NEW YORK STATE OF OPPORTUNITY. | Department of Financial Services

ANDREW M. CUOMO
Governor

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September 2, 2020

Via Email
Brian P. Brooks
Acting Comptroller
Office of the Comptroller of the Currency
Department of Treasury
400 7th Street S.W.
Washington, DC 20219
regs.comments@occ.treas.gov

Re: Proposed Rulemaking: National Banks and Federal Savings Associations as Lenders (Docket ID OCC-2020-0026; RIN 1557-AE97)

Dear Acting Comptroller Brooks:

I write as Superintendent of the New York State Department of Financial Services ("NYDFS") to submit comments in opposition to a proposed rule that is intended to enable nonbank lenders that are not chartered or licensed by the federal government to nevertheless qualify for federal protection from state usury laws. If enacted, this rule would gut state usury laws and state licensing requirements with respect to unregulated lenders. In doing so, the rule would jeopardize NYDFS's efforts to protect consumers and small businesses from these loans and their potential for financial harm, particularly in the midst of a global pandemic and economic crisis. The Office of the Comptroller of the Currency (the "OCC") should not finalize this proposed rule.

NYDFS is a fierce advocate and enforcer against abusive lending practices. NYDFS supervises approximately 3,300 institutions with assets of approximately $7.3 trillion, including state-chartered, domestic, and foreign banks operating in New York; U.S. and foreign insurance companies operating in New York; and licensed lenders, money transmitters, and other nonbank financial institutions. NYDFS has worked for years to enforce New York State's prohibition on predatory high-interest loans to protect consumers and small businesses and promote a thriving, sustainable financial services sector.

States play an important role, through consumer protection laws, including usury laws, licensing laws and laws that prohibit unfair, deceptive, abusive or fraudulent practices, in protecting consumers from harm. Usury laws are among the strongest tools states possess to protect consumers. These laws prevent high-cost lenders from issuing loans they know Americans ultimately cannot afford and trapping them in endless cycles of debt and bankruptcy. To that end, approximately 45 states, as well as the District of Columbia, have enacted some form of usury caps;[1] of those, approximately 16 states, plus the District of Columbia, effectively ban payday lending.[2]

In New York State, payday and other predatory, high-interest lending is illegal. An unlicensed, nonbank lender commits civil usury by charging an annual interest rate in excess of 16% on a loan to an individual in an amount under $250,000.[3] A lender commits criminal usury by charging an annual interest rate in excess of 25% on a loan to an individual or business in an amount under $2.5 million.[4] For good reason, usurious loans entered into in New York are void and unenforceable, and it is illegal to collect payments on these loans. One example of NYDFS's enforcement efforts in this realm is its years-long campaign to stop unlawful activity by abusive online payday lenders in New York, some of which were charging annual interest rates exceeding 1,000%. As result of this effort, dozens of online payday lenders were effectively eradicated from New York.

In codifying this rule, the OCC would effectively sanction so-called "rent-a-bank" or "rent-a-charter" schemes. In such arrangements, an unregulated nonbank lender essentially "rents" a national bank's or federal savings association's (together referred to as a "bank") federal charter. The purpose of the arrangement is to allow the unregulated nonbank lender to exploit the bank's ability, pursuant to federal law, to issue loans at the maximum interest rate allowable in the state in which the bank is located, without regard to any usury caps in the borrower's state. The OCC's rule would, in essence, allow unregulated nonbank lenders to launder loans through banks as an end-run around consumer-protective state usury limits.

The proposed rule does so by extending federal protection to loans that purport to be made by banks regulated by the OCC but, in substance, are actually made by unregulated, nonbank lenders. The test under the proposed rule for when these protections will apply is so formalistic and easy to satisfy as to be meaningless: a bank is deemed the "true lender" (*i.e.*, the entity that made the loan) and the loan benefits from federal protection from state usury laws when, at the date of the loan's origination, either (1) the bank is named as the lender in the loan agreement or (2) the bank funds the loan.[5] Under this test, to circumvent usury laws a nonbank lender need only find a bank located in a state with lax or no usury laws and either name the bank as the lender in the loan agreement or have the bank fund the loan on the date of origination with no further involvement (*i.e.*, the bank may sell the loan to the nonbank lender the day after origination).

The OCC's test places form over substance for determining which party has the predominant economic interest in the loan (*i.e.*, who is the true lender), failing to consider relevant factors such as which party markets, solicits, and processes the loan application; which party controls underwriting guidelines; which party services the loan; which party assumes the credit risk of the

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[1] National Consumer Law Center, *State Rate Caps for $500 and $2,000 Loans* (Feb. 2020), *available at* https://www.nclc.org/images/pdf/high_cost_small_loans/payday_loans/FactSheet-StateRateCap.pdf.
[2] Consumer Federation of America, *Legal Status of Payday Loans By State*, *available at* https://paydayloaninfo.org/state-information.
[3] New York General Obligations Law § 5-501; New York Banking Law § 14-a.
[4] New York Penal Law §§ 190.40, 190.42.
[5] 85 Fed. Reg. 44223, 44228 (July 22, 2020).

loan; and whether the nonbank lender indemnifies the bank against losses and risks associated with the loan.

If finalized, the proposed rule will trigger the proliferation of payday lenders, auto title lenders, shadowy online lenders, and other bad actors who will use the loophole provided by the rule to charge astronomical interest rates and exploit the most vulnerable consumers and businesses. Such a consequence is contrary to the OCC's baseless assertion that such nonbank-bank relationships are mere "partnerships" that would "expand[] access to affordable credit."[6] It is absurd to suggest that enabling a proliferation of usurious loans is a means to increase "affordability" of credit to consumers and businesses. In fact, some payday borrowers end up rolling over an initial loan repeatedly and, as a result, spend more on fees than the original amount that was borrowed.[7] Moreover, payday loans are taken out disproportionately by the very consumers who can afford them the least: low-to-moderate income individuals as well as senior citizens on fixed incomes.[8]

The OCC asserts that the primary objective of its proposal—when paired with the agency's recent rule regarding sales, assignments, or transfers of loans[9]—is to provide more clarity to banks.[10] In placing so much emphasis on such clarity for banks, however, the OCC has failed to consider the devastating effect this rule, if implemented, will have on individual consumers and small businesses. Indeed, given the present economic climate and ongoing COVID-19 pandemic, it would be arbitrary not to conduct a detailed assessment to evaluate the rule's impact on consumers. Such a study should consider, at a minimum, the state of the labor market; the potential for the cessation or reduction of unemployment benefits; circumstances facing small businesses, including small business closures and the status of federal support for such businesses; and consumers' debt levels, ability to pay for basic necessities, reliance on short-term lending, and heightened bankruptcy risk.

Furthermore, the proposed rule fails to consider that issues of credit availability and affordability have always been matters of state and local concern in our system of federalism. If unregulated nonbank lenders are allowed to export interest rates, it will undermine states' control over the terms and cost of credit offered within their states.

Finally, as was the case with its rule regarding sales, assignments, or transfers of loans, the OCC does not have the authority to issue this rule because it has failed to comply with the

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[6] 85 Fed. Reg. 44223, 44226 (July 22, 2020).

[7] *See, e.g.*, 82 Fed. Reg. 54472, 54569 (Nov. 17, 2017); The Pew Charitable Trusts, *Payday Loan Facts and the CFPB's Impact* (May 2016), *available at* https://www.pewtrusts.org/-/media/assets/2016/06/payday_loan_facts_and_the_cfpbs_impact.pdf.

[8] *See, e.g.*, 82 Fed. Reg. 54472, 54555 (Nov. 17, 2017); Consumer Financial Protection Bureau, *Payday Loans and Deposit Advance Products* (Apr. 24, 2013), at 17-20, *available at* https://files.consumerfinance.gov/f/201304_cfpb_payday-dap-whitepaper.pdf.

[9] 12 CFR 7.4001(e), 160.110(d) (effective Aug. 3, 2020); *Permissible Interest on Loans That Are Sold, Assigned, or Otherwise Transferred*, 85 Fed. Reg. 33530 (June 2, 2020). Several state attorneys general, including New York's, are challenging this rule. *See* Complaint, *People ex rel. Becerra v. OCC* (N.D. Cal. 2020) (No. 20-cv-5200), *available at* https://oag.ca.gov/system/files/attachments/press-docs/OCC%20Non-bank%20Interest%20Rule%20Complaint%20%28as%20filed%29.pdf.

[10] 85 Fed. Reg. 44223, 44227 (July 22, 2020).

requirements applicable to preemption determinations under federal law and conflicts with Congress's intent to limit the preemption of states' consumer protection laws.[11] Moreover, the OCC's longstanding position has been that the laws the agency purports to interpret in the proposed rule do not allow entities that are not banks to qualify for federal protection from state consumer protection laws.[12]

In short, the OCC's current proposal would severely harm the financial futures and social well-being of millions of consumers and small businesses in New York State and nationwide. Accordingly, NYDFS urges the OCC to withdraw the proposed rule in its entirety. If the OCC acts outside the scope of its authority and finalizes this rule, NYDFS will take all appropriate steps necessary to protect consumers and small businesses in New York.

Very truly yours,

Linda A. Lacewell

Linda A. Lacewell, Superintendent
New York State Department of Financial Services

[11] The OCC also failed to undertake the substantive and procedural steps required before preempting state consumer protection laws. *See* 12 U.S.C. §§ 25b, 1465(a).
[12] *See, e.g.*, John D. Hawke, Jr., Comptroller of the Currency, *Remarks Before the Women in Housing and Finance* at 10 (Feb. 12, 2002), *available at* https://www.occ.gov/news-issuances/speeches/2002/pub-speech-2002-10.pdf ("The benefit that national banks enjoy by reason of [the preemption doctrine] 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.").