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BANKING, HOUSING, AND URBAN AFFAIRS
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United States Senate

WASHINGTON, DC 20510 - 3505

November 21, 2019

The Honorable Joseph M. Otting
Comptroller
Office of the Comptroller of the Currency
400 7th St., SW
Washington, D.C. 20219

The Honorable Jelena McWilliams
Chairman
Federal Deposit Insurance Corporation
550 17th St., NW
Washington, D.C. 20429

Dear Comptroller Otting and Chairman McWilliams:

We write to express our strong opposition to rules proposed by the Office of the Comptroller of the Currency (OCC) and the Federal Deposit Insurance Corporation (FDIC) that could eviscerate state laws that limit the interest rates on loans and allow **unregulated** predatory lending across the nation.[1]

The proposed rules could allow payday and other non-bank lenders to launder their loans through banks so that they can charge whatever interest rate federally-regulated banks may charge, threatening federalism's careful balance and overturning more than two centuries of state regulation of lending activity. Since our nation's founding, states have enacted laws to provide for limits and regulation over the amount of interest that lenders can charge.[2] In the early 20th century, 34 states capped interest rates between 36 and 42 percent.[3] Currently, a supermajority of states and the District of Columbia limit the amount of interest that lenders can charge on many loans. For example, 43 states and the District of Columbia have capped the interest rate for loans of up to $500, six-month loans, and 42 states and the District of Columbia have capped the interest rate for $2,000, two-year loans.[4] The clear trend in the states is toward more protections for consumers and small business borrowers, with new bipartisan laws capping interest rates on payday and other personal loans in Montana in 2010, South Dakota in 2017, Ohio in 2019, and going into effect in California in 2020.[5]

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[1] https://www.occ.gov/news-issuances/news-releases/2019/nr-occ-2019-132.html; https://www.fdic.gov/news/news/press/2019/pr19107.html.
[2] James M. Ackerman, Interest Rates and the Law: A History of Usury, 1981, Arizona St. L.J.61 (1981).
[3] Elisabeth Anderson, Experts, Ideas, and Policy Change: The Russell Sage Foundation and Small Loan Reform, 1910–1940, at 2 (Mar. 8, 2006), *available at* http://www.yale.edu/scr/andersen.doc.
[4] 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 .
[5] *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.

The proposed rules would gut state laws by encouraging payday and other non-bank lenders to try to evade state interest limits by funneling payday and other loans through federally-regulated banks, which are not subject to these state laws.[6] In these "rent-a-bank" arrangements, the bank plays a nominal role as the formal lender of the loan.[7] The non-bank lender, by contrast, does all the work and bears all or nearly all of the economic risk: 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 a derivative interest in the loan.[8] Consumers have no relationship with the bank; they apply to and deal with the non-bank lender, which arranges and collects payments on the loan.[9]

During President George W. Bush's administration, the OCC and FDIC cracked down on these rent-a-bank schemes. In 2001, the OCC issued guidance making clear that it may be an "abuse of the national bank charter" for banks to enable non-bank lenders to make loans that violate state law.[10] 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.[11]

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[6] National banks are subject to state usury limits. 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 Oma Serv. Corp.*, 439 U.S. 299 (1978).

[7] *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).

[8] *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.

[9] For example, FinWise Bank, one of the 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/.

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

[11] 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, 2012) (same), *available at* https://www.occ.gov/news-issuances/speeches/2002/pub-speech-2002-10.pdf.

In the following years, the OCC brought several enforcement actions to end these arrangements.[12] The FDIC issued guidelines in 2005[13] and brought enforcement actions to end payday lenders' rent-a-bank arrangements with banks.[14]

Despite the troubling history of misuse of these rent-a-bank schemes, and prior clear steps from the OCC and FDIC to shut down these arrangements, we have seen a recent comeback. Opploans, for example, is an online non-bank lender that makes loans with a 160 percent annual percentage rate (APR), which are illegal in 22 states and the District of Columbia, through a rent-a-bank arrangement with FinWise Bank, regulated by the FDIC.[15] Elevate Credit, Inc. (Elevate), another online non-bank lender, makes loans (branded as Rise loans) with a 99 to 149 percent APR that are illegal in at least 15 states, also through a rent-a-bank arrangement with FinWise Bank.[16] Elevate also offers another loan product (branded as Elastic lines of credit) in 40 states at rates that can reach 109 percent APR through a rent-a-bank arrangement with Republic Bank, also regulated by the FDIC.[17]

The Trump administration's well-known support of payday lenders has only emboldened payday and other unscrupulous lenders to pursue rent-a-bank arrangements. Some of these non-bank lenders are openly discussing their efforts to evade the California state interest rate caps that are set to go into effect on January 1, 2020. The CEO of Elevate, Inc., for example, stated during a July 29, 2019 earnings call with investors:

> As you know, in California a piece of legislation . . . would limit the amount of interest that can be charged loans from $2,500 to $10,000. So what does this mean for Elevate? As you know, . . . similar to our recent experience in Ohio, we expect

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[12] *See, e.g.*, *In re Eagle National Bank*, No. 2001-104 (Dec. 18, 2001), available at https://www.occ.gov/static/enforcement-actions/ea2001-104.pdf; *In the Matter of Peoples National Bank*, No. 2003-02, *available at* https://www.occ.gov/static/enforcement-actions/ea2003-2.pdf.

[13] FDIC Guidelines for Payday Lending (Nov. 2015), available at https://www.fdic.gov/news/news/financial/2005/fil1405a.html.

[14] *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), *available at* https://www.fdic.gov/news/news/press/2008/pr08142a.pdf.

[15] *See* https://www.opploans.com/licenses/ (listing Alaska, Arizona, California, District of Columbia, Florida, Hawaii, Indiana, Kansas, Kentucky, Louisiana, Maine, Michigan, Minnesota, Montana, Nebraska, North Dakota, Ohio, Oklahoma, Oregon, South Dakota, Tennessee, Virginia, Washington, and Wyoming). *See* National Consumer Law Center, Issue Brief: Stop Payday Lenders' Rent-a-Bank Schemes (Nov. 2019), *available at* https://www.nclc.org/issues/issue-brief-stop-payday-lenders-rent-a-bank-schemes-november-2019.html. The 160 percent APR on loans exceeds the interest rate caps in these states. *Id.*

[16] Elevate 2018 10-K at 15-16. Elevate also appears to be evading interest rate caps in Ohio and Texas by "brokering" the loan as a credit service organization (CSO). *Id.* at 7, 15-16. Under this scheme, a third-party lender finances the loan at the legal interest rate, but has no relationship with the borrower. Elevate, as the CSO, charges fees to arrange, collect, and guarantee the loan, which result in an effective APR of 60 percent to 299 percent. *Id.* at 15 *See also* CRL Issue Brief, "Payday Lenders Pose as Brokers to Evade Interest Rate Caps," (Jul. 2010), *available at* https://www.responsiblelending.org/payday-lending/policy-legislation/states/CRL-CSO-Issue-Brief-FINAL.pdf.

[17] Elevate Form 10-Q at 46 (for period ending June 20, 2019).

> to be able to continue to serve California consumers **via bank sponsors** that are **not subject to the same proposed state level rate limitations.**[18]

Several other online payday lenders have also informed investors that they would be pursuing a rent-a-bank strategy to evade the new California law.[19]

Given the OCC's and FDIC's prior efforts to eradicate rent-a-bank arrangements, it is disturbing to see the agencies now reverse course and propose rules that could actively enable these predatory lending schemes. The OCC and FDIC's stated justification for enabling the return of rent-a-bank arrangements is to "clarify" the applicability of the "valid-when-made" doctrine. This doctrine purports to hold that a non-bank lender can ignore state usury laws for loans it purchases from a bank that is exempt from those laws.

But, like rent-a-banks arrangements, the valid-when-made doctrine is a legal fiction. As Professor Adam Levitin of Georgetown University Law Center explained: "With one exception, it cannot be found in case law predating the relevant statute, much less in treatises, or scholarly articles, and the Second Circuit rejected the doctrine in 2015 in *Madden v. Midland Funding, LLC* . . . ."[20] The OCC and FDIC are also wrong that the banks' preemption can be treated like property and assigned to a non-bank lender. Preemption is instead "a privilege personal to a bank that comes as part of a bundle of a detailed regulatory regime,"[21] which non-bank lenders are not subject to. Finally, the OCC and FDIC are wrong to seek to overturn the Second Circuit's *Madden* decision through a rulemaking. As evidenced by legislation introduced in the House and Senate, it is the role of Congress, not the executive branch, to address any disagreements with the Second Circuit's *Madden* decision.

The OCC's and FDIC's proposed rulemakings represent a disturbing return to their 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

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[18] *See* https://seekingalpha.com/article/4278838-elevate-credit-inc-elvt-ceo-ken-rees-q2-2019-results-earnings-call-transcript (emphasis added).

[19] *See* National Consumer Law Center, Issue Brief: Payday Lenders Plan to Evade California's New Interest Rate Cap through Rent-a-Bank Partnership, (Oct. 2019) (providing transcripts of earnings calls in which the CEOs of Curo Holdings Corp. (d/b/a Speedy Cash), Elevate Credit Inc., and Enova (d/b/a NetCredit, CashNetUSA) discuss plans to evade California's state law interest rate caps through rent-a-bank arrangements), *available at* https://www.nclc.org/issues/ib-rent-a-bank.html.

[20] *Rent-Rite Super Kegs West, Ltd. v. World Business Lenders, LLC*, Case No. 1:19-cv-01552 (D. Col.), Mot. for Leave to File *Amicus Curiae* Brief of Professor Adam J. Levitin in Support of Appellant, at 4, and Amicus Curiae Brief of Professor Adam J. Levitin in Support of Appellant, 10-12, *available at* https://www.creditslips.org/files/levitin-amicus-brief-rent-rite-super-kegs-west-ltd-v-world-business-lenders-llc.pdf.

[21] Levitin Amicus Brief at 12.

enabled predatory lending practices and led to the financial crisis from which the country is still emerging.

Sincerely,

[redacted]

Sherrod Brown
United States Senator

[redacted]

Jeffrey A. Merkley
United States Senator

[redacted]

Elizabeth Warren
United States Senator

[redacted]

Chris Van Hollen
United States Senator

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Brian Schatz
United States Senator

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Jack Reed
United States Senator