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The OCC's and FDIC's Attempts to Confer Banking Privileges on Nonbanks and Commercial Firms Violate Federal Laws and Are Contrary to Public Policy

By Arthur E. Wilmarth, Jr.

Introduction

This article criticizes recent efforts by the Office of the Comptroller of the Currency (OCC) and the Federal Deposit Insurance Corporation (FDIC) to confer the benefits and privileges of banks on nonbank providers of financial services (hereinafter "nonbanks") and commercial firms without requiring those entities to comply with the laws and regulations that govern banks and bank holding companies. As shown below, the OCC's and FDIC's initiatives are unlawful and contrary to the public interest. They are dangerous measures that would enable nonbanks and commercial firms to subvert important public policies embodied in our federal statutory framework for banking institutions. Congress should overturn the OCC's and FDIC's actions or persuade the agencies to rescind them.

In July 2018, the OCC announced its intention to approve national bank charters for nondepository "fintech" firms that provide lending or payment services but do not accept deposits. The New York Department of Financial Services (NYDFS) promptly filed a lawsuit to challenge the OCC's action. In May 2019, a federal district court held that the OCC lacked authority to grant national bank charters to financial institutions that do not accept deposits. The OCC has appealed that decision to the U.S. Court of Appeals for the Second Circuit.[1]

Despite the district court's decision, Acting Comptroller of the Currency Brian Brooks stated in August 2020 that the OCC was ready to "start processing applications for [nondepository national bank] charters from payments companies . . . . These could include financial technology firms like PayPal or cryptocurrency exchanges like Coinbase, his former employer." Big technology firms responded with enthusiasm to Mr. Brooks' announcement. "Financial Innovation Now – a group that represents Amazon, Apple, Google, Intuit, PayPal, Square and Stripe – praised Brooks' 'leadership and vision' in a statement."[2]

In March 2020, the FDIC issued a proposed rule that would allow all types of commercial firms—including the largest technology firms—to acquire FDIC-insured industrial banks and industrial loan companies (hereinafter collectively referred to as "ILCs").[3] If implemented, that rule could potentially transform our financial system and economy. Unlike the OCC's nondepository fintech charter, the FDIC's proposed ILC rule would permit Big Tech giants and other commercial firms to own FDIC-insured, deposit-taking institutions. The proposed ILC rule would also enable commercial owners of ILCs to avoid the limitations and obligations that apply to parent companies of FDIC-insured banks under the Bank Holding Company Act (BHC Act).

FDIC-insured ILCs have presumptive access to discount window loans, payment and settlement services, and other facilities and benefits that depository institutions receive from the Federal Reserve System (Fed). In contrast, as discussed below in Part 1.b, the Fed has not yet taken any position on whether the OCC's nondepository fintech national banks would qualify for access to the Fed's services and facilities.

The OCC has taken two additional steps to confer privileges of national banks on nonbank firms. In June

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2020, the OCC adopted a rule declaring that national banks can transfer their federal preemptive immunity from state usury laws to nonbanks that are purchasers, assignees, or transferees of their loans. The OCC's usury preemption transfer rule is designed to shield those nonbanks from all state usury laws except for the usury laws of the state where the national bank that transferred the loans is "located."[4] Most national banks "locate" their lending operations in states that have few if any usury limits. Consequently, the OCC's rule effectively grants blanket immunity from state usury laws to nonbanks that acquire loans from national banks.[5]

In July 2020, the OCC issued a proposed rule that would (1) allow national banks to form "partnerships" with nonbank lenders, (2) treat national banks as the "true lenders" for all loans produced by such "partnerships" if the banks are named as the lenders in the loan agreements or fund the loans, and (3) permit national banks to maintain their status as "true lenders" even if they sell their entire interest in those loans to their nonbank "partners" *one day after the loans are made*. The OCC's proposed "true lender" rule would permit national banks to establish "rent-a-charter" schemes with high-cost nonbank lenders. "Rent-a-charter" schemes enable banks to earn fees by selling their federal preemptive immunity from state laws to their nonbank "partners," while the nonbank "partners" assume all or most of the economic benefits and risks of the loans generated by the "partnerships."[6]

In July 2020, the FDIC issued a rule allowing FDIC-insured state banks to transfer their federal preemptive immunity from state usury laws to purchasers, assignees, and transferees of their loans. The FDIC's rule grants FDIC-insured state banks the same authority to transfer their preemptive immunity from state usury laws that national banks are given under the OCC's usury preemption transfer rule.[7] The FDIC has not yet proposed a regulation similar to the OCC's "true lender" rule.

Part 1 of this article shows that the OCC's nondepository fintech national bank charter and the FDIC's proposed ILC rule are contrary to federal statutes and policies governing banks and bank holding companies. Part 2 demonstrates that the OCC's and FDIC's attempts to confer on nonbanks the preemptive immunities granted to banks by Congress violate federal laws and threaten to impose serious injuries on states, consumers, and small businesses.

Analysis

1. The OCC's nondepository fintech charter and the FDIC's proposed ILC rule violate federal laws and undermine important public policies

Several federal banking statutes prohibit the OCC from granting national bank charters to financial institutions that do not accept deposits. In addition, the OCC's nondepository fintech national bank charter and the FDIC's proposed ILC rule contravene fundamental principles established by federal banking laws, including the policies of separating banking and commerce, avoiding significant risks to financial stability, preventing serious threats to competition, and protecting consumers and communities.

a. The National Bank Act requires national banks to accept deposits in order to engage in the "business of banking"

Congress passed the National Bank Act of 1864 (NBA) to establish a uniform national currency in the form of bank notes issued by a newly-created system of national banks.[8] The NBA also helped the federal government to finance the Civil War by requiring national banks to purchase and hold government bonds as liquidity reserves for their liabilities created by bank notes and deposits.[9] The NBA required every national bank to hold federal government bonds and other "lawful money of the United States" in an amount equal to a specified percentage of "its notes in circulation and its deposits."[10]

Since 1864, deposit-taking has been an essential part of the "business of banking" conducted by national banks. From its inception, the NBA has authorized the OCC to issue national bank charters only if the OCC determines that each proposed national bank "is lawfully entitled to commence the business of banking."[11] The NBA has always defined "the business of banking" as including "receiving deposits," making loans, paying ("discounting") negotiable instruments and other evidences of debt, buying and selling "bullion" and foreign exchange, and obtaining and issuing circulating bank notes, together with "all such incidental powers as shall be necessary to carry on the business of banking."[12] Since 1864, the NBA has required every national bank to identify in its organization certificate "[t]he place where its operations of discount and deposit are to be carried on."[13]

The NBA's designation of deposit-taking as an indispensable component of "the business of banking" reflects the crucial roles that bank deposits play in our monetary system and economy. Bank deposits increase our nation's money supply. Banks use deposits to fund their extensions of credit and their purchases of investment securities.[14] Businesses and consumers use bank deposits as vehicles for saving and for making payments to others. Under federal law, only banks and other chartered depository institutions are allowed to accept deposits.[15]

Thus, bank deposits are of central importance to the effective operation of our monetary system and our economy.[16] Federal courts have repeatedly identified deposit-taking as an "essential" aspect of the "business of banking" authorized by the NBA and other federal statutes.[17] The power to accept deposits is a special privilege conferred by federal and state governments on banks and other depository institutions through a demanding chartering process. That special privilege warrants the comprehensive regime of regulation and supervision that federal and state governments impose on banks and other depository institutions.[18]

In 1975, the OCC took the unprecedented step of granting a national bank charter to a special-purpose trust company. That trust company did not accept deposits other than trust funds and did not exercise any other nonfiduciary powers. A district court invalidated the OCC's special-purpose trust charter, holding that it violated the NBA's requirement that all national banks must engage in the "business of banking."[19]

In response to that court decision, Congress amended Section 27(a) of the NBA in 1978. The 1978 amendment specifically permitted the OCC to approve national bank charters for special-purpose, nondepository trust companies.[20] Based on that narrowly-tailored amendment, a federal appellate court reversed the district court's decision and upheld the OCC's special-purpose trust charter.[21]

Congress's 1978 amendment to Section 27(a) confirms that the NBA does not allow the OCC to approve nondepository charters for national banks *other than* special-purpose trust companies.[22] If the OCC possessed a general power to charter nondepository national banks, the 1978 amendment to Section 27(a) would have been redundant and unnecessary surplusage. Under two well-established canons of statutory construction—the canon against surplusage and the associated canon of *expressio unius est exclusio alterius* (the naming of one thing excludes other similar things), the narrowly-confined terms of the 1978 amendment refute the OCC's assertion of a general authority to charter nondepository national banks.[23]

The OCC rests its claim of authority to charter nondepository national banks on Section 36 of the NBA. However, Section 36 was not added to the NBA until 1927—more than 60 years after the NBA's enactment. Section 36 deals only with the authority of national banks to establish *branches*. Section 36 says nothing about the chartering of *banks*, and it does not refer to "the business of banking." The OCC did not assert any chartering authority under Section 36 until 2003, and the OCC did not take any definitive steps to exercise that claimed authority until 2016.[24]

Section 36 defines a "branch" as a location "at which deposits are received, or checks paid, or money lent."[25] Based on the disjunctive word "or" in Section 36, the OCC contends that it can charter national banks that engage in lending or payment activities but do not accept deposits. However, a branch is a *subset* of a national bank, and Section 36 merely authorizes a branch to exercise a subset of "the business of banking." The fact that a national bank may lawfully establish a subsidiary *branch* without accepting deposits has no bearing on whether the OCC may lawfully charter a *bank* that does not accept deposits.

In contrast to Section 36, Section 24 (Seventh) of the NBA uses the conjunctive word "and" when it identifies the activities that are part of "the business of banking"—including "receiving deposits." The activities specified in Section 24 (Seventh) include *all three* of the functions listed in Section 36. Viewed in combination with the 1978 amendment to Section 27(a) and Section 22 (Second)—which requires every national bank to identify "[t]he place where its operations of discount and deposit are to be carried on"—Section 24 (Seventh) bars the OCC from chartering nondepository national banks *other than* special-purpose trust companies.[26]

As the district court explained in *Vullo*, the OCC's nondepository fintech national bank charter could have a major "impact . . . on at least 'a significant portion' of the national economy" by causing a "dramatic disruption of federal-state relationships in the banking industry." Nonbanks could avoid state licensing, reporting, and supervisory requirements by obtaining fintech charters from the OCC. Recipients of the OCC's fintech charters could also claim that the NBA preempts numerous state consumer protection laws (including state usury laws) that currently apply to nonbank providers of lending and payment services.[27] The OCC could conceivably assert that recipients of fintech charters do not have to comply with state privacy and data protection laws.[28] Thus, the OCC's fintech charter would abrogate the longstanding federal policy of allowing states to regulate nonbanks that provide financial services within their borders.[29]

The OCC's fintech charter would severely impair the states' historic authority to enact and enforce laws that protect their residents against abusive, deceptive, and exploitative practices by nonbank providers of lending and payment services. As the NYDFS pointed out in its Complaint in *Vullo*, "preemption of state law governing mortgage lenders and servicers" by the OCC and the Office of Thrift Supervision (OTS) during the 1990s and 2000s "was a root cause of the global financial collapse," along with failures by the OCC, OTS, and other federal regulators to protect consumers against predatory lending and foreclosure practices.[30] Congress should not allow the OCC to repeat its disastrous pattern of preemptive overreach and regulatory laxity that contributed significantly to the catastrophic events of 2007–09.

The OCC's fintech chartering initiative offers federal corporate charters to a wide range of nonbank firms that provide lending and payment services. Big Tech giants like Alphabet (Google), Amazon, Apple, Facebook, and Microsoft could potentially obtain OCC fintech charters if they established significant lending or payment programs. Currently, Big Tech giants and other nonbanks must operate under state corporate charters and must comply with state corporate governance laws. The OCC's attempt to expand its federal chartering authority beyond deposit-taking national banks is indefensible in view of numerous court decisions that *refused* to construe federal statutes in a manner that would override "established state policies of corporate regulation" absent clear evidence of congressional intent.[31] As shown above, Congress has never expressed an intent to allow the OCC to grant national bank charters to nondepository firms *except for* special-purpose trust companies.

b. The Federal Reserve Act confirms that national banks must be depository institutions

The Federal Reserve Act of 1913 (FRA) established the Fed as the nation's new monetary authority. In creating the Fed, Congress sought to provide a "sound" and "flexible" national currency in the form of Federal Reserve notes. Federal Reserve notes gradually replaced the "bond-secured note[s]" issued by national banks under the NBA.[32] Congress also directed the Fed to clear and pay (at par) checks drawn by depositors on national banks and state banks that were members of the Fed (state member banks).[33] The Fed's duty to clear and pay checks reflected the fact that bank deposits were a major component of the U.S. money supply by 1913.

The FRA provides that Federal Reserve notes must be "receivable by all national and [state] member banks."[34] Congress included that mandate to ensure that Federal Reserve notes would be "payable . . . to any [member] bank for deposit purposes," thereby making each member bank a "quasi-redemption" facility for those notes.[35] The obligation of all Fed member banks to accept Federal Reserve notes as deposits demonstrated Congress's understanding that all member banks would be depository institutions.

Since 1913, the FRA has required every national bank to become a Fed member bank and to purchase stock in its respective regional Federal Reserve Bank. National banks that do not fulfill those commitments must forfeit their charters.[36] The FRA's provisions requiring national banks to become member banks, to buy stock in their Federal Reserve Banks, and to accept Federal Reserve notes as deposits were key elements of the FRA's design for an effective monetary system and national currency.[37] Congress recognized that "the Federal Reserve System could not function without national banks, which are required to be members therein, 12 U.S.C. § 222, and in that sense, they are part and parcel of the establishment and effectuation of the national fiscal and monetary policies."[38]

National banks and other federally-regulated depository institutions play significant roles in the Fed's implementation of monetary policy. National banks and other depository institutions must maintain reserves against their deposits in accordance with the Fed's regulations.[39] Bank reserve requirements are one of the "primary means through which the [Federal Reserve] System implements monetary policy."[40] Other important tools for implementing the Fed's monetary policy—including open-market operations and discount window loans—also operate through the Fed's relationships and transactions with national banks and other depository institutions.[41]

The Fed frequently changes its monetary policy stance by adjusting its target for the federal funds rate—the interest rate at which depository institutions borrow from and lend to each other in the overnight federal funds market. To influence the federal funds rate, the Fed changes the interest rate that it pays on reserve balances maintained by depository institutions in excess of their required reserves.[42] Thus, national banks and other depository institutions serve as a vitally important "transmission belt for monetary policy."[43]

National banks and other depository institutions enjoy a privileged relationship with the Fed, and they receive highly beneficial services from the Fed. The Fed provides loans to depository institutions through the discount window. The Fed also permits depository institutions to establish master accounts that give them access to the Fed's real-time payment system (Fedwire) and its securities custody and settlement services.[44]

As shown above, the FRA embodies Congress's clear understanding that national banks must be depository institutions to fulfill their intended functions within the Fed. The OCC's nondepository fintech national bank charter directly conflicts with Congress's design for the Fed. Nondepository fintech national banks could argue that they are automatically eligible to become Fed member banks and must receive the same benefits and services that the Fed provides to depository member banks.[45] The Fed has not yet expressed any view on whether it would recognize nondepository fintech national banks as Fed member banks.[46]

If nondepository fintech national banks achieved recognition as Fed member banks, they would immediately qualify for loans from the Fed's discount window. Such an outcome would undermine the crucial distinction that Congress has established between the broad support that the Fed can provide to depository institutions through the discount window and the much more limited assistance that the Fed can give to non-depository firms. Under Section 13(3) of the FRA, as amended in 2010, "nondepository institutions" may receive loans from the Fed only (1) in "unusual and exigent circumstances," (2) pursuant to a program or facility creating "broad-based eligibility" for nondepository borrowers that are "not insolvent," and (3) with the approval of the Secretary of the Treasury and a supermajority of the Federal Reserve Board.[47] Allowing nondepository fintech national banks to obtain loans through the discount window would vitiate Congress's policy of imposing significant constraints on the Fed's authority to provide loans to nondepository firms.

If nondepository fintech national banks became Fed member banks, they could also establish master accounts providing access to the Fed's payment services (including Fedwire) as well as the Fed's custody and settlement services. Fedwire provides real-time payments and guaranteed finality—important privileges that are currently available only to depository institutions. Depository institutions can also obtain intraday overdraft credit from the Fed.[48] Granting nondepository fintech national banks access to the Fed's payment and settlement services and overdraft credit would violate Congress's intent that only depository institutions should receive such benefits and services under the FRA.

Access to the Fed's benefits and services would give nondepository fintech national banks major advantages over nonbank competitors that could not obtain charters from the OCC. Allowing nondepository fintech national banks to exploit such competitive advantages would be contrary to the public policies embodied in the NBA and FRA. In addition, as explained below in Part 1.d, the OCC's fintech charter would allow fintech "banks" to evade a number of important regulatory requirements and public interest safeguards that apply to all FDIC-insured depository institutions and their parent companies.

If nondepository fintech national banks were recognized as Fed member banks, Big Tech giants and other technology firms could obtain a significant voice in the formulation of U.S. monetary policy. National banks and state member banks elect six of the nine directors of each Federal Reserve Bank. Half of the directors elected by member banks participate in selecting the presidents of the twelve Federal Reserve Banks. Five of those presidents serve as voting members of the Federal Open Market Committee (FOMC), which establishes the Fed's monetary policy. The other seven presidents attend the FOMC's meetings and participate in the FOMC's discussions.[49] Thus, Big Tech giants and other technology firms could influence the FOMC's deliberations and decisions through their ownership of fintech "banks" that participate in the selection of directors and presidents of Federal Reserve Banks. Allowing Big Tech giants and other technology firms to wield such influence would be contrary to the FRA's design, which draws a fundamental distinction between depository institutions and all other firms.

c. The Federal Deposit Insurance Act requires national banks to obtain federal deposit insurance

The Banking Acts of 1933 and 1935 created a new federal deposit insurance program and established the FDIC to administer that program. The 1933 and 1935 Acts mandated that all national banks must obtain deposit insurance from the FDIC.[50] Similarly, the Federal Deposit Insurance Act of 1950 (FDI Act) required every national bank "engaged in the business of receiving deposits other than trust funds" to obtain deposit insurance.[51] National banks that fail to obtain deposit insurance must forfeit their charters.[52]

The OCC's claim of plenary authority to charter nondepository national banks is negated by Congress's explicit mandate that national banks must obtain deposit insurance. The only national banks that currently operate without deposit insurance are nondepository, special-purpose trust companies.[53] As explained above in Part 1.a, Congress specifically authorized the chartering of those institutions under the 1978 amendment to Section 27(a) of the NBA.

The statutory requirement that all *other* national banks must obtain deposit insurance is consistent with Congress's understanding that deposit-taking is an essential aspect of the "business of banking" under the NBA and the FRA. Both statutes identify deposit-taking as the crucial and dispositive activity that distinguishes banks from nonbanks. Indeed, Section 21(a)(2) of the Banking Act of 1933 imposes criminal penalties on any person who engages in "the business of receiving deposits" without being chartered and regulated as a depository institution.[54]

d. The OCC's fintech charter and the FDIC's proposed ILC rule threaten to undermine the BHC Act's policy of separating banking and commerce

i. The BHC Act mandates the separation of banking and commerce

The BHC Act regulates all "companies" that control "banks."[55] The original BHC Act of 1956 applied to companies that controlled two or more banks. In 1970, Congress expanded the BHC Act's scope to include all companies that control a single bank.[56]

Section 4 of the BHC Act prohibits banks from controlling commercial firms, and it also bars commercial firms from controlling banks. Section 4 reflects our nation's "longstanding policy of separating banking from commerce."[57] The BHC Act prohibits affiliations between banks and commercial firms because such combinations create significant dangers, including (1) hazardous concentrations of economic and financial power, (2) conflicts of interest that would destroy the ability of banks to act objectively in providing loans and other services, and (3) unacceptable risks to the federal "safety net" for banks, including the FDIC's deposit insurance fund, the Fed's discount window, the Fed's guarantees for interbank payments made on Fedwire, and the Fed's overdraft credit facility for depository institutions.[58]

In 1970, Congress changed the BHC Act's definition of "bank." The 1970 amendment defined "bank" as a financial institution that accepted demand deposits (business checking accounts) and made commercial loans. A decade later, the OCC began to charter "nonbank banks"—national banks that refrained from accepting demand deposits or from making commercial loans. By forgoing one of those functions, nonbank banks enabled their parent companies to escape regulation under the BHC Act. The OCC allowed many commercial firms to acquire "nonbank banks," thereby threatening the BHC Act's policy of separating banking and commerce.[59]

In 1987, Congress closed the "nonbank bank loophole" and strongly criticized the OCC's efforts to circumvent the BHC Act. As amended in 1987, the BHC

Act defines "bank" to include all FDIC-insured banks (as well as any other banks that accept demand deposits and make commercial loans), subject to narrowly-defined exceptions.[60] The Senate committee report on the 1987 legislation declared that "[n]onbank banks undermine the principle of separating banking and commerce, a policy that has long been the keystone of our banking system." The report also explained that Congress was closing the nonbank bank loophole to "minimize the concentration of financial and economic resources" and improve "the safety and soundness of our financial system."[61]

ii. The OCC's fintech charter would allow technology firms to evade the BHC Act's prohibition against combining banking and commerce

The OCC's nondepository fintech national bank charter is the OCC's latest attempt to subvert the BHC Act's policy of separating banking and commerce. As Congress made crystal clear in 1987, the OCC has no authority to create new types of national bank charters that permit combinations of banking and commerce. The 1987 amendments to the BHC Act shut down the OCC's "nonbank bank" charter. The 1987 legislation gave nondepository, special-purpose trust companies a special exemption from the BHC Act's definition of "bank." However, that exemption is not available to special-purpose trust companies if they receive any discount window loans or payment services from the Fed.[62]

The OCC's nondepository fintech national bank charter would once again allow parent companies of chartered national banks to avoid regulation under the BHC Act. Nondepository fintech national banks would not be FDIC-insured, would not accept demand deposits, and therefore would not be treated as "banks" under the BHC Act. Big Tech giants and other commercial firms could acquire fintech national banks and evade the BHC Act.

As discussed above in Part 1.b, nondepository fintech national banks could potentially gain access to the benefits and services that the Fed provides to national banks—including discount window loans, payment and settlement services, guarantees for payments made on Fedwire, and overdraft credit. Under those circumstances, ownership of fintech national banks by Big Tech giants and other commercial enterprises would expose major components of the federal safety net to the risks posed by their unregulated parent companies. That outcome would severely undercut the BHC Act's fundamental policy of separating banking and commerce to protect the federal safety net from risks and losses generated by commercial firms.[63]

In addition to end-running the BHC Act, nondepository fintech national banks and their commercial owners would evade a number of other important regulatory requirements and public interest safeguards that apply to FDIC-insured depository institutions and their parent companies. For example, FDIC-insured depository institutions and their parent companies must comply with (a) capital requirements and other safety and soundness standards for depository institutions under 12 U.S.C. §§ 1831p-1 and 3901-07; (b) prompt corrective action rules for depository institutions under 12 U.S.C. § 1831*o*; (c) "source of strength" obligations for parent companies of depository institutions under 12 U.S.C. § 1831*o*-1; (d) capital requirements for parent companies of depository institutions under 12 U.S.C. § 5371(b); (e) the FDIC's conservatorship and receivership powers over depository institutions under 12 U.S.C. §§ 1821-23; and (f) community service commitments for depository institutions under the Community Reinvestment Act, 12 U.S.C. §§ 3901-08.

The OCC's nondepository fintech national banks would not be subject to any of the foregoing requirements and safeguards because they would not be FDIC-insured depository institutions.[64] The OCC's fintech charter initiative is contrary to public policy because it would allow Big Tech firms and other commercial enterprises to own national banks without complying with statutory requirements and public interest obligations that perform vital roles in supporting the soundness of our financial system and the health of our economy.

iii. The FDIC's proposed ILC rule poses a grave threat to the separation of banking and commerce, the stability of our financial system, and the competitiveness of our economy

The FDIC's proposed ILC rule poses an even greater threat to the BHC Act's policy of separating banking and commerce. Unlike nondepository fintech national banks, ILCs are FDIC-insured, state-chartered institutions that are authorized to accept all types of deposits except business checking accounts. The ILC charter is the only vehicle that arguably allows commercial firms to own FDIC-insured depository institutions without violating the BHC Act.[65]

The FDIC's proposed ILC rule states that "the industrial bank exemption in the [BHC Act] . . . provides an avenue for commercial firms to own or control a bank."[66] However, there is no evidence indicating that Congress intended or expected that the 1987 exemption for ILCs would lead to widespread acquisitions of ILCs by large commercial firms. In 1987, ILCs were small, locally-focused institutions that offered deposit and credit services to lower- and middle-income households. ILCs held only $4.2 billion of assets in 1987, and the largest ILC had less than $420 million of assets. A 1993 report from the Congressional Research Service (CRS) stated that ILCs played only a "minor" role in the U.S. financial system.[67]

In July 2005, Walmart, the largest U.S. retailer, applied to the FDIC for permission to acquire an FDIC-insured, Utah-chartered ILC. Walmart's application triggered vigorous public opposition as well as extensive debates about the wisdom of allowing large commercial firms to own ILCs. In April 2006, during one of the FDIC's public hearings on Walmart's application, Senator Jake Garn (R-UT)—who sponsored the 1987 exemption for ILCs—stated that "it was never my intent, as the author of this particular section, that any of these industrial banks be involved in retail [commercial] operations."[68]

In response to the intense public opposition against Walmart's application, the FDIC imposed a six-month moratorium in July 2006 on acquisitions of ILCs by commercial firms. In its moratorium notice, the FDIC observed that the "evolution" of the "ILC industry" was occurring "in ways that may not have been anticipated at the time [Senator Garn's exemption] was enacted in 1987." In January 2007, the FDIC extended its moratorium for an additional year. In doing so, the agency pointed out that "business plans" for ILCs owned by commercial firms "differ substantially from the consumer lending focus of the original industrial banks."[69]

Walmart withdrew its ILC application in March 2007, due to the FDIC's extended moratorium and unrelenting public hostility toward Walmart's application. The magnitude of the public outcry against Walmart's proposed ILC—which included statements of opposition by many members of Congress—supported Senator Garn's view that Walmart's application went far beyond the intended scope of the exemption he sponsored in 1987.[70]

Senator Garn's exemption was included in the Competitive Equality Banking Act of 1987 (CEBA). As discussed above in Part 1.d.i, CEBA reaffirmed and strengthened Congress's policy of separating banking and commerce by closing the nonbank bank loophole. During the floor debates on CEBA, members of Congress called for shutting down that loophole to preserve the separation of banking and commerce and ensure parity of regulatory treatment for all companies that controlled FDIC-insured banks.[71]

It is highly unlikely that Congress passed CEBA to *reaffirm and strengthen* the policy of separating banking and commerce by closing the nonbank bank loophole and, at the same time, wanted to *undermine and weaken the same policy* by adopting Senator Garn's exemption for ILCs. The improbability of such a self-contradicting purpose is heightened by the absence of any evidence of a congressional understanding that Senator Garn's exemption could be used to break down the barrier between banking and commerce. In 1999, Congress again reinforced the policy of separating banking and commerce by passing a statute that prohibited further acquisitions of FDIC-insured savings associations by commercial firms. In view of Congress's powerful expressions of support for the policy of separating banking and commerce in 1987 and 1999, the unexplained text of Senator Garn's exemption should *not* be construed in a way that undermines that policy.[72]

The FDIC's policy toward ILCs should adhere to Congress's strongly articulated purpose of separating banking and commerce. The appropriate policy for the FDIC would be to allow acquisitions of ILCs by companies engaged in financial activities but *not* by firms engaged in commercial activities. The FDIC followed that policy when (1) it did not approve Walmart's application, (2) it imposed a moratorium on acquisitions of ILCs by commercial firms between June 2006 and January 2008, and (3) it did not approve any acquisitions of ILCs by commercial firms between the expiration of its moratorium in 2008 and March 2020. Unfortunately, on March 18, 2020—one day after the FDIC issued its proposed ILC rule—the FDIC approved deposit insurance applications for ILCs owned by Square and Nelnet. Square and Nelnet engage in both financial and nonfinancial activities and would not qualify for status as bank holding companies under the BHC Act.[73]

The FDIC's issuance of its proposed ILC rule and its approvals of Square's and Nelnet's applications represented a fundamental and undesirable change in the FDIC's policy toward ILCs. If adopted, the proposed ILC rule would encourage many other technology and commercial firms to acquire FDIC-insured ILCs.

For example, Rakuten recently renewed its application to acquire an FDIC-insured ILC in Utah. Rakuten is a large Japanese company engaged in e-commerce, information technology, and other commercial activities. Rakuten's global website states that it conducts "over 70 businesses across e-commerce, digital content, communications and fintech," ranging from "new open platforms for e-commerce, to experiments with drones, chatbots, deep learning and AI." Rakuten's website also declares that "we challenge the status quo" and "embrace new and disruptive ideas."[74] If the FDIC allowed Rakuten to own an FDIC-insured ILC, Big Tech giants would almost certainly follow Rakuten's example.

Permitting further acquisitions of ILCs by commercial firms would (i) greatly impair the policy of separating banking and commerce, (ii) create serious threats to competition and consumer welfare, (iii) generate a strong probability of imposing large losses on the federal safety net for financial institutions during future systemic crises, and (iv) pose grave dangers to the stability of our financial system and the health of our economy. Accordingly, further acquisitions of ILCs by commercial firms would be contrary to the public interest factors that the FDIC must consider when it acts on applications for deposit insurance or acquisitions of FDIC-insured banks. Under the FDI Act, the FDIC must take a negative view of such transactions if they would increase the risk of losses to the federal deposit insurance fund, have harmful effects on competition or communities, or pose serious risks to the stability of the U.S. banking and financial systems.[75]

The federal government bailed out several large corporate owners of ILCs during the financial crisis of 2007–09, including CIT Group, GE Capital, GMAC, Goldman Sachs, Merrill Lynch, and Morgan Stanley. Those bailouts indicate the systemic dangers and public costs that are likely to arise if large commercial firms acquire ILCs and combine the operations of those ILCs with their commercial activities. In addition, four large ILCs failed between 1999 and 2010 after engaging in predatory subprime lending, and three of those failures inflicted significant losses on the FDIC's deposit insurance fund.[76]

Widespread ownership of ILCs by commercial firms would greatly increase the likelihood of contagious spillovers of risks and losses between the financial system and the general economy. During future financial crises and economic downturns, federal agencies would face intense pressures to rescue large commercial owners of ILCs to ensure the stability of our financial system and economy. For example, the German technology firm Wirecard was reportedly planning to pursue an acquisition of Deutsche Bank before Wirecard collapsed following the revelation of its massive accounting fraud.[77] Imagine the systemic crisis that could have occurred if Wirecard had acquired Deutsche Bank *before* its accounting fraud became known to regulators and the public.

FDIC-insured ILCs have full access to the federal safety net, including deposit insurance and the Fed's discount window loans, payment and settlement services, and overdraft credit. That access would give significant competitive advantages to commercial firms that own ILCs. In addition to the low-cost funding provided by ILC deposits and discount window loans, commercial owners would benefit from implicit "catastrophe insurance" in the form of expected federal support during future systemic crises. Allowing commercial firms to own ILCs would create a highly skewed playing field favoring large enterprises that could afford to acquire ILCs and handicapping smaller firms that could not.[78]

The financial industry and many commercial sectors of our economy (including the information technology industry) already display very high levels of concentration and are dominated by a small number of giant firms. Big incumbent firms in those industries capture unjustified super-profits by using their market power to impose unfair prices on customers and suppliers, by acquiring or crowding out smaller firms, and by deterring entry by new firms.[79] Allowing Big Tech giants and other large commercial firms to acquire ILCs would give them an additional competitive edge, thereby further impairing competition and harming customers and suppliers in many lines of commerce.

iv. Acquisitions of ILCs and fintech national banks by commercial firms would impose serious costs on our economy and society

Acquisitions of ILCs and nondepository fintech national banks by Big Tech giants and other commercial firms would transform our financial system and economy in ways that are likely to have significant adverse effects on taxpayers, consumers, and communities. Big Tech firms already enjoy technological superiority over banks in the fields of automation, artificial intelligence, data management, and mobile payments. Rapid growth rates for Alibaba, Ant Financial, and Tencent in China's financial system indicate that Big Tech firms could potentially dominate major segments of our financial industry if they are allowed to establish "in-house banks" and exploit their technological advantages. Financial regulators around the world are just beginning to grapple with a wide array of public policy issues raised by the potential entry of Big Tech firms into the banking industry. Those issues include concerns about unfair competition, the enforceability of limits on sharing of customer data, the protection of privacy rights in customer financial and health information, as well as operational and systemic risks created by combinations between banks and large technology firms.[80]

The FDIC and OCC should not preempt the ongoing consideration of these vitally important issues by allowing large technology firms to acquire ILCs and nondepository fintech national banks. Such acquisitions would create intense pressures on Congress to remove all of the BHC Act's restrictions on joint ownership of banks and commercial firms. Big Tech giants would not be satisfied with making "toehold" acquisitions of ILCs or fintech "banks." They would want to establish a stronger competitive presence in the financial industry by acquiring large full-service banks. Conversely, big banks would demand that Congress create a "level playing field" by allowing banks to acquire technology firms. Thus, allowing large technology firms to acquire ILCs and nondepository fintech national banks would almost certainly lead to legislation permitting large-scale combinations between Big Tech giants and big banks. Those combinations would magnify the excessive levels of concentration, the lack of effective competition, the "too big to fail" status, and the unhealthy political influence that our technology giants and megabanks already leverage to their benefit. Such outcomes would be contrary to the public interest factors that the FDIC, the OCC, and other bank regulators are required to consider under the FDI Act.[81]

As discussed above, Big Tech giants and other commercial firms that acquire ILCs and nondepository fintech national banks would not be subject to regulation by the Fed under the BHC Act. The FDIC and the OCC could not exercise the type of consolidated, comprehensive supervision over commercial owners of ILCs and fintech "banks" that the Fed exercises over bank holding companies under the BHC Act. For example, the FDIC and OCC could not conduct unlimited, full-scope examinations of commercial parent companies and their nonbank subsidiaries. In addition, the FDIC and OCC could not impose consolidated capital requirements and liquidity requirements on commercial parent companies, nor could they require those companies to undergo stress tests and resolution planning exercises that large bank holding companies must complete.[82]

The Wirecard debacle illustrates the great danger of allowing the FDIC and OCC to regulate ILCs or fintech "banks" without possessing comprehensive, consolidated supervisory authority over those institutions' parent companies and other nonbank affiliates. Felix Hufeld, president of BaFin (Germany's financial regulatory agency) told the Bundestag (Germany's federal legislature) that BaFin did not uncover Wirecard's accounting fraud because BaFin lacked authority to supervise Wirecard and its complex global network of nonbank subsidiaries. Hufeld explained that BaFin's "ability to act was limited because Wirecard was classified as a technology company rather than a financial services provider, and so was not fully under BaFin's purview. The agency only oversaw Wirecard Bank," a deposit-taking bank that Wirecard owned.[83]

The Wirecard scandal also demonstrates that financial regulators cannot rely on external auditors to police large firms with complex financial operations. Ernst & Young reportedly overlooked numerous indicators of fraud at Wirecard, just as Arthur Andersen failed to identify pervasive fraud at Enron. Both auditing firms were subject to intense pressure from their clients not to pursue evidence of fraud.[84] A prominent financial journalist described the Wirecard scandal as "an Enron moment for today's financial technology sector."[85]

Even if Congress granted the FDIC and OCC consolidated supervisory authority over commercial owners of ILCs and fintech "banks," that authority would *not* remove the grave threats posed by commercial-financial conglomerates. Any federal banking agency would face enormous logistical challenges in attempting to oversee complex and highly diversified commercial-financial enterprises, including the need to hire personnel with expertise in many different commercial sectors of the U.S. economy. The catastrophic failures by federal financial agencies to supervise large bank holding companies and "shadow banks" effectively prior to the financial crisis of 2007–09 should persuade us that federal regulators would have an even *lower* probability of success in supervising far-flung commercial-financial conglomerates.[86]

Big Tech giants and other large commercial owners of ILCs and fintech "banks" would inevitably be considered "too big to fail" by both regulators and market participants. Their "too big to fail" status, their extensive lobbying resources, and their political influence would also make them "too big to regulate effectively." Thus, any attempt to establish a rigorous system of consolidated supervision for commercial-financial conglomerates would almost certainly fail. The unfeasibility of consolidated supervision for enterprises spanning banking and commerce provides a further compelling reason for prohibiting their existence.[87]

2. The OCC's and FDIC's attempts to confer the benefits of federal preemption on nonbanks violate federal laws and pose serious threats to consumers and small businesses

As described in the Introduction, the OCC's and FDIC's recent rulemakings seek to extend the benefits of federal preemption to nonbanks that either (1) acquire loans from federally-chartered and federally-insured banks, or (2) establish lending "partnerships" with such banks. The OCC's and FDIC's rules violate federal statutes and are likely to inflict serious injuries on consumers, small businesses, and communities.

a. Federal laws prohibit the OCC and FDIC from expanding the scope of federal preemption to benefit nonbanks

i. The OCC's and FDIC's usury preemption transfer rules are unlawful

Since 1864, Section 85 of the NBA has governed 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 is determined by the usury laws of the state where the bank is "located." Section 85 gives national banks preemptive immunity from the usury laws of other states. As noted above, most national banks "locate" their lending operations in states that impose few if any restrictions on the "interest" they can charge.[88]

The OCC's usury preemption transfer rule exceeds the agency's authority by expanding Section 85's scope of preemption to include nonbank purchasers, assignees, and other transferees of loans made by national banks.[89] Section 85's text makes clear that the power to charge "interest" thereunder is granted *only* to national banks and does *not* extend to nonbanks that acquire loans from 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."[90] A century later, the Supreme Court's *Marquette* decision stated that Section 85 provides the terms on which "a *national bank* may charge interest."[91] The Court also explained that its decision in *Marquette*—which allowed a national bank to "export" to borrowers in other states the interest rate allowed by the state where the bank was "located"—did *not* extend to the bank's nondepository subsidiary or to other persons with whom the bank had contractual relationships.[92]

In 1980, Congress enacted 12 U.S.C. §§ 1463(g)(1) and 1831d, which give federal savings associations and FDIC-insured, state-chartered depository institutions "parity, or competitive equality" with national banks in terms of the "interest" they may charge on their loans.[93] Congress intended that Sections 1463(g) and 1831d would "provide federally-insured credit institutions with the same 'most-favored-lender' status enjoyed by national banks."[94] The preemptive immunity granted by Sections 1463(g) and 1831d applies *only* to "interest" that is lawfully charged by federal savings associations and FDIC-insured, state-chartered depository institutions. The preemptive scope of those two statutes is the same as Section 85, which applies *only* to "interest" lawfully charged by national banks.[95]

Sections 1463(g) and 1831d were enacted as part of Section 521 of the Depository Institutions Deregulation and Monetary Control Act of 1980 (DIDMCA).[96] Like Section 85, Sections 1463(g) and 1831d 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 purchasers, assignees, and other transferees of its loans.

In contrast, 12 U.S.C. § 1735f-7a—enacted as part of Section 501 of DIDMCA—preempts state usury laws from applying to originations and "credit sales" of first-lien residential mortgages that qualify as "federally related mortgage loans" under 12 U.S.C. § 1735f-5(b). Congress intended that the preemption provided by Section 501 would apply to *both* originations *and* sales of qualifying first-lien residential mortgages. Congress wanted to "facilitate a national housing policy and the functioning of a national secondary market in mortgage lending."[97] Congress therefore made clear that qualifying first-lien residential mortgages would continue to receive the benefit of Section 501's preemption of state usury laws if they were sold to investors who were *not* "eligible lenders" for such mortgages.[98]

Thus, the preemption authorized by Section 501 of DIMCA covers purchasers of qualifying first-lien residential mortgages. In contrast, the preemption authorized by Section 521 of DIDMCA—which enacted Sections 1463(g) and 1831d—does *not* refer to purchasers of loans covered by those statutes. The Supreme Court has repeatedly held that Congress is presumed to act "intentionally and purposely" when "it includes particular language in one section of a statute but omits it in another section of the same Act."[99] That presumption is especially strong when the two statues were enacted "simultaneously" by the "same Congress," as Sections 501 and 521 of DIDMCA were in 1980.[100] It must therefore be presumed that Congress acted "intentionally and purposefully" when it did *not* make any reference to purchasers of nonmortgage loans in Section 521 of DIDMCA.

The absence of any reference to purchasers of loans in Section 521 of DIDMCA supports the conclusion that the preemption provided by 12 U.S.C. § 85—the historical model for Section 521—also does *not* extend to purchasers of similar loans made by national banks.[101] That conclusion is further bolstered by the Alternative Mortgage Transactions Parity Act, 12 U.S.C. §§ 3801-06 (AMTPA), which was enacted only two years after DIDMCA. Under 12 U.S.C. § 3803, "housing creditors" (including state-chartered, nondepository lenders) can "make, purchase, and enforce alternative mortgage transactions" in accordance with AMTPA, regardless of contrary state laws. Thus, the scope of AMTPA's preemption expressly extends to purchasers of qualifying alternative mortgages, in the same way that the preemptive scope of Section 501 of DIDMCA includes purchasers of qualifying first-lien residential mortgages. Section 501 of DIDMCA and AMTPA show that Congress knew how to make its intention clear when it wanted to extend preemptive immunity to purchasers of loans.

The preemption standards for national banks under 12 U.S.C. § 25b (enacted in 2010) reinforce the conclusion that Sections 85 does *not* provide preemptive immunity to purchasers, assignees, and other transferees of loans made by national banks. Under Sections 25b(b)(2), (e), and (h)(2), state laws apply to subsidiaries, affiliates, and agents of national banks to the same extent as they apply to any other person subject to those state laws, *unless* the subsidiary, affiliate, or agent is itself chartered as a national bank.[102] Similarly, state laws apply to subsidiaries, affiliates, and agents of federal savings associations pursuant to 12 U.S.C. § 1465(a), which establishes equivalent preemption standards for federal thrifts.

The foregoing provisions of Section 25b overruled several court decisions that were issued before 2010 and expanded the NBA's preemptive scope to cover nonbank subsidiaries and agents of national banks.[103] In light of Section 25b's explicit *denial* of NBA preemption to nonbank subsidiaries, affiliates, and agents of national banks, the OCC's usury preemption transfer rule is untenable. Purchasers and assignees of loans are counterparties to contracts with national banks and federal thrifts, just as subsidiaries, affiliates, and agents are. The OCC cannot grant to purchasers and assignees of loans a preemptive immunity that Congress has expressly *denied* to other types of contract counterparties that have *closer* relationships to national banks and federal thrifts.

Section 25b(f) provides further evidence of Congress's intent *not* to expand Section 85's 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" from the preemption framework established by Section 25b (discussed below in Part 2.b). Like Section 85, Section 25b(f) does *not* refer to purchasers, assignees, or other transferees of loans made by national banks. Federal savings associations are governed by the same limited scope of preemption under 12 U.S.C. § 1465(a).

The OCC has acknowledged that its expansion of preemptive immunity to cover nonbanks that acquire loans from national banks is *not* based on any language "expressly stated" in Sections 85 and 1463(g).[104] The OCC has also admitted that its rule is contrary to the decision of the Second Circuit Court of Appeals in *Madden v. Midland Funding*. The Second Circuit held that usury preemption under Section 85 did *not* apply to a debt collector that purchased loans from a national bank. The Second Circuit concluded that extending Section 85 to cover debt collectors would be an "overly broad application" of the NBA and "would create an end-run around usury laws for non-national bank entities that are not acting on behalf of a national bank."[105]

The OCC contends that its usury preemption transfer rule is supported by "common-law" principles of "valid-when-made and the assignability of contracts," which the OCC has derived from court decisions dating back to the 19th century. The OCC says that it is "not citing these tenets as independent authority for this rulemaking but rather as tenets of common law that inform its reasonable interpretation of section 85."[106]

The OCC cannot rely on common-law "tenets" extracted from past federal court decisions to expand the preemptive scope of federal statutes. Since 1938, the Supreme Court has made clear that "[t]here is no federal general common law."[107] The Supreme Court has repeatedly held that "cases in which judicial creation of a special federal [common law] rule would be justified . . . are . . . 'few and restricted.'"[108] The Supreme Court has twice struck down attempts by the FDIC to invoke federal common-law rules as a justification for expanding the preemptive scope of the FDI Act.

In its 1997 *Atherton* decision, the Supreme Court held that the FDIC could not rely on an alleged "federal common law" duty of ordinary care for bank directors and officers to expand the preemptive scope of 12 U.S.C. § 1821(k). Section 1821(k) imposes liability on directors and officers of FDIC-insured banks for gross negligence. The statute is silent on the question of whether the FDIC can impose liability on bank directors and officers for simple negligence if applicable state laws do not create a duty of ordinary care. The FDIC claimed that it could impose liability for simple negligence under a "federal common law" rule dating from the 19th century, even if applicable state laws did not prescribe liability for simple negligence. The Court rejected the FDIC's claim and held that "state law, not federal common law, provides the applicable rules for decision," except where Section 1821(k) preempted state law by stipulating a gross negligence standard. The Court pointed out that "federally chartered banks are subject to state law," and "a federal charter by itself shows no conflict, threat, or need for 'federal common law.'"[109]

In its 1993 *O'Melveny & Myers* decision, the Supreme Court rejected a similar preemption claim by the FDIC. The FDIC alleged that a law firm was liable for negligence and breach of fiduciary duty due to its malpractice in representing a failed thrift institution. The FDIC argued, based on a "federal common-law rule," that the law firm could not defend itself by imputing the knowledge of corporate officers to the thrift or to the FDIC as the thrift's receiver. Again, Section 1821 was silent regarding any imputation of knowledge from corporate officers to their institution and the FDIC. In contrast, applicable state laws did impute the knowledge of those officers to both the thrift and the FDIC. After reviewing the "comprehensive and detailed" provisions of Section 1821, the Court determined that "matters left unaddressed in such a scheme are presumably left to the disposition provided by state law." The Court held that Section 1821 "places the FDIC in the shoes of the insolvent S&L, to work out its claims under state law, except where some provision in the extensive framework of [Section 1821] provides otherwise. *To create additional 'federal common-law' exceptions is not to 'supplement' this scheme, but to alter it.*"[110]

The OCC's reliance on alleged common-law "tenets" to expand the preemptive scope of 12 U.S.C. §§ 85 and 1463(g) is invalid for the same reasons that the

Supreme Court rejected the FDIC's reliance on "federal common law" rules in *Atherton* and *O'Melveny & Myers*. The OCC's usury preemption transfer rule applies to transactions between private parties (national banks and nonbank purchasers, assignees, and other transferees of their loans). The OCC's rule does not implicate the rights, liabilities, or duties of the United States or its agencies, officials, or contractors, and it also does not involve U.S. foreign relations or admiralty matters. The Supreme Court has held that application of a federal common-law rule is *not* justified when "private parties," including national banks, are involved in a dispute relating to a "private transaction" that "does not touch the rights and duties of the United States."[111]

There is an additional reason why the OCC cannot rely on purported common-law "tenets" to expand the preemptive scope of Sections 85 and 1463(g). In determining whether federal statutes preempt state authority in a traditional field of state regulation, such as consumer protection, federal 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."[112] Accordingly, "compelling evidence of [Congress's] intention to preempt" is required" before courts will conclude that a federal statute preempts state consumer protection laws.[113]

There is no "compelling evidence" of any "clear and manifest purpose of Congress" to expand the scope of usury preemption under Sections 85 and 1463(g) to cover nonbanks that acquire loans made by national banks and federal thrifts. On the contrary, as shown above, the express terms of Sections 85 and 1463(g) apply only to "interest" that is lawfully "charge[d]" by national banks and federal thrifts. When Congress wanted to extend usury preemption to reach purchasers of qualifying mortgage loans under DIDMCA and AMTPA, Congress made its intention abundantly clear.

The FDIC has acknowledged that 12 U.S.C. § 1831d "is patterned after section 85 and receives the same interpretation as section 85."[114] Consequently, the FDIC's authority to preempt state usury laws under Section 1831d is no broader than the OCC's authority under Section 85 and does *not* extend to nonbanks that acquire loans from FDIC-insured state banks. The OCC's and FDIC's usury preemption transfer rules plainly exceed the agencies' statutory authority, and both rules are invalid.[115]

ii. The OCC's proposed "true lender" rule is unlawful and would allow national banks to form "rent-a-charter" schemes with predatory nonbank lenders

Under the OCC's proposed "true lender" rule, a national bank or federal thrift would be deemed to "make" a loan if the institution, "as of the date of origination," is either "named as the lender in the loan agreement" or "[f]unds the loan."[116] The proposed rule is designed to "operate together" with the OCC's usury preemption transfer rule.[117] Working in tandem, those rules would permit national banks and federal thrifts to form "partnerships" with nonbank lenders. Nonbank lenders that acquire loans through such "partnerships" would be given preemptive immunity from state usury laws, even if their bank "partners" did not retain any meaningful credit risk or other economic risks related to those loans. The bank "partners" could act as mere conduits by quickly transferring loans to their nonbank "partners," and the nonbank "partners" could assume all of the economic risks, dictate the terms, and control the enforcement of those loans. Such "partnerships" would amount to "rent-a-charter" schemes, which the OCC barred national banks from entering during the early 2000s.[118]

The OCC's proposed "true lender" rule would potentially preempt not only state usury laws but also a wide range of other state laws—including state licensing, examination, and consumer protection laws—that would otherwise apply to nonbank lenders that form "partnerships" with national banks. For example, a loan that is deemed to be "made" by a national bank under either of the proposed rule's two tests would presumably 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 bank subsequently transfers the loan to its nonbank "partner." The proposed rule's potential scope of preemption therefore embraces a very broad array of state laws.[119]

The OCC has acknowledged 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 federal statutes also do not stipulate "what legal framework applies, when the loan is originated as part of a lending relationship between a bank and a third party." The OCC has also admitted that none of the federal statutes authorizing national banks 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."[120] Thus, the OCC has conceded that its proposed tests for determining "true lender" status are *not* supported by any explicit statutory language.

The proposed rule also ignores the fact that state laws govern contracts made by national banks *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.[121]

Similarly, the Supreme Court affirmed in 2009 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."[122]

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 abusive and exploitative lending practices.[123] Because usury is a traditional field of state regulation, federal courts have refused to infer from statutory silence that Congress intended to preempt state usury laws.[124] As shown above, Congress has *not* expressed any intention to preempt "true lender" doctrines that are a key aspect of many state usury laws.[125]

Federal courts have repeatedly held that Section 85 incorporates the entire usury jurisprudence of the relevant state, including that state's usury statutes and the interpretations of those statutes by state courts.[126] Federal and state courts have also held that usury claims should be determined based on the "substance" of the relevant transactions and not their legal "form." In an 1835 decision, the Supreme Court declared—in an opinion by Chief Justice John Marshall—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*."[127] Other courts have similarly evaluated usury claims against national banks by "look[ing] behind the form of a transaction to its substance" in accordance with state usury laws.[128]

Several courts have applied a substance-over-form analysis in determining whether nonbank lenders were the "true lenders" when they claimed to act as "partners" or "agents" of national banks or FDIC-insured state banks. Those courts rejected claims that the nonbank lenders were entitled to preemptive immunity under Section 85 or Section 1831d by reason of their status as "partners" or "agents" of banks. The courts held that the nonbank lenders should be treated as the "true lenders" if they held the "predominant economic interest" in the loans. In determining which party had the "predominant economic interest," the courts considered several factors, including which party bore the greatest amount of credit risk under the loans, which party dictated the terms and controlled the enforcement of the loans, and whether the nonbank lender indemnified its "partner" bank.[129]

The OCC's proposed rule is contrary to the foregoing court decisions and would preempt state "true lender" laws without any statutory authority. The proposed rule would create a conclusive, inflexible, and highly formalistic standard for determining the "true lender" for loans produced by "partnerships" between national banks and nonbank lenders. The proposed rule would consider only two narrow factors—whether the national bank was named as the lender in the loan agreements or funded the loans *for at least one day*. Thus, the proposed rule would grant preemptive immunity to nonbank lenders from a wide range of state laws, even if those lenders held the "predominant economic interest" in loans produced by "partnerships" with national banks.

The OCC's proposed rule would legitimize "rent-a-charter" schemes between national banks (or federal thrifts) and high-cost nonbank lenders. "Rent-a-charter" schemes are designed to prevent states from enforcing their usury laws and other consumer protection laws against high-cost nonbank lenders, including payday lenders and auto title lenders. Those lenders impose very high-interest charges on consumers and small businesses, with annual percentage rates 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 take out auto title loans eventually lose their cars through default and repossession. Predatory high-cost nonbank lenders typically focus their marketing campaigns on communities with relatively high percentages of vulnerable minority and lower-income households.[130]

In the early 2000s, the OCC recognized the dangers created by "rent-a-charter" partnerships between national banks and nonbank payday lenders. The OCC took decisive action to shut down those schemes.[131] 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" ventures with nonbank lenders.

In January 2002, the OCC issued an enforcement order against Eagle National Bank after determining that Eagle's payday lending partnership with Dollar Financial Group "risked [Eagle's] financial viability" and violated "a multitude of standards of safe and sound banking, compliance requirements, and OCC guidance." The OCC declared that Eagle's joint venture with Dollar "demonstrates the dangers inherent in arrangements under which national banks rent out their charters to nonbank providers of financial services . . . . [Eagle] effectively collaborated in Dollar's scheme to evade state law requirements that would otherwise be applicable to it."[132]

In announcing a similar enforcement order against Peoples National Bank in January 2003, Comptroller of the Currency John D. Hawke, Jr. 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.*[133]

In a speech delivered in February 2002, Comptroller Hawke warned that "rent-a-charter" schemes threatened to undermine the "safety and soundness" of national banks and represented "an abuse of the national charter." 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.*[134]

Thus, the OCC established a strong policy in the early 2000s of prohibiting national banks from transferring their preemptive immunity to nonbank payday lenders through "rent-a-charter" schemes. As shown by the OCC's website, that policy has remained in effect—at least formally—*until now*.[135] The OCC's enforcement orders from the early 2000s provide compelling evidence of the injuries that the OCC's usury preemption transfer rule and proposed "true lender" rule are likely to inflict on our banking system and the public. Those injuries include: undermining the states' longstanding authority to protect their residents from predatory nonbank lenders, threatening the financial and reputational soundness of national banks, encouraging reckless lending practices, and facilitating efforts by predatory nonbank lenders to exploit consumers and small businesses with exorbitant interest rates and fees, deceptive marketing practices, privacy violations, abusive debt collection practices, and other unconscionable conduct.[136]

By enabling predatory lending and impairing the states' authority to protect their residents, the OCC's rules would violate fundamental purposes of the Dodd–Frank Wall Street Reform and Consumer Protection Act (Dodd–Frank).[137] When Congress passed the Dodd–Frank Act in 2010, it strongly criticized federal financial regulators for failing to take effective measures to stop predatory nonprime lending during the 1990s and 2000s. Congress also condemned the OCC and OTS for aggressively preempting efforts by many states to stop predatory nonprime lending during the 1990s and 2000s.[138]

The OCC's and OTS's regulatory failures and unwarranted preemption of state laws were major factors behind Congress's decisions to abolish the OTS and enact 12 U.S.C. § 25b, which imposes significant constraints on the OCC's authority to preempt state consumer financial laws.[139] As shown in the next section, the OCC has not complied with Section 25b and therefore has no legal authority to pursue its current preemption efforts.

b. The OCC's fintech charter and preemption rules violate Section 25b

Section 25b of the NBA, enacted as part of the Dodd–Frank Act, establishes a new framework for determining whether state consumer financial laws apply to national banks and federal savings associations. Under Section 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 NBA.[140] Section 25b(b)(1)(B) expressly incorporates the "prevent or significantly interfere" standard for preemption established by the Supreme Court's 1996 decision in *Barnett Bank of Marion County, N.A. v. Nelson*.[141] Section 25b's preemption framework for national banks also governs federal thrifts.[142]

Section 25b requires the OCC to demonstrate, with regard to each of its preemption rules and orders, that "substantial evidence, made on the record of the proceeding," supports the OCC's "specific finding" of preemption in accordance with *Barnett Bank*. The OCC must also act on a "case-by-case basis" when it issues a preemption rule or order. 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." 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.[143]

The OCC did not comply with Section 25b when it issued its nondepository fintech national bank charter, its usury preemption transfer rule, and its proposed "true lender" rule. The OCC did not explain how any of those three measures conformed to Section 25b's "prevents or significantly interferes" preemption standard or Section 25b's "substantial evidence" requirement or its "case-by-case" mandate. Indeed, the OCC did not even attempt to fulfill Section 25b's requirements when it adopted those three measures.[144]

The OCC claimed that its usury preemption transfer rule fell "outside of the scope of section 25b because of section 25b(f)."[145] However, that assertion is clearly erroneous. As shown above, Section 25b(f) provides that Section 25b's preemption framework does not affect "the authority conferred by [Section 85] for the charging of interest *by a national bank*" (emphasis added). Section 25b(f) did *not* relieve the OCC from its duty to comply with Section 25b's requirements when the OCC sought to *expand* Section 85's preemptive scope to cover *nonbank* purchasers, assignees, and transferees of loans made by national banks. The OCC's rule went far beyond the exemption provided by Section 25b(f), which applies *only* to the "charging of interest *by a national bank*."[146]

The OCC's recent actions are the latest examples of the agency's repeated failures to comply with Section 25b. When Congress passed the Dodd–Frank Act in 2010, it rejected the sweeping preemption rules that the OCC issued in 2004. The Senate committee report stated that, under Section 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."[147]

In 2011, the OCC revised several of its preemption rules, purportedly to bring them into conformity with Section 25b.[148] However, the OCC's revised rules do 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). In defiance of Congress's explicit mandate, the OCC asserted that "the Dodd-Frank Act does not create a new stand-alone 'prevents or significantly interferes' preemption standard."[149]

Three of the revised preemption rules that the OCC issued in 2011—12 C.F.R. §§ 7.4007, 7.4008, and 34.4—continue to declare that broad categories of state laws are preempted across the nation. 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. The OCC claimed that it did not need to comply with Section 25b's requirements because its blanket preemption rules were based on similar preemption rules it 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."[150]

The OCC's claim that its 2004 rules remained valid after 2010—even though they did *not* comply with Section 25b's requirements—is indefensible. Under Section 25b(b)(1), state consumer financial laws are preempted "only if" a federal agency or court makes a preemption determination in compliance with *all* of the requirements of Section 25b. Section 1043 of the Dodd–Frank Act provides a very limited exception to that mandate. Section 1043 preserves the applicability of previous 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).[151] 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 preexisting rules and orders.[152]

Section 1043's carefully limited exception demonstrates the unmistakable intention of Congress that the OCC's preexisting preemption rules and orders would *not* apply to transactions by national banks *after* July 21, 2010, *unless* the OCC revised those rules and orders to bring them into full compliance with Section 25b. The OCC's claim that its 2004 preemption rules 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.'"[153] Accordingly, the OCC violated Section 25b when it issued three blanket preemption rules in 2011 that did *not* comply with Section 25b's "prevents or significantly interferes" preemption standard, "case-by-case" requirement, and "substantial evidence" mandate.[154]

The OCC has also failed to comply with Section 25b(d). That provision 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. After completing a preemption review, the OCC must issue a public notice describing the results of that 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 must explain whether the OCC intends to continue, rescind, or amend the preemption determination it reviewed. The OCC has not conducted any preemption reviews pursuant to Section 25b(d), even though the OCC's most important preemption rules were issued more than nine years ago, in July 2011. Several of the OCC's other preemption rules are at least fifteen years old, and the OCC has not performed any preemption reviews of those rules.[155]

The Supreme Court has admonished the OCC that it cannot "pick and choose what portion of the law binds [it]."[156] The OCC should abandon its nondepository fintech charter initiative, rescind its usury preemption transfer rule, and withdraw its proposed "true lender" rule, in view of the OCC's lack of authority to adopt those measures and their glaring lack of compliance with Section 25b. The OCC should also conduct preemption reviews of all of its existing preemption rules and orders that are more than five years old, as required by Section 25b(d).

Conclusion

The OCC's and FDIC's attempts to confer the benefits and privileges of banks on nonbanks and commercial firms violate federal banking laws, undermine fundamental public policies, and threaten to inflict severe injuries on our financial system, economy, and society. Congress should overturn those measures or persuade the OCC and FDIC to abandon them.

Notes

1. *Vullo v. OCC*, 378 F.Supp.3d 271 (S.D.N.Y. 2019), *appeal pending sub nom. Lacewell v. OCC*, No. 19-4271-cv (2d Cir.). Morgan Ricks, Lev Menand, Joseph Sommer, and I were the drafting committee for an amicus brief filed by 33 banking law scholars in the Second Circuit in support of the NYDFS and in opposition to the OCC. Parts 1.a, 1.b, and 1.c of this article are adapted from that brief, which is available at *https://justmoney.org/wp-content/uploads/2020/08/19-4271-Amicus-Brief-of-Banking-Law-Scholars.pdf*.
2. Victoria Guida, "Top regulator pushes ahead with plan to reshape banking, sparking clash with states," *Politico* (Aug. 31, 2020), available at *https://www.politico.com/news/2020/08/31/currency-comptroller-reshape-banking-406393* (summarizing Mr. Brooks' statement and quoting Financial Innovation Now's statement).
3. FDIC notice of proposed rulemaking, "Parent Companies of Industrial Banks and Industrial Loan Companies," 85 Fed. Reg. 17771 (Mar. 31, 2020) [hereinafter "FDIC Proposed ILC Rule"]. On April 10, 2020, I filed a comment letter (available at *https://www.fdic.gov/regulations/laws/federal/2020/2020-parent-companies-of-industrial-banks-3064-af31-c-002.pdf*) opposing the FDIC's proposed rule. I subsequently published the following article based on that comment letter: Arthur E. Wilmarth, Jr., "The FDIC Should Not Permit Commercial Firms to Acquire Industrial Banks," 39 *Banking & Financial Services Policy Report* No. 5 (May 2020), at 1-17, available at *http://ssrn.com/abstract=3613022* [hereinafter Wilmarth, "Industrial Banks"].
4. OCC final rule, "Permissible Interest on Loans That Are Sold, Assigned or Otherwise Transferred," 85 Fed. Reg. 33530 (June 2, 2020) [hereinafter OCC Usury Preemption Transfer Rule]. The OCC's rule provides parallel treatment for loans that are sold, assigned or transferred to nonbanks by federal savings associations. I filed a comment letter opposing the OCC's rule as proposed in November 2019. Arthur E. Wilmarth, Jr., Comment Letter in Opposition to the OCC's Proposed Valid-When-Made Rule (Jan. 17, 2020), available at *http://ssrn.com/abstract=3523939* [hereinafter Wilmarth Usury Preemption Transfer Rule Comment Letter].
5. *See* Adam Levitin, "Rent-a-Bank: Bank Partnerships and the Evasion of Usury Laws" (draft of Sept. 16, 2020), at 3–4, 8, 18–20, 26–27, 47, 73–74, available at *http://ssrn.com/abstract=3684244*.
6. OCC notice of proposed rulemaking, "National Banks and Federal Savings Associations as Lenders," 85 Fed. Reg. 44223 (July 22, 2020) [hereinafter OCC Proposed "True Lender" Rule]; *see also* Levitin, *supra* n.5, at 8, 73–74. The OCC's proposed rule would provide parallel treatment for federal savings associations that form lending "partnerships" with nonbanks. On August 11, 2020, I filed a comment letter opposing the OCC's proposed rule. Arthur E. Wilmarth, Jr., Comment Letter in Opposition to the OCC's "True Lender" Rule (Aug. 11, 2020), available at *http://ssrn.com/abstract=3673421* [hereinafter Wilmarth "True Lender" Comment Letter].
7. FDIC final rule, "Federal Interest Rate Authority," 85 Fed. Reg. 44146 (July 22, 2020) [hereinafter FDIC Usury Preemption Transfer Rule]. On January 17, 2020, I filed a comment letter (available at *https://www.fdic.gov/regulations/laws/federal/2019/2019-federal-interest-rate-authority-3064-af21-c-008.pdf*) opposing the FDIC's rule as proposed in November 2019.
8. *See, e.g.,* Bray Hammond, *Banks and Politics in America, from the Revolution to the Civil War* 723–27 (1957); Edward L. Symons, Jr., "The Business of Banking in Historical Perspective," 51 *George Washington Law Review* 676, 699 (1983).
9. Hammond, *supra* n.8, at 724, 731–32; Symons, *supra* n.8, at 699.
10. Act of June 3, 1864, ch. 106, § 31, 13 Stat. 108; *see also id.* § 16, 13 Stat. 104 (requiring every national bank to deposit a minimum amount of federal government bonds with the U.S. Treasury).
11. 12 U.S.C. § 27(a) (derived from § 18 of the NBA of 1864, 13 Stat. 104-05).
12. 12 U.S.C. § 24 (Seventh) (derived from § 8 of the NBA of 1864, 13 Stat. 101-02). As discussed below in Part 1.b, Congress transferred the function of issuing a national currency in the form of circulating notes from national banks to the Federal Reserve System in 1913.
13. 12 U.S.C. § 22 (Second) (derived from § 6 (Second) of the NBA of 1864, 13 Stat. 101).
14. *See United States v. Philadelphia National Bank*, 374 U.S. 321, 326 (1963) ("Commercial banks are unique among financial institutions in that they alone are permitted by law to accept demand deposits. This distinctive power gives commercial banking a key role in the national economy. For banks do not merely deal in, but are actually a source of, money and credit; when a bank makes a loan by crediting the borrower's demand deposit account, it augments the Nation's credit supply."); *see also* Milton Friedman, "The Euro-Dollar Market: Some First Principles," 7 *Review* 16 (Fed. Res. Bank of St. Louis, July 1971).
15. 12 U.S.C. § 378(a).
16. *See* E. Gerald Corrigan, "Are Banks Special? A Revisitation" (Fed. Res. Bank of Minneapolis, Mar. 1, 2000), available at *https://www.minneapolisfed.org/article/2000/are-banks-special*; John L. Douglas, "The Role of a Banking System in Nation-Building," 60 *Maine Law Review* 511, 513–19 (2008); *see also* Morgan Ricks, "Money as Infrastructure," 2018 *Columbia Business Law Review* 757, 758–72 (describing the "competing paradigms" that view banks as "monetary institutions" or as "financial intermediaries," and explaining that those paradigms are "not strictly incompatible" and "coexist in uneasy tension").
17. *Mercantile National Bank v. New York*, 121 U.S. 138, 156 (1887) (The "business of banking" under the NBA includes "receiving deposits payable on demand"); *In re Prudence Co.*, 79 F.2d 77, 79 (2d Cir.), *cert. denied*, 296 U.S. 646 (1935) ("[T]he power to receive deposits . . . is generally recognized as the essential characteristic of a banking business."); *Gamble v. Daniel*, 39 F.2d 447, 450 (8th Cit. 1930) (In 1910, Congress recognized that "the ordinary conception of a bank was of a business which was based primarily on the receipt of deposits (general or special), which deposits were used by the bank for loans, discounts, buying and selling commercial paper, and other business purposes.").
18. *Philadelphia National Bank*, 374 U.S. at 326–27 ("[A]mong [the roles played by banks], the creation of additional money and credit, the management of the checking-account system, and the furnishing of short-term business loans would appear to be the most important. For the proper discharge of these functions

is indispensable to a healthy national economy. . . . It is therefore not surprising that commercial banking in the United States is subject to a variety of governmental controls, state and federal."); *Noble State Bank v. Haskell*, 219 U.S. 104, 112–13 (1911) (holding that the "public interest[]" in "mak[ing] the currency of checks secure" is "sufficient to warrant the state in taking the whole business of banking under its control"); S. Rep. No. 89-1482, at 5 (1966) (justifying Congress's grant of extensive enforcement powers to federal banking agencies by explaining that the "banking system is a fundamental part of our monetary system and the Nation's $130 billion of demand deposits represents the principal element in the Nation's money supply"); *see also* Robert C. Hockett & Saule T. Omarova, "The Finance Franchise," 102 *Cornell Law Review* 1143, 1148–64 (2017); Lev Menand, "Why Supervise Banks? The Forgotten Past and Uncertain Future of a Distinctive Form of Governance," *Vanderbilt Law Review* (forthcoming) (draft of July 6, 2020), available at *http://ssrn.com/abstract=3421232*).

19. *National State Bank v. Smith*, 1977 U.S. Dist. LEXIS 18184 (D.N.J., Sept. 16, 1977). As indicated by 12 U.S.C. § 1815(a)(1), trust funds are not "deposits." In contrast to deposits, trust funds do not augment the nation's money supply. Trust funds must be held in segregated accounts established in accordance with customers' trust instruments and federal and state fiduciary laws. Unlike deposits, trust funds cannot be used by a bank or trust company to make loans or investments for its own account. *See* 12 U.S.C. § 92a(a)-(d); 12 C.F.R. §§ 9.8-9.13, 9.18.
20. As amended in 1978, Section 27(a) provides that a national bank "is not illegally constituted solely because its operations are . . . limited to those of a trust company and activities related thereto." Pub. L. No. 95-630, § 1504, 92 Stat. 3713 (1978) (codified as amended at 12 U.S.C. § 27(a)).
21. *National State Bank v. Smith*, 591 F.2d 223, 231–32 (3d Cir. 1979).
22. *See Vullo v. OCC*, 378 F.Supp.3d at 294–95 (concluding, based in part on the 1978 amendment to Section 27(a), that Congress "understood the NBA's original use of the 'business of banking' phrase to require deposit-receiving, such that a non-depository institution (or class of such institutions) is not considered eligible to be granted a federal charter to commence the 'business of banking' absent a statutory amendment to the contrary").
23. *See Independent Ins. Agents of America, Inc. v. Hawke*, 211 F.3d. 638, 641–45 (D.C. Cir. 2000) (holding that the NBA's specific authorization for national banks to sell insurance in towns with populations of 5,000 or less precluded the OCC from allowing national banks to sell crop insurance in larger communities); *American Land Title Ass'n v. Clarke*, 968 F.2d 150, 155–57 (2d Cir. 1992) (concluding, on similar grounds, that the OCC could not permit national banks to sell title insurance in larger communities), *cert. denied*, 508 U.S. 971 (1993); *Vullo*, 378 F.3d at 294–95.
24. *See Vullo*, 378 F.Supp.3d at 279, 288–90, 295–96 ("The Court finds that a delay of that length" in asserting chartering authority under Section 36 "provides substantial grounds to cast doubt on OCC's interpretation" of Section 36).
25. 12 U.S.C. § 36(j).
26. *See Vullo*, 378 F.Supp.3d at 294–98 ("[R]eceiving deposits is an indispensable part of the 'business of banking' as used by Congress in the original phrase that now appears in Section 27 and Section 24 (Seventh)" of the NBA); *see also* Symons, *supra* n.8, at 721 and 721–22 n.239 (discussing "the critical importance of the deposit-taking power to the determination of an entity as a bank").
27. *Vullo*, 378 F.Supp.3d at 286–88, 296 (citing and quoting the NYDFS' Complaint, ¶¶ 3, 11–12, 35, 43–49).
28. As discussed below in Part 2.b, the OCC has authority to issue regulations or orders preempting state consumer financial laws if those state laws would "prevent or significantly interfere" with the federally-authorized powers of national banks. *See* 12 U.S.C. § 25b(b)(1)(B). The OCC could potentially issue preemptive rules or orders claiming that state privacy and data protection laws "prevent or significantly interfere" with the lending and payment activities of nondepository fintech national banks.
29. *See, e.g.,* 12 U.S.C. §§ 5551–5552; *Meade v. Avant of Colorado LLC*, 307 F.Supp.3d 1134 (D. Colo. 2018); *West Virginia v. CashCall*, 605 F.Supp.2d 781 (S.D.W.Va. 2009).
30. NYDFS Complaint in *Vullo*, ¶ 12; *see also* S. Rep. No. 111-176, at 11–18, 175–76 (2010); Kathleen Engel & Patricia A. McCoy, *The Subprime Virus: Reckless Credit, Regulatory Failure, and Next Steps* 157-226 (Oxford University Press, 2011); Lev Menand, "Too Big to Supervise: The Rise of Financial Conglomerates and the Decline of Discretionary Oversight in Banking," 103 *Cornell Law Review* 1527, 1529–32, 1551–74 (2018); 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, 897–919 (2011) [hereinafter Wilmarth, "Dodd-Frank"], available at *http://ssrn.com/abstract=1891970*.
31. *Santa Fe Industries, Inc. v. Green*, 430 U.S. 462, 478–80 (1977); *accord, e.g., Business Roundtable v. SEC*, 905 F.2d 406, 411–17 (D.C. Cir. 1990); *Field v. Trump*, 850 F.2d 938, 947 (2d Cir. 1988), *cert. denied,* 489 U.S. 1012 (1989); *Panter v. Marshall Field & Co.*, 646 F.2d 271, 289 (7th Cir.), *cert. denied*, 454 U.S. 1092 (1981).
32. H.R. Rep. No. 63-69, at 16–19, 22–26 (1913); *see also First Agricultural Bank v. State Tax Comm'n*, 392 U.S. 339, 355–56 (1968) (Marshall, J., dissenting) (explaining that national banks "ceased" issuing bank notes by 1935). Congress formally abolished the power of national banks to issue bank notes in 1994. Pub. L. 103-325, §§ 602(e)-(g), 108 Stat. 2291-94 (1994).
33. Act of Dec. 23, 1913 § 16, 38 Stat. 268 (codified as amended at 12 U.S.C. § 360); *see also* H.R. Rep. No. 63-69, at 55–56 (1913).
34. Act of Dec. 23, 1913, § 16, 38 Stat. 265 (codified as amended at 12 U.S.C. § 411).
35. H.R. Rep. No. 63-69, at 26, 54–55 (1913).
36. Act of Dec. 23, 1913, § 2, 38 Stat. 252-53 (codified as amended at 12 U.S.C. §§ 222, 282, 501a).
37. H.R. Rep. No. 63-69, at 16–19, 31–37, 39–41 (1913); *see also Federal Reserve System: Purposes and Functions* 3–6, 9, 12–17, 35, 38–44 (10th ed. 2016) [hereinafter *Fed Purposes and Functions*].
38. *First Agricultural National Bank*, 392 U.S. at 357 (Marshall, J., dissenting).
39. Act of Dec. 23, 1913, § 19, 38 Stat. 270 (codified as amended at 12 U.S.C. § 461).

40. *Committee for Monetary Reform v. Board of Governors*, 765 F.2d 538, 539 (D.C. Cir. 1985).
41. *Fed Purposes and Functions*, *supra* n.37, at 17, 38–44.
42. *Id.* at 23, 38–40, 50–51; Ricks, *supra* n.16, at 786–90.
43. Corrigan *supra* n.16; *see also Fed Purposes and Functions*, *supra* n.37, at 17 (explaining that depository institutions perform "important roles in the Federal Reserve System's core functions"); Ricks, *supra* n.16, at 772–801 (describing the changing roles of depository institutions in the Fed's implementation of monetary policy before and after 2008).
44. *Fed Purposes and Functions*, *supra* n.37, at 40–46, 130–34.
45. *See* 12 U.S.C. § 222 (requiring all national banks to become Fed member banks); *id*. § 301 (requiring the Fed to carry out its duties under the FRA "fairly and impartially and without discrimination in favor of or against any member bank or banks").
46. *See* Guida, *supra* n.2.
47. 12 U.S.C. § 343(3); *see also Fed Purposes and Functions*, *supra* n.37, at 64.
48. *Fed Purposes and Functions*, *supra* n.37, at 131–34, 146–48.
49. *See* 12 U.S.C. §§ 304, 341 (Fifth); *Fed Purposes and Functions*, *supra* n.37, at 12–17.
50. Act of June 16, 1933, § 8, 48 Stat. 162, 168–70; Act of Aug. 23, 1935, § 101, 49 Stat. 684, 687.
51. Act of Sept. 21, 1950, § 4, 64 Stat. 873, 875. The only national banks that were exempted from the deposit insurance mandate were "national nonmember banks" located in U.S. territories. Act of Sept. 21, 1950, §§ 3(e), 4(b), 64 Stat. 874, 875–76. When Alaska and Hawaii were admitted as states in 1958 and 1959, Congress amended 12 U.S.C. § 222 to confirm that national banks located in those former territories must become Fed member banks and obtain deposit insurance, as national banks located in the other 48 states were required to do. Act of July 7, 1958, § 19, 72 Stat. 350; Act of Mar. 18, 1959, § 17, 73 Stat. 12.
52. 12 U.S.C. §§ 222, 501a.
53. *See* OCC proposed rule, "Receiverships for Uninsured National Banks," 81 Fed. Reg. 62835 (2016) ("There are only a small number of uninsured national banks in operation today. . . . [A]ll of these institutions are trust banks.").
54. 12 U.S.C. § 378(a)(2).
55. 12 U.S.C. § 1841(b) & (c).
56. *See* Arthur E. Wilmarth, Jr., "Wal-Mart and the Separation of Banking and Commerce," 39 *Connecticut Law Review* 1539, 1566-69 (2007), available at *http://ssrn.com/abstract=984103* [hereinafter Wilmarth, "Wal-Mart"].
57. 12 U.S.C. § 1843; *see* S. Rep. No. 91-1084, at 2–4 (1970) (quote at 3); S. Rep. No. 100-19, at 2 (1987) ("At the foundation of American financial law is a longstanding tradition of separating banking and commerce.").
58. S. Rep. No. 91-1084, at 2–4 (1970); S. Rep. No. 100-19, at 2, 8–10 (1987); Wilmarth, "Wal-Mart," *supra* n.56, at 1566–71.
59. *See Independent Bankers Ass'n of America v. Conover*, 1985 U.S. Dist. LEXIS 22529, at *2–*6 (M.D. Fla. Feb. 15, 1985); S. Rep. No. 100-19, at 5–7 (1987).
60. The BHC Act's definition of "bank," as amended in 1987, includes exemptions for state-chartered ILCs, special-purpose trust companies, and limited-purpose credit card banks (which cannot offer any checking accounts or accept any time deposits smaller than $100,000 and may provide business credit card loans only to small firms), as well as thrift institutions and credit unions (which are subject to separate regulatory regimes). *See* Pub. L. No. 100-86, § 101(a), 101 Stat. 552, 555–56 (codified as amended at 12 U.S.C. § 1841(c)); S. Rep. No. 100-19, at 11, 29–31 (1987). For discussions of the exemptions in the BHC Act for special-purpose trust companies and state-chartered ILCs, *see infra* nn.62, 64–71, and accompanying text.
61. S. Rep. No. 100-19, at 2, 6–10 (1987) (quote at 8).
62. *See* 12 U.S.C. § 1841(c)(2)(D)(iv); S. Rep. No. 100-19, at 29 (1987).
63. *See* Wilmarth, "Wal-Mart," *supra* n.56, at 1588–93.
64. *See* OCC, *Exploring Special Purpose National Bank Charters for Fintech Companies* (Dec. 2016) [hereinafter OCC Policy Statement on Fintech Charters], at 6–7, 12, available at *https://www.occ.gov/publications-and-resources/publications/banker-education/files/exploring-special-purpose-nat-bank-charters-fintech-companies.html*.
65. *See* 12 U.S.C. § 1841(c)(2)(H); Wilmarth, "Wal-Mart," *supra* n.56, at 1549–53, 1572–73.
66. FDIC Proposed ILC Rule, *supra* n.3, at 17772.
67. In 1992, U.S. banks and trust companies held total assets of $3.5 trillion—500 times larger than the $7 billion of assets held by ILCs. Wilmarth, "Industrial Banks," *supra* n.3, at 2 (quoting the 1993 CRS report).
68. *Id*. at 2–3 (quoting Sen. Garn's statement on April 10, 2006, during one of the FDIC's three public hearings on Wal-Mart's application).
69. *Id*. at 3 (quoting rulemaking notices issued by the FDIC in Aug. 2006 and Feb. 2007).
70. *Id*.
71. *Id*. (summarizing floor statements by 11 Senators and House members).
72. *Id*.; *see also* Wilmarth, "Wal-Mart," *supra* n.56, at 1569–73, 1584–86 (discussing Congress's passage of CEBA and the 1999 law that prohibited further acquisitions of thrifts by commercial firms); *Kanikal v. Attorney General*, 776 F.3d 146 (3d Cir. 2015) (refusing to interpret the literal text of one federal statute to override the clearly intended purpose of another federal law because the second law's legislative history revealed Congress's clear intent that the second law's policy should be given priority). In the course of its opinion in *Kanikal*, the Third Circuit stated, "In resolving ambiguity, we must allow ourselves some recognition of the existence of sheer inadvertence in the legislative process." 776 F.3d at 152–53 & n.5 (quoting *Cass v. United States*, 417 U.S. 72, 83 (1974)).
73. Wilmarth, "Industrial Banks," *supra* n.3, at 1, 3–4 (noting, in addition, that Congress imposed a three-year moratorium on acquisitions of ILCs between July 2010 and July 2013).
74. *Id*. at 1–2 (quoting statements on Rakuten's global website under the headings "About Us" and "Leadership"), available at *https://global.rakuten.com/corp/about/*); Jon Prior, "Rakuten refiles with FDIC for ILC charter," *American Banker* (May 29, 2020), available at *https://www.americanbanker.com/news/rakuten-refiles-with-fdic-for-ilc-charter*.
75. *See* Wilmarth, "Industrial Banks," *supra* n.3, at 2–13; *see also infra* n.81 and accompanying text (describing the public interest factors that the FDIC must consider under the FDI Act). The FDIC's proposed ILC rule also violated the Administrative

Procedure Act because the FDIC did not provide the public with adequate notice of—and an opportunity to comment on—the agency's change in policy toward acquisitions of ILCs by commercial firms and its factual, legal, and policy reasons for making that change. Wilmarth, "Industrial Banks," *supra* n.3, at 2, 13–14.

76. *Id.* at 4–7 (discussing bailouts of large corporate owners of ILCs and the failures of Pacific Thrift, Southern Pacific, and Fremont); Comments of the Center for Responsible Lending et al. opposing the FDIC's proposed ILC rule (July 1, 2020), at 11–18 (describing those bailouts and failures as well as the failure of Advanta in 2010), available at *https://www.responsiblelending.org/sites/default/files/uploads/files/group-ilc-comment-fdic-jul2020.pdf*.
77. *See* Olaf Storbeck, "Wirecard: the frantic final months of a fraudulent operation," *Financial Times* (Aug. 25, 2020), available at *https://www.ft.com/content/6a660a5f-4e8c-41d5-b129-ad5bf9782256*; Olaf Storbeck & Dan McCrum, "Wirecard's deceit went beyond its fraudulent Asian operations," *Financial Times* (Sept. 22, 2020), available at *https://www.ft.com/content/04c77d71-c2ff-4340-8cf9-ee9c55b800e0*; *see also* Todd H. Baker, "The Fall of Wirecard," *CLS Blue Sky Blog* (July 8, 2020), available at *https://clsbluesky.law.columbia.edu/2020/07/08/the-fall-of-wirecard/*.
78. Wilmarth, "Industrial Banks," *supra* n.3, at 8–9; Wilmarth, "Wal-Mart," *supra* n.56, at 1588–93, 1621.
79. *See* Thomas Philippon, *The Great Reversal: How America Gave Up on Free Markets* (2019); Timothy Wu, *The Curse of Bigness: Antitrust in the New Gilded Age* (2018).
80. *See* Kathryn Petralia, Thomas Philippon, Tara Rice, & Nicolas Véron, *Banking Disrupted? Financial Intermediation in an Era of Transformational Technology* 25–38, 44–82 (Geneva Reports on the World Economy 22, 2019), available at *https://www.cimb.ch/uploads/1/1/5/4/115414161/banking_disrupted_geneva22-1.pdf*.
81. Wilmarth, "Industrial Banks," *supra* n.3, at 9–13. The public interest factors that federal regulators must consider under the FDI Act include (a) risks to the federal deposit insurance fund, (b) the "convenience and needs" of communities and their residents, (c) adverse effects on competition, and (d) risks to the stability of the U.S. banking and financial systems. *See id.* at 12–13 (discussing 12 U.S.C. §§ 1815, 1816, 1817(j)(7), and 1828(c)(5)).
82. *See id.* at 10–11; *see also* 12 U.S.C. §§ 5365.
83. Guy Chazan & Olaf Storbeck, "Head of German financial watchdog defends agency's Wirecard role," *Financial Times* (July 1, 2020) (summarizing Hufeld's statement), available at *https://www.ft.com/content/fd2e1442-d35c-412e-a7a5-aa4d5b52e629*; *see also* Baker, *supra* n.77; Matthew Vincent, Jim Brunsden & Olaf Storbeck, "EU watchdog to probe German regulators after Wirecard collapse," *Financial Times* (July 15, 2020), available at *https://www.ft.com/content/7b711f0e-0e2d-4639-94db-0c26b4073e78*.
84. Guy Chazan & Olaf Storbeck, "Wirecard: the scandal spreads to German politics," *Financial Times* (Sept. 29, 2020), available at *https://www.ft.com/content/81779b15-7b1d-404f-b523-d61510397dd4*; Dan McCrum & Olaf Storbeck, "How EY missed the chance to stop Wirecard's fraud, *Financial Times* (Oct. 2, 2020), available at *https://www.ft.com/content/d5103236-2799-4eab-bb71-afad7b703ae4*; Olaf Storbeck, "EY faces mounting backlash after Wirecard whistleblower revelation," *Financial Times* (Sept. 30, 2020), available at *https://www.ft.com/content/8c87468f-67f9-4a5c-bfa9-37b561a50da0*.
85. Martin Arnold, "Fintechs expect regulatory backlash after Wirecard scandal," *Financial Times* (July 6, 2020), available at *https://www.ft.com/content/76f0856d-8b0f-404e-a94d-31584e50c431*.
86. Wilmarth, "Industrial Banks," *supra* n.3, at 4–7, 11–12; *see also supra* n.30, *infra* n.138 and accompanying text (discussing the supervisory failures that contributed to the financial crisis of 2007–09).
87. Wilmarth, "Industrial Banks," *supra* n.3, at 11–12; Wilmarth, "Wal-Mart," *supra* n.56, at 1617–21.
88. Act of June 3, 1864, § 30, 13 Stat. 108 (codified as amended at 12 U.S.C. § 85); *see also Marquette National Bank v. First of Omaha Serv. Corp.*, 439 U.S. 299 (1978); *supra* n.5 and accompanying text.
89. OCC Usury Preemption Transfer Rule, *supra* n.4.
90. *Tiffany v. National Bank of Missouri*, 85 U.S. (18 Wall.) 409, 413 (1873) (emphasis added).
91. *Marquette National Bank*, 439 U.S. at 308 (emphasis added).
92. *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.").
93. *Greenwood Trust Co. v. Massachusetts*, 971 F.2d 818, 827 (1st Cir. 1992) (quoting 126 Cong. Rec. 6900 (1980) (remarks of Sen. Proxmire)), *cert. denied*, 506 U.S. 1052 (1993); *accord*, *Garvey Properties/762 v. First Financial Savings & Loan Ass'n*, 845 F.2d 519, 520–22 (5th Cir. 1988).
94. *Garvey Properties*, 845 F.2d at 521.
95. *See In re Community Bank of N. Va.*, 418 F.3d 277, 296 (3d Cir. 2005) (Sections 85 and 1831d "apply only to national banks and state chartered banks, not to non-bank purchasers of second mortgage loans").
96. Pub. L. No. 96-221, § 521, 94 Stat. 132, 164 (1980).
97. *Smith v. Fidelity Consumer Discount Co.*, 898 F.2d 907, 911 (3d Cir. 1990) (quoting S. Rep. No. 96-368, at 19 (1979)).
98. *See* S. Rep. No. 96-368, at 19 (1979) ("[I]t is the committee's intent that loans originated under this usury exemption will not be subject to claims of usury even if they are later sold to an investor who is not exempt under this section."); *see also* Levitin, *supra* n.5, at 68.
99. *Barnon v. Sigmon Coal Co.*, 534 U.S. 438, 452 (2002) (quoting *Russelo v. United States*, 464 U.S. 16, 23 (1983)); *accord*, *INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 (1987).
100. *Cardoza-Fonseca*, 480 U.S. at 432.
101. *See Greenwood Trust,* 971 F.2d at 827 ("The historical record clearly requires a court to read the parallel provisions of [DIDMCA] and the [National] Bank Act *in pari materia*."); *accord*, *In re Community Bank of N. Va.*, 418 F.3d at 295–96 ("[T]he language of the two statutes [– Sections 1831d and 85 –] should ordinarily be interpreted in the same way.").
102. 12 U.S.C. §§ 25b(b)(2), (e) & (h)(2); *see* S. Rep. No. 111-176, at 176 (2010) (Under the Dodd-Frank Act, "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."); Wilmarth, "Dodd-Frank," *supra* n.30, at 934–35.

103. *See Mississippi Dept. of Finance v. Pikco Finance, Inc.*, 97 So.3d 1203, 1209 n.7 (Miss. 2012) (explaining that the enactment of 12 U.S.C. § 25b in 2010, as part of the Dodd-Frank Act, overruled *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1 (2007), to the extent that *Watters* expanded the NBA's preemptive scope to cover operating subsidiaries of national banks); *Phillips v. Bank of America, N.A.*, 186 Cal.Rptr.3d 434, 444 (Cal. App. 2015) (same); Wilmarth, "Dodd-Frank," *supra* n.30, at 934–35 (discussing how Section 25b overruled *Watters* and other federal court decisions insofar as they expanded the NBA's scope of preemption to reach subsidiaries and agents of national banks).
104. OCC, notice of proposed rulemaking, "Permissible Interest on Loans That Are Sold, Assigned, or Otherwise Transferred," 84 Fed. Reg. 64229, 64230 (Nov. 21, 2019).
105. *Madden v. Midland Funding, LLC*, 786 F.3d 246, 251–52 (2d Cir. 2015), *cert. denied*, 136 S. Ct. 2505 (2016). The OCC's usury preemption transfer rule is expressly designed to overrule *Madden*. *See* OCC Usury Preemption Transfer Rule, *supra* n.4, at 33531–33; *see also* Levitin, *supra* n.5, at 47–50, 70–75.
106. OCC Usury Preemption Transfer Rule, *supra* n.4, at 33532 (citing, inter alia, *Nichols v. Fearson,* 32 U.S. (7 Pet.) 103 (1833), and *Gaither v. Farmers & Mechanics Bank of Georgetown*, 26 U.S. (1 Pet.) 37 (1828)); *but see* Levitin, *supra* n.5, at 12–13, 15–16, 54–67 (contending that the OCC's valid-when-made concept is "completely lacking in historical roots" and "is not mentioned as such in any case until 2019") (quotes at 13 and 55); *id*. at 68–69 (arguing that "the common law of assignments [of contracts] has nothing whatsoever to do with the assignability of [statutory] exemptions from usury laws").
107. *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 83 (1994) (quoting *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938)).
108. *Atherton v. FDIC*, 519 U.S. 213, 218 (1997) (quoting *O'Melveny & Myers*, 512 U.S. at 87) (quoting *Wheeldin v. Wheeler*, 373 U.S. 647, 651 (1963)).
109. *Atherton*, 519 U.S. at 218–26; *see also* Wilmarth Usury Preemption Transfer Rule Comment Letter, *supra* n.4, at 11.
110. *O'Melveny & Myers*, 512 U.S. at 85–88 (emphasis added); *see also* Wilmarth Usury Preemption Transfer Rule Comment Letter, *supra* n.4, at 11–12.
111. *Bank of America National Trust & Savings Ass'n v. Parnell*, 352 U.S. 29, 33–34 (1956); *see also Atherton*, 519 U.S. at 226; Wilmarth Usury Preemption Transfer Rule Comment Letter, *supra* n.4, at 12–13.
112. *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (quoting *Medtronic v. Lohr*, 518 U.S. 470, 485 (1996)).
113. *Lusnak v. Bank of America, N.A.*, 883 F.3d 1185, 1188, 1191–94 (9th Cir.), *cert. denied*, 139 S. Ct. 567 (2018) (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)).
114. FDIC, notice of proposed rulemaking, "Federal Interest Rate Authority," 84 Fed. Reg. 66845, 66849 (Dec. 6, 2019); *see also supra* nn.93–95 and accompanying text (explaining that the scope of usury preemption under Section 1831d is the same as under Section 85).
115. *See* Wilmarth Usury Preemption Transfer Rule Comment Letter, *supra* n.4, at 7–13.
116. OCC Proposed "True Lender" Rule, *supra* n.6, at 44228.
117. *Id.* at 44227.
118. *See* Wilmarth "True Lender" Comment Letter, *supra* n.6, at 1–3, 15–21. For descriptions of "rent-a-charter" partnerships between banks and nonbank lenders, *see* Levitin, *supra* n.5, at 3–10, 14–15, 26–46; Christopher K. Odinet, "Predatory Fintech and the Politics of Banking," *Iowa Law Review* (forthcoming) (draft of Aug. 26, 2020), at 16–28, 37–46, available at *http://ssrn.com/abstract=3677283*.
119. Wilmarth, "True Lender" Comment Letter, *supra* n.6, at 2; *see also* Odinet, *supra* n.118, at 22–26, 36–47, 55–56.
120. OCC Proposed "True Lender" Rule, *supra* n.6, at 44224–25.
121. *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)).
122. *Cuomo v. Clearing House Ass'n*, 557 U.S. 519, 534 (2009); *see also* Wilmarth, "Dodd-Frank," *supra* n.30, at 944–48 (discussing additional Supreme Court decisions upholding the applicability of state laws to contracts and other transactions of national banks).
123. *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 711, 716 (E.D.N.C. 2002) ("[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).
124. *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"); *Lingerfelt*, 211 F. Supp. 2d at 716–18 (rejecting the plaintiff's assertion that the NBA completely preempted the application of state usury laws to a nonbank lender that 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.").
125. *See supra* n.120 and accompanying text.
126. *Union National Bank v. Louisville, N., A. & C. Ry. Co.*, 163 U.S. 325, 330–31 (1896) (holding that 12 U.S.C. § 85 incorporated the usury statutes of Illinois as interpreted by Illinois state courts); *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."); *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).

127. *Scott v. Lloyd*, 34 U.S. 418, 453 (1835) (quoting Lord Mansfield; emphasis added); *see also id.* at 456 ("[T]he only question in all cases like the present, is, *what is the real substance of the transaction*, not what is the colour and form" (quoting Lord Mansfield; emphasis added).
128. *Anderson v. Hershey*, 127 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).
129. *In re Community Bank of N. Va.*, 418 F.3d at 283–85, 294–97 (applying Pennsylvania law); *Ubaldi*, 852 F. Supp. 2d at 1194–200 (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); *Lingerfelt*, 211 F. Supp. 2d at 717–19 (applying North Carolina law); *CashCall, Inc. v. Morrissey*, 2014 WL 2404300, at *14–*15 & n.19, *18 (W.Va. May 30, 2014) (applying West Virginia law); *see also CFPB v. CashCall, Inc.*, 2016 WL 4820635 at *5 (C.D. Cal. Aug. 31, 2016) (applying the laws of 16 states and determining that a nonbank lender was the "true lender" after considering "the substance, not the form" of a joint venture between the nonbank lender and a "tribal lending entity").
130. *See* 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*; Odinet, *supra* n.118, at 20–28, 36–47, 55–56; *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 law).
131. *See* 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-lending.html* (visited on Oct. 7, 2020).
132. 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*.
133. OCC News Release 2003-6 (Jan. 31, 2003) (Peoples National Bank) (emphasis added), 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*.
134. Remarks by Comptroller of the Currency John D. Hawke, Jr. before the Women in Housing and Finance (Feb. 12, 2002), at 10 (emphasis added), available at *https://www.occ.gov/news-issuances/speeches/2002/pub-speech-2002-10.pdf*.
135. 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-lending.html* (visited on Oct. 7, 2020).
136. *See* Comments filed by the Center for Responsible Lending et al. in opposition to the OCC's proposed "true lender" rule (Sept. 3, 2020), available at *https://www.nclc.org/images/pdf/high_cost_small_loans/payday_loans/OCC-True-Lender-Comments.pdf*; Odinet, *supra* n.118, at 20–28, 36–47.
137. Pub. L. No. 111-203, 124 Stat. 1376 (2010).
138. S. Rep. No. 111-176, at 15–18 (2010). For analysis of the devastating injuries inflicted on states, consumers, and the U.S. economy by (1) the pervasive failures of federal financial regulators to stop predatory nonprime lending and (2) the OCC's and OTS's aggressive preemption of state consumer protection laws and state enforcement efforts, *see* Kathleen Engel & Patricia A. McCoy, *supra* n.30, at 157–226; Wilmarth, "Dodd-Frank," *supra* n.30, at 897–919.
139. S. Rep. No. 111-176, at 16–17, 25–26, 175–77 (2010).
140. 12 U.S.C. § 25b(b)(1)(B).
141. 517 U.S. 25, 33 (1996); *see Lusnak*, 883 F.3d at 1188, 1191–94; *Hymes v. Bank of America, N.A.*, 408 F.Supp.3d 171, 184 (E.D.N.Y. 2019); S. Rep. No. 111-176, at 175–76 (2010).
142. 12 U.S.C. § 1465(a). Sections 25b(b)(4) and 1465(b) declare that the statutes governing national banks and federal thrifts do *not* create a regime of field preemption. Accordingly, state laws apply to national banks and federal thrifts *unless* they create an irreconcilable conflict with federal law under the "prevent or significantly interfere" preemption standard set forth in *Barnett Bank*, 517 U.S. at 31, 33. *See* Jared Elosta, "Dynamic Federalism and Consumer Financial Protection: How the Dodd-Frank Act Changes the Preemption Debate," 89 *North Carolina Law Review* 1273, 1276–77, 1298 (2011); Wilmarth, "Dodd-Frank," *supra* n.30, at 925–30 (2011).
143. 12 U.S.C. §§ 25b(c), 25b(b)(3)(A) & (B); *see Lusnak*, 883 F3d at 1192, 1194; Elosta, *supra* n.142, at 1300–01; Wilmarth, "Dodd-Frank," *supra* n.30, at 931–32.
144. *See* Wilmarth Usury Preemption Transfer Rule Comment Letter, *supra* n.4, at 2–4; Wilmarth "True Lender" Comment Letter, *supra* n.6, at 3–5; *see also* OCC Policy Statement on Fintech Charters, *supra* n.64, at 5 (referring to "the preemption provisions added to the National Bank Act by Dodd-Frank"

but failing to explain how the OCC's nondepository fintech national bank charter complies with those provisions).

145. *See* OCC Usury Preemption Transfer Rule, *supra* n.4, at 33533.
146. *See* Wilmarth Usury Preemption Transfer Rule Comment Letter, *supra* n.4, at 2–4.
147. S. Rep. No. 111-176, at 175–76 (2010); *see also* Elosta, *supra* n.142, at 1298–1300; Wilmarth, "Dodd-Frank," *supra* n.30, at 936–37.
148. OCC, "Office of Thrift Supervision Integration; Dodd-Frank Act Implementation," 76 Fed. Reg. 43549 (July 21, 2011).
149. *Id.* at 43555; *see Lusnak*, 883 F.3d at 1193–94 ("[T]he OCC has largely reaffirmed its previous preemption conclusions without further analysis under the *Barnett Bank* standard," and therefore the OCC's 2011 preemption rules "are entitled to little, if any, deference.").
150. 76 Fed. Reg. at 43553, 43556–57, 43558.
151. 12 U.S.C. § 5553 (emphasis added).
152. S. Rep. No. 111-176, at 175 (2010).
153. *Independent Ins. 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)); *see also* Wilmarth, "Dodd-Frank," *supra* n.30, at 939–40.
154. 12 C.F.R. §§ 7.4007, 7.4008 & 34.4. *See* 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; *see also* Arthur E. Wilmarth, Jr., "The Financial Industry's Misguided Quest to Undermine the Consumer Financial Protection Bureau," 31 *Review of Banking & Financial Law* 881, 914–16 (2012), available at *http://ssrn.com/abstract=1982149*.
155. *See, e.g.*, 12 C.F.R. §§ 7.4002, 7.4003, 7.4004, 7.4005, 34.5, & 37.1.
156. *First National Bank of Logan v. Walker Bank & Trust Co.*, 385 U.S. 252, 261 (1966).