug. 18, 2014) (unpublished).

B. Summary of the OCC’s Proposal to Preempt State Oversight of Non-Bank “True Lenders”

The Proposed Rule is purportedly intended to address supposed “ambiguities” in provisions of three federal banking statutes – the NBA,²⁰ the Federal Reserve Act,²¹ and the Home Owners’ Loan Act²² – that generally authorize National Banks to make loans, but, according to the OCC, do not “describe how to determine when a bank has, in fact, exercised this authority, and when, by contrast, the bank’s relationship partner has made the loan.”²³ The OCC’s solution is to replace flexible longstanding standards focused on the substance of the relationship between the National Bank and non-banks with an unprecedented categorical and formalistic standard that would purport to foreclose any meaningful oversight of loans originated as part of such relationships. In asserting its right to preempt state true lender laws, the Proposed Rule is part and parcel of the OCC’s misguided campaign to undermine state oversight of lending activities through dubious interpretations of federal law.

As discussed above, under the NBA, when National Banks originate loans, they are subject only to the usury laws of the state in which they are located (potentially a state with no usury cap), and usury laws of other states – including the laws of the states where the borrowers reside – are preempted. The OCC recently issued what it calls a “*Madden*-fix rule,” which extends NBA preemption to any entity that purchases a loan from a National Bank,²⁴ and attempts to overrule *Madden v. Midland Funding, LLC*, a 2015 decision in which the Second Circuit held that extending NBA privileges to unaffiliated assignees of National Banks “would be an overly broad application of the NBA” and would “create an end-run around usury laws for non-national bank entities that are not acting on behalf of a national bank.”²⁵ The OCC explains that the Proposed Rule and the *Madden*-fix rule will benefit National Banks and their non-bank

²⁰ 12 U.S.C. §§ 24(Seventh) (providing that a national banking association “shall have power . . . To exercise . . . all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes according to the provisions of [the NBA].”).

²¹ 12 U.S.C. § 371(a) (providing that “[a]ny national banking association may make, arrange, purchase or sell loans or extensions of credit secured by liens on interests in real estate . . .”).

²² 12 U.S.C. § 1464(c) (providing that “[t]o the extent specified in regulations of the Comptroller, a Federal savings association may invest in, sell, or otherwise deal in the following loans and other investments . . .”).

²³ Proposed Rule at 44,224-25.

²⁴ OCC, *Permissible Interest on Loans That Are Sold, Assigned, or Otherwise Transferred*, 85 Fed. Reg. 33,530-36 (June 2, 2020) (to be codified at 12 C.F.R. §§ 7.40001(e) and 160.110(d)). Several States recently sued the OCC to invalidate the *Madden*-fix rule, arguing, among other things, that the OCC lacked statutory authority to issue the rule. See *California v. OCC*, Case No. 4:20-Civ.-05200-JSW (N.D. Cal.). Another coalition of States sued the Federal Deposit Insurance Corporation to invalidate a substantially similar rule. See *California v. FDIC*, Case No. 4:20-Civ.-05860 (N.D. Cal.). Given the relationship between the true lender doctrine and the *Madden*-fix rule, many of the arguments raised in these lawsuits – and comment letters filed by many of the States with the OCC and FDIC regarding the *Madden*-fix rules – apply with equal force to the Proposed Rule, and are incorporated herein by reference.

²⁵ See *Madden v. Midland Funding, LLC*, 786 F.3d 246, 251-52 (2d Cir. 2015), *cert. denied*, 136 S. Ct. 2505 (2016).

partners as the two rules “would operate together . . . to provide greater clarity to banks regarding their lending activities.”²⁶

While the OCC pays lip service to condemning predatory lending, it gives its wholesale endorsement to lending relationships predicated on evasion of usury laws designed to protect consumers. Without citation to any evidence or authority, the OCC opines that credit markets are “most efficient” when National Banks enter into relationships with non-bank entities to make loans, because these relationships “allow banks to manage their risks and leverage their balance sheets to increase the supply of available credit in ways they would not be able to if they were acting alone.”²⁷ The Proposed Rule does not explain why National Banks cannot make these loans on their own; why National Banks cannot enter into lending partnerships with other National Banks; or why the purported benefits of these arrangements would be undermined by requiring non-bank lenders to comply with state usury laws.

As noted above, in determining whether a loan is usurious, courts have historically looked to the substance of the transaction, not its form, recognizing that usury has “taken every shape and form that the wit of man could devise.”²⁸ Courts carefully scrutinize transactions to see which party – the National Bank or the non-bank – is the “true lender” of the loan, usually looking to see which party had the predominant economic interest in the loan. The Proposed Rule is designed to foreclose this judicial scrutiny, as the OCC maintains:

These fact-intensive inquiries, coupled with the lack of a uniform and predictable standard, increase the subjectivity in determining who is the true lender and undermine banks’ ability to partner with third parties to lend across jurisdictions on a nationwide basis. As a result of this legal uncertainty, stakeholders cannot reliably determine which entity makes a loan, and therefore, the applicability of key aspects of the legal framework as of the date of origination is unclear.²⁹

Contrary to the OCC’s assertion, for nearly two hundred years, courts considering usury cases have consistently examined the substance of loan transactions rather than the form, which has led to a widely-adopted “preponderant economic interest” standard. Instead, the OCC now endeavors to supplant longstanding state statutory and case law with an artificial and unprecedented standard that eschews the economic realities of consumer loan transactions and is in direct conflict with existing law. Specifically, the OCC proposes a categorical and formalistic two-pronged standard under which “a bank makes a loan when, as of the date of origination, it (1) is named as lender in the loan agreement or (2) funds the loan.”³⁰ Notably, this bright-line rule determination “would be complete as of the date the loan is originated and would not change, even if the bank were to subsequently transfer the loan.”³¹

²⁶ Proposed Rule at 44,227.

²⁷ *Id.* at 44,223-24.

²⁸ *Quackenbos*, 62 N.Y. at 346.

²⁹ Proposed Rule at 44,224.

³⁰ *Id.* at 44,225.

³¹ *Id.*

The OCC opines that, when a National Bank is identified as the lender in a loan agreement, “the OCC views this imprimatur as conclusive evidence that the bank is exercising its authority to make loans pursuant to” federal law.³² The second prong is intended to capture circumstances in which a National Bank is not identified as the lender in a loan agreement, but “funds the loan”: “Under this standard, if a bank funds a loan as of the date of origination, the OCC concludes that it has a predominant economic interest in the loan and, therefore, has made the loan—regardless of whether it is the named lender in the loan agreement as of the date of origination.”³³

While the Proposed Rule conspicuously avoids using the word preemption, the Proposed Rule is exactly that. It would apply three federal banking statutes³⁴ in place of state consumer protections and purports to categorically invalidate the “true lender” doctrine currently applicable to state consumer-lending laws. The OCC is also clear that the very purpose of the Proposed Rule is to replace state true-lender standards employed by courts today with a bright-line federal standard.³⁵ As the OCC is well aware, the true lender doctrine is typically only implicated by claims premised on a violation of a state usury or other consumer-lending law,³⁶ and courts apply state law in determining the true lender.³⁷ Thus, the effect of the Proposed Rule would be the attempted wholesale preemption of longstanding state laws.³⁸

The OCC attempts to assuage concerns that the Proposed Rule will unleash a wave of predatory loans by pointing to the OCC’s “robust” and “multifaceted” prudential oversight of National Banks.³⁹ The Proposed Rule notes that the OCC has oversight of loans made through

³² *Id.*

³³ *Id.*

³⁴ The full text of the Proposed Rule reads as follows: “For purposes of sections 5136 and 5197 of the Revised Statutes (12 U.S.C. 24 and 12 U.S.C. 85), section 24 of the Federal Reserve Act (12 U.S.C. 371), and sections 4(g) and 5(c) of the Home Owners’ Loan Act (12 U.S.C. 1463(g) and 12 U.S.C. 1464(c)), a national bank or Federal savings association makes a loan when the national bank or Federal savings association, as of the date of origination: a) Is named as the lender in the loan agreement; or (b) Funds the loan.” *Id.* at 44,228.

³⁵ *See id.* at 44,224 & nn.9-15 (citing and criticizing various court rulings applying state law true-lender standards).

³⁶ This can either be direct claims under a usury statute where such suits are allowed, or indirect claims for violation of a consumer protection statute with usury as the underlying violation. For example, in *Consumer Financial Protection Bureau v. CashCall, Inc.* – a case discussed in the Proposed Rule – the CFPB alleged the defendants had engaged in unfair, deceptive, and abusive acts and practices in violation of 12 U.S.C. § 5536 “by servicing and collecting full payment on loans that state-licensing and usury laws had rendered wholly or partially void or uncollectible.” Case No. 15-CV-7522, 2016 WL 4820635, at *4 (C.D. Cal. Aug. 31, 2016).

³⁷ *See, e.g., Easter*, 381 F.3d at 957 (applying the de facto lender doctrine under Washington state law).

³⁸ *See Kaur*, 440 F. Supp. 3d at 122 (“If the national bank is not the ‘true lender,’ some courts have ruled, the partner non-bank entity does not gain the benefit of federal preemption.”); *Ubaldi*, 852 F. Supp. 2d at 1193-1203 (evaluating whether the state law true lender doctrine applies to a transaction involving a national bank as a question of preemption).

³⁹ *See Proposed Rule* at 44,225.

partnerships between National Banks and non-banks, and that the OCC “expects all banks to establish and maintain prudent credit underwriting practices” that, among other things, “provide for consideration, prior to credit commitment, of the borrower’s overall financial condition and resources, the financial responsibility of any guarantor, the nature and value of any underlying collateral, and the borrower’s character and willingness to repay as agreed.” But the Proposed Rule would attempt to foreclose any inquiry by state regulators, private litigants, or the judiciary into the underwriting standards – or any other aspect of the lending relationship – if a National Bank meets one of the two bright-line standards (*i.e.*, the National Bank is identified as the lender in the loan agreement, or the National Bank “funds” the loan). Under the Proposed Rule’s formalistic approach, these loans are subject to the NBA, and state regulators and courts must simply take the OCC’s word for it that proper underwriting standards were in place and followed.

II. The OCC’s Attempt to Preclude State Usury Laws from Applying to Non-Bank “True Lenders” is Unlawful

As explained in section I.A above, the true lender doctrine is a necessary and important application of state usury law – preventing unregulated non-bank entities that wish to charge exorbitant and illegal interest rates from disguising their loan transactions through rent-a-bank schemes. Under most states’ application of the doctrine, courts consider the totality of the circumstances in determining who is the true lender – with the primary factor being which entity (the National Bank or the non-bank entity) holds the predominant economic interest in the loan. The doctrine is flexible and allows for the exposure and prevention of sham transactions designed to evade state law. As discussed further below, the OCC’s attempt to abolish the doctrine and give a “get out of jail free” card to entities that engage in rent-a-bank schemes is unwarranted, contrary to decades of OCC policy, and violates procedural and substantive regulatory law.

A. The Proposed Rule Is Fundamentally Flawed Because Its Two Categorical and Formalistic Standards Will Produce Contradictory and Absurd Results

Notwithstanding the merits of the true lender doctrine that has undergone centuries of common law development and refinement, the Proposed Rule would create a new test that determines the true lender by applying two – and only two – categorical and formalistic standards. But the Proposed Rule is fundamentally flawed because its two categorical rules will produce contradictory and absurd results.

The Proposed Rule would effectively create two separate categorical rules. On the one hand, when a National Bank is listed as the lender on the face of the loan agreement, the National Bank will always be deemed to have made the loan regardless of all other facts about the transaction. On the other hand, when a National Bank funds the loan, the National Bank will always be deemed to have made the loan regardless of all other facts about the transaction. The Proposed Rule provides no direction on how to reconcile contradictory results from the two categorical rules.

These two categorical rules will result in nonsensical, inconsistent outcomes because they both can apply simultaneously. For example, one National Bank can be the lender on the face of the loan agreement and a different National Bank can fund the loan. In such situations, the Proposed Rule on its face would deem two different National Banks to be the sole entity that makes the loan. Setting up a test in which two different National Banks will be deemed the true

lender is contrary to the stated purpose of the Proposed Rule of providing “a clear test.”⁴⁰ The OCC obliquely concedes this problem exists by confessing that it is “considering how the two standards interact and may revise its test if this interaction creates challenges in determining which party makes a loan.”⁴¹

Additionally, the inconsistent outcomes created by the Proposed Rule’s contradictory categorical rules will be amplified if the FDIC proceeds to propose and adopt its own true lender regulation applicable to state-chartered banks similar to the Proposed Rule.⁴² This would create two separate federal regulations providing contradictory answers on which entity is the true lender. It is unclear how a court (or regulator) would reconcile these contradictory answers, as the OCC has no power to preempt the FDIC (or vice versa).

Moreover, the contradictory results that would result from applying the two categorical tests to all lenders demonstrate a fatal logical flaw in the Proposed Rule. In circumstances in which one of the categorical rules is satisfied by a National Bank and the other categorical rule is satisfied by a non-bank or a state-chartered bank, the Proposed Rule would, on its face, only apply to the National Bank participating in the transaction.⁴³ This is inconsistent with the OCC’s justification for one of the two categorical rules.

The OCC justifies the “funds the loan” categorical rule by explaining that “if a bank funds a loan as of the date of origination, the OCC concludes that it has a predominant economic interest in the loan and, therefore, has made the loan – regardless of whether it is the named lender in the loan agreement as of the date of origination.”⁴⁴ As the only support for that conclusion, the OCC states that “while courts have relied on a multitude of factors to evaluate which party has the predominant economic interest in a loan, the OCC believes that such a fact-specific analysis is unnecessarily complex and unpredictable.”⁴⁵

In other words, the OCC’s justification *accepts* that determining who holds the “predominant economic interest” should establish the true lender, and it just asserts that a simpler test needs to make the determination. It thus provides no justification for failing to apply the “funds to loan” categorical rule when a non-bank is the funder and a National Bank is the lender on the face of the loan agreement.⁴⁶ Indeed, we are unaware of – and the OCC does not

⁴⁰ *Id.* at 44,224.

⁴¹ *Id.* at 44,225 n.26.

⁴² See Manatt, *OCC Proposes Rule to Define the ‘True Lender’ Financial Services Law*, <https://www.manatt.com/insights/newsletters/financial-services-law/occ-proposes-rule-to-define-the> (July 27, 2020) (“Federal Deposit Insurance Corporation Chair Jelena McWilliams stated during the board meeting on June 25, 2020, that the FDIC would address the true lender doctrine in a rulemaking.”).

⁴³ See Proposed Rule at 44,228 (“[A] national bank or Federal savings association makes a loan when *the national bank or Federal savings association*, as of the date of origination: a) Is named as the lender in the loan agreement; or (b) Funds the loan.”) (emphasis added).

⁴⁴ *Id.* at 44,225.

⁴⁵ *Id.* at 44,225 n.24. For reasons explained elsewhere in this letter, the States believe this justification for a simplified predominant economic interest test is legally and factually flawed.

⁴⁶ The OCC may have avoided making such an argument to try to better disguise its violation of 12 U.S.C. § 25b, discussed below, in preempting state law without following procedures and making findings mandated by Congress.

cite – any case law that has held a different true lender test applies to National Banks than to other lenders.

B. The OCC’s Interpretation of Federal Law Is Unreasonable

Courts have consistently held that the rulemaking authority of federal agencies is constrained by the statutory language Congress chose to enact. “An agency’s ‘power to promulgate legislative regulations is limited to the authority delegated’ to it by Congress.”⁴⁷ Generally, when an agency uses its power to interpret a federal statute and “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.”⁴⁸ But, “when it comes to the OCC in particular, Congress has made it abundantly clear that courts are not to give any heightened deference to the agency’s views on NBA preemption.”⁴⁹

The OCC claims that the Proposed Rule is intended to address ambiguities in the NBA, the Federal Reserve Act, and the Home Owners’ Loan Act that authorize National Banks to make loans, but do not “describe how to determine when a bank has, in fact, exercised this authority, and when, by contrast, the bank’s relationship partner has made the loan.”⁵⁰ As a threshold matter, the OCC offers nothing more than a conclusory assertion that these statutes are ambiguous on a relevant issue,⁵¹ but more than conclusory assertions are required when the OCC seeks to displace state usury laws, a traditional field of state regulation.⁵²

And even if these statutes are ambiguous in the way the OCC claims – a point the States do not concede – under the Administrative Procedure Act, 5 U.S.C. §§ 550 *et seq.* (the “APA”), the OCC’s interpretation “must operate within the bounds of reasonable interpretation.”⁵³ The OCC’s interpretation is unreasonable, on a number of grounds.

First, the Proposed Rule makes a mockery of federal law. The reason Congress authorized National Banks to preempt state interest rate laws is because National Banks were subject to comprehensive regulatory oversight that would prevent National Banks from abusing this valuable privilege. The Proposed Rule would permit partnerships where National Banks are identified as the lender on loan agreements; non-banks market, fund, originate, and service the

⁴⁷ *Amalgamated Transit Union v. Skinner*, 894 F.2d 1362, 1368 (D.C. Cir. 1990) (quoting *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988)).

⁴⁸ *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984).

⁴⁹ *Hymes v. Bank of Am., N.A.*, 408 F. Supp. 3d 171, 183 (E.D.N.Y. 2019).

⁵⁰ Proposed Rule at 44,224-25.

⁵¹ The OCC does not cite any case law – and the States are not aware of any – the holds that the NBA, Federal Reserve Act, or Home Owners’ Loan Act is the right source of law to answer whether a National Bank is the true lender.

⁵² See, e.g., *Doyle v. S. Guaranty Corp.*, 795 F.2d 907, 914 (11th Cir. 1986) (noting the “traditional deference to the state’s right to determine its usury statute”); *O’Melveny & Myers v. FDIC*, 512 U.S. 79, 85 (1994) (holding, in analogous context, that “matters left unaddressed in such a [comprehensive and detailed statutory] scheme are presumably left subject to the disposition provided by state law”).

⁵³ *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 321 (2014) (internal citation and quotation marks omitted).

loans; the loans are sold to the non-banks immediately after origination (sometimes within hours); and the OCC has no oversight authority over non-banks. Put differently, the Proposed Rule would permit non-banks to enjoy the benefits of NBA preemption without submitting to any type of oversight.⁵⁴ But the United States Supreme Court in *First National Bank v. Missouri* rejected an interpretation of the NBA that would permit activities subject to the oversight of neither federal nor state regulators.⁵⁵ Under the APA, an agency interpretation that is “inconsistent[t] with the design and structure of the statute as a whole”⁵⁶ is not reasonable, and the Proposed Rule is inconsistent with the design and structure of the NBA.

Second, the Proposed Rule would not solve the problem it claims to remedy. The OCC argues that the Proposed Rule is designed to replace an unpredictable, subjective, and fact-intensive inquiry with a “predictable, bright-line standard,”⁵⁷ but the Proposed Rule will not accomplish this goal. The Proposed Rule does not define what it means to “fund” a loan, or address the likelihood that courts trying to make such a determination would conduct precisely the type of fact-intensive inquiries the Proposed Rule criticizes. For example, the Proposed Rule notes that courts conducting true lender inquiries frequently consider factors such as “whether the third party advances money that the named lender draws on to make loans . . . whether the third party guarantees minimum payments or fees to the named lender . . . [and] whether the third party agrees to indemnify the named lender.”⁵⁸ All of these factors would appear to be relevant to determining whether a National Bank or third party “funds” a loan.”⁵⁹

Third, the OCC’s “funds the loan” approach would likewise offer no clarity to the borrower as to what substantive law governs the loan. A borrower likely would be unaware that she has lost the protection of state law merely because a National Bank – not named as the lender on loan documents and potentially unknown to the borrower – happens to fund the loan behind the scenes even when it lacks a predominant economic interest in the loan.

⁵⁴ See Proposed Rule at 44,225 (acknowledging that “if a third party makes a loan as part of a relationship with a bank, the OCC is *not* the prudential regulator of the lending activity, though it still assesses *the bank’s* third-party risk management in connection with the relationship itself”) (emphases added).

⁵⁵ See *First Nat’l Bank v. Missouri*, 263 U.S. 640, 659-61 (1924); see also *Madden*, 786 F.3d at 251-52 (noting that extending the NBA to third party debt buyers could place them outside the reach of federal or state regulators).

⁵⁶ *Util. Air Regulatory Grp.*, 573 U.S. at 321 (internal citation and quotation marks omitted).

⁵⁷ Proposed Rule at 44,224.

⁵⁸ *Id.* (footnotes omitted).

⁵⁹ Lines of credit extended by National Banks to non-banks could also raise fact-intensive issues under the Proposed Rule. For example, several large National Banks have previously provided substantial lines of credit to public companies that operate payday lending storefronts. See Kevin Connor & Matthew Skomarovsky, *The Predators’ Creditors: How the Biggest Banks are Bankrolling the Payday Loan Industry* 10-12 (2010), <https://public-accountability.org/wp-content/uploads/2011/09/payday-final-091410.pdf>. Given the ambiguity of the Proposed Rule, it is possible that some payday lenders could claim a National Bank had made any payday loans with proceeds traceable to these lines of credit. The States are unaware of the OCC conducting consumer protection examinations related to such payday loans, so application of the Proposed Rule in such situations could result in payday lenders facing no government examination or enforcement.

Fourth, the Proposed Rule violates the presumption against preemption. As discussed above, the Proposed Rule is designed to preempt state true lender laws. When addressing preemption, courts start with “the assumption that the historic police powers of the States [are] not to be superseded by [federal law] unless that was the clear and manifest purpose of Congress.”⁶⁰ Consumer-protection laws like true lender laws are among those historic police powers held by the states,⁶¹ and the OCC’s attempt to preempt these laws is a federal intrusion into an area in which states have traditionally exercised their police powers. Thus, the strong presumption against preemption should apply to the Proposed Rule.

Fifth, the Proposed Rule ignores that federal courts – including a federal appellate court – have held that state law true lender doctrine applies to lending partnerships between National Banks and non-banks.⁶² This is consistent with the frequent application of state-law principles to many aspects of the conduct of National Banks.⁶³ The OCC’s departure from this legal background is an unreasonable interpretation of the NBA.

Sixth, the Proposed Rule flies in the face of Congress’ decision in 2010 to amend the NBA to expressly provide that preemption does not apply to non-bank entities.⁶⁴ In doing so, Congress took the strong action of overriding the Supreme Court’s contrary prior interpretation of the NBA.⁶⁵ The OCC acts unreasonably to cavalierly disregard the direction of Congress on the narrow coverage of the NBA’s preemptive power to only the National Bank itself.

Finally, the Proposed Rule would lead to contradictory and absurd results, as discussed above.

⁶⁰ *Altria Grp., Inc. v. Good*, 555 U.S. 70, 77 (2008) (first brackets in original) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)); *see also id.* (presumption against preemption “applies with particular force when Congress has legislated in a field traditionally occupied by the States. Thus, when the text of a pre-emption clause is susceptible of more than one plausible reading, courts ordinarily accept the reading that disfavors pre-emption.”); *O’Neal v. Capital One Auto Fin., Inc.*, No. 3:10-cv-40, 2011 WL 4549148, at *2-3 (N.D. W. Va. Sept. 29, 2011) (applying presumption against preemption to the NBA).

⁶¹ *Griffith v. Connecticut*, 218 U.S. 563, 569 (1910) (“It is elementary that the subject of the maximum amount to be charged by persons or corporations subject to the jurisdiction of a state for the use of money loaned within the jurisdiction of the state is one within the police power of such state.”).

⁶² *See, e.g., Daniel*, 227 F.2d at 357; *O’Donnell*, 239 F. Supp. 2d at 747, 755; *Lingerfelt*, 211 F. Supp. 2d at 714 n.4; *Ubaldi*, 852 F. Supp. 2d at 1203; *Ace Cash Exp., Inc.*, 188 F. Supp. 2d at 1285; *Eul*, 2017 WL 1178537, at *6.

⁶³ *See, e.g., Nat’l Bank v. Kentucky*, 76 U.S. (9 Wall.) 353, 362 (1869) (observing that National Banks “are subject to the laws of the State, and are governed in their daily course of business far more by the laws of the State than of the nation”)

⁶⁴ 12 U.S.C. § 25b(h)(2) (“No provision of this title [*e.g., the NBA*] . . . 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).”).

⁶⁵ *See Gordon v. Kohl’s Dep’t Stores, Inc.*, 172 F. Supp. 3d 840, 864 (E.D. Pa. 2016) (“[B]y the plain language of the statute . . . the Dodd-Frank Act effectively overturned the subsidiary-preemption holding in *Watters v. Wachovia Bank*, 550 U.S. 1 (2007).”).

**C. The Proposed Rule Reverses Longstanding OCC Policy and Practice
With No Reasoned Explanation and Is Therefore Unlawful**

The Proposed Rule is contrary to longstanding policy of the OCC, which has strongly condemned rent-a-bank schemes in which a National Bank merely acts as a conduit for loans that are illegal under states' usury laws. Indeed, with no basis in fact, law, or policy, the Proposed Rule reverses prior OCC policy and practice to instead endorse sham arrangements between nonbank lenders and National Banks under which the bank has no meaningful involvement in the marketing, origination, or underwriting of the loans, nor the preponderant economic interest in the loans. Thus, by endorsing these sham arrangements, the OCC turns a blind eye to its history and to the prospect of abusive, triple-digit interest rate loans being made to financially distressed consumers in states that expressly forbid them. Further, in proposing this reversal with no reasoned explanation, and by utterly failing to acknowledge or notify the public that the Proposed Rule is, in fact, a reversal of the OCC's prior policies – the Proposed Rule is unlawful and invalid.

In the late 1990s, numerous payday lenders engaged in subterfuges to circumvent state usury laws. A common subterfuge was the rent-a-bank model under which the payday lenders claimed they were not making the loans themselves, but were merely the marketing, processing and servicing agents of National Banks and out-of-state state chartered banks. In 2000, recognizing the harms caused by high-cost, short-term consumer loans by payday lenders that entered into sham arrangements with National Banks, the OCC issued guidance cautioning National Banks from entering into these arrangements. The OCC guidance provided:

[S]ome national banks have entered into arrangements with third parties in which the national bank funds payday loans originated through the third party. In these arrangements, national banks often rely on the third party to provide services that the bank would normally provide itself. These arrangements may also involve the sale to the third party of the loans or the servicing rights to the loans. Such third-party arrangements significantly increase risks to the bank and the OCC's supervisory concerns.... *Payday lenders entering into such arrangements with national banks should not assume that the benefits of a bank charter, particularly with respect to the application of state and local law, would be available to them.*⁶⁶

The OCC guidance acknowledged that these arrangements carry risks to National Banks, including credit, transactional, and reputational risks:

- *Credit Risk*.... 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.... The risk from the third party's failure to meet the terms of the contract also results in increased compliance, reputation, and legal risk.
- *Transaction Risk*. Payday loans are a form of ... lending not

⁶⁶ OCC Advisory Letter No. 2000-10 (Nov. 27, 2000) (emphasis added).

typically found in national banks but are frequently originated by unregulated nonbank firms.... 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.

● *Reputation Risk*.... [B]anks 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.*⁶⁷

In the early 2000s, consistent with its guidance, the OCC took action against at least four National Banks that had entered into rent-a-bank schemes with nonbank payday lenders; the OCC's orders required the National Banks to terminate their partnerships with the payday lenders and to cease making the loans.⁶⁸ In issuing the OCC's enforcement order against Eagle National Bank in 2002, Comptroller of the Currency John D. Hawke, Jr. admonished that Eagle "essentially rented out its national bank charter to a payday lender" and that its actions were "in violation of a multitude of standards of safe and sound banking, compliance requirements, and OCC guidance." Comptroller Hawke further stated:

[Eagle's actions] demonstrates the dangers inherent in arrangements under which national banks rent out their charters to nonbank providers of financial services Not only did Eagle allow itself to become a mere appendage to Dollar, but it *effectively collaborated in Dollar's scheme to evade state law requirements that would otherwise be applicable to it.*⁶⁹

In 2002, Comptroller Hawke again warned National Banks against entering into rent-a-bank schemes, observing that "*the predominant economic interest in the typical arrangement belongs to the payday lender, not the bank*"; consequently, Comptroller Hawke pronounced that the arrangements were an "*abuse of the national charter*":

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

We have recently seen several instances in which nonbank lenders who would otherwise have been fully subject to various state regulatory laws have sought to rent out the preemption privileges of a national bank to evade such laws. Indeed, the payday lending industry has expressly promoted such a "national bank strategy" as

⁶⁷ *Id.*

⁶⁸ OCC News Release 2002-1 (Jan. 3, 2002) (Eagle National Bank); OCC Consent Order 2002-93 (Oct. 28, 2002) (Goleta National Bank); OCC News Release 2003-3 (Jan. 31, 2003) (First National Bank of Brookings); OCC News Release 2003-6 (Jan. 31, 2003) (Peoples National Bank).

⁶⁹ OCC News Release 2002-1 (emphasis added).

a way of evading state and local laws. Typically, these arrangements are originated by the payday lender, which attempt 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.*

Not only do *these arrangements constitute an abuse of the national charter*, but 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.⁷⁰

Similarly, in a preemption opinion issued in 2001 involving auto loans, the OCC saliently noted the fact of the National Bank’s preponderant economic interest in the loans. In that opinion, the OCC advocated the authority of a National Bank to use car dealer agents to originate loans. However, despite its broad construction of the National Bank’s agency authority, the OCC carefully distinguished the car financing situation from the payday lending “rent-a-bank” scenario: “This is not a situation where a loan product has been developed by a non-bank vendor that seeks to use a national bank as a delivery vehicle, and where the vendor, rather than the bank, has the preponderant economic interest in the loan.”⁷¹

Notably, in 2001, the OCC expressly disavowed attempts by a payday lender to cloak itself with federal preemption when the State of Colorado took enforcement action against the lender for entering into a rent-a-bank scheme with a National Bank to make usurious loans to Colorado consumers. In an amicus brief filed with the federal court in Colorado, the OCC made clear that the rights of federal preemption did not attach to the nonbank payday lender:

The standard for finding complete preemption is not met in this case. While the Defendant’s Notice of Removal repeatedly refers to Goleta National Bank using Ace Cash Express, Inc. (“ACE”) as its agent to solicit loans ..., ACE is the only defendant in this action, and ACE is not a national bank. Nor do the [the State’s] claims against ACE arise under the National Bank Act, or other federal law. Although [ACE] apparently attempts to appropriate attributes of the legal status of a national bank for its own operations as a defense to certain of [the State’s] claims, such a hypothetical conflict between federal and state law does not give this court federal questions jurisdiction under the doctrine of complete preemption.⁷²

Further, as recently as 2018, in small dollar loan guidance, the OCC declared that it “views unfavorably an entity that partners with a bank with the sole goal of evading a lower

⁷⁰ John D. Hawke, Jr., Comptroller of the Currency, *Remarks Before the Women in Housing and Finance* at 10 (Feb. 12, 2002).

⁷¹ OCC Preemption Determination 01-10, 66 Fed. Reg. 28,593, 28,595 n.6 (May 23, 2001).

⁷² Comptroller of the Currency’s Brief As Amicus Curiae In Support of Plaintiffs’ Motion to Remand, *Salazar v. Ace Cash Express, Inc.*, No. 1:01-cv-1576-WYD-OES (D. Colo. Sept. 27, 2001).

interest rate established under the law of the entity’s licensing state(s).” However, shortly before promulgating this Proposed Rule, the OCC inexplicably withdrew that guidance.⁷³

As this history shows, for many years, the OCC has recognized that arrangements between nonbank lenders and National Banks constitute an “abuse of the national charter” when they are made simply to evade state interest rate laws. Moreover, the OCC’s pronouncements, enforcement actions, and opinion make plain that a crucial indicia of these sham arrangements is the nonbank lender’s preponderant economic interest in the loan, rather than the National Bank’s.

However, in clear contravention of its previous policy and practice, the OCC’s Proposed Rule would instead permit nonbank lenders and their National Bank partners to manipulate loan transactions with impunity to designate the National Bank as the lender, regardless of which entity has the actual preponderant economic interest in the loan and is, in fact, the true lender – thereby manifestly elevating form over substance.

Finally, the OCC’s Proposed Rule fails to even acknowledge the agency’s reversal of its prior policy and practice – let alone to explain or substantiate why the OCC now departs from its previous findings and policy concerns. As observed by the Supreme Court, “[a]n agency may not . . . depart from a prior policy *sub silentio* or simply disregard rules that are still on the books.”⁷⁴ In reversing its policy, the OCC must provide “a reasoned explanation . . . for disregarding facts and circumstances that underlay . . . the prior policy”⁷⁵ – which it has completely failed to do.

D. The OCC Has Failed to Comply with Provisions of the Dodd-Frank Act Intended to Reign In the OCC’s Reckless Preemption Determinations

In the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act (the “Dodd-Frank Act”),⁷⁶ Congress imposed new substantive and procedural requirements that the OCC must observe when it seeks to preempt any “State consumer financial law,”⁷⁷ such as state-law true lender doctrines and the interest-rate limitations they protect.⁷⁸ The OCC – with a long

⁷³ OCC Bulletin 2018-14: Installment Lending: Core Lending Principles for Short-Term, Small-Dollar Installment Lending (May 23, 2018), *rescinded* by OCC Bulletin 2020-54 (May 20, 2020).

⁷⁴ *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

⁷⁵ *Id.* at 515-16; *see also Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125-27 (2016) (holding that a regulation promulgated by the Department of Labor was “arbitrary and capricious” because it was “issued without the reasoned explanation that was required in light of the Department’s change in position and the significant reliance interests involved”).

⁷⁶ Pub. L. 111-203, 124 Stat. 1376 (2010).

⁷⁷ *See* 12 U.S.C. § 25b(b) (imposing procedural and substantive requirements on OCC’s preemption under the NBA of state consumer financial law); *see also id.* § 1465(a) (requiring the OCC to make any preemption determination relating to savings associations “in accordance with the laws and legal standards applicable to national banks regarding the preemption of State law,” *i.e.*, those imposed by section 25b).

⁷⁸ “The term ‘State consumer financial law’ means a State law that does not directly or indirectly discriminate against national banks and that directly and specifically regulates the manner, content, or terms and conditions of any financial transaction (as may be authorized for national banks to engage in), or any account related thereto, with respect to a consumer.” 12 U.S.C. § 25b(a)(2). True lender laws regulate the terms and conditions of financial transactions with respect to consumers by limiting the rates

history of lawless preemption determinations⁷⁹ – does not even mention these requirements, let alone how the OCC plans to fulfill them.

In section 25b, Congress imposed the following limitations on OCC preemption determinations:

- Before making a preemption determination, the OCC “shall first consult with the Bureau of Consumer Financial Protection and shall take the views of the Bureau into account”⁸⁰;
- The OCC shall make such determinations on a “case-by-case basis” in which the Comptroller must determine “the impact of a particular State consumer financial law on [a] national bank that is subject to that law”⁸¹;
- The NBA preempts State consumer financial laws *only* when the state law “prevents or significantly interferes with the exercise by the national bank of its powers” as described by the Supreme Court in *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25 (1996)⁸²; and
- “[T]he OCC may not deem preempted a provision of a state consumer financial law ‘unless substantial evidence, made on the record of the proceeding, supports the specific finding regarding the preemption of such provision in accordance with [*Barnett Bank*].’”⁸³

The OCC has failed to abide by these procedural and substantive requirements.

Procedurally, the Proposed Rule ignores the consultation requirement, never mentioning whether the agency has completed or plans to complete the required consultation with the Consumer Financial Protection Bureau. This omission is particularly glaring given that the CFPB has itself recently embraced the true lender analysis when challenging a lending program involving consumer loans made above state usury limits.⁸⁴

The Proposed Rule likewise shows no signs of the required “case-by-case” consideration of the impact of true lender laws and state interest rate caps binding non-banks on a National Bank.⁸⁵ Instead, the OCC speculates that “uncertainty” about state treatment of rent-a-bank schemes *may* deter “stakeholders” from entering into such arrangements,⁸⁶ but nowhere does the OCC analyze whether true lender laws, as well as rate caps applied to non-bank lenders, “prevent[] or significantly interfere[] with the exercise by the national bank of its powers.” And

of interest that non-bank lenders may charge consumers, and thus fit squarely in § 25b’s definition of “State consumer financial law.”

⁷⁹ S. Rep. No. 111-176, at 15-17 (2010).

⁸⁰ 12 U.S.C. § 25b(b)(3)(B).

⁸¹ *Id.* § 25b(b)(1)(B) & (3)(A).

⁸² *Id.* § 25b(b)(1)(B); *see also Lusnak v. Bank of Am., N.A.*, 883 F.3d 1185, 1191-92 (9th Cir.), *cert. denied*, 139 S. Ct. 567 (2018).

⁸³ *Lusnak*, 883 F.3d at 1194 (quoting 12 U.S.C. § 25b(c)).

⁸⁴ *See supra* n. 36 (discussing the CFPB’s enforcement action against CashCall).

⁸⁵ 12 U.S.C. § 25b(3).

⁸⁶ *See Proposed Rule* at 44,224.

the fact is that the OCC could not possibly meet this standard. First, helping a non-bank lender evade state usury laws is not a power of a National Bank. Second, true lender laws do not prevent National Banks from making loans on their own, entering into lending partnerships with other National Banks, or entering into lending partnerships with non-banks. True lender laws only impact the interest rate a non-bank could charge on a loan. At most, the impact of true lender laws may theoretically reduce the price at which a National Bank could sell such a loan to a non-bank, but that does not constitute significant interference for the purposes of NBA preemption.⁸⁷ And state interest rate caps that would apply to non-bank lenders in the absence of the Proposed Rule likewise do not burden National Banks. The OCC appears to take the position that a state law that impacts or inconveniences a National Bank in any way is preempted, but that is not the standard set forth by the Dodd-Frank Act.

Moreover, the OCC has indicated no plan to adduce and evaluate the “substantial evidence, made on the record” that is required to preempt state law.⁸⁸ In fact, it has not identified *any* evidence that true lender laws prevent or significantly interfere with a National Bank’s exercise of its powers. For example, it has identified no evidence that true lender doctrine has reduced the prices at which National Banks sell loans.

Like all federal agencies, the OCC is bound to act in accordance with the procedural and substantive requirements Congress has set forth. It has not done so.

III. The Proposed Rule Violates the Administrative Procedure Act

The same defects of the Proposed Rule discussed above also constitute violations of the APA. The APA requires “reasoned decision making,” wherein the grounds for agency action must be “logical and rational.”⁸⁹ The APA embodies a “basic presumption of judicial review,” through which reviewing courts set aside agency action that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,” “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right,” or “without observance of procedure required by law.”⁹⁰ The Proposed Rule violates the APA for at least the following reasons (all of which are discussed more fully above):

First, the OCC’s interpretation of federal law is unreasonable, and the Proposed Rule leads to contradictory and absurd results. Therefore, it is arbitrary and capricious.⁹¹

Second, the Proposed Rule fails to acknowledge that it constitutes an abrupt reversal of past OCC policy and practice, rendering the Proposed Rule arbitrary and capricious.⁹²

Third, the OCC does not have the authority to preempt state true lender laws, and the OCC has failed to comply with the procedural and substantive requirements imposed by the Dodd-Frank Act. The Proposed Rule is therefore “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right” or “without observance of procedure required by law.”

⁸⁷ See *Madden*, 786 F.3d at 251.

⁸⁸ 12 U.S.C. § 25b(c).

⁸⁹ *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 374 (1998).

⁹⁰ 5 U.S.C. §§ 706(2)(A), (C), (D).

⁹¹ *Util. Air Regulatory Grp.*, 573 U.S. at 321.

⁹² 5 U.S.C. §§ 553(b)(3), 706(2)(A).

Fourth, the OCC has failed to address the fact that the Proposed Rule will incentivize and sanction predatory lending, an “important aspect of the problem” the OCC was required to consider.⁹³ The OCC ignores the consumer harm that is all but sure to ensue if rent-a-bank schemes are allowed and encouraged, and proceeds arbitrarily and capriciously from a one-sided and partial perspective.⁹⁴

Finally, the Proposed Rule is arbitrary and capricious because the OCC has failed to set forth *any* factual findings or any reasoned analysis supporting its decision to supplant true lender laws with a rigid and unworkable standard that leads to absurd results. Under the APA, the OCC “must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.”⁹⁵ The OCC has failed to do so.

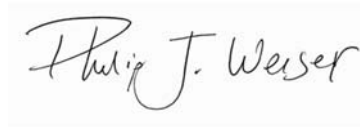
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For the reasons discussed herein, the OCC should withdraw the Proposed Rule in its entirety.

Respectfully submitted,



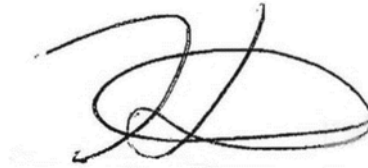
XAVIER BECERRA
California Attorney General



PHIL WEISER
Colorado Attorney General



WILLIAM TONG
Connecticut Attorney General



KARL A. RACINE
District of Columbia Attorney
General

⁹³ See *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

⁹⁴ See *Ctr. for Biological Diversity v. Nat’l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1198 (9th Cir. 2008) (agency cannot “put a thumb on the scale” by undervaluing key effects and overvaluing others); *Water Quality Ins. Syndicate v. United States*, 225 F. Supp. 3d 41, 69 (D.D.C. 2016) (invalidating agency decision based on “cherry-pick[ed] evidence”); *accord Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015) (agency must weigh “the advantages and the disadvantages” of its regulatory decisions).

⁹⁵ *Motor Vehicle Mfrs.*, 463 U.S. at 43.



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