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Comment Letter In Opposition to the OCC's Proposed "True Lender" Rule

Arthur E. Wilmarth Jr.
George Washington University Law School, awilmarth@law.gwu.edu

Arthur E. Wilmarth, Jr.
Professor Emeritus of Law
George Washington University Law School
2000 H Street, N.W.
Washington, DC 20052
Email: awilmarth@law.gwu.edu
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Office of the Comptroller of the Currency
400 - 7th Street, S.W., Suite 3E - 218
Washington, DC 20219

Re: Docket ID OCC-2020-0026: Notice of Proposed Rulemaking – "National Banks and Federal Savings Associations as Lenders," 85 Fed. Reg. 44223 (July 22, 2020) (RIN 1557-AE97)

Thank you for giving the public an opportunity to submit comments on the referenced proposed rule issued by the Office of the Comptroller of the Currency ("OCC"). The proposed rule would "determine when a national bank or Federal savings association . . . makes a loan and is the 'true lender' in the context of a partnership between a bank and a third party, such as a marketplace lender." 85 Fed. Reg. at 44223. The proposed rule – to be codified at 12 C.F.R. 7.1031 – would provide that a national bank or federal savings association is deemed to "make" a loan if the institution, "as of the date of origination: (a) Is named as the lender in the loan agreement; or (b) Funds the loan." 85 Fed. Reg. at 44228.

The proposed rule is designed to "operate together" with the OCC's recently-adopted "*Madden*-fix rule." 85 Fed. Reg. at 44227.[1] Under the *Madden*-fix rule, a loan that is "made" by a national bank or federal savings association will retain its preemptive immunity from state usury laws under 12 U.S.C. 85 or 1463(g) if the loan is "subsequently sold, assigned, or otherwise transferred" to a nonbank.[2]

The proposed rule – operating in tandem with the *Madden*-fix rule – would allow a national bank or federal savings association to form "partnerships" with nonbank lenders, including payday lenders and auto title lenders. The two rules would allow a national bank or federal savings association to be treated as the "lender" under 12 U.S.C. 85 or 1463(g) for loans that are originated in its name or that it funds, even if it sells those loans to a nonbank "partner" *one day after the loans are originated*.[3]

[1] *See* OCC, "Permissible Interest on Loans That Are Sold, Assigned or Otherwise Transferred," 85 Fed. Reg. 33530 (June 2, 2020) [hereinafter "*Madden*-fix rule"].
[2] *Id.* at 33530-33, 33536 (purpose and text of *Madden*-fix rule as codified in 12 C.F.R. 7.4001(e) & 160.110(d)).
[3] *See* Notice of proposed rulemaking, 85 Fed. Reg. at 44225 (stating that "the determination of which entity made the loan under the above standards 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") (emphasis added).

The two rules would permit a nonbank lender that generates loans through a "partnership" with a national bank or federal savings association to claim preemptive immunity from state usury laws under 12 U.S.C. 85 or 1463(g), even if the federally-chartered bank or thrift does not retain any meaningful credit risk or other economic risk related to those loans.[4] For example, the proposed rule would allow a national bank to be indemnified by its nonbank "partner" for all losses and risks arising out of loans that the bank sells to the nonbank. Thus, a national bank could act as a mere conduit by quickly transferring loans to its nonbank "partner," and the nonbank could assume all of the credit and other economic risks and control the lending terms and enforcement for those loans. Such "partnerships" would amount to "rent-a-charter" schemes, which the OCC has barred national banks from entering since the early 2000s (*see* Part 3 below).

As discussed below in Part 2, the proposed rule would preempt state "true lender" laws, which many courts have applied in determining whether a loan is "made" by a national bank and therefore is entitled to preemptive immunity from state usury laws under 12 U.S.C. 85. The proposed rule's attempt to override state "true lender" laws is unprecedented. The notice of proposed rulemaking acknowledges that the OCC "has not previously taken regulatory action" to define when a loan is deemed to be "made" by a national bank. 85 Fed. Reg. at 44224.

According to the proposed rule, a loan that is "made" by a national bank under one of its two tests would also be subject to "the panoply of applicable Federal laws and regulations (including but not limited to consumer protection laws) governing lending by banks." 85 Fed. Reg. at 44225. The proposed rule evidently seeks to preempt a wide range of state laws – including state licensing, examination, and consumer protection laws – that would otherwise apply to nonbank lenders that establish "partnerships" with national banks. For example, a loan that is "made" by a national bank under either of the proposed rule's highly formalistic tests would evidently be covered by the OCC's sweeping claims of preemption of state law under 12 C.F.R. 7.4008 (for loans "made" by national banks that are not secured by real estate) or 12 C.F.R. 34.4 (for real estate loans "made" by national banks), even if the loan is subsequently sold to a nonbank "partner." Accordingly, the proposed rule's scope of preemption is not limited to state usury laws and potentially embraces a far broader range of state laws.

For the following reasons, the proposed rule is unlawful, invalid, and contrary to the public interest:

(1) The proposed rule does not comply with the substantive and procedural requirements set forth in 12 U.S.C. 25b, which governs the OCC's authority to issue rules and orders that seek to preempt state consumer financial laws.

(2) The proposed rule would unlawfully override state "true lender" laws without congressional authorization and in contravention of applicable court decisions.

[4] Unless the context indicates otherwise, references to "national banks" in this comment letter apply equally to federal savings associations. The same preemption standards apply to both categories of institutions. *See* 12 U.S.C. 1465; S. Rep. No. 111-176, at 176 (2010).

(3) The proposed rule is contrary to the public interest because it would allow national banks to establish "rent-a-charter" schemes with nonbank lenders, thereby encouraging predatory lending and other abusive practices that would inflict very serious injuries on consumers and small businesses.

(4) The proposed rule would reverse the OCC's existing policy that has barred national banks from participating in "rent-a-charter" schemes with nonbank lenders since the early 2000s. The proposed rule violates the Administrative Procedure Act because the OCC has not provided the required public notice of its intention to reverse that policy as well as the factual, legal, and policy reasons for doing so. It would therefore be unlawful for the OCC to adopt the proposed rule unless the agency first provides to the public: (A) notice of the OCC's intention to reverse its policy banning "rent-a-charter" schemes as well as a reasoned explanation of the agency's factual, legal, and policy basis for doing so, and (B) a reasonable opportunity to submit comments on the OCC's proposal to reverse its policy and its stated reasons for doing so.

The following analysis explains in greater detail why the OCC's proposed rule would be unlawful and contrary to the public interest if it were adopted. The OCC should withdraw the proposed rule, and the OCC should not issue any other rule or order that would (1) override state "true lender" laws, or (2) allow national banks to establish "rent-a-charter" schemes with nonbank lenders.

1. The Proposed Rule Does Not Comply with 12 U.S.C. 25b

The Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) ("Dodd-Frank"), established a new statutory framework for determining the applicability of state consumer financial laws to national banks and federal savings associations. Under 12 U.S.C. 25b(b)(1) , a state consumer financial law is preempted "only if" (A) the state law has "a discriminatory effect on national banks" or (B) the state law "prevents or significantly interferes with the exercise by the national bank of its powers," or (C) the state law is preempted by a federal statute other than the National Bank Act ("NBA"). Section 25b(b)(1)(B) expressly incorporates the "prevent or significantly interfere" standard for preemption set forth in *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25, 33 (1996). *See Lusnak v. Bank of America, N.A.*, 883 F.3d 1185, 1188, 1191-94 (9th Cir.), *cert. denied*, 139 S. Ct. 567 (2018); *Hymes v. Bank of America, N.A.*, 408 F. Supp. 3d 171, 184 (E.D.N.Y. 2019); Senate Report No. 111-176, at 175-76 (2010). Under 12 U.S.C. 1465, questions concerning the applicability of state laws to federal savings associations are governed by "the laws and legal standards applicable to national banks regarding the preemption of State law," including 12 U.S.C. 25b. Thus, the Dodd-Frank Act establishes the same preemption standards for both national banks and federal thrifts.[5]

Section 25b(b)(4) and Section 1465(b) declare that the NBA and the Home Owners' Loan Act ("HOLA") do *not* "occupy the field in any area of state law." Accordingly, field

[5] Jared Elosta, "Dynamic Federalism and Consumer Financial Protection: How the Dodd-Frank Act Changes the Preemption Debate," 89 *North Carolina Law Review* 1273, 1298 (2011); Arthur E. Wilmarth, Jr., "The Dodd-Frank Act's Expansion of State Authority to Protect Consumers of Financial Services," 36 *Journal of Corporation Law* 893, 925-28 (2011), available at http://ssrn.com/abstract=1891970.

preemption does *not* exist under either the NBA or HOLA. Instead, a state law is preempted only if it creates an irreconcilable conflict with federal law, based on the "prevent or significantly interfere" preemption standard formulated in *Barnett Bank*, 517 U.S. at 31, 33. *See* Elosta, *supra* note 5, at 1276-77, 1298; Wilmarth, *supra* note 5, at 927-28, 932.

As explained above, the OCC's proposed rule would (i) preempt state usury laws from applying to nonbank lenders with respect to loans that are deemed to be "made" by national banks under either of the proposed rule's two highly formalistic tests, (ii) override state "true lender" laws, and (iii) potentially preempt a broad range of other state laws, including consumer protection laws, from applying to nonbank lenders that establish "partnerships" with national banks. Under 12 U.S.C. 25b(b)(1)(B), the OCC does *not* have authority to adopt the proposed rule *unless* it demonstrates that application of the foregoing state laws to such nonbank lenders "prevents or significantly interferes with" the exercise of authorized powers by national banks. *Lusnak*, 883 F.3d at 1191-94; *Hymes*, 408 F. Supp. 3d at 184, 193-98; Elosta, *supra* note 5, at 1298; Wilmarth, *supra* note 5, at 927-30. The OCC's notice of proposed rulemaking does not refer to Section 25b's "prevents or significantly interferes with" preemption standard, and the notice does not attempt to satisfy that standard.

Under 12 U.S.C. 25b(c), the OCC must show that "substantial evidence, made on the record of the proceeding, supports the specific finding regarding the preemption of [state consumer financial law] in accordance with the legal standard" set forth in *Barnett Bank* – namely, that the state law in question "prevents or significantly interferes with" the exercise of lawful powers by national banks. *See Lusnak,* 883 F3d at 1194; Elosta, *supra* note 5, at 1301; Wilmarth, *supra* note 5, at 931. The notice of proposed rulemaking does not mention the "substantial evidence" requirement and does not attempt to comply with it. The notice is devoid of any showing of "substantial evidence" that application of state consumer financial laws to nonbank "partners" of national banks "prevents or significantly interferes with" the exercise of authorized powers by national banks.

The notice of proposed rulemaking asserts that state "true lender" laws create "uncertainty about the legal framework that applies to the loans made as part of" partnerships between nonbank lenders and national banks. 85 Fed. Reg. at 44224. However, the OCC does not provide any empirical data that would quantify the extent of any burdens or costs created by the alleged "uncertainty." The OCC also does not provide any empirical data that would quantify the claimed benefits of lending "partnerships" between nonbank lenders and national banks. Crucially, as shown below in Part 3, the OCC has not considered the tremendous costs and injuries that the proposed rule would inflict on consumers and small businesses.

The OCC's proposed rule also does not mention, or attempt to comply with, the requirement that the OCC must act on a "case-by-case basis" when it issues a preemptive rule or order. 12 U.S.C. 25b(1)(B) & (3); *see Lusnak*, 883 F.3d at 1192, 1194; Elosta, *supra* note 5, at 1300-01; Wilmarth, *supra* note 5, at 931. To satisfy the "case-by-case" requirement, the OCC must consider "the impact of a particular State consumer financial law on any national bank that is subject to that law, or the law of any other State with substantially equivalent terms." 12 U.S.C. 25b(b)(3)(A). Thus, the OCC must identify each state law that it believes would be preempted under the *Barnett Bank* standard codified in Section 25b(b)(1)(B). In addition, the

OCC must "first consult with the Bureau of Consumer Financial Protection and take the views of the Bureau into account" when the OCC makes its "case-by-case" determination. 12 U.S.C. 25b(b)(3)(B). The OCC's notice of proposed rulemaking does not indicate that the OCC has consulted with the Bureau, and the notice does not contain any identification and analysis of particular state laws, as required by Section 25b's "case-by-case" mandate.

In sum, the OCC's proposed rule does not satisfy the substantive and procedural requirements of 12 U.S.C. 25b. As shown above, the OCC's notice of proposed rulemaking does not even mention those requirements.

Section 25b(f) provides that the substantive and procedural requirements of Section 25b do not affect "the authority conferred by [12 U.S.C. 85] for the charging of interest *by a national bank*" (emphasis added). Section 25b(f) does *not* exempt the OCC's proposed rule from the substantive and procedural requirements of Section 25b. The scope of the proposed rule goes far beyond the subject of the "charging of interest *by a national bank*." The proposed rule seeks to preempt state usury laws from applying to the interest charged by *nonbanks* that form "partnerships" with national banks and purchase loans from those banks. In addition, as shown in Part 2(b), the proposed rule attempts to override state "true lender" laws, which determine whether a loan is "made" by a national bank or by its nonbank "partner." The proposed rule would also potentially apply the sweeping preemption provisions of 12 C.F.R. 7.4008 and 34.4 to loans that are sold by national banks to nonbank "partners." Accordingly, any attempt by the OCC to adopt the proposed rule in final form would violate multiple provisions of Section 25b, including the "prevents or significantly interferes with" preemption standard, the "substantial evidence" requirement, and the "case-by-case" mandate.

The proposed rule is the latest example of a highly disturbing trend in which the OCC has repeatedly failed to comply with legal standards that govern its authority to issue preemption determinations. When the OCC recently adopted its preemptive "*Madden*-fix rule," it did not satisfy the substantive and procedural requirements of 12 U.S.C. 25b. The OCC asserted that its *Madden*-fix rule was "not subject to the requirements of section 25b," but that assertion was clearly erroneous.[6]

In 2004, the OCC adopted sweeping regulations that preempted broad categories of state law across the nation and amounted to "de facto field preemption."[7] The OCC's 2004 preemption rules did not comply with the "prevent or significantly interfere" preemption standard set forth in *Barnett Bank*, and the OCC's rationale for its blanket preemption rules was subsequently rejected by courts and overruled by Congress in the Dodd-Frank Act.

In *Cuomo v. Clearing House Ass'n*, 557 U.S. 519 (2009), the Supreme Court held that the OCC's aggressive rationale for its 2004 preemption rules "does not comport with" the NBA

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[6] *See* the OCC's *Madden*-fix rule, *supra* note 1, at 33533. *See also* Arthur E. Wilmarth, Jr., "Comment Letter in Opposition to the OCC's Valid-When-Made Rule" (Jan. 17, 2020), at 2-4 (explaining why the OCC's *Madden*-fix rule was required to comply with Section 25b's substantive and procedural requirements) [hereinafter "Wilmarth Comment Letter"], available at http://ssrn.com/abstract=3523939.

[7] Arthur E. Wilmarth, Jr., "The OCC's Preemption Rules Exceed the Agency's Authority and Present a Serious Threat to the Dual Banking System and Consumer Protection," 23 *Annual Review of Banking & Financial Law* 225, 228-30, 233-37 (2004), available at http://ssrn.com/abstract=577863; *see also* Elosta, *supra* note 5, at 1280-81.

because the OCC "attempts to do what Congress declined to do: exempt national banks from all state banking laws, or at least state enforcement of those laws." *Id.* at 533. In *Lusnak*, the Ninth Circuit stated, "The OCC's [2004] preemption rule reads more broadly than *Barnett Bank*'s 'prevent or significantly interfere' standard in two respects." 883 F.3d at 1192 n.4. The Ninth Circuit held that the OCC's 2004 preemption test "did not conform to *Barnett Bank*" and was entitled to "little, if any, deference." *Id.* at 1193.

Congress rejected the OCC's 2004 preemption rules when it adopted the Dodd-Frank Act. The Senate committee report on the Dodd-Frank Act explained that, under 12 U.S.C. 25b, "[t]he standard for preempting State consumer financial law would return to what it had been for decades, those recognized by the Supreme Court in *Barnett Bank v. Nelson*, 517 U.S. 25 (1996) (*Barnett*), undoing broader standards adopted by rules, orders, and interpretations issued by the OCC in 2004." S. Rep. No. 111-176, at 175-76 (2010); *see also* Elosta, *supra* note 5, at 1298-1300; Wilmarth, *supra* note 5, at 936-37; Wilmarth, *supra* note 7, at 246-52.

Congress's displeasure with the OCC's aggressive preemption efforts (further described in Part 3 below) caused Congress to include a provision in Dodd-Frank that greatly reduces the degree of judicial deference for preemption determinations by the OCC. Under 12 U.S.C. 25b(b)(5)(A), the OCC's preemptive rules and orders are no longer entitled to deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Instead, the OCC's preemptive rules and orders receive a much lower level of deference under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). "Dodd-Frank's endorsement of *Skidmore* deference will force the OCC to bear the burden of persuading the courts that its preemption determinations are correct." Wilmarth, *supra* note 5, at 932-34; *see also Lusnak*, 883 F.3d at 1192-93 (explaining the significance of Dodd-Frank's stipulation that "the OCC's preemption determinations are entitled only to *Skidmore* deference"); *Hymes*, 408 F. Supp. 3d at 179-80 ("only *Skidmore* deference applies to the OCC's preemption determinations").

In 2011, the OCC revised its preemption rules, purportedly to bring them into conformity with the Dodd-Frank Act's mandates contained in 12 U.S.C. 25b and 1465. 76 Fed. Reg. 43549 (July 21, 2011). However, the OCC's revised rules did not include the "prevent or significantly interfere" preemption standard established by *Barnett Bank*, despite Congress's express incorporation of that standard in 12 U.S.C. 25b(b)(1)(B). The OCC's 2011 rulemaking made the extraordinary assertion – contrary to Congress's explicit mandate – that "the Dodd-Frank Act does not create a new stand-alone 'prevents or significantly interferes' preemption standard." 76 Fed. Reg. at 43555. As the Ninth Circuit explained in *Lusnak*, "the OCC has largely reaffirmed its previous preemption conclusions without further analysis under the *Barnett Bank* standard," in spite of Congress's statutory incorporation of that standard. The Ninth Circuit therefore held that the OCC's "conclusions" in its 2011 preemption rules "are entitled to little, if any, deference." 883 F.3d at 1193-94; *accord, Hymes*, 408 F. Supp. 3d at 191.[8]

Three of the preemption rules that the OCC issued in 2011 – 12 C.F.R. 7.4007, 7.4008, and 34.4 – continue to assert that broad categories of state laws are preempted across the nation.

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[8] *See also* Arthur E. Wilmarth, Jr., "OCC Gets It Wrong on Preemption, Again," *American Banker* (July 29, 2011), at 8, available on Westlaw at 2011 WLNR 14961080 (criticizing the OCC's 2011 rules for "refus[ing] to accept 'prevents or significantly interferes' as the governing preemption standard for [national] banks").

As explained above, the proposed rule would evidently apply the last two of those regulations to loans that are sold by national banks to nonbank "partners." When the OCC issued those sweeping and categorical preemption rules in 2011, the OCC did not comply with Section 25b's "substantial evidence" and "case-by-case" requirements. *See* Wilmarth, *supra* note 8. The OCC claimed in 2011 that it did not need to comply with Section 25b's requirements because its blanket preemption rules were based on similar rules adopted in 2004. The OCC asserted that its "regulations in effect prior to the effective date [of Dodd-Frank] are not subject to the case-by-case requirement." 76 Fed. Reg. at 43556-57, 43558.

The OCC's claim that its 2004 rules remained valid – even though they did *not* comply with Section 25b's substantive and procedural requirements – was clearly erroneous. Under 12 U.S.C. 25b(b)(1), state consumer financial laws are preempted "only if" a federal agency or court makes a preemption determination in full compliance with *all* of the requirements of Section 25b. Section 1043 of the Dodd-Frank Act (codified at 12 U.S.C. 5553) created a very limited exception to that mandate. Section 1043 preserved the applicability of existing OCC regulations and orders to "any contract entered into [by a national bank or its subsidiary] before July 21, 2010" (the date of Dodd-Frank's enactment). Congress intended that Section 1043 would "provide stability to existing contracts" – those entered into *before* Dodd-Frank's enactment – by allowing those contracts to be governed by the OCC's pre-Dodd-Frank rules and orders. Senate Report No. 111-176, at 175 (2010).

Section 1043's carefully limited exception provides compelling evidence of Congress's intent that the OCC's existing preemptive rules and orders would *not* apply to national bank transactions occurring *after* July 21, 2010, "*unless* they are brought into full compliance with the new preemption standards and requirements established by [12 U.S.C. 25b]." Wilmarth, *supra* note 5, at 940. The OCC's argument that its 2004 preemption rules (as reissued in 2011) remained valid for *new* transactions *after* 2010 would render Section 1043 "meaningless, in violation of the 'endlessly repeated principle of statutory construction . . . that all words in a statute are to be assigned meaning, and that nothing therein is to be construed as surplusage.'" *Independent Insurance Agents of America, Inc. v. Hawke*, 211 F.3d 638, 643-44 (2000) (quoting *Qi-Zhou v. Meissner*, 70 F.3d 136, 139 (D.C. Cir. 1995)).

The OCC's argument also contravenes the related canon of statutory construction known as *expressio unius est exclusio alterius – i.e.*, the "mention of one thing implies the exclusion of another [similar] thing." *IIAA v. Hawke*, 211 F.3d at 644 (citations and internal quotation marks omitted); *accord*, *American Land Title Ass'n v. Clarke*, 968 F.2d 150, 155-56 (2d Cir.), *cert. denied*, 508 U.S. 971 (1993). Congress's decision to provide a narrowly limited exception from Section 25b for national bank contracts that *preexisted* Dodd-Frank necessarily implies that all *subsequent* transactions of national banks are governed by Section 25b's preemption standards. Accordingly, the OCC violated 12 U.S.C. 25b when it issued three blanket preemption rules in 2011 – 12 C.F.R. 7.4007, 7.4008, and 34.4 – that did not comply with Section 25b's "prevents or significantly interferes" preemption standard or with Section 25b's "case-by-case" and "substantial evidence" requirements. Wilmarth, *supra* note 8.

The OCC has also failed to comply with 12 U.S.C. 25b(d), which requires the OCC to "periodically conduct a review, though notice and public comment, of each determination that a provision of Federal law preempts a State consumer financial law," within five years after issuing that determination. *See Lusnak*, 883 F.3d at 1194. The OCC must issue a public notice for each preemption review, including an invitation for public comments. After completing each preemption review, the OCC must issue a public notice describing the results of its review and submit a report to the House Financial Services Committee and the Senate Committee on Banking, Housing, and Urban Affairs. The OCC's public notice and report to those Committees must state whether the OCC intends to continue, rescind, or amend the preemption determination it reviewed. The OCC has not conducted any public reviews pursuant to Section 25b(d), even though the OCC issued its most important preemption rules nine years ago, in July 2011. The OCC has issued several other preemption rules that are at least 15-20 years old, and it has not conducted any public reviews of those rules pursuant to Section 25b(d). *See, e.g.*, 12 C.F.R. 7.4002, 7.4003, 7.4004, 7.4005, 34.5, and 37.1.

The Supreme Court has admonished the OCC that it cannot "pick and choose what portion of the law binds [it]." *First National Bank of Logan v. Walker Bank & Trust Co.*, 385 U.S. 252, 261 (1966). The OCC should withdraw the proposed rule due to its glaring lack of compliance with 12 U.S.C. 25b. The OCC should also conduct public reviews of all of its existing preemption rules and orders that are more than five years old – including those adopted in July 2011 – as required by 12 U.S.C. 25b(d).

2. The Proposed Rule Would Unlawfully Preempt State Laws That Apply to Nonbank "Partners" of National Banks and Federal Savings Associations.

a. 12 U.S.C. 85 and 1463(g) Preempt State Usury Laws Only for "Interest" That Is Lawfully Charged by National Banks and Federal Savings Associations.

The OCC does not have authority to extend the scope of preemption provided by 12 U.S.C. 85 and 1463(g) to reach purchasers and assignees of loans made by national banks and federal savings associations. Section 85 specifies the "interest" that a national bank may "take, receive, reserve, and charge" on its loans. The "interest" allowed to a national bank under Section 85 depends on the state in which that bank is "located." Section 85's explicit terms show that the power to charge "interest" thereunder is granted *only* to national banks and does *not* extend to purchasers or assignees of loans made by national banks. Less than a decade after Congress enacted the NBA, the Supreme Court held that Section 85 was intended "to allow *to National associations* the rate allowed by the State to natural persons generally, and a higher rate, if State banks of issue were authorized to charge a higher rate." *Tiffany v. National Bank of Missouri*, 85 U.S. (18 Wall.) 409, 413 (1873) (emphasis added). A century later, the Supreme Court reiterated that Section 85 establishes the terms on which "a *national bank* may charge interest." *Marquette National Bank v. First of Omaha Serv. Corp.*, 439 U.S. 299, 308 (1978) (emphasis added). The Court pointed out in *Marquette* that its decision – which allowed a national bank to "export" to other states the interest rate allowed by the state in which the bank was "located" – did *not* extend either to the bank's non-depository subsidiary or to other parties with which the bank had contractual relationships.[9]

Under 12 U.S.C. 1463(g)(1), federal savings associations may "charge . . . interest" under terms that are "substantially identical" to the authority granted to national banks under Section 85. *Garvey Properties/762 v. First Financial Savings & Loan Ass'n*, 845 F.2d 519, 521 (5th Cir. 1988). Congress enacted Section 1463(g) in 1980, together with 12 U.S.C. 1831d, which provides comparable authority to FDIC-insured, state-chartered banks and savings associations. Sections 1463(g) and 1831d, like Section 85, do *not* include any reference to the right of a federally-chartered or federally-insured depository institution to transfer its preemptive immunity from state usury laws to nonbank purchasers and assignees of its loans.

In *Greenwood Trust Co. v. Massachusetts*, 971 F.2d 818, 827 (1st Cir. 1992), *cert. denied*, 506 U.S. 1052 (1993), the court explained that Section 1831d "achieves parity between national banks and their state-chartered counterparts" because Congress made a "conscious choice to incorporate the [National] Bank Act standard" into Section 1831d. The preemptive immunity granted by Sections 1463(g) and 1831d applies *only* to "interest" that is lawfully charged by federally-chartered or federally-insured depository institutions, just as the parallel preemption provided by Section 85 applies *only* to "interest" that is lawfully charged by national banks. *In re Community Bank of N. Va.*, 418 F.3d 277, 296 (3d Cir. 2005) (12 U.S.C. 85 and 1831d "apply only to national banks and state chartered banks, not to non-bank purchasers of second mortgage loans"); *Goleta National Bank v. Lingerfelt*, 211 F. Supp. 2d 711, 717 (E.D.N.C. 2002) ("While it is true that the NBA does preempt state efforts to regulate the interest collected by national banks, the NBA patently does not apply to non-national banks.").

The preemption standards established by the Dodd-Frank Act reinforce the conclusion that Sections 85 and 1463(g) do *not* provide preemptive immunity for nonbank "partners" that purchase loans made by national banks or federal thrifts. Congress provided in three of Dodd-Frank's provisions – 12 U.S.C. 25b(b)(2), (e), and (h)(2) – that state laws apply to each subsidiary, affiliate, and agent of a national bank to the same extent as state laws apply to any other person, corporation, or other entity, *unless* the subsidiary, affiliate, or agent is itself chartered as a national bank. *See* S. Rep. No. 111-176, at 176 (2010) (explaining that, under Dodd-Frank, "State law applies to State-chartered nondepository institution subsidiaries, affiliates, and agents of national banks, other than entities that are themselves chartered as national banks."); *see also* Wilmarth, *supra* note 5, at 934-35. State laws similarly apply to nonbank subsidiaries, affiliates, and agents of federal thrifts under 12 U.S.C. 1465(a).

The foregoing provisions of Section 25b overruled and negated several court decisions issued prior to 2010 – including *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1 (2007) – that extended the NBA's preemptive scope to reach nonbank subsidiaries and agents of national banks. *See Mississippi Dept. of Finance v. Pikco Finance, Inc.*, 97 So.3d 1203, 1209 n.7 (Miss. 2012); Wilmarth, *supra* note 5, at 934-35. In view of Section 25b's *denial of preemption* to

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[9] See *Marquette*, 439 U.S. at 307-08 ("There is no allegation in petitioners' complaints that either Omaha Service Corp. or the Minnesota merchants and banks participating in the BankAmericard program are themselves extending credit in violation of Minn.Stat. § 48.185 (1978), and we therefore have no occasion to determine the application of the National Bank Act in such a case.").

nonbank subsidiaries, affiliates, and agents of national banks, the OCC's proposed rule and its *Madden*-fix rule violate congressional intent by attempting to extend the preemptive scope of Sections 85 and 1463(g) to reach nonbank purchasers and assignees of loans made by national banks and federal thrifts. Nonbank purchasers and assignees are parties to contracts with national banks and federal thrifts, just as their subsidiaries, affiliates, and agents are. The OCC has no authority to give nonbank purchasers and assignees of loans a preemptive immunity that Congress has expressly *denied* to other types of contractual counterparties – nonbank subsidiaries, affiliates, and agents – that have *closer* relationships with national banks and federal thrifts.

As discussed above, Section 25b(f) provides additional evidence of Congress's intent *not* to extend preemption of state usury laws beyond national banks. Section 25b(f) preserves only "the authority conferred by section 85 . . . for the charging of interest *by a national bank*" (emphasis added). Federal thrifts are subject to the same limited scope of usury preemption under 12 U.S.C. 1465(a). Accordingly, the proposed rule – like the OCC's *Madden*-fix rule – is invalid because it unlawfully provides that the preemption of state usury laws 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." 85 Fed. Reg. at 44225.[10]

b. The OCC Has No Authority to Preempt State "True Lender" Laws, Which Determine Whether a Loan Is "Made" by a Nonbank Lender Instead of a National Bank or Federal Savings Association

The OCC's notice of proposed rulemaking acknowledges that federal statutes – including 12 U.S.C. 85 and 1463(g) – "do not specifically address which entity makes a loan (or, in the vernacular commonly used in case law, which entity is the 'true lender') and, therefore, what legal framework applies, when the loan is originated as part of a lending relationship between a bank and a third party." 85 Fed. Reg. at 44244. The OCC claims that it is "reasonable to interpret" federal statutes "to provide that a bank makes a loan whenever it, as of the date of origination, (1) is named as the lender in the loan agreement or (2) funds the loan." *Id.* at 44246. However, the OCC does not identify any federal statute that supports its novel "interpretation." The OCC admits that *none* of the federal statutes authorizing national banks and federal savings associations to make contracts and loans "describes 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." *Id.* at 44224, 44225 (quote).

The OCC also asserts that it should receive *Chevron* deference for its unprecedented "interpretation." To the contrary, as shown above, 12 U.S.C. 25b(b)(5)(A) makes clear that the OCC's interpretation is entitled only to *Skidmore* deference. The OCC's interpretation does not merit *Skidmore* deference because it lacks any statutory basis. In addition, as shown below, the OCC's interpretation seeks to preempt – without congressional authorization – state "true lender" laws that determine whether a national bank has "made" a loan and therefore qualifies for the preemption provided by 12 U.S.C. 85.

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[10] For additional reasons why the OCC has no authority to extend the scope of preemption of state usury laws under 12 U.S.C. 85 and 1463(g) to reach nonbanks that are purchasers or assignees of loans made by national banks and federal savings associations, *see* Wilmarth Comment Letter, *supra* note 6, at 7-10.

As the OCC recognizes, "partnerships" between national banks and third-party nonbank lenders are governed by contracts. 85 Fed. Reg. at 44224. The OCC fails to acknowledge, however, that contracts made by national banks are governed by *applicable state laws* unless a particular state law creates an irreconcilable conflict with a federal statute. The Supreme Court has repeatedly held 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. *All their contracts are governed and construed by State laws.* Their acquisition and transfer of property, their right to collect their debts, and their liability to be sued for debts, are all based on State law." *Atherton v. FDIC*, 519 U.S. 213, 222-23 (1997) (emphasis added) (quoting *National Bank v. Commonwealth*, 76 U.S. (9 Wall.) 353, 362 (1870)). In *Cuomo v. Clearing House Ass'n*, 559 U.S. at 534, the Supreme Court affirmed that "States . . . have always enforced their general laws against national banks – and have enforced their banking-related laws against national banks for at least 85 years." *See also* Wilmarth, *supra* note 5, at 944-48 (discussing additional Supreme Court decisions that have upheld the application of state laws to contracts and other transactions made by national banks).

Contracts for loans are subject to state usury laws as well as general state contract laws. State usury laws are valid exercises of the states' historic police power to protect their residents from predatory and abusive lending practices. *See Griffith v. Connecticut*, 218 U.S. 563, 569 (1910) (It is "elementary" that usury laws fall "within the police power" of the states.); *Goleta National Bank v. Lingerfelt*, 211 F. Supp. 2d at 716 ("[T]he State does have a vital interest in protecting its citizens from predatory lending, usury, and other forms of deceptive trade practices."); *Pa. Dept. of Banking v. NCAS of Delaware, LLC*, 948 A.2d 752, 759 (Pa. 2008) ("[R]egulation of the rate of interest is a subject within the police power of the State, and this is especially true in the case of loans of comparatively small amounts, since the business of making such loans profoundly affects the social life of the community.") (quoting *Equitable Credit & Discount Co. v. Geier*, 21 A.2d 53, 58 (Pa. 1941)); James M. Ackerman, "Interest Rates and the Law: A History of Usury," 1981 *Arizona State Law Journal* 61, 85-110 (explaining that state usury laws "are viewed as a protective measure imposed to safeguard consumers from abuse and exploitation by sellers of credit," *id.* at 110).

Because usury is a traditional field of state regulation, federal courts have declined to infer from statutory silence that Congress intended to preempt state usury laws. *See Doyle v. Southern Guaranty Corp.*, 795 F.2d 907, 914 (11th Cir. 1986) (noting Congress's "traditional deference to the state's right to determine its usury statute"); *Goleta National Bank v. Lingerfelt*, 211 F. Supp. 2d at 716-18 (rejecting the claim that the NBA completely preempted the application of state usury laws to a "non-national bank," which made loans as an alleged partner of a national bank, because that preemption claim was "far from being facially conclusive or readily apparent"); *see also In re Seolas*, 140 B.R. 266, 272 (E.D. Cal. 1992) ("ERISA does not preempt generally applicable usury laws [in the] absence of any evidence that Congress intended preemption," because "usury laws are a traditional subject of state regulation."). As noted above, the OCC has acknowledged that Congress has *not* expressed any intention to override "true lender" laws that are a key component of many state usury laws.[11]

[11] *See* the first paragraph of this Part 2(b).

Under 12 U.S.C. 85, the NBA incorporates *all* of the usury laws of the state where a national bank is located. Section 85 provides that a national bank may "charge" interest "at the rate *allowed by the laws of the State* . . . where the bank is located . . . and no more" (emphasis added). Courts have confirmed that Section 85 incorporates the entire usury jurisprudence of the state where a national bank is located, including the state's usury statutes and judicial interpretations of those statutes. "True lender" laws are part of the usury jurisprudence of many states, as shown below.

In 1896, the Supreme Court held that a national bank "cannot enforce a contract forbidden by the terms of [usury] statutes" in the state where the bank is located. *Union National Bank v. Louisville, N., A. & C. Ry. Co.*, 163 U.S. 325, 330 (1896) (applying Illinois law). The Court explained that Section 85 incorporates the usury statutes of that state as interpreted by the courts of that state:

> *[T]he true construction of state [usury] legislation is a matter of state jurisprudence; and, while the right of the national bank springs from the act of congress, yet it is only a right to have an equal administration of the rule established by the state law. It does not involve a reservation to the national courts of the authority to determine adversely to the state courts what is the rule as to interest prescribed by the state law*, but only to see that such rule is equally enforced in favor of national banks. The decision here was not against any equality of right, but only a determination of the meaning of the state law as applied to all creditors. The decision [of the Illinois Supreme Court] was not against any equality of right, but only a determination of the meaning of the state law as applied to all creditors. It therefore denied no rights given by the federal statute.

Id. at 331 (emphasis added). *Accord*, *Citizens National Bank v. Donnell*, 195 U.S. 369, 374 (1904) ("[W]e follow the state court" in determining whether a national bank violated Missouri's usury laws); *Daggs v. Phoenix National Bank*, 177 U.S. 549, 555 (1900) ("The intention of the [NBA] is to adopt the state law, and permit to national banks what the state law allows to its citizens and to the banks organized by it.").

Subsequent decisions have confirmed that Section 85 incorporates the entire corpus of state usury jurisprudence embodied in the statutes and court decisions of the state where a national bank is located. *Bartholomew v. Northampton National Bank*, 584 F.2d 1288, 1295 (3d Cir. 1978) (The NBA "incorporates by reference the usury law of the state where the national bank is located."); *First National Bank of Mena v. Nowlin*, 509 F.2d 872, 876 (8th Cir. 1975) (Section 85 "adopts the entire case law of the state interpreting the state's limitations on usury; it does not merely incorporate the numerical rate adopted by the state."); *Roper v. Consurve, Inc.*, 777 F. Supp. 508, 513 (S.D. Miss. 1990) (Section 85 "adopts not only the numerical interest rates set by state statute, but also the entire case law of the state interpreting the state's limitations on usury."), *aff'd*, 932 F.2d 965 (5th Cir.) (table), *cert. denied*, 502 U.S. 861 (1991).

Federal and state courts have also held that claims of usury should be determined based on the "substance" of the relevant transactions and not their legal "form." In *Scott v. Lloyd*, 34

U.S. 418 (1835), Chief Justice John Marshall observed, "The ingenuity of lenders has devised many contrivances, by which, under forms sanctioned by law, the [usury] statute may be evaded. . . . Courts, therefore, perceived the necessity of disregarding the form, and examining into the real nature of the transaction." *Id.* at 446-47. Quoting Lord Mansfield, Marshall explained that an alleged violation of usury laws should be evaluated based on "*the substance of the transaction* and the true intent and meaning of the parties, for they alone are to govern, *and not the words used*." *Id.* at 453 (emphasis added). Marshall also quoted Lord Mansfield's statement that "the only question in all cases like the present, is, *what is the real substance of the transaction*, not what is the colour and form." *Id.* at 456 (emphasis added). Marshall concluded, "If the real contract was for a loan of money, . . . it is plainly within the statute of usury; and this fact was very properly left to the jury." *Id.* at 459.

Thus, *Scott v. Lloyd* embraced a case-by-case, substance-over-form approach for determining whether a transaction is usurious. That approach has been adopted by "true lender" laws in many states, as described below. The OCC's proposed rule is contrary to *Scott v. Lloyd* and state "true lender" laws because it would establish a conclusive, inflexible, and formalistic standard for determining the identity of the "true lender" of a loan generated by a "partnership" between a national bank and a nonbank. The OCC's proposed rule would consider only two narrow factors – whether the national bank was named as the lender in the loan agreement or whether the national bank funded the loan *for at least one day*.

Numerous federal and state courts have evaluated usury claims against national banks by "look[ing] behind the form of a transaction to its substance," as required by the usury laws of the states where the banks were located. *Anderson v. Hershey*, 142 F.2d 884, 886 (6th Cir. 1942) (applying Kentucky law); *accord*, *First National Bank in Mena v. Nowlin*, 509 F.2d at 877 (applying Arkansas law); *Ubaldi v. SLM Corp.*, 852 F. Supp. 2d 1190, 1194-98 (N.D. Cal. 2012) (applying California law); *First National Bank v. Phares*, 174 P. 519, 521 (Okla. 1918) (applying Oklahoma law); *see also CashCall, Inc. v. Morrissey*, 2014 WL 2404300, at *14 –*15 & n.19, *18 (W.Va. May 30, 2014) (applying West Virginia law in "examining the substance, and not just the form," of agreements between a nonbank lender and an FDIC-insured state bank to determine which entity was the "true lender"); *CFPB v. CashCall, Inc.*, 2016 WL 4820635 at *5 (C.D. Cal. Aug. 31, 2016) (applying the laws of 16 states, and concluding that the court "should look to the substance, not the form, of the transaction to identify the true lender" in a joint venture between a nonbank lender and a "tribal lending entity").

Federal and state courts have applied a case-by-case, substance-over-form analysis, in accordance with state usury laws, to determine whether nonbank lenders were the "true lenders" in allegedly usurious transactions. Courts have rejected claims that nonbank lenders were entitled to preemptive immunity under 12 U.S.C. 85 or 1831d simply because they acted as "partners" or "agents" of national banks or FDIC-insured state banks. In determining whether nonbank lenders were the "true lenders," courts have considered several factors, including which party held the "predominant economic interest" in the loan, which party bore the greatest amount of credit risk under the loan, which party controlled the terms and enforcement of the loan, and whether the nonbank lender indemnified the national bank. *In re Community Bank of N. Va.*, 418 F.3d at 283-85, 294-97 (applying Pennsylvania law); *Ubaldi*, 852 F. Supp. 2d at 1194-1200 (applying California law); *Eul v. Transworld Systems*, 2017 WL 1178537 at *5 –*10 (N.D. Ill.

Mar. 30, 2017) (applying Illinois law); *Goleta National Bank v. O'Donnell*, 239 F. Supp. 2d 745, 753-58 (S.D. Ohio 2002) (applying Ohio law); *Goleta National Bank v. Lingerfelt*, 211 F. Supp. 2d at 717-19 (applying North Carolina law); *CashCall, Inc. v. Morrissey*, 2014 WL 2404300 at *6 –*8, *14 –*15, *18 (applying West Virginia law in determining that the nonbank lender was the "true lender" instead of its partner, an FDIC-insured state bank); *see also CFPB v. CashCall, Inc.*, 2016 WL 4820635 at *5 –*7 (applying the laws of 16 states in which the affected borrowers resided, and determining that the nonbank lender was the "true lender" rather than its partner, a "tribal lending entity").

As explained above, the OCC's proposed rule attempts to override state "true lender" laws. It would allow a nonbank lender to claim preemptive immunity from a wide range of state laws even if (1) its "partner" national bank held loans in its name or funded loans for *only one day*, (2) the nonbank lender assumed all of the credit risk for the loans *after* that day, (3) the nonbank lender controlled the terms and enforcement of the loans, and (4) the nonbank lender indemnified the national bank against risks and losses connected to the loans. The proposed rule would severely impair the ability of states to enforce their usury laws – and, potentially, many other state consumer protection laws – against nonbank lenders that enter into "partnerships" with national banks or federal savings associations.

When a party alleges that a federal statute preempts an area of traditional state regulation – such as usury – the courts "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (quoting *Medtronic v. Lohr*, 518 U.S. 470, 485 (1996)); *accord, Lusnak*, 883 F.3d at 1191. As shown above, Congress has clearly demarcated the limits of federal usury preemption under 12 U.S.C. 85 and 1463(g). Both statutes expressly provide that loans are *not* entitled to such preemption *unless* they are "made" by national banks or federal savings associations. In addition, as shown above, the Supreme Court and other courts have held that Section 85 incorporates the entire usury jurisprudence of the state where a national bank is located, including state "true lender" laws. If there were any doubt about the matter, the Supreme Court has explained that, in determining the preemptive scope of "a federal statutory regulation that is comprehensive and detailed" – like the NBA and HOLA – "matters left unaddressed in such a scheme are presumably left subject to the disposition provided by state law." *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 85 (1993).

In contrast, when Congress *wanted* to allow purchasers and assignees of residential mortgage loans to inherit the preemptive immunity from state usury laws that the original lenders enjoyed, Congress made that intention abundantly clear.[12] The NBA and HOLA are devoid of any indication that Congress intended to authorize national banks and federal savings associations to transfer their preemptive immunity from state usury laws to nonbank purchasers or assignees of non-mortgage loans. Hence, there is no evidence of any "clear and manifest

[12] *See* 12 U.S.C. 3803, which (i) expressly allows nonbank "housing creditors" to "purchase and enforce alternative mortgage transactions" that are originated by other lenders in accordance with the Alternative Mortgage Transactions Parity Act, 12 U.S.C. 3801-06, and (ii) expressly preempts conflicting state laws. *See also* Senate Report No. 96-368, at 19 (1979) (stating that "loans originated under [the] usury exemption" contained in 12 U.S.C. 1735f-7a "will not be subject to claims of usury [under state law] even if they are later sold to an investor who is not exempt under this section"); *see also* Wilmarth Comment Letter, *supra* note 6, at 8-9.

purpose of Congress" that would authorize the OCC to adopt the proposed rule and override state "true lender" laws.

Consumer protection is another traditional area of state regulation. Courts have repeatedly held that federal statutes do not preempt state consumer protection laws unless there is "compelling evidence" of a congressional intent to preempt the state laws in question. As the Ninth Circuit explained in *Lusnak*, "Where, as here, we are confronted with state consumer protection laws, 'a field traditionally regulated by the states, compelling evidence of an intention to preempt is required.'" 883 F.3d at 1191 (quoting *Aguayo v. U.S. Bank*, 653 F.3d 912, 917 (9th Cir. 2011) (quoting *General Motors Corp. v. Abrams*, 897 F.2d 34, 41-42 (2d Cir. 1990)).

As shown above in Part 1, the Dodd-Frank Act makes clear that Congress does *not* intend to preempt state consumer financial laws *unless* they create an irreconcilable conflict with a federal statute. In addition, the Dodd-Frank Act requires nonbanks to comply with applicable state laws, even if they have contractual or structural relationships with national banks. *See* 12 U.S.C. 25b(b)(1) & (2), (c), (e), (h) & (i); *see also* 12 U.S.C. 5551-52. Thus, there is no evidence of an irreconcilable conflict between state "true lender" laws and any federal statute. Accordingly, the proposed rule's attempt to override state "true lender" laws is unlawful and invalid.

3. The Proposed Rule Is Contrary to the Public Interest Because It Would Promote "Rent-a-Charter" Schemes and Allow Nonbank Lenders to Exploit Consumers and Small Businesses.

The OCC's proposed rule is contrary to the public interest because it would allow national banks and federal savings associations to enter into "rent-a-charter" schemes with nonbank lenders. "Rent-a-charter" schemes (1) support efforts by nonbank lenders to engage in predatory lending and other abusive practices that inflict severe injuries on consumers and small businesses, and (2) severely impair the states' authority to protect their residents from exploitation by nonbank lenders. The OCC recognized the unacceptable risks created by "rent-a-charter" schemes in the early 2000s, when the OCC established a policy banning national banks from entering into such arrangements with nonbank lenders. The OCC's ban on "rent-a-charter" schemes has remained in place until now.

"Rent-a-charter" schemes are created by joint ventures between national banks or other FDIC-insured institutions and nonbank lenders. The typical "rent-a-charter" scheme provides that the bank is the nominal originator or funder of high-cost loans that are made to consumers or small businesses. However, the nonbank lender usually markets, reviews, and approves those loans before they are originated or funded by the bank. The nonbank lender purchases the loans from the bank shortly after origination and thereafter services and enforces the loans. The nonbank lender also frequently indemnifies the bank against risks and losses connected to the loans.

High-cost nonbank lenders form "rent-a-charter" partnerships with banks that are located in states with few if any usury limits. Nonbank lenders assert that they can evade restrictive state usury laws by relying on their partner banks' authority to charge higher interest rates under federal law. *See, e.g., In re Community Bank of N. Va.*, 418 F.3d at 283-85, 294-97 (describing alleged "rent-a-charter" arrangements between a predatory nonbank lender and a national bank and an FDIC-insured state bank); *Ubaldi*, 852 F. Supp. 2d at 1194-96, 1200-01 (describing a similar scheme in which a national bank allegedly "rent[ed] out its bank charter" to a high-cost nonbank lender); *Eul*, 2017 WL 1178537 at *5 –*7 (examining an alleged "rent-a-charter" arrangement between a high-cost nonbank lender and a national bank); *CashCall, Inc. v. Morrissey*, 2014 WL 2404300 at *1 –*2, *6 –*8, *14 –*15 (describing a "rent-a-charter" scheme between a high-cost nonbank lender and an FDIC-insured state bank).[13]

"Rent-a-charter" schemes are designed to prevent states from enforcing their usury laws and other consumer protection laws against high-cost nonbank lenders. The OCC's notice of proposed rulemaking asserts that the proposed rule would permit lending "partnerships" that create "benefits, including expanding access to affordable credit." 85 Fed. Reg. at 44226. In fact, the loans generated by rent-a-charter schemes are *not* "affordable." Nonbank lenders that participate in those schemes – including payday lenders and auto title lenders – impose very high interest charges with annual percentage rates ("APRs") that often exceed 100%. Loans made by high-cost nonbank lenders produce staggering rates of delinquency and default among borrowers. For example, Elevate, a high-cost lender that is a "partner" of several banks, reported charge-off rates on its loans that exceeded 52% of its revenues in 2016 and 2017. Similarly, more than one-fifth of borrowers who enter into auto title loans eventually lose their cars through repossession. Nonbank lenders usually focus their marketing efforts on communities with high percentages of vulnerable, lower-income households.[14]

The OCC is well aware of the unconscionable interest rates that nonbank lenders charge in "rent-a-charter" schemes. In July 2019, the OCC and the FDIC filed a joint amicus brief in support of World Business Lenders (WBL), a high-cost nonbank lender that entered into a "rent-a-charter" arrangement with Bank of Lake Mills, an FDIC-insured state bank located in Wisconsin. The OCC and FDIC supported WBL's attempt to enforce a loan with an APR of 120% against a small business located in Colorado. WBL invoked its partner bank's right to make loans with APRs of 120% under Wisconsin law, even though Colorado's usury laws imposed a maximum permissible APR of 45%. WBL is involved in other litigation, in which it seeks to enforce small business loans with APRs ranging from 72% to 138%, based on its claims of preemptive immunity under "rent-a-charter" schemes with various banks. Evidently, the FDIC and OCC are not concerned about the "affordability" of WBL's loans.[15]

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[13] *See also* Jayne Munger, "Note: Crossing State Lines: The Trojan Horse Invasion of Rent-a-Bank and Rent-a-Tribe Schemes in Modern Usury Law," 87 *George Washington Law Review* 468, 475-77 (2019).

[14] Testimony of Graciela Aponte-Diaz, Center for Responsible Lending, before the House Financial Services Committee (Feb. 5, 2020), at 3-8, available at https://financialservices.house.gov/uploadedfiles/graciela_testimony_crl_rent_a_bank_final_rev.pdf; Testimony of Lauren Saunders, National Consumer Law Center, before the House Financial Services Committee (Feb. 5, 2020), at 7-13, available at https://financialservices.house.gov/uploadedfiles/lauren_saunders_testimony_on_rent_a_bank_hearing_revised_2-5-20.pdf. *See also CashCall, Inc. v. Morrissey*, 2014 WL 2404300, at *1 –*8 (stating that more than two-thirds of West Virginia borrowers who received high-cost loans from CashCall defaulted on those loans, and describing the predatory lending and abusive debt collection practices that CashCall perpetrated against those borrowers in violation of West Virginia laws).

[15] Saunders Testimony, *supra* note 14, at 10-13.

The OCC's notice of proposed rulemaking states that a national bank's "overall returns" on loans made through "lending relationships with third parties" would be deemed "reasonably related to the bank's risks and costs of the loans" if the returns on 12-month loans "do not exceed, the principal amount of the loan[s]." 85 Fed. Reg. at 44227. That statement indicates that the OCC would allow national banks and their nonbank "partners" to make loans with APRs of up to 100%. Loans with such astronomical APRs would stretch the concept of "affordability" beyond any reasonable definition of that term. One wonders whether any senior OCC officials would be willing to borrow money at those sky-high rates.

In the early 2000s, the OCC recognized the dangers created by high-cost, short-term consumer loans, "commonly referred to as 'payday loans,'"[16] which were marketed to consumers through "rent-a-charter" schemes established by national banks and nonbank lenders. The OCC took decisive action to shut down those schemes. The OCC issued enforcement orders that required four national banks – Eagle National Bank, First National Bank of Brookings, Goleta National Bank, and Peoples National Bank of Paris, Texas – to stop making payday loans and to terminate their "rent-a-charter" partnerships with nonbank lenders.

In announcing the OCC's enforcement order against Eagle National Bank in January 2002, Comptroller of the Currency John D. Hawke, Jr. said that Eagle "essentially rented out its national bank charter to a payday lender." The OCC determined that Eagle "risked its financial viability" and conducted its "payday lending program . . . in violation of a multitude of standards of safe and sound banking, compliance requirements, and OCC guidance." Comptroller Hawke declared that Eagle's conduct

> 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.[17]

In announcing the OCC's enforcement order against Peoples National Bank in January 2003, Comptroller Hawke similarly stated:

> 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.[18]

[16] OCC Consent Order 2003-2, at 1-2 (Jan. 30, 2003) (Peoples National Bank), available at https://www.occ.gov/static/enforcement-actions/ea2003-2.pdf.
[17] OCC News Release 2002-1 (Jan. 3, 2002) (Eagle National Bank), available at https://www.occ.gov/news-issuances/news-releases/2002/nr-occ-2002-1.html.
[18] OCC News Release 2003-6 (Jan. 31, 2003) (Peoples National Bank), available at https://www.occ.gov/news-issuances/news-releases/2003/nr-occ-2003-6.html. *See also* OCC News Release 2003-3 (Jan. 31, 2003) (First National Bank of Brookings), available at https://www.occ.gov/news-issuances/news-releases/2003/nr-occ-2003-3.html; OCC Consent Order 2002-93 (Oct. 28, 2002) (Goleta National Bank), available at https://www.occ.gov/static/enforcement-actions/ea2002-93.pdf.

Comptroller Hawke also explained that, "[i]n many of these cases, we have also found that the bank failed to properly manage its relationships with the payday lenders, leading to significant safety and soundness problems and violations of federal laws and regulations." The OCC's order against Peoples National Bank pointed out that "no payday lenders are any longer carrying on business through a relationship with a national bank."[19]

In a speech delivered in February 2002, Comptroller Hawke described the OCC's reasons for shutting down "rent-a-charter" schemes between national banks and nonbank lenders. He explained that "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." He condemned such schemes as illegitimate because

> [t]he 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.

Comptroller Hawke described a typical "rent-a-charter" scheme in which the payday lender "attempts to clothe itself with the status of an 'agent' of the national bank" while retaining the "predominant economic interest" in the resulting loans. He denounced such arrangements as "an abuse of the national charter." He warned that "rent-a-charter" schemes were "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."[20]

The OCC's current website provides the following description of its enforcement actions in the early 2000s to prohibit national banks from entering into "rent-a-charter" schemes with nonbank payday lenders:

> Payday lending can provide short-term access to credit, but it often comes with high rates of interest and expensive fees.
>
> A handful of national banks essentially rented out their charters to third party payday lenders. The OCC found a number of abuses in these relationships. Of primary concern was the inability of small banks to properly oversee the third parties who were making loans in their names. Among the abuses: deceptive marketing practices, failure to secure confidential customer files, and unsafe and unsound lending. The OCC took a series of enforcement actions that eliminated these relationships from the national banking system.[21]

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[19] OCC News Release 2003-6, *supra* note 18.

[20] Remarks by Comptroller of the Currency John D. Hawke, Jr. before the Women in Housing and Finance (Feb. 12, 2002), at 10, available at https://www.occ.gov/news-issuances/speeches/2002/pub-speech-2002-10.pdf.

[21] OCC webpage, "Consumers and Communities: Consumer Protection – Payday Lending," available at https://www.occ.gov/topics/consumers-and-communities/consumer-protection/payday-lending/index-payday-

Thus, the OCC established a strong policy in the early 2000s that prohibited national banks from participating in "rent-a-charter" schemes with nonbank lenders. As shown by the OCC's current website, that policy has remained in effect *until now*. The OCC's enforcement orders in the early 2000s, Comptroller Hawke's speech in 2002, and the OCC's current website provide compelling evidence of the significant harms that would be caused by the proposed rule in combination with the *Madden*-fix rule. Those harms include: undermining the states' longstanding authority to protect their residents from predatory nonbank lenders, threatening the financial and reputational viability of national banks, encouraging unsafe and unsound lending practices, and promoting efforts by nonbanks to injure consumers and small businesses through deceptive marketing practices, privacy violations, and other abuses.

Accordingly, there is a "clear and present danger" that the proposed rule and the *Madden*-fix rule "will lead to an explosion of harmful predatory lending and the evisceration of states' historic ability to protect their residents."[22] That dual outcome – enabling predatory lending and impairing the states' authority to protect their residents – would undermine core purposes of the Dodd-Frank Act.

When Congress passed the Dodd-Frank Act, it strongly criticized federal financial regulators for failing to take timely and effective actions to stop predatory nonprime mortgage lending during the 1990s and 2000s, even after regulators received many warnings about the dangers of nonprime mortgages. As the Senate committee report on Dodd-Frank explained:

> Underlying the whole chain of events leading to the financial crisis was the spectacular failure of the prudential regulators to protect average American homeowners from risky, unaffordable, 'exploding' adjustable-rate mortgages, interest only mortgages, and negative amortization mortgages. These regulators 'routinely sacrificed consumer protection for short-term profitability of banks,' undercapitalized mortgage firms and mortgage brokers, and Wall Street investment firms, despite the fact that so many people were raising the alarm about the problems these loans would cause.[23]

Congress specifically condemned the OCC and the Office of Thrift Supervision ("OTS") for aggressively preempting efforts by many states to stop predatory lending during the 1990s and 2000s. Senate Report No. 111-176, at 16-17. The Senate committee report concluded:

> In sum, the Federal Reserve and other federal regulators failed to use their authority to deal with mortgage and other consumer abuses in a timely way, and

lending.html (visited on Aug. 10, 2020). The OCC's "Payday Lending" webpage includes weblinks to the OCC's enforcement orders against Peoples National Bank and First National Bank of Brookings.

[22] National Consumer Law Center (NCLC), "FDIC/OCC Proposal Would Encourage Rent-a-Bank Predatory Lending" (Dec. 2019), at 9, available at https://www.nclc.org/images/pdf/high_cost_small_loans/ib-fdic-rent-a-bank-proposal-dec2019.pdf.

[23] Senate Report No. 111-176, at 15 (2010) (quoting testimony of Prof. Patricia McCoy on Mar. 3, 2009). For further analysis of the pervasive failures by federal financial regulators to stop predatory nonprime lending, see Kathleen Engel & Patricia A. McCoy, *The Subprime Virus: Reckless Credit, Regulatory Failure, and Next Steps* 157-226 (Oxford University Press, 2011); Wilmarth, *supra* note 5, at 897-908.

> the OCC and the OTS actively created an environment where abusive mortgage lending could flourish without State controls.[24]

In adopting the Dodd-Frank Act, Congress expressed great concerns about payday lending and other abusive financial practices that the proposed rule and the *Madden*-fix rule would encourage. Senate Report No. 111-176, at 19-21 (2010). As shown above, the proposed rule and the *Madden*-fix rule would allow nonbank lenders to exploit consumers and small businesses by using "rent-a-charter" schemes to make toxic high-cost loans (including payday loans) and evade state usury laws and other state consumer protection laws. *See also* NCLC, *supra* note 22, at 2-6, 8-9.

The OTS's and OCC's regulatory failures and their unwarranted preemption of state laws during the 1990s and 2000s were major factors behind Congress's decisions to abolish the OTS and impose significant constraints on the OCC's authority to preempt state consumer financial laws. *See* Senate Report No. 111-176, at 16-17, 25-26, 175-77 (2010). In view of that recent history, the OCC has no legal basis for its attempt to launch a new preemption campaign that would undermine the states' historic authority to protect their residents against predatory nonbank lenders.

4. The Proposed Rule Violates the Administrative Procedure Act Because It Does Not Provide Notice of, and "Good Reasons" for, the OCC's Reversal of Its Policy Banning "Rent-a-Charter" Schemes.

As shown in Part 3, the OCC established a strong policy in the early 2000s of barring national banks from entering into "rent-a-charter" schemes with high-cost nonbank lenders. The OCC has maintained that policy *until now*, as shown by its current website.

The OCC's existing policy was based on a number of important factors, which were described in its enforcement orders, Comptroller Hawke's 2002 speech, and the OCC's current website. *Until now*, the OCC has banned "rent-a-charter" schemes because it determined that those schemes (1) unlawfully impair the states' longstanding authority to enforce their usury laws and other consumer protection laws against nonbank lenders, (2) compromise the ability of national banks to maintain adequate controls over their lending activities, (3) encourage unsafe and unsound lending, (4) threaten the financial and reputational viability of national banks, and (5) harm consumers by promoting predatory lending, deceptive marketing practices. privacy violations, and other abuses.

The OCC's notice of proposed rulemaking does not explain why the agency has decided to reverse its policy prohibiting national banks from entering into "rent-a-charter" schemes with nonbank lenders. The notice of proposed rulemaking does not provide the factual, legal, and

[24] Senate Report No. 111-176, at 17 (2010). For additional discussions of the injuries caused to consumers and the U.S. economy by the OCC's and OTS's sweeping preemption of state consumer protection laws and their interference with state enforcement efforts during the 1990s and 2000s, see Elosta, *supra* note 5, at 1278-81, 1284-86; Engel & McCoy, *supra* note 23, at 157-86; Wilmarth, *supra* note 5, at 909-19; Wilmarth, *supra* note 7, at 228-37, 306-16, 348-56.

policy basis for the OCC's decision to reverse its policy. In fact, the notice does not inform the public that the agency has changed its policy.

In view of the glaring omissions described above, the OCC's proposed rule is unlawful and invalid under the public notice requirement of the Administrative Procedure Act ("APA"), 5 U.S.C. 553(b)(3). The OCC's proposed rule violates Section 553(b)(3) because it does not give the public adequate notice of, and a reasonable opportunity to submit informed comments on, the OCC's decision to reverse its policy and its factual, legal, and policy reasons for doing so.[25]

If adopted, the OCC's proposed rule would be "arbitrary and capricious," and therefore unlawful, under a separate provision of the APA, 5 U.S.C. 706(2)(A). As shown above, the proposed rule would reverse the policy established by the OCC in the early 2000s, when it prohibited national banks from participating in "rent-a-charter" schemes with nonbank lenders. The proposed rule would reverse the OCC's existing policy without recognizing that policy reversal. As the Supreme Court has made clear, "An agency may not . . . depart from a prior policy *sub silentio* or simply disregard rules that are still on the books." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

In addition, the OCC's proposed rule does not provide "good reasons" for the OCC's decision to reverse its policy, including "a reasoned explanation . . . for disregarding facts and circumstances that underlay . . . the prior policy." *Id.* at 515-16; *see also Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125-27 (2016) (holding that a regulation issued 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"). The OCC's notice of proposed rulemaking does not explain whether (and, if so, why) the agency now disagrees with the factual findings and policy concerns that the agency identified when it barred national banks from participating in "rent-a-bank" schemes with nonbank lenders in the early 2000s. The notice also fails to provide other "good reasons" for reversing the OCC's existing policy.

Accordingly, the OCC would violate the APA if it adopted the proposed rule, *unless* the OCC first completes the following steps: (A) the OCC must evaluate the factual findings and public policy concerns that the OCC identified in the early 2000s, when it established its existing policy prohibiting national banks from participating in "rent-a-charter" schemes with nonbank lenders; (B) the OCC must provide "good reasons" for reversing its existing policy, including a "reasoned explanation" why the OCC now disagrees with the factual findings and public policy concerns that caused the OCC to adopt that policy; (C) the OCC must provide public notice of its intention to reverse its existing policy and its "good reasons" for doing so, and (D) the OCC must

[25] The APA's public notice requirement, 12 U.S.C. 553(b)(3), ensures that (1) an agency's proposed rule will receive adequate scrutiny from a diversity of public views, and (2) affected parties will be given a fair opportunity to present their objections to the proposed rule. *Daimler Trucks North America LLC v. EPA*, 737 F.3d 95, 100 (D.C. Cir. 2013). The "adequacy" of an agency's notice of proposed rulemaking "must be tested by determining whether it would fairly apprise interested persons of the 'subjects and issues' before the agency." *Prometheus Radio Project v. FCC*, 373 F.3d 372, 411 (3d Cir. 2004) (quoting *American Iron & Steel Institute v. EPA*, 568 F.2d 284, 293 (3d Cir. 1977)). "A notice of proposed rulemaking is legally inadequate if it does not 'adequately frame the subjects for discussion.'" *Citibank Federal Savings Bank v. FDIC*, 836 F. Supp. 3, 7 (D.D.C. 1993) (quoting *Connecticut Power & Light Co. v. NRC*, 673 F.2d 525, 533 (D.C. Cir. 1982)).

give the public a reasonable opportunity to submit comments on its proposal to reverse its policy and its stated reasons for doing so.

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For all of the reasons stated above, the OCC should withdraw the proposed rule, and the OCC should not issue any other rule or order that would (1) override state "true lender" laws or (2) allow national banks to participate in "rent-a-bank" schemes with nonbank lenders.

Thank you for your consideration of the foregoing comments.[26]

Very truly yours,

Arthur E. Wilmarth Jr.

Arthur E. Wilmarth, Jr.
Professor Emeritus of Law
George Washington University Law School

[26] This comment letter is submitted in my personal capacity and does not represent the views of The George Washington University or its Law School.