



April 14, 2021

The Honorable Sherrod Brown, Chairman
Committee on Banking, Housing, and Urban Affairs
United States Senate
Washington, D.C. 20510

The Honorable Pat Toomey, Ranking Member
Committee on Banking, Housing, and Urban Affairs
United States Senate
Washington, D.C. 20510

Dear Chairman Brown and Ranking Member Toomey:

On March 25, 2021, S.J. Res. 15 was introduced, providing for Congressional disapproval under the Congressional Review Act of the Office of the Comptroller of the Currency's (OCC) final rule, entitled "National Banks and Federal Savings Associations as Lenders," commonly referred to as the "True Lender" rule. As you and other members consider the resolution, I want you to be aware of the rule's intended effect and the adverse impact of overturning the rule.

On October 27, 2020, the OCC issued its final true lender rule¹ to provide legal and regulatory certainty to national banks' and federal savings associations' (banks) lending, including loans made in partnerships with third parties.² The OCC's rule specifies that a bank makes a loan and is considered to be the true lender of the loan if, as of the date of origination, it (1) is named as the lender in the loan agreement or (2) funds the loan. The rule clarifies that as the true lender of a loan, the bank retains the compliance obligations associated with making the loan, even if the loan is later sold, thus negating concerns regarding harmful rent-a-charter arrangements. Our rulemaking prevents potential arrangements in which a bank receives a fee to "rent" its charter and unique legal status to a third party with the intent of evading state and local laws, while disclaiming any compliance responsibility for the loan. These schemes have absolutely no place in the federal banking system, and this rule helps address them.

The rule makes clear banks' responsibility and accountability for the loans they make and facilitates the OCC's supervision of this core banking activity. Disapproval of the rule would

¹ OCC NR 2020-139. "Office of the Comptroller of the Currency Issues True Lender Rule." October 27, 2020 (<https://occ.gov/news-issuances/news-releases/2020/nr-occ-2020-139.html>).

² The rule became effective on December 29, 2021. In addition, as the OCC stated in its rulemaking, the term "partnership" does not connote any specific legal relationship between a bank and a third party, and the terms "partnership" and "relationship" are used interchangeably to describe a variety of relationships among banks and third parties.

return bank lending relationships to the previous state of legal and regulatory uncertainty, which, as nearly 50 preeminent economic and finance scholars explained in January 2021, adversely affects the function of secondary markets and restricts the availability of credit.³

Legal and regulatory certainty facilitates access to responsible credit and clarifies responsibility and accountability in lending involving third-party partnerships. Bank third-party partnerships help banks better serve their communities by expanding access to affordable credit products from mainstream financial service providers. Such access is particularly important as individuals and small businesses across the country work to recover from effects of the COVID-19 pandemic. Banks seek partnerships with third parties for a variety of legitimate reasons, including reaching additional markets, benefiting from specific expertise or technology, and improving the efficiency and cost of their own operations. The OCC's third-party risk management guidance⁴ and supplemental exam procedures⁵ make clear to banks that they retain the risks for activities conducted through relationships with third parties.

With the legal and regulatory certainty provided by the rule, lending by banks made in partnership with third parties can be assessed as part of the ongoing supervision of these banks, including as part of the OCC's examinations to evaluate bank compliance with applicable laws and regulations that ensure consumer protection, Bank Secrecy Act and anti-money laundering compliance, required disclosures, and other obligations associated with making loans. The OCC clarified examiner responsibilities in assessing true lender activities in third-party relationships in 2021.⁶ This clarification addressed considerations related to assessing banks'

- due diligence on the lending product or activity (e.g., terms and scope) and the third party;
- credit risk management, including underwriting practices;
- model risk management;
- compliance management systems; and
- ongoing monitoring of the lending activity and the third party's performance.

If a bank fails to satisfy any of its compliance obligations, the OCC will not hesitate to use its supervisory and enforcement authorities to correct the deficiencies, protect consumers, and ensure the federal banking system operates in a safe, sound, and fair manner.

As you consider the Congressional Review Act resolution, you should be confident that the OCC issued this rule with the intent to enhance its ability to supervise bank lending. The rulemaking conformed to the Administrative Procedure Act, and the agency considered all stakeholder

³ *Amici Curiae Economics and Finance Professors. People of the State of California vs The Office of the Comptroller of the Currency. Case 4:20-cv-05200-JSW Document 59. January 21, 2021* (<https://occ.gov/publications-and-resources/publications/economics/hamiltons-corner/amicus-brief.pdf>).

⁴ OCC Bulletin 2013-29. "Third-Party Relationships: Risk Management Guidance." October 30, 2013 (<https://www.occ.gov/news-issuances/bulletins/2013/bulletin-2013-29.html>).

⁵ OCC Bulletin 2017-7. "Third-Party Relationships: Supplemental Examination Procedures." January 24, 2017 (<https://www.occ.gov/news-issuances/bulletins/2017/bulletin-2017-7.html>).

⁶ OCC issued internal supervisory guidance to examiners in the form of a "Supervision Tip," which highlights risks and provides supplemental procedures for examiners to use in supervising the activities of national banks and federal savings associations.

comments provided during the rulemaking process. The resulting rule is consistent with the authority granted to the agency by Congress.

It is also important to dispel misperceptions of the rule, many of which are repeated by opponents of the rule. To be clear, the rule does not change banks' authority to export interest rates. That authority is granted by federal statute. Nor does the rule permit national banks to charge whatever rate they like; national banks and federal savings associations have the same authority as state banks regarding the exportation of interest rates. Both federal and state-chartered banks must conform to applicable interest rate limits. Disparities of interest rates from state to state result from differences in the state laws that impose these caps, not OCC rules or actions. States retain the authority to set interest rates, and rates vary from state-to-state.

The rule does not limit states' ability to regulate the conduct of state-licensed and regulated nonbank lenders, which engage in the vast majority of predatory lending.⁷ States are the primary regulators of nonbank lenders, including payday lenders. Nonbank lenders are generally also subject to the rules and enforcement actions of the Consumer Financial Protection Bureau (CFPB).

It is also important to understand why demand exists for short-term, small-dollar credit products and why many consumers rely on nonbank sources of such credit, including payday lenders. Unfortunately, mainstream service providers, including commercial banks, largely abandoned short-term small-dollar lending over the past two decades. The resulting lack of choice and fewer options pushed up the cost of these products and forced consumers to seek services on less favorable terms. Because millions of U.S. consumers do not have sufficient savings or access to traditional credit, they borrow nearly \$90 billion each year in short-term small-dollar loans typically ranging from \$300 to \$5,000 to make ends meet⁸ and to address things like emergency car repairs and other unexpected expenses. That is why the OCC has remained vocal about encouraging banks to provide consumers with more safe and affordable options to meet these small-dollar needs. In providing these products, banks should consider the "Interagency Lending Principles for Offering Responsible Small-Dollar Loans," published in May 2020.⁹ Banks should also consider the full and actual cost of a credit product and its affordability. Fees associated with short-term loans may range from \$10 to \$30 per \$100 borrowed, and the imputed annual percentage rate (APR) of those loans can appear to exceed 100 percent or more.¹⁰ But often, the fees and total cost of these loans to the consumer can be less than that of loans made with a 36 percent APR, when such loans are available at all.

⁷ How Features of Payday Loans Vary by State. New America. January 2018

(https://d1y8sb8igg2f8e.cloudfront.net/documents/Payday_lending_report-1.02.18.pdf).

⁸ Wilson, Eric and Eva Wolkowitz. 2017 Financially Underserved Market Size Study. Center for Financial Services Innovation, December 2017 (<https://finhealthnetwork.org/research/2017-financially-underserved-market-size-study/>).

⁹ OCC Bulletin 2020-54. "Small-Dollar Lending: Interagency Lending Principles for Offering Responsible Small-Dollar Loans." May 20, 2020 (<https://www.occ.gov/news-issuances/bulletins/2020/bulletin-2020-54.html>).

¹⁰ "What are the costs and fees for a payday loan?" CFPB. June 5, 2017 (<https://www.consumerfinance.gov/ask-cfpb/what-are-the-costs-and-fees-for-a-payday-loan-en-1589/>).

As you consider the Congressional Review Act resolution, please keep in mind what may be an unintended consequence of a Congressional Review Act disapproval. Disapproving the OCC's true lender rule will constrain future Comptrollers' ability to address the true lender issue and may limit the OCC's ability to take supervisory or enforcement actions against banks that would have been deemed to have "made" the loan under the true lender rule. Rather than vacate the rule, limit future Comptrollers from taking up similar rules or possibly hamstringing the OCC's enforcement authority, changes to the rule, if any, should be made through the agency's rulemaking process and in accordance with the Administrative Procedures Act.

Enclosed is a fact sheet that provides additional information for your awareness. If you have any questions or need additional information, please do not hesitate to contact me or Carrie Moore, Director, Congressional Relations, at (202) 649-6737.

Sincerely,



Blake J. Paulson
Acting Comptroller of the Currency

Enclosure: Fact Sheet

The Honorable Chuck Schumer, Majority Leader, United States Senate
The Honorable Mitch McConnell, Minority Leader, United States Senate
The Honorable Nancy Pelosi, Speaker, United States House of Representatives
The Honorable Kevin McCarthy, Minority Leader, United States House of Representatives
Members of the Committee on Banking, Housing, and Urban Affairs, United States Senate