By electronic submission to comments@fdic.gov

Robert E. Feldman
Executive Secretary
Attention: Comments, Federal Deposit Insurance Corporation
550 17th Street, N.W.
Washington, D.C. 20429

Re: Request for Information on Small-Dollar Lending, RIN 3064-ZA04

Dear Mr. Feldman:

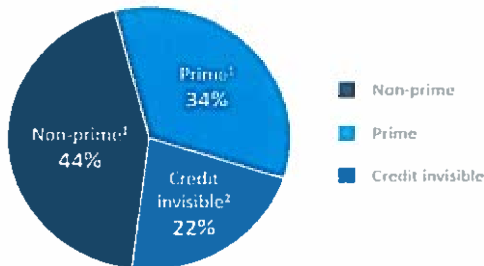
Elevate Credit, Inc. ("Elevate") appreciates the opportunity to respond to the request for information ("RFI") issued by the Federal Deposit Insurance Corporation ("FDIC") for comments and information on small-dollar lending, including steps that can be taken to encourage FDIC-supervised banks to offer small-dollar credit products that are responsive to customers' needs and that are underwritten and structured responsibly. We believe providing greater access to credit to the 160 million Americans shut out of traditional bank loans is essential. With regulatory clarity, bank-fintech partnerships can make this possible.

Elevate, together with its bank partners, has originated $6.3 billion in credit to more than 2.1 million non-prime consumers to date and has saved our customers more than $4 billion versus the cost of payday loans. Our responsible, tech-enabled online credit solutions provide immediate relief to customers today and help them build a brighter financial future. The company is committed to rewarding borrowers' good financial behavior with features like interest rates that can go down over time, free financial training and free credit monitoring.

Elevate provides online credit solutions either as a direct lender or in partnership with banks to consumers in the US and the UK who are not well-served by more traditional bank products and who are looking for better options than payday loans, title loans, pawn and storefront installment loans. Elevate believes that partnerships between FDIC-supervised banks and fintech innovators will result in more responsible, prudently underwritten small-dollar credit products that are economically viable and will address the credit needs of bank customers, especially those that are considered non-prime, with credit scores below 700. The chart below, illustrates the size of the non-prime population and describes more about the non-prime consumer in the US today.

Non-prime consumers – the New Middle Class

US non-prime population larger than prime



US non-prime population >160MM people

Elevate customer profile[3]

	US
Average income	~ $59K (RISE) ~ $41K (Elastic)
Average college	~ 82%
Own home	~ 29%
FICO range (mean)	513-630

Banks not serving non-prime[4]

$142B

Total reduction in non-prime credit since 2008

There has been rapid growth in the online lending market since 2010 with many corresponding benefits to consumers. More consumers are benefiting from increased competition and more responsible online options with lower costs. Bank-fintech partnerships bring more innovation and lower costs for consumers. These collaborations have benefited smaller, community and rural banks that may not have the capital to develop innovative technologies to better address the needs of their customers.

However, a lack of regulatory and judicial certainty has impeded bank-fintech partnerships and is a barrier to expansion of responsible small-dollar products. Unfortunately, as explained in the Pepper Hamilton article, *A Remedy for 'True Lender' Lawsuits Already Exists*, attached, some bank-fintech partnerships have been subject to costly lawsuits that challenge whether loans made by bank-fintech partnerships are, in fact, made by the bank. The article goes on to suggest that when the bank lender is responsible for approving the loan, communicating the approval of the loan and disbursing the loan proceeds, (as outlined in the OCC interpretive letter that was later adopted by the FDIC in 1998) it is not subject to usury laws outside of the bank's home state.

The FDIC could eliminate the regulatory and judicial uncertainty clouding bank-fintech partnerships by reinforcing that it stands by the above test. Such a clarification should result in more competition and lower cost products for customers. Further, finalizing third party lending guidelines (proposed in 2016) for bank-fintech partnerships would greatly assist in providing a clear framework for banks and their fintech partners.

Lastly, requiring banks and their fintech partners to provide robust underwriting and ability-to-repay analyses for non-prime consumers would ensure access to credit for those who need it the most. Most importantly, this eliminates the need for arbitrary interest rate caps not supported by empirical evidence.

Elevate appreciates the opportunity to submit its comments for consideration by the FDIC related to small-dollar lending. Please let me know should you have any questions.

Sincerely,

Sarah Fagin Cutrona
Chief Counsel, Elevate

1 According to an analysis of TransUnion data through the third quarter of 2014 by the Corporation for Enterprise Development.
2 FICO, Expanding Credit Opportunities, July 2015.
3 Elevate analysis 2017; US income and home ownership data from Elevate internal database for customers acquired in 2017; other data from self-reported customer research
4 According to our analysis of master pool trust data of securitizations for the five major credit card issuers, we estimate that from 2008 to 2016, revolving credit to US borrowers with FICO scores of less than 660 was reduced by approximately $142 billion.

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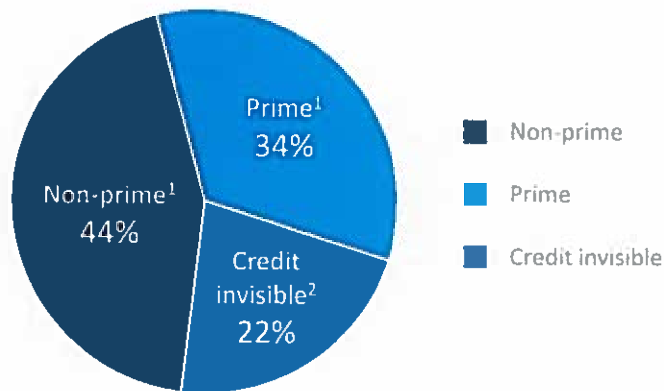

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Pepper Hamilton LLP
Attorneys at Law

A Remedy For 'True Lender' Lawsuits Already Exists

January 17, 2019

Mark T. Dabertin | dabertinm@pepperlaw.com

This article was published in American Banker's BankThink on January 17, 2019. It is reprinted here with permission.

Online lenders continue to be plagued by "true lender" lawsuits that challenge whether the named lender in loans made through a partnership between a nonbank lender and a regulated bank is actually an artifice in a "rent-a-bank" scheme.

In such lawsuits, the plaintiff indirectly alleges that the bank is not the lender by arguing that the nonbank, which typically markets, services and invests in loans made under the program, is in fact the true lender. Because the nonbank lacks the legal ability to charge the rate of interest being assessed by the bank, the result of a successful true lender lawsuit is that the loans are deemed unlawful and unenforceable.

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The objective in such cases is to unmask the nonbank party to a loan program relationship as, in other words, a "wolf in sheep's clothing."

The resulting legal uncertainty dissuades the vast majority of banks from engaging in such programs, which have the potential to expand the availability of credit to underserved borrowers. The uncertainty concentrates such programs into a relative handful of banks, driving the already high costs of such loans still higher.

The good news is that a potential means for ending this problem already exists. Federal bank agency opinions that were issued 18 years ago in connection with then-newly authorized interstate branch banking could be used to clarify the issue.

The complaint in a true lender lawsuit usually makes no allegations against the bank, for which the challenged interest charges would be lawful. Rather, the allegation that the bank is not the actual lender is implied from the contentions that the nonbank made the loans.

If the plaintiffs in a true lender lawsuit were to directly challenge whether the named bank lender actually made the loans, the bank would likely prevail based on the interpretations of the National Bank Act set forth in the Office of the Comptroller of the Currency's Interpretative Letter 822 or the Federal Deposit Insurance Act in the Federal Deposit Insurance Corp.'s General Counsel Opinion No. 11.

The OCC issued Interpretative Letter 822 on February 17, 1998, in response to the Neal-Riegle Interstate Banking Act of 1994, which both brought about interstate branch banking and created the possibility that a national bank could be subject to the usury laws of more than its home state. The OCC opined in Interpretative Letter 822 that it would be would be "nonsensical" for a national bank to be expected to engage in a nationwide lending business "without a reference point for determining appropriate state interest rate law."

As a result, it created a three-part test in the letter for conclusively determining where a national bank is "located" when it makes a loan. This same test was adopted by the FDIC several months later in its opinion.

Under the three-part test, the activity of making a loan is boiled down to just three primary activities: the decision to approve the loan, the communication of the approval decision

and the physical disbursal of the proceeds. If any one of these activities takes place in the bank's home state, the loan is considered to have been made in that state and the bank may choose to charge its home state's interest rates to all borrowers, irrespective of state of residence.

By conclusively determining where a loan is made in an easy-to-apply manner, the three-part test brought interest-rate certainty to bank lending conducted through branches.

As a general rule, the fact that a bank subcontracts marketing, loan servicing or other "ministerial," or nonessential, lending activities to third-party service providers has no effect on the bank's ability to export its home state's interest rate under federal law. To this end, the Bank Service Company Act expressly authorizes banks to utilize the services of third-parties. In short, under the federal banking laws, there is no "tipping point" beyond which a servicer becomes the lender in lieu of the bank — so long as the bank remains the party that is performing the primary, or "non-ministerial," lending activities laid out in the three-part test, the bank is the *only* lender.

Yet federal bank agency guidance is silent regarding true lender risk, despite the growing number of states in which such lawsuits have arisen. The FDIC published draft third-party lending guidance in July 2016 that had the potential to provide some clarity, but it is still pending. Moreover, the guidance merely observes in a footnote that "courts are divided on whether third-parties may avail themselves of such preemption."

As to whether a bank's status as the lender could be undermined by its use of agents, the guidance says nothing. This silence is problematic because, as things stand, one could evaluate the facts of the same loan program and reach opposite conclusions with respect to the program's status under usury laws depending on whether federal interest rate preemption rules or judge-made, state true lender rules are applied.

In drafting the 1998 guidance, the OCC's goal was to avoid having the interest rate exportation rule of the National Bank Act, which is essentially mirrored in the Federal Deposit Insurance Act, "interpreted so as to throw into confusion the complex system of modern interest banking."

Such confusion results whenever state authorities create or adopt legal tests for determining when, where and by whom loans are made that contradict federal banking agency interpretations of federal law.

The OCC or FDIC could presumably put a stop to this ongoing uncertainty by asserting that as a matter of federal law, the bank is the sole lender when the bank is named as the lender in the loan documents, and when the agencies' three-part test is satisfied.

Regulators have the tools they need to end this legal uncertainty, if they so choose.