Comments to the
Comptroller of the Currency
Office of the Comptroller of the Currency
on
"**Exploring Special Purpose National Bank Charters for Fintech Companies**"

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by
National Consumer Law Center, on behalf of its low-income clients
and
Consumer Federation of America
Consumers Union
Main Street Alliance
U.S. PIRG

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Introduction

The National Consumer Law Center (on behalf of its low-income clients) and Consumer Federation of America, Consumers Union, Main Street Alliance, and U.S. PIRG[1] thank you for the opportunity to comment on the Office of the Comptroller of the Currency's (OCC's) white paper on Exploring Special Purpose National Bank Charters for Fintech Companies.[2] We appreciate the OCC's desire to foster financial innovations that make financial products and services more accessible, easier to use, and more tailored to individual consumer needs. We also note your genuine commitment to *responsible* innovation, safety and soundness, and consumer protection.

However, because of the substantial harm that will undoubtedly result from a new special purpose national bank charter, we strongly oppose this proposal. We urge the OCC to reconsider this position and withdraw the proposal.

First, we do not believe that the OCC has the authority to create a new class of "national banks" that do not take deposits and do not have deposit insurance. The OCC's interpretation that it can charter any company that lends money or is involved in payments is a dangerous expansion that upends our federalist system.

Second, enabling a new class of companies to be considered "national banks" would allow these companies to ignore state interest rate caps, state consumer protection laws, and state oversight to the great detriment of consumers. States play a vital role in protecting consumers and small businesses and have many protections that are absent on the federal level. The OCC should not supplant the role of the states.

Safety and soundness and federal consumer protection supervision by the OCC simply does not and cannot substitute for the critical safeguards provided by state interest rate caps and other specific state laws that do not have counterparts at the national level. Maintaining state consumer protection cops on the beat is also critical, as federal agencies cannot vigilantly protect consumers in all fifty states nearly as effectively as local agencies can. State agencies are closer to the people of their respective states, more nimble, and able to react quickly when local problems first arise.

We understand that the OCC could place conditions on the national bank charters that it issued to fintechs and other non-banks. In Section 4 of these comments we spell out the conditions that the OCC should impose if it decides to grant charters. However, these conditions would not even come close to countering the damage caused by preemption of state laws, the eradication of private rights of action, and the exemption from state oversight.

In these comments, we attempt to provide a comprehensive explanation of why the OCC cannot and should not proceed with this charter:

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[1] Organizational descriptions are attached as Exhibit A.

[2] Office of the Comptroller of the Currency, Exploring Special Purpose National Bank Charters for Fintech Companies (Dec. 2016) [hereinafter Fintech Charter White Paper], *available at* https://www.occ.gov/topics/bank-operations/innovation/special-purpose-national-bank-charters-for-fintech.pdf.

- Section 1 explains why the OCC does not have the legal authority to proceed as outlined in the Fintech Charter White Paper.
- Section 2 describes why supervision by the OCC cannot make up for displacing state laws and state oversight.
- Section 3 illustrates the harm to consumers and small businesses that will result from the preemption of state laws and state oversigh if the OCC issues national bank charters to fintechs. In this section we describe how past preemptive moves by the OCC have resulted in devastating harm to millions of Americans.
- Section 4 outlines how the OCC could establish a set of strong protections that would partially, but not completely, mitigate the damage done by the preemption that would flow from the proposed charters.

Among the most critical protections that the OCC must adopt if it goes forward with new charters are capping interest rates at 36% for small loans and lower for larger loans; ensuring that consumers can enforce any conditions that protect them; retaining the authority of state attorneys general to investigate potential violations of law; and insisting on robust financial inclusion measures.

First, however, we must point out that the proposed charter is completely unnecessary. Financial innovation is proceeding at a fast and healthy pace throughout the American and the worldwide economy. As the OCC itself recognized just recently—

> Fintech companies are growing rapidly in number, and they are attracting increasing investment. In 2015, the number of fintech companies in the United States and United Kingdom increased to more than 4,000, and investment in fintech companies since 2010 has surpassed $24 billion worldwide.[3]

There has been no justification offered, nor does one exist, for endangering American consumers by extending national bank preemption to fintechs. The OCC should not proceed with this ill-advised charter.

1. The OCC Does Not Have Authority to Charter Special Purpose National Banks.

1.1. The OCC Needs Congress's Authority to Charter Banks that Do Not Take Deposits.

The OCC insists that it has the authority to grant a national bank charter to any entity that engages in at least one of three activities that the OCC characterizes as the "business of banking": taking deposits, making loans, or paying checks.[4] We strongly disagree with the OCC that its authority is that expansive.

The National Banking Act (NBA) does not authorize the Comptroller to issue a general purpose charter to an institution that engages exclusively in non-depository functions. Taking

[3] Office of the Comptroller of the Currency, Supporting Responsible Innovation in the Federal Banking System: An OCC Perspective at 3 (Mar. 2016), *available at* https://www.occ.gov/publications/publications-by-type/other-publications-reports/pub-responsible-innovation-banking-system-occ-perspective.pdf.
[4] Fintech Charter White Paper at 3.

deposits is a key precedent to the lending and check paying functions that together make up the business of banking. The OCC's chartering history,[5] federal banking law,[6] as well as applicable legal precedent[7] and other federal laws[8] all plainly indicate that engaging exclusively in non-depository functions does not, in itself, constitute engaging in the "business of banking" under the NBA.

Although Congress has at times given the Comptroller specific grants of authority to charter nondepository special purpose institutions engaged in fiduciary activities[9] or a narrowly drawn set of specialized activities, [10] those narrowly drawn grants of authority clearly do not allow the Comptroller to issue other types of special purpose charters to institutions that are engaged exclusively in non-depository functions.

In addition, even if the OCC has the power to charter national banks that pay checks, that authority does not extend to entities that are engaged in other payments functions but not paying checks. The OCC stretches the meaning of its National Bank Act authority when it claims: "issuing debit cards or engaging in other means of facilitating payments electronically are the modern equivalent of paying checks."[11]

The word "check" has a very specific meaning. Checks are written drafts that are governed by the UCC.[12] Many federal statutes give regulators specific authority over checks, or exempt checks

[5] Since the adoption of 12 C.F.R. § 5.20(e)(1)(i) of the OCC's chartering regulations in 2003, the Comptroller, to our knowledge, has not granted a general purpose charter to an institution engaged exclusively in nondepository core banking functions.

[6] *See, e.g.,* 12 U.S.C. § 22 (requiring that the organization certificate (*i.e.*, charter) specify the place where the institution's operations of discount and deposit are to be carried on). Other federal banking laws likewise recognize that deposit-taking is the essential function of and necessary condition to engage in the business of banking. *See* 12 U.S.C. § 378 (prohibiting deposit-taking without a bank charter); 12 U.S.C. § 1841(c)(1) (definition of "bank" under the Bank Holding Company Act).

[7] *See* Independent Bankers Ass'n of America v. Conover, 1985 U.S. Dist. LEXIS 22529, at *34 - 36 (M.D. Fla. Feb. 15, 1985) (holding that an institution which does not engage in both accepting deposits and making loans cannot be chartered as a national bank because it would not be engaged in the "business of banking" within the meaning of the NBA); National State Bank of Elizabeth v. Smith, No. 76-1479 (D.N.J. Sept. 16, 1977) (holding that the Comptroller lacked the authority to charter a trust company which did not also engage in the "business of banking"), *rev'd on other grounds*, 591 F.2d 223 (3d Cir. 1979).

[8] Numerous federal laws treat the function of deposit-taking as a necessary condition for qualifying as a bank. *See In re* Republic Trust & Sav. Co., 59 B.R. 606 (Bankr. N.D. Okla. 1986) (interpreting Bankruptcy Code definition of "banking institution" in 11 U.S.C. § 109(b) as inapplicable to an institution that does not have the power to, or actually, engage in deposit taking). *See also* 26 U.S.C. § 581 (defining a "bank" under federal tax law as an institution "a substantial part of the business of which consists of receiving deposits and making loans and discounts").

[9] *See* 12 U.S.C. § 27(a) (national trust companies).

[10] *See* 12 U.S.C. § 24(Eleventh) (community development banks); 12 U.S.C. § 27(a) (cash management banks); 12 U.S.C. § 27(b) (bankers' banks). For certain special purpose charters, the OCC's chartering authority stems from other federal banking laws, see 12 U.S.C. § 1841(c)(2)(F) (credit card banks).

[11] Fintech Charter White Paper at 4.

[12] *See* NCLC, Consumer Banking and Payments Law § 3.2.1 (5th ed. 2013), updated at nclc.org/library; U.C.C. § 3-104(f) ("'Check' means (i) a draft, other than a documentary draft, payable on demand and drawn on a bank or (ii) a cashier's check or teller's check.""). Regulation CC defines both "original check," 12 C.F.R. § 229.2(ww), and "substitute check," 12 C.F.R. § 229.2(aaa), in terms that include the word "paper."

from rules applicable to other forms of payment. The meaning of "check" is not a loose term that is applicable to any form of payment.

For example, the Electronic Fund Transfer Act (EFTA) regulates electronic fund transfers (EFTs), which include debit cards and other forms of electronic payments. But the term EFT is carefully defined to be distinct and separate from "checks," which are exempt from the EFTA.[13] That is, debit card and other electronic payments clearly are not "checks."

Similarly, the Expedited Funds Availability Act gives the Federal Reserve Board the authority to regulate the nation's check-payment system.[14] But the FRB has not understood that authority to give the Board the authority to regulate any aspect of any payment system.

The NBA does not give the OCC broad authority to grant national bank status to any entity that is engaged in any means of facilitating payments electronically – and to preempt state laws that are otherwise applicable to those entities.

For a more fully developed articulation of why the proposed charter would not be permitted under current law, see the earlier comments from the Conference of State Bank Supervisors,[15] as well as the comments in this docket filed by CSBS and Americans for Financial Reform.

1.2. The OCC Cannot Preempt State Laws for Fintech Companies Unless it Proceeds Case by Case under the Dodd-Frank Requirements.

If the OCC decides to proceed with a fintech charter, it cannot preempt state laws that currently apply to nonbank companies unless it proceeds case-by-case under the procedures adopted in the Dodd-Frank Act in 2010. Congress curtailed the OCC's ability to preempt state laws in response to the damage caused by the OCC's preemption regulations. Any new preemption activity by the OCC must take place under the Dodd-Frank framework.

Among other restrictions, the OCC can preempt "only if" it determines on a "case-by-case basis" that a "particular" state consumer financial law, or a substantially equivalent one, prevents or significantly interferes with the exercise of bank powers.[16] In addition, the OCC may not preempt "unless substantial evidence, made on the record of the proceeding" supports the OCC's finding that a particular state law is preempted.[17] Thus, if the OCC proceeds into new areas of "fintech innovation," it may not simply wipe state laws off the books. Congress rejected that approach in 2010.

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[13] The EFTA's definition of an "electronic fund transfer" excludes "a transaction originated by check, draft, or similar paper instrument." 15 U.S.C. § 1693a(6).

[14] 12 U.S.C. §§ 4008(c), 4009(c)(2), 4010(f). *See also* https://www.federalreserve.gov/paymentsystems/regcc-about.htm ("The EFAA also gave the Board the authority to regulate the nation's check-clearing system more generally.").

[15]Letter from the Conference of State Bank Supervisors to Thomas J. Curry, Comptroller of the Currency (Nov. 14, 2016), *available at* https://www.csbs.org/regulatory/policy/Documents/2016/CSBS%20Comment%20Letter%20on%20OCC%20Receiverships%20for%20Uninsured%20National%20Banks%20NPRM.pdf.

[16] 12 U.S.C. § 25b(b)(1)(B).

[17] 12 US.C. § 25b(c).

2. Supervision by the OCC and Other Federal Regulators Cannot Make Up for Displacing State Laws and State Oversight.

2.1. Safety and Soundness Supervision and Enforcement of Federal Laws Do Not Replace Substantive State Laws that Do Not Have a Federal Counterpart.

The OCC has stated that any institution that receives a special purpose national bank charter "would be held to the same rigorous standards of safety and soundness, fair access, and fair treatment of customers that apply to all national banks and federal savings associations."[18] The entity would be required to have a consumer compliance program that would include "compliance with Section 5 of the Federal Trade Commission Act, the unfair, deceptive, or abusive acts or practices prohibitions of Dodd-Frank, and all other applicable consumer financial protection laws and regulations."[19]

We realize that close scrutiny by the OCC would have some benefits, particularly with respect to ensuring compliance with federal laws. However, federal law has huge gaps in consumer protection that are filled by state laws that would be preempted if the OCC chartered fintechs.

In particular, safety and soundness supervision and enforcement of federal laws do not make up for a lack of interest rate caps at the federal level for most forms of lending. As discussed in greater detail in section 3.2 below, interest rate caps are the simplest, most effective way to protect borrowers. They draw bright, easily enforceable lines that safety and soundness principles do not.

While we expect the OCC to insist that lenders have a reasonable expectation of repayment, that standard is vague and difficult to evaluate and enforce. In addition, a lender can meet a standard requiring a reasonable expectation of repayment even if a loan is unaffordable, as there is a difference between a borrower's ability to repay and a lender's ability to collect. Lenders have a variety of mechanisms to secure repayment even if the borrower is having trouble affording the loan while meeting other expenses.[20] Lenders may claim that their borrowers have demonstrated the capacity to repay loans that are, in fact, quite unaffordable.

The OCC and FDIC have issued important safety and soundness guidances that, in the past, have successfully protected consumers from harmful bank payday loans.[21] However, it would be far more difficult for the OCC to curb high-cost lending by nationally chartered fintechs than it was for

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18 Fintech Charter White Paper at 2.

19 Fintech Charter White Paper at 11.

20 *See, e.g.,* Comment of Center For Responsible Lending, NCLC, et al. on Bureau of Consumer Financial Protection Request for Information on Payday Loans, Vehicle Title Loans, Installment Loans and Open-End Lines of Credit, Docket No. CFPB-2016-0026, RIN 3170-AA40 at 4-23 (Nov. 7, 2016) ("NCLC Payday RFI Comments"), http://www.nclc.org/images/pdf/rulemaking/cmmnt-cfpb-RFI-11072016.pdf; Consumer Fin. Prot. Bureau, Proposed Rule with Request for Public Comment, Payday, Vehicle Title, and Certain High-Cost Installment Loans, Docket No. CFPB-2016-0025, 81 Fed. Reg. 47964, 47997 (July 22, 2016) ("CFPB Payday NPR") ("Lenders also know that the defining loan features will enable the lender to extract payment from the consumer even if the payment exceeds the consumer's ability to repay and leaves her in financial distress, but consumers do not understand the likelihood or severity of the harms they will suffer in that scenario.").

21 Office of the Comptroller of the Currency, Guidance on Supervisory Concerns and Expectations Regarding Deposit Advance Products, Docket No. OCC-2013-0005 (Nov. 26, 2013).

the OCC to address bank payday loans. Bank payday loans, with their built-in balloon-payment structure, were on their face unaffordable for the vast majority of consumers. With high-cost installment loans, the regular payment may initially appear to be manageable, but over time it can prevent the consumer from meeting other expenses during the full term of the loan.[22] Thus, the unaffordability of the payments will be less obvious than with a balloon-payment loan. Curbing unaffordable high-cost installment lending is much harder without an interest rate cap.

Indeed, the FDIC – which has supervision tools similar to the OCC's – has struggled to protect consumers from high-rate rent-a-bank relationships that exploit banks' ability to ignore state interest rate caps.[23] In the past, the federal bank regulators were able to use violations of federal laws—such as deceptive marketing, and violations of the Equal Credit Opportunity Act and the Fair Credit Reporting Act—to shut down high-rate rent-a-bank lending that harmed consumers.[24] But the companies engaged in rent-a-bank arrangements today have become more sophisticated. They may purport to be in compliance with federal law and still make high-cost loans, charge unfair fees, or engage in other practices that cause consumer harm. Without the bright lines that interest rate caps provide, the FDIC's focus on safety and soundness has left it to issue a proposed guidance that primarily warns banks of the "risks" of partnering with unaffordable, high-rate lenders without clearly prohibiting those partnerships.[25]

Beyond the problems of preempting interest rate caps, the vague rubric of safety and soundness will not replicate the many substantive protections of state laws. State laws may limit fees, regulate credit insurance products, limit collateral, prohibit negative amortization, and restrict balloon payments and interest-only payment schedules.[26] Safety and soundness supervision is a very indirect and imprecise way of protecting consumers, far weaker than substantive state laws.

2.2. Safety and Soundness Supervision of Entities Without Deposits Will Not be as Rigorous as for Depositories, and May Actually Harm Consumers.

Safety and soundness regulation, on it is face, is focused on the viability of the company, not the protection of consumers. When a bank holds deposits, preventing the insolvency of a bank does protect those consumers who have deposit accounts. But safety and soundness supervision is not

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22 Center for Responsible Lending, NCLC et al., Comments to the Consumer Financial Protection Bureau Proposed Rule on Payday, Vehicle Title, and Certain High-Cost Installment Loans, 12 CFR Part 104, Docket No. CFPB-2016-0025, RIN 3170-AA40 at 165-73(Oct. 7, 2016) ("CRL/NCLC CFPB Payday Comments"), http://www.nclc.org/images/pdf/high_cost_small_loans/payday_loans/comment-payda-cfpb-oct2016.pdf.

23 Comments to the Federal Deposit Insurance Corporation regarding Comments on Proposed Financial Institutions Letter (FIL) 50-2106: Third-Party Lending by the National Consumer Law Center on behalf of its low-income clients, et al. at 2-6 (Oct. 27, 2016) ("NCLC FDIC Third-Party Lending Comments"), *available at* http://www.nclc.org/images/pdf/rulemaking/comments-fdic-3rdparty-lending.pdf.

24 *See, e.g.,* In the Matter of First Bank of Delaware and CompuCredit Corporation, Notice of Charges for an Order to Cease and Desist and for Restitution, Federal Deposit Insurance Corporation, FDIC-07-256b, FDIC-07-257k, *available at* http://www.fdic.gov/news/news/press/2008/FBD_Notice_of_Charges.pdf.

25 *See* NCLC FDIC Third-Party Lending Comments, *supra.*

26 *See* Carolyn Carter et al., National Consumer Law Center, *Installment Loans: Will States Protect Borrowers From A New Wave Of Predatory Lending?* (July 2015) ("NCLC, Installment Loans"), *available at* https://www.nclc.org/images/pdf/pr-reports/report-installment-loans.pdf. While state installment laws are not as robust or uniform as they could be, where they exist they provide protection that does not generally have a counterpart at the federal level.

directly aimed at protecting consumers who are harmed by unfair fees, abusive lending practices, or other problematic practices that do not endanger the bank's bottom line. Mistreatment of consumers certainly can cause safety and soundness problems, but bank regulators can be insensitive to consumer protection issues when practices appear lucrative. The failure of safety and soundness regulation as a means of consumer protection was a primary cause of the mortgage crisis and the reason for creation of the Consumer Financial Protection Bureau (CFPB).

Moreover, a safety and soundness regime applied to an entity that does not hold consumer deposits will likely be less rigorous than one aimed at a depository bank. The security of consumer bank deposits is essential. The protection of depositors and of taxpayers creates an urgency to ensure the soundness of depository banks that will not exist for non-depository entities.

Indeed, it may actually be inappropriate for the OCC to protect the safety and soundness of non-depository companies. The OCC should not be picking winners and losers or propping up companies with unsustainable or unfair business models. Fintechs are more likely than banks to have mono-line, or nearly mono-line, business models that focus on a single product. If that product fails, the entity itself may well fail – as it should, if the company is built on a foundation of consumer exploitation. Thus, safety and soundness regulation is in a sense meaningless in this context.

For example, before "fintech" was a word, a company called Tandem Money launched an "innovative" prepaid-card based credit/savings product that purported to help wean consumers off of payday loans and into savings. But the savings feature turned out to be sugar coating on 300% payday loans; the savings account triggered a $5/month inactivity fee if the consumer did not keep borrowing or saving. The company went out of business after investors pulled out following OCC action against the issuing bank arising out of partnerships with payday lenders.[27]

In the Tandem Money case, the OCC's action did not threaten the safety and soundness of the bank, but it clearly undermined the viability of Tandem Money. We fear that the agency could be reluctant to take strong action if a fintech company might collapse as a result. The OCC's focus on encouraging innovation, and the reputation it has staked on chartering fintech companies, could lead it to be overly protective of fintech entities, and unwilling to take aggressive action that could threaten their safety and soundness. A focus on profits and preserving fee income often comes at the expense of consumers. This is exactly what happened in the lead-up to the mortgage crisis.

Detecting potentially problematic practices through the allure of fintech innovations can be difficult. LendUp is a case in point. LendUp had received a considerable amount of positive press in the fintech world – despite the 333.71% interest rate[28] it charges for payday loans.[29] Accolades included "bringing a new level of innovation and transparency to an industry that desperately needs

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27 *See* Press Release, National Consumer Law Center, Prepaid Card Payday Loan/Savings Product Folds: Tandem Money Investors Pull Out Due to Regulatory Concerns (Nov. 9, 2012), *available at* http://www.nclc.org/images/pdf/pr-reports/pr-tandem-money.pdf.

28 *See* https://www.lendup.com/rates-and-notices (rate for a 14-day loan).

29 *See* https://www.lendup.com/press.

disruption"[30] and "The World's Top 10 most Innovate Companies in 2015 in Personal Finance."[31] But earlier this year, LendUp paid $3.63 million to the CFPB[32] and $2.7 million to the State of California[33] to settle claims that it mislead consumers, charged fees that are unlawful under California law, and engaged in other state law lending violations.

The OCC recognizes that not all "innovations" are positive. Most everyone now realizes that the "innovations" of exploding adjustable rate mortgages and other practices that led up to the mortgage crisis were a disaster. But this agreement is only in hindsight. The OCC and its sister federal regulators did not share this view before the crisis, and were dismissive of our organizations' concerns about dangerous subprime mortgage lending.

An affinity and protectiveness towards "innovative" new products could lead the OCC to underestimate consumer protection concerns – making it all the more important that state eyes remain on these entities as well. While we expect that the OCC will attempt to balance consumer protection, innovation and safety and soundness, the agency may be attempting to serve too many masters. Particularly given the emphasis that the OCC is placing on "encouraging" innovation, the OCC's oversight role does not justify removing state regulators, enforcers, and state consumer protection laws from the scene.

2.3. Oversight by the CFPB and the FTC Will Not Address Shortcomings in Supervision by the OCC.

Both the FTC and the CFPB play important roles in ensuring consumer protection. The FTC has taken a number of actions to protect consumers from problems caused by fintech companies, and the CFPB was created in order to remedy weaknesses in the bank regulators' consumer protection efforts. But neither the FTC nor the CFPB will be able to fill the void that would be created by giving fintechs a national bank charter that would preempt state laws and displace state supervision. The issuance of a national bank charter would likely deprive the FTC of jurisdiction over fintech companies. The CFPB's authority is incomplete, and its commitment to vigorous consumer protection could wane. Thus, a state oversight role over fintechs and other nonbank companies remains critically important to protecting consumers.

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30 Leena Rao, *LendUp Raises $14M From Google Ventures, Data Collective To Disrupt Payday Lending* (Nov. 12, 2013), *available at* https://techcrunch.com/2013/11/12/lendup-raises-14m-from-google-ventures-data-collective-to-disrupt-payday-lending/.

31 Fast Company, *The World's Top 10 Most Innovative Companies of 2015 in Personal Finance* (Feb. 9, 2015) ("For recasting the $49 billion payday loan business as an opportunity to turn high-risk clients into near-prime borrowers."), *available at* https://www.fastcompany.com/3041660/most-innovative-companies-2015/the-worlds-top-10-most-innovative-companies-of-2015-in-person.

32 *See* Press Release, Consumer Fin. Prot. Bureau, CFPB Orders LendUp to Pay $3.63 Million for Failing to Deliver Promised Benefits: Online Lender Did Not Help Consumers Build Credit or Access Cheaper Loans, As It Claimed (Sept. 27, 2016), *available at* http://www.consumerfinance.gov/about-us/newsroom/lendup-enforcement-action/.

33 *See* Press Release, California Dep't of Business Oversight, CA DBO Announces $2.7 Million Settlement with LendUp to Redress Widespread Violations of Payday, Installment Loan Laws: Firm Charged Thousands of Borrowers Unlawful Fees and Rates (Sept. 27, 2016), *available at* http://www.dbo.ca.gov/Press/press_releases/2016/LendUp%20Settlement%20Release%2009-26-16.pdf.

The FTC does not have jurisdiction over national banks.[34] Thus, declaring fintech companies to be national banks will likely preclude the FTC from preventing fintech companies from engaging in unfair or deceptive practices in violation of the FTC Act.

This would be unfortunate, because the FTC has played an important role in monitoring the fintech world and taking enforcement action when warranted. The FTC has taken action against Amazon,[35] Google,[36] Apple,[37] bitcoin operations,[38] and mobile apps,[39] among others. The FTC would likely be powerless to act against a fintech company that held a national bank charter.

The FTC's role in preventing unfair and deceptive practices is especially important in protecting small businesses, as the CFPB does not have jurisdiction to protect businesses, and most consumer protection laws do not apply to businesses. The FTC has taken action to protect businesses from deceptive debt collection activities,[40] unauthorized charges,[41] and merchant account

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34 15 U.S.C. §§ 45(a)(2), 57a(f)(2)(A) (defining "banks" to include "national banks").

35 FTC, Press Release, Federal Court Finds Amazon Liable for Billing Parents for Children's Unauthorized In-App Charges (April 27, 2016), https://www.ftc.gov/news-events/press-releases/2016/04/federal-court-finds-amazon-liable-billing-parents-childrens.

36 FTC, Press Release, Google to Refund Consumers at Least $19 Million to Settle FTC Complaint It Unlawfully Billed Parents for Children's Unauthorized In-App Charges (September 4, 2014), https://www.ftc.gov/news-events/press-releases/2014/09/google-refund-consumers-least-19-million-settle-ftc-complaint-it.

37 FTC, Apple Inc. Will Provide Full Consumer Refunds of At Least $32.5 Million to Settle FTC Complaint It Charged for Kids' In-App Purchases Without Parental Consent (January 15, 2014), https://www.ftc.gov/news-events/press-releases/2014/01/apple-inc-will-provide-full-consumer-refunds-least-325-million.

38 FTC, Press Release, Operators of Bitcoin Mining Operation Butterfly Labs Agree to Settle FTC Charges They Deceived Consumers (February 18, 2016), https://www.ftc.gov/news-events/press-releases/2016/02/operators-bitcoin-mining-operation-butterfly-labs-agree-settle.

39 FTC, Press Release, Marketers of Criminal Background Screening ReportsTo Settle FTC Charges They Violated Fair Credit Reporting Act (January 10, 2013), https://www.ftc.gov/news-events/press-releases/2013/01/marketers-criminal-background-screening-reportsto-settle-ftc; *See also* FTC, Press Release, Warns Marketers That Mobile Apps May Violate Fair Credit Reporting Act (February 7, 2012), https://www.ftc.gov/news-events/press-releases/2012/02/ftc-warns-marketers-mobile-apps-may-violate-fair-credit-reporting.

40 *See* FTC, Press Release, FTC Settlement Obtains Permanent Ban Against Abusive Debt Collection Operation (Jan. 17, 2013), *available at* https://www.ftc.gov/news-events/press-releases/2013/01/ftc-settlement-obtains-permanent-ban-against-abusive-debt; Press Release, Fed. Trade Comm'n, Court Prohibits Finance Company From Unfair and Deceptive Collection Tactics (Nov. 7, 2008), *available at* https://www.ftc.gov/news-events/press-releases/2013/01/ftc-settlement-obtains-permanent-ban-against-abusive-debt.

41 *See* Press Release, Fed. Trade Comm'n, FTC Asks Court to Shut Down $70 Million Cramming Operation (Jan. 22, 2013), *available at* https://www.ftc.gov/news-events/press-releases/2013/01/ftc-asks-court-shut-down-70-million-cramming-operation; Press Release, Fed. Trade Comm'n, At FTC's Request, Court Permanently Shuts Down Massive Cramming Operation; Orders Defendants to Refund Almost $38 Million in Unauthorized Charges Placed on Consumers' Phone Bills (Sept. 30, 2010), *available at* https://www.ftc.gov/news-events/press-releases/2010/09/ftcs-request-court-permanently-shuts-down-massive-cramming; Press Release, Fed. Trade Comm'n, Operator Who Crammed Unauthorized Charges for Web Site Services onto Phone Bills Ordered to Pay $4.1 Million over FTC Charges (Jun. 4, 2008), *available at* https://www.ftc.gov/news-events/press-releases/2008/06/operator-who-crammed-unauthorized-charges-web-site-services-phone.

and payment processing abuses,[42] among others. Thus, giving a company a national bank charter and depriving the FTC of jurisdiction could weaken protection of small businesses.

The CFPB will continue to have authority over fintech companies, at least with respect to their consumer financial products, even if they become special purpose national banks. But the existence of the CFPB does not make up for the preemption of state consumer protection laws and of state oversight.

The CFPB does not have the authority to cap interest rates, which considerably weakens its ability to protect consumers from dangerous high-rate lending. The CFPB's proposed payday loan rules are far weaker than the state laws that cap interest rates.[43] The CFPB itself has recognized that "the fee and interest rate caps in these States [that cap rates below payday loan rates] would provide greater consumer protections than … the requirements of the proposed [payday loan] rule."[44] As a result, even after the payday loan rules are finalized, ensuring compliance with federal law will not be enough to protect consumers from harmful, damaging credit. State interest rate caps will continue to play a vital role in protecting consumers from predatory lending.

Moreover, it is unclear whether the CFPB will consistently be a vigorous protector of consumers. Many in Congress are calling for changes that would weaken the agency and give industry lobbyists and their congressional allies more power to stop consumer protection rules or enforcement actions. Some potential candidates to be the next director of the CFPB have focused more on eliminating regulations and giving industries a free hand than on protecting consumers.

Given the presidential power to appoint the director of both the OCC and the CFPB when the directors' terms expire, a pendulum swing away from consumer protection and towards deregulation is likely to happen at both agencies at the same time. Thus, the FTC will be off the scene, and the CFPB cannot be counted on to make up for any lapses in the OCC's protection of consumers.

2.4. State Regulators and State Attorneys General Play an Essential Role in Protecting Consumers, Especially in Emerging Markets.

The oversight of state regulators and state attorney general offices is critical to protecting consumers. Problems often start small, and states can be quicker to react than a federal agency.

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[42] *See* Press Release, Fed. Trade Comm'n, Marketers Agree to Settle FTC Charges They Deceived Small Businesses Into Buying Credit/Debit Card Processing Services (Oct. 27, 2014), *available at* https://www.ftc.gov/news-events/press-releases/2014/10/marketers-agree-settle-ftc-charges-they-deceived-small-businesses; Press Release, Fed. Trade Comm'n, Defendants Agree to $26 Million Judgment to Settle FTC Charges for Deceiving Merchants in Debt/Credit Card Processing Scheme, (May 15, 2008), *available at* https://www.ftc.gov/news-events/press-releases/2008/05/defendants-agree-26-million-judgment-settle-ftc-charges-deceiving; Press Release, Fed. Trade Comm'n, Federal Trade Commission Garners $23.5 Million in Settlement of Certified Merchant Services Case (Jan. 15, 2004), *available at* https://www.ftc.gov/news-events/press-releases/2004/01/federal-trade-commission-garners-235-million-settlement-certified.

[43] *See, e.g.*, Comment Letter from New York Re: Proposed rulemaking on payday, auto title, and certain high-cost installment loans Docket number CFPB-2016-0025 or RIN 3170-AA40 (Oct. 7, 2016), *available at* http://www.neweconomynyc.org/wp-content/uploads/2016/10/2016-10-7-Sign-on-Letter-from-NY-FINAL.pdf.

[44] 81 Fed. Reg. 47903 (July 22, 2016).

With new business models, where the problems may not be immediately apparent, more eyes are always helpful. Yet applying the national bank preemption regime to nonbank fintechs will weaken state oversight.

Many "fintechs" are relatively new start-up companies. Even those that have been around for several years may not have been through a full business cycle and have evolving business models that have not been fully tested. As new companies develop new ways of doing things, problems with their models may not be instantaneously obvious. It is better for these companies to start small, with close oversight from a few states, rather than immediately rushing them out nationwide. A risky, untested business model is the last one that should benefit from federal preemption.

Even in more established markets, states have often been faster than federal agencies to take action when problematic practices arise. Major multi-state enforcement actions were launched against Household, Ameriquest and Countrywide long before federal agencies began taking action against subprime mortgage lending. State regulators took more than 7,000 mortgage enforcement actions in 2008 alone.[45] At the same time, because of the OCC's broad preemption regulations, many subprime lenders were banks or bank subsidiaries out of the reach of states.[46] States were also the first to address widespread mortgage servicing and robosign problems.[47]

States have also played an important role in addressing problems at other financial services companies, including credit reporting agencies,[48] retail lenders,[49] student loans,[50] and debt collectors,[51] even though both the CFPB and FTC have authority in those areas. State and local scrutiny of the fintech lender LendUp and of Wells Fargo Bank may have been what prompted federal action.

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[45] *See* Mark Pearce, *Viewpoint: Far From Blame, States Deserve Vital Reg Role*, American Banker, Aug. 26, 2009. (Mark Pearce, was North Carolina's deputy commissioner of banks and the president of the American Association of Residential Mortgage Regulators, and is now Director of the FDIC's Division of Depositor and Consumer Protection.)

[46] *See* Press Release, National Consumer Law Center, NCLC White Paper: Restoring the Role of States in Protecting Consumers is Vital to Financial Regulatory Reform (Sept. 16, 2009), *available at* http://www.nclc.org/images/pdf/preemption/pr-restore-the-role-of-states-2009.pdf.

[47] *See* Press Release, U.S. Dep't of Justice, Federal Government and State Attorneys General Reach $25 Billion Agreement with Five Largest Mortgage Servicers to Address Mortgage Loan Servicing and Foreclosure Abuses—$25 Billion Agreement Provides Homeowner Relief & New Protections, Stops Abuses (Feb. 9, 2012), *available at* https://www.justice.gov/opa/pr/federal-government-and-state-attorneys-general-reach-25-billion-agreement-five-largest.

[48] Jonathan Stempel, *Multi-state accord to aid consumers with credit report errors*, Reuters, May 20, 2015, *available at* http://www.reuters.com/article/us-consumers-credit-settlement-idUSKBN0O52JH20150520.

[49] *See* Press Release, Office of Attorney General of Georgia, Attorney General Sam Olens Announces $135.9 Million Multi-State Settlement with USA Discounters (Sept. 30, 2016), *available at* http://law.ga.gov/press-releases/2016-09-30/attorney-general-sam-olens-announces-1359-million-multi-state-settlement-0.

[50] Danielle Douglas-Gabriel, *ACS's $2.4 million settlement in Massachusetts highlights problems in student loan servicing*, Washington Post, Nov. 22, 2016, available at https://www.washingtonpost.com/news/grade-point/wp/2016/11/22/acss-2-4-million-settlement-in-massachusetts-highlights-problems-in-student-loan-servicing/?utm_term=.89fc86276ed5.

[51] Tom Carter, Fed. Trade Comm'n, *Partners bring more than 100 debt collection enforcement actions* (Nov. 4, 2015), *available at* https://www.consumer.ftc.gov/blog/partners-bring-more-100-debt-collection-enforcement-actions.

By replacing state licenses with a federal charter, the OCC would deprive states of the right to examine these entities and to request information from them. It is often in the examination process that problems are uncovered. For example, it was in the course of examining the California-based fintech LendUp that the State of California's DBO discovered the violations discussed in Section 2.2. We suspect that DBO's oversight contributed to the CFPB's coordinated enforcement action.

If the OCC granted national bank charters to fintechs, states would still have the right to bring enforcement actions based on federal law (where authorized) or on non-preempted state laws. But states would not have the authority to investigate potential violations.[52] Without the ability to conduct examinations or request information, it can be nearly impossible for an enforcement agency to detect or investigate problems at the level that justifies an enforcement action.

States might even have difficulty enforcing laws against unfair or deceptive acts and practices (UDAP), despite the OCC's recent reaffirmation[53] of its longstanding position that UDAP laws are not preempted.[54] As discussed in Section 3, at times the OCC has acted as a staunch defender of abusive banks against consumers. The OCC's position that certain unfair practices are permissible or are immune from state law has on occasion trumped evidence of unfair practices.[55]

Granting a charter to fintech companies would also weaken the authority that state attorneys general currently have to enforce the ban on unfair, deceptive and abusive acts and practices (UDAAP) in the Dodd-Frank Act. If fintechs become national banks, states would be allowed to enforce specific CFPB regulations but not the broad Dodd-Frank ban on UDAAPs that they can currently enforce against nonbank companies.[56] States' federal UDAAP enforcement authority is especially important in states where state UDAP authority does not cover credit.

The current Wells Fargo scandal, involving the creation of 2 million fake, unauthorized accounts to meet sales quotas, also shows the important role that state regulators play and why OCC supervision is not enough to protect consumers. In March 2012, the OCC received a "small number" of complaints alleging improper sales practices at Wells Fargo, which were forwarded to

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52 Under the Supreme Court's decision in *Cuomo v. Clearing House Association*, 129 S. Ct. 2710 (2009), state attorneys general can enforce nonpreempted laws against national banks, but they cannot exercise "visitorial" powers. The Court held that the New York Attorney General's letters to banks requesting information about potential fair lending violations were visitorial in nature, not an exercise of law enforcement power, and therefore the letters violated the National Bank Act and the OCC's preemption regulations.
53 Fintech Charter White Paper at 5.
54 *See* Office of the Comptroller of the Currency, Advisory Letter 2002-3, Guidance on Unfair or Deceptive Acts or Practices (Mar. 22, 2002), *available at* 2002 WL 521380 (cautioning banks that they may be subject to laws that prohibit unfair or deceptive acts or practices).
55 *See, e.g.,* Gutierrez v. Wells Fargo Bank, 704 F.3d 712 (9th Cir. 2012) (bank's use of high-to-low posting order as means of maximizing fees for dishonored checks is pricing decision permitted by the OCC, and district court's finding that the calculation method was imposed in bad faith in order to increase overdraft fees and was unfair is preempted); Austin v. Provident Bank, 2005 WL 1785285 (N.D. Miss. July 26, 2005) (predatory lending claims based on overpriced loans, inability to repay, and charging excessive and fraudulent fees are preempted, as these claims relate to "terms of credit" and "disclosure").
56 12 U.S.C. § 5552(a)(2).

OCC supervision staff but apparently resulted in no action.[57] Nearly two years later, the Los Angeles Times exposed the breadth of the fraudulent practices.[58] Even then, a series of annual OCC examinations, and repeated findings of problems at the bank, do not appear to have led to significant repercussions[59] until 2016— after the Los Angeles City Attorney filed suit.[60]

While Wells Fargo's status as a national bank did not prevent the City Attorney from taking action, that case is the exception that proves the rule. The case was a very unusual one, with blatant fraud exposed in an extensive investigative news article. Most bank misconduct is not so obviously illegal, and the evidence is not laid out so clearly. Granting fintech companies a national bank charter would hamstring state and local enforcement authorities from investigating and protecting consumers, even when the OCC does not do so.

3. Preemption of State Laws Presently Applicable to Fintechs and Other Chartered Entities Would Seriously Harm Consumers.

3.1. An OCC Charter Will Wipe out Many State Consumer Protections.

Our primary concern about the creation of a new class of "national bank" charters is that the OCC intends to give chartered entities the same ability to ignore state laws and escape state oversight that traditional national banks have. The OCC's preemption of state law primarily comes from regulations it has issued over the last two decades. In additiion, the laws of many states have added to the preemptive effect of the OCC's regulations by codifying federal preemption and exempting banks from their laws regulating financial products. Yet these state exemptions were not intended to apply to nonbank entities of the type that the OCC is now considering chartering.

As discussed in section 1.2, the Dodd-Frank Act prevents the OCC from embarking on a new wave of preemption without following the Act's case-by-case preemption procedures. Despite the clear mandates of Congress, the OCC's intention of granting full preemption status to chartered entities without any new rulemaking is clear:

> A special purpose national bank also has the same status and attributes under federal law as a full-service national bank. State law applies to a special purpose national bank in the same way and to the same extent as it applies to a full-service national bank. Limits on state visitorial authority also apply in the same way. A special purpose national bank would look to the relevant statutes (including the preemption provisions added to the National Bank Act by Dodd-Frank), regulations (including

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[57] Testimony of Thomas J. Curry, Comptroller of the Currency, Before the Committee on Banking, Housing, and Urban Affairs, United States Senate at 3 (Sept. 20, 2016) [hereinafter Curry Wells Fargo Testimony], *available at* http://www.banking.senate.gov/public/_cache/files/b536fe39-6a01-423c-b2a9-bf47e2617af9/6A84E268645FE4120535CAE43C198DBC.092016-curry-testimony.pdf.

[58] E. Scott Reckard, *Wells Fargo's pressure-cooker sales culture comes at a cost*, Los Angeles Times, Dec. 21, 2013, *available at* http://www.latimes.com/business/la-fi-wells-fargo-sale-pressure-20131222-story.html.

[59] *Id.*

[60] *See* Office of the Los Angeles City Attorney, Protecting Consumers – Wells Fargo (documenting May 2015 lawsuit filed by City Attorney), *available at* www.lacityattorney.org/allegations-against-wells-fargo. *See also* Curry Wells Fargo Testimony at 3 - 8.

the OCC's preemption regulations), and federal judicial precedent to determine if or how state law applies.[61]

In its white paper, the OCC mentions only one type of state law to be preempted—licensing laws—while providing a much longer list of examples of state laws that are not preempted as to national banks.[62] But the reality is that the National Bank Act and the OCC's regulations preempt wide swaths of critical state consumer protection laws.

At the top of the list of critical state consumer protection laws are interest rate caps. The National Bank Act allows a national bank to ignore all state interest rate and fee caps on loans as long as it locates its nominal headquarters in a state that does not cap those rates or fees.

Additionally, the OCC's preemption regulations broadly preempt most state laws that govern lending, deposits, and other banking activities. For example, the OCC's non-mortgage lending rule[63] provides that a national bank may ignore state-law limitations concerning almost everything to do with lending, most particularly—

- The terms of credit, including the schedule for repayment of principal and interest, amortization of loans, balance, payments due, minimum payments, or term to maturity of the loan, including the ability to call the loan due and payable upon the passage of time or a specified event external to the loan.

- Loan-to value ratios.

For real estate secured loans,[64] the preemption rules provide that national banks may exercise their lending powers without regard to state-law limitations concerning a similar list of topics. Additionally, the regulation preempts critical consumer protections in state laws relating to:

- Processing, origination, servicing, sale or purchase of, investment in, or participation in mortgages.

The rule about deposit taking[65] -- which might cover a wide range of mobile, prepaid and stored value accounts as well as payments services – preempts state laws relating to almost all aspects of deposit taking.

All three of these preemption rules (non-mortgage lending, real estate lending, and deposit taking)[66] provide that state laws on a list of subjects[67] are *not* preempted "to the extent consistent

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[61] Fintech Charter White Paper at 5.
[62] *Id.* ("Examples of state laws that *would* generally apply to national banks include state laws on anti-discrimination, fair lending, debt collection, taxation, zoning, criminal laws, and torts. In addition, any other state laws that only incidentally affect national banks' exercise of their federally authorized powers to lend, take deposits, and engage in other federally authorized activities are not preempted. Moreover, the OCC has taken the position that state laws aimed at unfair or deceptive treatment of customers apply to national banks.") (emphasis in original).
[63] 12 C.F.R. § 7.4008.
[64] 12 C.F.R. § 34.4.
[65] 12 C.F.R. § 7.4007.

with" the *Barnett Bank* decision. But the clear intent and impact of the rules is to preempt many if not all lending-specific and banking-specific state laws.

The preempted state laws provide critically important protections. Among other areas, some state lending laws limit origination fees, late fees, balloon payments, negative amortization, excessively long terms, loan flipping, prepayment penalties, lending without regard to repayment ability, sale of credit insurance and other low-value add-ons, and permissible forms of collateral.[68] These are critical laws and rules providing substantial protections for consumers with generally no counterpart in federal law.

Other OCC rules preempt important state consumer protections as well:

- The rule on adjustable rate mortgages (ARM) states that national banks may make, sell, purchase, participate in, or otherwise deal in ARM loans and interests therein without regard to any state law limitations on those activities.[69]

- The rule on debt cancellation contracts and debt suspension agreements provides that those agreements are not governed by state law.[70]

- Other OCC rules on non-interest charges and fees[71] and furnishing products and services by electronic means[72] also indicate that state laws may be preempted.

Notably, the OCC has stated that, while its paper focuses "on fintech companies in particular, there is no legal limitation on the type of 'special purpose' for which a national bank charter may be granted…."[73] Thus, a broad range of companies engaged in activities with some marginal relationship to lending, payments or deposit-taking could be able to ignore state laws if given a national bank charter. The result would be great harm to consumers, as demonstrated by the history of preemption of consumer protection laws for national banks.

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66 12 C.F.R. §§ 7.4007(c), 7.4008(e), 34.4(b).
67 The subjects are contracts, torts, criminal law, rights to collect debts, acquisition and transfer of property, taxation, zoning, and any other law that the OCC determines to meet the same criteria.
68 *See* Carolyn Carter et al., National Consumer Law Center, Installment Loans: Will States Protect Borrowers From A New Wave Of Predatory Lending? (July 2015) [hereinafter NCLC, Installment Loans], *available at* https://www.nclc.org/images/pdf/pr-reports/report-installment-loans.pdf.
69 12 C.F.R. § 34.21(a).
70 12 C.F.R. § 37.1(c).
71 12 C.F.R. § 7.4002(d) ("The OCC applies preemption principles derived from the United States Constitution, as interpreted through judicial precedent, when determining whether State laws apply that purport to limit or prohibit charges and fees described in this section.").
72 12 C.F.R. § 7.5002(c) ("As a general rule, and except as provided by Federal law, State law is not applicable to a national bank's conduct of an authorized activity through electronic means or facilities if the State law, as applied to the activity, would be preempted pursuant to traditional principles of Federal preemption derived from the Supremacy Clause of the U.S. Constitution and applicable judicial precedent. Accordingly, State laws that stand as an obstacle to the ability of national banks to exercise uniformly their Federally authorized powers through electronic means or facilities, are not applicable to national banks.").
73 Fintech Charter White Paper at 3.

3.2. Preemption of State Caps on Interest and Fees Has Led to Abuses in Non-Mortgage Lending.

State interest rate caps provide essential consumer protection from predatory lending. While some states have gaps that permit abusive short-term payday loans, all but a few states cap interest rates for non-bank installment loans to consumers. Many states cap interest rates for small installment loans at 36% or less, with rates often lower, in the 18% to 24% range, for larger loans.[74]

Interest rate caps are the simplest, most effective way to protect consumers from unaffordable loans and to align the interests of lenders and borrowers.[75] In the absence of federal usury caps for most forms of lending,[76] state interest rate caps are critical.

Until 1978, national banks were limited by state interest rate caps or the alternate federal rate. However, the Supreme Court decision in *Marquette Nat'l Bank v. First of Omaha Service Corp.*[77] permitted banks to "export" their home state interest rates to any other part of the country. National banks promptly relocated to states that repealed their interest rate caps. The problem was compounded in 1996 when the Supreme Court, in *Smiley v. Citibank,*[78] held that the NBA preempts state credit card late fee restrictions, and upheld an OCC regulation that deemed a long list of fees to be "interest" immune from state caps.

These actions preempting state laws that limit interest rates and fees directly led to abuses by national banks. In some cases, the abuses have been curtailed; in other areas, serious problems remain—costing American consumers billions of dollars every year.

Credit Cards. Credit card interest rates increased after the 1978 *Marquette* decision and fees exploded after the 1996 *Smiley* decision, as shown by an analysis by the Federal Reserve.[79]

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[74] S*ee* Carolyn Carter et al., National Consumer Law Center, Installment Loans: Will States Protect Borrowers From A New Wave Of Predatory Lending? (July 2015), *available at* https://www.nclc.org/images/pdf/pr-reports/report-installment-loans.pdf. Since the publication of this report, South Dakota voters approved an initiative to impose a 36% interest rate cap on consumer lending.

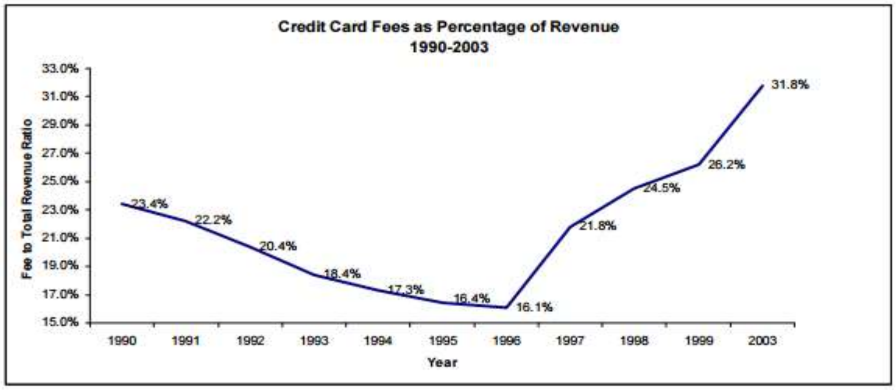
[75] *See* National Consumer Law Center, *Misaligned Incentives: Why High-rate Installment Lenders Want Borrowers Who Will Default* (July 2016) ("NCLC, Misaligned Incentives), *available at* http://www.nclc.org/images/pdf/high_cost_small_loans/payday_loans/report-misaligned-incentives.pdf.

[76] Federal law caps interest rates for loans to servicemembers and their dependents, and loans made by federal credit unions. In theory, the National Bank Act also provides a usury cap, but states avoid any cap by locating in states from which they can export credit at any rate they choose.

[77] 439 U.S. 299 (1978).

[78] 517 U.S. 735 (1996).

[79] Mark Furletti, Payment Cards Center, *The Debate Over the National Bank Act and the Preemption of State Efforts to Regulate Credit Cards* at 21-24, 38 (Mar. 2004). The chart above reflects updated information provided by Mr. Furletti at the request of the Center for Responsible Lending in an e-mail on March 5, 2003 that is on file with CRL.



Not only did interest rates and fees rise, but national banks embarked on a binge of abusive practices.[80] They imposed retroactive interest rate increases on existing balances, often triggered by events unrelated to the credit cards. Many national banks also manipulated consumers into triggering over-limit fees on approved purchases and into paying late fees despite payments made the day they were due.

Despite the fact that these problems were well known, OCC oversight did not stop these abuses by the banks it regulated. It took Congress to pass the Credit CARD Act to restrain out of control practices that were so out of control that even banks will today quietly admit that they needed to be reined in.[81]

Overdraft Fees. The preemption of state laws limiting fees is also the direct cause of the explosion of manipulative practices to trick consumers into paying overdraft fees. Following the OCC's 2000 preemption regulations, banks both increased the amount of their overdraft fees and began making it easier for consumers to trigger them.

[80] *See, e.g.,* Testimony of Alys Cohen, National Consumer Law Center, Before The Committee On Homeland Security And Governmental Affairs Permanent Subcommittee On Investigations Regarding Credit Card Practices: Fees, Interest Rates, and Grace Periods (March 7, 2007), www.hsgac.senate.gov/download/ws-alys-cohen-march-7-07.

[81] *See* CFPB, CARD Act factsheet (Feb. 2011), http://www.consumerfinance.gov/credit-cards/credit-card-act/feb2011-factsheet/.

Overdraft fees charged to consumers shot up from $16.50 in 1997 to $29 in 2007.[82] Today, most large banks charge $35 overdraft fees. Banks also began authorizing overdrawn ATM and debit card transactions, which they had previously denied, so that they could charge overdraft fees. As recently as 2004, only 20 percent of institutions approved debit card transactions when the account lacked sufficient funds; by 2009, 81 percent of banks surveyed by the FDIC allowed debit card and ATM overdrafts, charging a fee for each overdraft transaction.[83]

Overdraft revenue rose from $20.5 billion in 2000 to $37.1 in 2009, far outpacing inflation.[84] In 2009, the Federal Reserve Board took a modest step by requiring consumers to "opt in" to overdrawn debt and ATM transactions before they can be charged a fee. The rule imposed a hit on overdraft revenue, but banks found a way to deceive many consumers into opting in,[85] preserving the bulk of the revenue. Overdraft fee revenue continues to recover and to climb; revenue increased 2.1% in 2015.[86] The nearly $700 million increase over 2014 was the biggest in five years.[87]

The OCC observed and initially expressed concern about the banks' overdraft fee practices. In 2001, the OCC refused to give a bank a program evaluation (comfort letter) in connection with an overdraft program that a third party vendor was marketing to depository institutions. Instead, the OCC noted "the complete lack of consumer safeguards built into the program," including the lack of limits on the numbers of fees charged per month; the similarities between overdraft fees and other "high interest rate credit;" and the lack of efforts by banks to identify customers incurring

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[82] Testimony of Michael Calhoun, Center for Responsible Lending, Before the U.S. House of Representatives Committee on Financial Services, "Perspectives on the Consumer Financial Protection Agency" at 32 n.34 (Sept. 30, 2009) (citing Federal Reserve Board research), *available at* http://financialservices.house.gov/media/file/hearings/111/calhoun_testimony.pdf.
[83] *Id.* at 11 n.42 (citing Mark Fusaro, *Are "Bounced Check Loans" Really Loans?* at 6 n.4 (Feb. 2007)) (noting that 20% of institutions in June 2004 were applying "bounce protection" to debit cards or ATM transactions)) and n.43 (citing FDIC Study of Bank Overdraft Programs at iv (Nov. 2008)).
[84] See Moebs Services, Inc., Overdraft Revenue Starts Slow Climb (Mar. 15, 2016), *available at* http://moebs-com.deskpal.net/Portals/0/pdf/Press%20Releases/160315%20Moebs%20PR%20YE%202015%20OD%20Revenues%20-%20v1.8%20Press%20Only%20Final.pdf. Inflation would have brought the $20.5 billion in revenue in 2000 up to only $25.5 billion in 2009.
[85] *See, e.g.,* Leslie Parrish, Center for Responsible Lending, Banks Target, Mislead Consumers As Overdraft Deadline Nears (Aug. 5, 2010), http://www.responsiblelending.org/overdraft-loans/research-analysis/Banks-Target-And-Mislead-Consumers-As-Overdraft-Dateline-Nears.pdf; Pew Charitable Trusts, Overdrawn: Consumer Experiences with Overdraft Survey shows checking account holders still confused, unhappy with practices and fees (June 26, 2014) (more than half of those who incurred a debit card overdraft penalty fee do not believe they ever opted in to the service).
[86] *Id.*
[87] *Id.*

numerous overdraft fees and meet their needs in a more economical way." But, despite recognizing the consumer protection concerns, the OCC did nothing to rein in these practices, which continued to grow.

The CFPB has expressed concern about overdraft fee practices and indicated that it plans to issue a new rule. But the fate of that rule is uncertain in light of potential congressional attacks on the CFPB and a new director. In the meantime, states can do nothing to rein in overdraft fee abuses.

Bank Payday Loans (aka Deposit Advance Products). Preemption of state interest rate caps also permitted banks to begin making 150% to 650% payday loans, even in states that prohibit payday lending.[88] Bank payday loans began sometime before 2005 and continued until about 2014, after the current OCC leadership enacted strong guidance warning banks about the abusive nature of these loans.

We assume that the current leadership at the OCC does not intend to grant a charter to a high-rate lender and would continue to enforce the deposit advance guidance for any new national banks. But a future OCC might not be so vigilant, just as the agency in the past ignored consumer complaints about bank payday loans. Anything the OCC puts in place today could be changed, amended or eroded under different leadership.

Unaffordable lending can also emerge in a form where it is not so apparent, as with overdraft loans or with installment loans. Without interest rate caps to enforce, the OCC could struggle to find appropriate tools to restrain high rate lending.[89]

3.3. Preemption Contributed to the Foreclosure Crisis.

One of the most punishing results of the preemption of state laws for national banks and savings institution was the growth in the 1990's of both mortgage and unsecured predatory lending by the subprime industry.[90] The problem of predatory mortgages was first only a serious problem in low- and middle-income communities.[91] When foreclosures from subprime predatory mortgage loans mounted, states began passing laws limiting the activities of mortgage lenders.[92] The response

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[88] *See* National Consumer Law Center, Bank Payday Loans …They're Baaaaaaaack (Jun. 2009), *available at* https://www.nclc.org/images/pdf/banking_and_payment_systems/prepaid_payday_loans.pdf.

[89] The difficulty of using safety and soundness regulation and ability-to-repay guidances to restrain high rate lending is discussed in section 5.1.1.2.

[90] *See, e.g.,* Office of Pol'y Dev. & Research, U.S. Dep't of Hous. & Urb. Dev., Report to Congress on the Root Causes of the Foreclosure Crisis 33 (2010), *available at* www.huduser.org; Lynn Drysdale & Kathleen E. Keest, *The Two-Tiered Consumer Financial Services Marketplace: The Fringe Banking System and its Challenge to Current Thinking About the Role of Usury Laws in Today's Society*, 51 S.C. L. Rev. 589 (2000).

[91] *See, e.g.,* Daniel Immergluck & Marti Wiles, *Two Steps Back: The Dual Mortgage Market, Predatory Lending, and the Undoing of Community Development,* Woodstock Institute (Nov. 1999). There are also concerns that such lending is discriminatory. *See* National Community Reinvestment Coalition, *The Broken Credit System* (2003), *available at* http://www.ncrc.org/ncrcdiscrimstudy.pdf.

[92] *See, e.g.,* N.C. Gen. Stat. § 24.1-1E (1999). Even the credit industry in that state was convinced that re-regulation was necessary to address the escalation of predatory mortgage lending, and the banking industry participated in the passage of the anti- predatory lending bill. *See also* Wei Li & Keith S. Ernst, Center for Responsible Lending, The Best Value in the Subprime Market: State Predatory Lending Reforms (Feb. 23,

of the OCC and other federal regulators was to specifically and deliberately preempt the application of state anti-predatory mortgage lending statutes.[93]

The preemption of state laws exacerbated the problem of predatory lending significantly, causing problem loans to be made more extensively throughout the market, spreading from the subprime market to prime loans in upper-income neighborhoods.[94] A significant portion of dangerous subprime loans were made by entities exempt from state laws, and preemption inhibited states from enacting protections for state-regulated lenders that would face uneven competition from banks.[95] This policy of aggressive preemption of state consumer protections without replacing them with strong, enforceable federal standards led directly to the 2008 economic crisis.[96]

3.4. Preemption of State Laws Governing Debt Cancellation has Harmed Consumers.

As in other areas, the preemption of state laws governing bank debt cancellation products has harmed consumers. Without the protection of state insurance laws, banks have lured consumers into paying for high cost products with little value.

Traditional credit insurance—including credit life, credit disability, credit involuntary unemployment, credit personal property and credit family leave—is regulated by state law or by state insurance departments. These state regulations are necessitated by the universal recognition that credit insurance is not sold in a truly competitive market.[97] Rather, the sale of credit insurance is

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2006) (families that live in states with strong laws get fewer abusive loans, have sufficient access to reasonably priced credit, and pay less for subprime mortgages), *available at* www.responsiblelending.org.

[93] In 2004, the OCC issued two letters addressing questions from the Georgia banking agency regarding the limits of the OCC's determination. OCC Interpretive Letter No. 1000 (Apr. 2, 2004); OCC Interpretive Letter No. 1002 (May 13, 2004). *See also* Salvador v. Bank of Am., 456 B.R. 610 (Bankr. M.D. Ga. 2011) (counseling, anti-churning, and assignee liability provisions of Georgia Fair Lending Act are preempted as to national bank that originated loan); *In re* Hollingworth, 453 B.R. 32 (D. Mass. 2011) (relying on OCC letter to hold that Truth in Lending Act preempts Massachusetts predatory lending law).

[94] *See* Lei Ding et al., *The Impact of Federal Preemption of State Antipredatory Lending Laws on the Foreclosure Crisis*, 31 J. of Pol'y Analysis & Mgmt. 367 (2012).

[95] National Consumer Law Center, *NCLC White Paper: Restoring the Role of States in Protecting Consumers is Vital to Financial Regulatory Reform* (Sept. 16, 2009), http://www.nclc.org/images/pdf/preemption/restore-the-role-of-states-2009.pdf.

[96] *Id. See also* Danyeale L. Hensley, *Section 1044 of Dodd-Frank: When Will State Laws Be Preempted Under the OCC's Revised Regulations?,* 16 N.C. Banking Inst. 161, 162 (Mar. 2012); Arthur E. Wilmarth, Jr.*, The Dodd-Frank Act's Expansion of State Authority to Protect Consumers of Financial Services,* 36 J. Corp. L. 893 (2011); Kurt Eggert, *Foreclosing on the Federal Power Grab: Dodd-Frank, Preemption, and the State Rule in Mortgage Servicing Regulation,* 15 Chap. L. Rev. 171 (2011).

[97] *See* Hearing on Credit Life Insurance Before the Subcomm. on Antitrust, Monopoly and Business Rights of the S. Comm. on the Judiciary, 96th Cong, 1st Sess. 48 (1979) (statement of Robert Sable). *See also* Equity Predators: Stripping, Flipping and Packing Their Way to Profits: Hearing Before the Spec. Comm. on Aging, United States Senate, 105th Cong. 2d Sess., 33–34, Serial No. 105-18 (Mar. 16, 1998) (statement of Jim Dough, former employee of predatory lender); Dobson, Credit Insurance: The Hidden Insurance, 65 Mich. Bar J. 166, 167 (Feb. 1986); College of Bus. Adm., Ohio Univ., Consumer Credit Life and Disability Insurance 7–8 (C. Hubbard ed., 1973); National Ass'n of Ins. Comm'rs, A Background Study of the Regulation of Credit Life and Disability Insurance 3 (1970); Spears v. Colonial Bank of Alabama, 514 So. 2d 814 (Ala. 1987) (car dealer, who received a 50% commission from each premium, earned profits of nearly a quarter million dollars in one year from his insurance sales).

characterized by reverse competition: lenders benefit more from *higher* priced insurance products because the lenders receive higher commissions. This reverse competition drives up prices for consumers.[98]

In the late 1990s, banks began adding an extra contractual provision to their credit agreements in place of credit insurance, called debt protection products. These allowed banks to avoid having to split the premiums with insurance companies, and it removed these provisions from the oversight of—and pesky limitations imposed by—the states.[99]

Debt protection products are independent, add-on products to extensions of credit that modify the credit contract such that the borrower's obligation to pay will be cancelled or suspended if certain events occur, such as the death, disability or involuntary unemployment of the borrower.[100] A debt protection contractual provision functions much like traditional credit insurance:[101] for a fee the lender agrees to cancel payment on the consumer's loan or forgive or defer monthly payments for some period of time in the event of death, serious illness or injury, or unemployment. The fee for debt protection is usually paid as a monthly charge.

The debt protection market is almost completely noncompetitive. Consumers applying for a particular credit card cannot select a debt protection product other than the one offered by the card issuer. The products are offered on a take-it-or-leave-it basis; despite the fact that they cover a

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98 *See* Letter from Center for Economic Justice & Consumer Federation of America to National Association of Insurance Commissioners (Oct. 13, 2009), *available at* www.cej-online.org (relying on data submitted by insurers to state insurance regulators, countrywide credit insurance loss ratios hovered in the 40% vicinity for a decade); Letter from Center for Economic Justice and Consumer Federation of America,to Senator Dodd et al. (July 29, 2009), *available at* www.consumerfed.org (detailing credit insurance abuses and supporting creation of federal consumer financial protection agency; noting loss ratios in 2008 of 44% for credit life, 38% for credit disability, 13% for credit unemployment, 7.8% for credit property, and 0.2% for credit family leave insurance); The Fact Book of Credit-Related Insurance, 2007 Credit-Related Insurance Experience Data 5 (Nov. 30, 2008) (showing that consumers paid $6.46 billion in 2007 and total premium payments increased by 16% over the previous year); Press Release, Consumer Federation of America and Center for Economic Justice, Credit Insurance Overcharges Hit $2.5 Billion Annually (Nov. 2001), *available at* www.consumerfed.org (in 2000, consumers paid about $6 billion for the traditional credit insurance products). *See also* Mary Griffin & Birny Birnbaum, Consumers Union and the Center for Economic Justice, Credit Insurance: The $2 Billion a Year Rip-Off (Mar. 1999) (from 1995 to 1997, more than $17 billion of credit insurance was sold in the U.S., excluding private mortgage insurance).

99 12 C.F.R. pt. 37 (OCC).

100 *Id. See also* OCC Interpretive Letter No. 903 (Jan. 2001) (stating that debt protection products are part of lending function of national banks); First Nat'l Bank v. Taylor, 907 F.2d 775 (8th Cir. 1990) (state insurance commissioner could not prohibit national bank from entering into debt cancellation agreements because National Bank Act gave national banks "incidental" powers to conduct business; since contracts do not require the bank to take investment risk or to make payment to the borrower's estate, they are not "insurance").

101 U.S. Gov't Accountability Office, Credit Cards: Consumer Costs for Debt Protection Products Can Be Substantial Relative to Benefits But Are Not a Focus of Regulator Oversight, GAO-11-311, at 8 (Mar. 2011) [hereinafter GAO Credit Cards Report], *available at* http://www.gao.gov/new.items/d11311.pdf.

number of events, some of which are not applicable to many consumers, consumers have no power to choose individual plan components.[102]

Consumer advocates cried foul, but the OCC stepped in and protected the banks from state regulation, including limitations on charges and other requirements.[103] Inevitably, abuses followed

Debt protection products have been heavily criticized for being overpriced.[104] For example, a report by the U.S. Government Accountability Office (GAO) found that in 2009 consumers paid approximately $2.4 billion for debt protection products on credit cards,[105] yet cardholders only received twenty-one cents in tangible financial benefits for every dollar spent on debt protection fees,[106] a "loss ratio" of only 21%. In contrast, other insurance products pay out up to 90% of premiums in benefits, according to industry experts.[107] The National Association of Insurance Commissioners' Credit Insurance Model Regulation specifies a minimum loss ratio of 60%[108]—nearly three times the loss ratio of 21% for debt protection products.

A GAO report in 2011 found that credit card lenders kept an astounding 55% of the $2.4 billion in debt protection product fees as pretax earnings—or $1.3 billion as pure profit.[109] Lenders also spent 24% on administrative expenses—that is, they spent more on administrative costs than they paid out in benefits.[110] Thus, debt protection products are extremely profitable,[111] even after the Credit CARD Act took effect.[112]

Debt protection charges can be a significant component of the cost of credit. The GAO report found that the annual cost of these products often exceeded 10% of the cardholder's average

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102 *See* Birny Birnbaum, Center for Economic Justice, et al., Comments to the Consumer Financial Protection Bureau Regarding Information Collection for Report of Terms of Credit Card Plans (Mar. 19, 2012), *available at* www.cej-online.org.
103 12 C.F.R. pt. 37 (OCC).
104 Consumer advocates are not the only ones to question the value of debt protection products. *See* William H. Ryan, Portales Partners, Alliant Data Systems Corp., Mar. 21, 2011 (noting with respect to World Financial Network Bank's debt protection product that "we fail to understand how offering products of questionable value (see details in the lawsuit), especially relative to the price paid by the borrower, will stand the test of time or go unnoticed by regulators.").
105 GAO Credit Cards Report at 29.
106 *Id.*
107 Carter Dougherty, *JP Morgan Debt-Protection Fees May Drop on Consumer Bureau Rules*, Bloomberg News, May 2, 2011 (quoting Edward Graves, Associate Professor of Insurance at the American College in Bryn Mawr, PA).
108 GAO Credit Cards Report at 23.
109 *Id* .
110 *Id.*
111 *See, e.g.,* Andrew Johnson, *Discover Shares Drop on News of FDIC Review*, American Banker, July 1, 2011 (noting that debt protection and other fee-based products generated $412.5 million in income for Discover Financial Services in 2010, up 40% from the previous year).
112 *See* Victoria Finkle and Jeff Horwitz, *Consumer Bureau Threatens Banks; Credit Card Protection Profits*, American Banker, Feb. 6, 2012 (noting that revenue from debt protection took on increased importance after the Credit CARD Act).

monthly balance on a credit card account.[113] Only 5.3% of consumers who bought debt protection and carried a balance on their credit cards received a benefit in 2009.[114]

The story of the preemption of state laws applicable to debt cancellation provisions illustrates just how poorly the OCC's protection of consumers has been when it replaces substantive, specific state limits and rules consumer protections with its own rules.

3.5. Preemption of State Laws May Eliminate the Only Substantive Protections for Small Businesses.

While our organizations primarily work on behalf of consumers, lines are becoming more blurred between consumers and micro-businesses. There is also a growing realization that traditional small businesses need protections of the same type that help consumers.[115]

A recent news story about a fintech lender providing "merchant cash advances" to small businesses highlights our concerns. Fintechs that obtain an OCC charter could facilitate dangerous credit that will be untouchable by state regulators, leaving the businesses themselves with no state tools to fight abusive terms.[116]

Merchant cash advances operate very similarly to payday loans and have similar problems. A lump sum of cash is taken out as an advance on a borrower's future sales. The merchant then pays back this balance in addition to an expensive premium through automatic deductions from the merchant's daily credit card or debit card sales or from its bank account. In one case—

> A provider gave an advance of nearly $24,000 to a business, charging more than $1,100 in fees for things like issuing the advance, risk assessment and processing. To collect its payments, it deducted $499 a day from the business' sales for 76 days.
>
> In total, the borrower paid nearly $37,500 -- paying an effective interest rate of about 346%.[117]

Like payday lenders, providers of merchant cash advances may claim that their loans are short term – and that APRs are irrelevant – when in fact the business model is based on a long term debt trap. Some fintech lenders to small business may even deliberately design their programs to encourage long-term use of these short-term, high cost products. One short-term financing provider, OnDeck Capital, explained to investors in a bond filing: "Seller believes that its marketing strategy, personnel training and the products it offers are designed to foster loan originations to repeat borrowers."[118] Another leading alternative financing provider, RapidAdvance, advertises the

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113 GAO Credit Cards Report at 27.
114 *Id.* at 29.
115 Paulina Gonzalez & Amanda Ballantyne, *Let's prevent a repeat of the mortgage meltdown for small business owners*, The Hill, Aug. 4, 2016, *available at* http://thehill.com/blogs/congress-blog/economy-budget/290394-lets-prevent-a-repeat-of-the-mortgage-meltdown-for-small.
116 Octavio Blanco, *Controversial cash advances come at a high cost to small businesses,* CNN Money, Dec. 1, 2016, *available at* http://money.cnn.com/2016/12/01/news/economy/merchant-cash-advance/.
117 *Id.*
118 OnDeck Capital Preliminary Offering Memorandum 42, 48 (Apr. 2014).

long-term use of their short-term product as a sign of borrower satisfaction: "Approximately 90% of our Merchant Cash Advance clients participate in the program more than once. In fact, the average customer renews about ten times!" the website reads.[119]

Currently, there are some state law protections for small businesses: in some states, interest rate caps apply to small business loans, and some state UDAP laws protect small businesses.[120] States are considering new laws aimed at abuses by fintech lenders and others.[121] States are more likely to adopt these protections than is Congress. But there is virtually nothing at the federal level to protect small businesses from predatory lending, and the state laws that exist will be preempted if fintech lenders obtain national bank charters.

4. If the OCC Goes Forward With New Charters, It Must Establish Meaningful and Enforceable Consumer Protections.

In its white paper, the OCC states that it will rigorously enforce applicable consumer protection laws. But as described above, if state laws are preempted, in many critical areas there are no comparable federal laws to replace them. The OCC also emphasizes that it will ensure that consumers are treated fairly.[122] These are admirable and important goals. But a commitment to fairness, by itself, is not sufficient to guard consumers from overreaching, predatory, harmful, even abusive financial products.

The history of preemption (including the very recent history) teaches us that consumers are not adequately protected from harmful financial products and activities when preempted state protections are not replaced by stronger federal standards and when oversight is left primarily to one prudential federal regulator. Preemption can harm consumers even when the federal regulator is led by forward-thinking people who understand and are sympathetic to the needs of consumers.

If the OCC insists on moving forward with a new special purpose charter, it must adopt meaningful safeguards that raise the consumer protection floor for all states, rather than simply allowing companies to avoid strong state laws and oversight. Effective safeguards include two distinct parts: clear and specific rules to prevent harmful activity on the front end, and robust oversight and effective and accessible private and public enforcement tools on the back end, when those rules are violated. The recommendations below begin to address these issues but they do not fully alleviate our concerns about a new national bank charter for nondepository institutions.

4.1. The OCC Should Set Strong Uniform Conditions For All New Charters—and Not Allow Different Standards for Each Charter.

Prior to issuing any new charters, the OCC must issue a comprehensive, transparent, clearly articulated set of safeguards to govern all charters. Conditions must not be left to charter-by-charter negotiations. Otherwise each company would have the opportunity to renegotiate the rules that

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119 *See* http://www.rapidadvance.com/merchant-cash-advance (last visited Nov. 17, 2016).

120 *See* Michael Flynn & Karen Slater, *All We are Saying Is Give Business a Chance: The Application of State UDAP Statutes to Business-to-Business Transactions*, 15 Loy. Consumer L. Rev. 81 (2003).

121 *See* Emily Robbins, *Illinois May Be the First State in the Nation to Regulate Predatory Small Business Lenders*, CitiesSpeak, Apr. 15, 2016, *available at* https://citiesspeak.org/2016/04/15/illinois-may-be-the-first-state-in-the-nation-to-regulate-predatory-small-business-lenders/.

122 *See* Fintech Charter White Paper at 1, 3, 5, 7.

apply to it in an opaque process, leaving the fate of consumer protections to the negotiating power of each company and the changing policies of the then-current OCC leadership.

Charter-by-charter negotiations would not only weaken consumer protections but would also result in unfair, uneven competition between companies subject to different rules. The result could disadvantage responsible players. For example, the Responsible Business Lending Coalition is also calling for a uniform set of borrower protection standards.[123] Without uniform standards that all businesses know that their competitors will also be held to, the result could likely be a race to the bottom, with companies that are subject to more rules pushing to even the playing field at a lower level (or threatening to abandon their federal charters).

The OCC should start by issuing a policy guidance delineating the core contours of conditions for each type of potential charter. The document would establish the standards for a future regulation, and would provide guidance to companies that are preparing charter applications of the type of rules to expect. We describe these core elements in sections that follow.

Ultimately, rules for any special purpose charter must be articulated in a regulation. A regulation, issued pursuant to the Administrative Procedures Act (APA), is necessary to specify the full scope of the rules of conduct applicable to the financial products offered and to ensure public input and a transparent process. Only through a regulation will the rules be—

- sufficiently comprehensive to begin to fill the role that the detailed state rules being preempted filled;
- universally applicable to all companies offering those products or services;
- accessible to courts and all members of the public.

Below we discuss some of the most important conditions that should apply to special purpose national banks. But we cannot in these comments identify every condition that should apply to every potential type of company. We urge the OCC to start with these elements but to conduct a more thorough, detailed review of the rules that should apply to different business models. The OCC's protections should be informed by the strongest state laws.

4.2. Conditions for particular types of activities.

4.2.1. Lending

4.2.1.1. Require a Fee-Inclusive Interest Rate Cap of 36% for Small Loans and Lower for Larger Loans.

Clear interest rate caps are the most important protection against abusive lending practices, as discussed above. Thus, if the OCC preempts state interest rate caps for special purpose national banks, it must replace those caps with a federal interest rate cap.

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[123] *See* Letter of Responsible Business Lending Coalition to Comptroller Thomas Curry at 3 (Jan. 17, 2017) ("Fintech Charter Comments of Responsible Business Lending Coalition").

The OCC has advised banks that abusive lending practices include "[p]ricing and terms, whether interest rates or fees, that far exceed the true risk and cost of making the loan,"[124] and "[i]nterest rates [that are] inordinately high."[125] The OCC should reiterate this guidance, which is helpful. But it is not sufficient to prevent abusive high-cost lending by special purpose national banks. While full service national banks rarely charge nominal interest rates that exceed 36%, they have at times used fees to engage in abusive high-cost lending, as described in a previous section.

Moreover, special purpose national banks may not have the same self-imposed constraints against high-cost lending as full service banks do. Full service banks need to worry about how the reputation risk of a high-cost lending product could impact the full range of their products and services, including deposit accounts and lower cost loans. A more mono-line special purpose bank that only engages in a narrow range of lending products has less reason to worry about the repercussions for other services or for its general reputation in the community.

In addition, the OCC's suggestion that rates and fees should not "far exceed the true risk and cost of making the loan" does not necessarily translate into meaningful limits on interest rates. High-cost lenders argue that the high default rates that come from lending to borrowers with questionable ability to repay justify high rates. The opposite, however, is actually true: High interest rates create misaligned incentives and unaffordable loans that drive high default rates.[126] Lenders that do not conduct adequate underwriting should not be allowed to use their own irresponsible high default rates to justify high interest rates or fees.

It is theoretically possible that an OCC expectation that rates and fees be related to costs and risk, combined with a requirement for low default rates, could lead special purpose national banks to keep their rates reasonable. But this is at best a vague standard, making it difficult to enforce because it requires the OCC to engage in complex and intensive lender-by-lender evaluations of pricing decisions and cost justifications.

A far simpler and more effective approach—which would remedy one of the most significant dangers of a national bank charter—would be to impose specific interest rate caps to replace those preempted by the OCC. <u>We strongly urge the OCC to cap rates directly rather than hope that vague guidance will prevent high-cost lending, which has not been an effective strategy even for full service national banks</u>.

Policymakers have recognized for centuries that interest rate caps are necessary because lenders and borrowers have grossly unequal bargaining power. Protections are necessary because borrowers who are desperate to acquire credit are "forced by [their] economic circumstances to resort to excessively costly funds to meet . . . financial needs."[127] Struggling borrowers will often accept almost any terms, even unaffordable ones, in order to obtain a loan.[128]

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124 OCC Advisory Letter 2000-7, Abusive Lending Practices, at 1 (July 25, 2000).
125 OCC Advisory Letter 2000-11, Title Loan Programs, at 1 (Nov. 27, 2000).
126 NCLC, Misaligned Incentives.
127 Ghirardo v. Antonioli, 883 P.2d 960, 969 (Cal. 1994). *See also* Jersey Palm-Gross, Inc. v. Paper, 658 So. 2d 531, 534 (Fla. 1995) (purpose of usury laws is to "protect borrowers from paying unfair and excessive interest to overreaching creditors"; and "to bind the power of creditors over necessitous debtors and prevent them from extorting harsh and undue terms in the making of loans"); Scarr v. Boyer, 818 P.2d 381, 383 (Mont. 1991) ("Usury statutes protect borrowers who lack real bargaining power against overreaching by creditors");

For small loans, the OCC should cap rates at 36%, including fees. Small loans should be capped at 36% for several reasons.

First, 36% is widely accepted as the dividing line between reasonably priced and high-cost, predatory small loans.[129] The 36% rate cap for small dollar lending emerged over 100 years ago and has been reaffirmed repeatedly at the state and federal levels. Congress[130] and four federal agencies (the Department of Defense,[131] the FDIC,[132] the National Credit Union Administration,[133] and the CFPB[134]) have used 36% or lower as the dividing line between affordable and dangerous forms of credit.

North Shore Auto Financing, Inc. v. Block, 2003 WL 21714583 (Ohio Ct. App. July 14, 2003); Smith v. Mitchell, 616 A.2d 17 (Pa. Super. Ct. 1992) (purpose of usury law, "to protect the citizenry . . . from being exploited at the hands of unscrupulous individuals seeking to circumvent the law at the expense of unsuspecting borrowers who may have no other avenue to secure backing for a, for example, business venture"); Whitworth & Yancy v. Adams, 5 Rand 333, 335, 26 Va. 333 (1827) ("These statutes we made to protect needy and necessitous persons from the oppression of usurers and monied men, who are eager to take advantage of the distress of others; while they, on the other hand, from the pressure of their distress, are ready to come to any terms; and with their eyes open, not only break the law, but complete their ruin"); Demopolis v. Galvin, 786 P.2d 804, 807 (Wash. Ct. App. 1990) (purpose is to protect desperate borrowers "driven to borrow money at any cost"). *See also* Trapp v. Hancuh, 530 N.W.2d 879 (Minn. Ct. App. 1995) (purpose of usury laws is "to protect the weak and necessitous from being taken advantage of by lenders who can unilaterally establish the terms of the loan transaction"); Paulman v. Filtercorp, 899 P.2d 1259 (Wash. 1995) ("The evil at which the usury laws are aimed…is the oppression of the borrower 'who by adversity and necessity of economic life [is] driven to borrow money at any cost' protecting vulnerable borrowers from oppression is the objective). *Cf.* Sunburst Bank v. Keith, 648 So. 2d 1147 (Miss. 1995) (business loans at issue; purpose of usury statutes and its remedy of forfeiture "is to discourage exorbitance"). *See generally* Steven W. Bender, *Rate Regulation at the Crossroads of Usury and Unconscionability: The Case for Regulating Abusive and Commercial Interest Rates Under the Unconscionability Standard*, 31 Hous. L. Rev. 721 (1994).

128 *See* Schneider v. Phelps, 359 N.E.2d 1361, 1365 (N.Y. 1977) ("The purpose of usury laws, from time immemorial, has been to protect desperately poor people from the consequences of their own desperation. Law-making authorities in almost all civilizations have recognized that the crush of financial burdens causes people to agree to almost any conditions of the lender and to consent to even the most improvident loans. Lenders, with the money, have all the leverage; borrowers, in dire need of money have none.").

129 Lauren K. Saunders, NCLC, Why 36%? The History, Use, and Purpose of the 36% Interest Rate Cap (Apr. 2013), *available at* https://www.nclc.org/images/pdf/pr-reports/why36pct.pdf.

130 John Warner National Defense Authorization Act of 2006, Pub. L. No. 109-364, § 670 (2006); Public Law No. 112-239, §§ 661 to 663 (Jan. 2, 2013) (adding 10 U.S.C. § 987(f)(5)); H.R. 4310, H. Rep. 112-705 Text of the Joint Statement of Managers, Subtitle G-Military Lending 110–111,*available at* http://www.rules.house.gov/Media/file/PDF_112_2/PDF/HR4310crJES.pdf.

131 Department of Defense, Report on Predatory Lending Practices Directed at Members of the Armed Forces and Their Dependents 13, Aug. 9, 2006, *available at* http://archive.defense.gov/pubs/pdfs/Report_to_Congress_final.pdf.

132 *See* Press Release, Federal Deposit Ins. Corp.,Small Dollar Loan Guidelines, *available at* http://www.fdic.gov/news/news/press/2007/pr07052a.html.

133 12 C.F.R. § 701.21(c)(7)(iii).

134 CFPB Payday NPR, 81 Fed. Reg. at 47912 (proposing rules only for "longer-term loans with a total cost of credit exceeding a rate of 36 percent per annum in order to focus regulatory treatment on the segment of the longer term credit market on which the Bureau has significant evidence of consumer harm.").

Second, banks are directly subject to the Military Lending Act, which caps rates at 36% for loans to servicemembers and their dependents. The possibility that a consumer could be covered by the MLA results in greater compliance risks when a lender is making loans above MLA limits.

Third, without a 36% rate cap, a national charter would enable lenders to charge rates that would otherwise violate the laws in a substantial number of states. For example, a $2000, two-year loan that has an APR above 36%, including all fees,[135] would violate the law in 30 states and the District of Columbia.[136] The loan would violate the law in 12 additional states if the fee-inclusive rate is above 41%.[137] Thus, permitting special purpose national banks to make loans above 36% would expose consumers to substantial harm from which they are currently protected under state law.

Fourth, the 36% rate is likely to be the dividing line between loans that are exempt from the CFPB's payday installment loan rules and those that are covered.[138] Banks will be exposed to greater compliance risks if they make higher-priced loans that are covered by the CFPB's payday rules. In addition to up-front underwriting requirements, the bank could be in violation of the ability-to-repay rule if default, delinquency or reborrowing rates are excessive.[139]

Fifth, higher default rates tend to correlate with rates above 36%,[140] leading to more substantial debt collection efforts and greater risk of unlawful, abusive debt collection efforts. While the Fair Debt Collection Practices Act does not apply to banks or other first-party lenders, abusive debt collection efforts by a creditor can violate the ban on unfair, deceptive or abusive practices and lead to CFPB enforcement action.[141] The CFPB is also in the process of drafting more extensive rules to govern debt collection practices by creditors. The bank will be at greater risk of violating these rules if it makes high-cost loans that result in substantial debt collection efforts. The bank can even be at risk if the loans are sold to debt buyers.[142]

Finally, capping rates at 36% prevents misaligned incentives that can lead banks to make loans that are not affordable. With higher-rate loans, the lender has weaker incentives to make

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[135] The actual Truth in Lending Act APR might be lower with fees excluded. Our methodology tracks the requirements of the Military Lending Act.

[136] *See* NCLC Installment Loans 46. (New Hampshire amended its law after the publication of the NCLC report.)

[137] *Id.*

[138] The CFPB has defined the term "total cost of credit" in a way that largely tracks the MLA's military APR. *See* 81 Fed. Reg. 47909-10 (July 22, 2016).

[139] 81 Fed. Reg. 48010 (explaining that rates of delinquency, default or reborrowing are evidence of whether the lender has made a reasonable ability to repay determination as required by the proposed rule).

[140] *See* NCLC, Misaligned Incentives at 27-35.

[141] *See* Press Release, Consumer Fin. Prot. Bureau, CFPB Takes Action Against ACE Cash Express for Pushing Payday Borrowers Into Cycle of Debt (July 10, 2014), *available at* http://www.consumerfinance.gov/about-us/newsroom/cfpb-takes-action-against-ace-cash-express-for-pushing-payday-borrowers-into-cycle-of-debt/.

[142] *See* Press Release, Consumer Fin. Prot. Bureau, 47 States and D.C. Take Action Against JPMorgan Chase for Selling Bad Credit Card Debt and Robo-Signing Court Documents (July 8, 2015), *available at* http://www.consumerfinance.gov/about-us/newsroom/cfpb-47-states-and-d-c-take-action-against-jpmorgan-chase-for-selling-bad-credit-card-debt-and-robo-signing-court-documents/.

affordable loans and avoid unfair, deceptive or abusive practices.[143] Misaligned incentives between the lender and the borrower ultimately expose the bank to risks of predatory lending programs.

While we support a 36% rate for smaller loans, for larger loans rates should be lower. In recognition of this, many states have tiered rates, requiring a reduction in the interest rates on larger loans.[144] The OCC should look to state interest rate caps to develop a tiered interest rate structure depending on the size of the loan.

We believe that Iowa's Regulated Loan Act, as implemented by regulation, provides an appropriate rate tier structure.[145] Iowa caps interest at:

- 36% on the first $1,000;
- 24% on the next $1800;
- 18% on the remainder up to $10,000;[146] and
- A blended rate of 21% for loans above $10,000.[147]

Other states have similar rate tiers.[148] We note that Iowa's 21% for loans above $10,000 is quite high for loans of that size. An 18% cap might be more appropriate for larger loans, consistent with the rate cap for federal credit unions.[149]

Rate caps should include all fees and charges. Iowa's rate caps, for example, apply to "interest or charges."[150] Similarly, the Military Lending Act (MLA) includes all fees within its 36% rate cap, with only small exceptions for reasonable credit card fees.[151] Permitting fees on top of rate caps would enable lenders to avoid rate limits.

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143 *See* NCLC, Misaligned incentives.

144 *See* NCLC, Installment Loans at Appx. C (state-by-state analysis of interest rate caps and other features of non-bank installment loan laws).

145 Iowa's statute (Iowa Code § 536.13(4)) sets tiers at much lower dollar amounts, but permits the superintendent to raise those tier levels by regulation, which the superintendent has done. *See* Iowa Admin. Code r. 187-15.5(536).

146 Iowa Admin. Code r. 187-15.5(536).

147 For loans over $10,000, the maximum rate of interest or charges a licensee may charge is the greater of 2 percentage points above a Treasury bill rate (which currently yields a rate of only about 2 percent), Iowa Code § 535.2(3)(a)(1), or the rate authorized for supervised financial organizations, which is 21%, § 536.13(7a). Note that the blended rate on a $10,000 loan based on the 36%/24%/18% tiered structure for loans up to $10,000 is close to 21% (20.88%).

148 *See, e.g.,* Fla. Stat. § 516.031(1) (30% on first $3,000, 24% on next $1,000, 18% on amount over $4,000); Me. Rev. Stat. tit. 90A § 2-401 (30% on first $2,000; 24% on next $2,000; 18% on remainder and on loans above $8,000); Md. Code Ann., Com. Law § 12-306 (for loan up to $2,000, 33% on first $500, 24% on amount over $500 but not more than $700, and 15% on remainder; for loan between $2,000 and $3,500, 21%; for loan between $3,500 and $5,000, 18%; for a loan over $5,000, 16.2%).

149 *See* National Consumer Law Center, Consumer Credit Regulation § 9.5.3.2 (2d ed. 2015), updated at www.nclc.org/library (Federal Credit Union Act caps interest at 15%, but gives NCUA the authority to raise it to 18%, which it has done).

150 Iowa Code § 536.13(4).

151 32 C.F.R. § 232.4(c), (d).

In addition, it is critical to include all credit insurance and other add-on products within the rate cap in order to prevent evasions, as discussed above, whether the insurance is purportedly voluntary or not. Lenders use low-value, overpriced credit insurance and similar products to pad interest rates and deceive borrowers about the cost of credit.[152] The MLA includes credit insurance within its rate cap.[153] The CFPB has also proposed to include credit insurance in calculating the total cost of credit for purposes of determining coverage by the proposed payday loan rules.[154]

If the OCC permits any application or origination fees that are not subject to the interest rate cap, the fees should be strictly limited. For example, we urged the CFPB to limit any fees on loans that are exempt from the proposed payday loan regulations to a maximum of $30, charged no more than once a year.[155] Limiting fees to once per year is especially important in order to prevent fees from multiplying and increasing the true interest rate. If loans are refinanced, fees should be refunded pro rata in order to prevent incentives for loan flipping.

4.2.1.2. Ability-to-Repay (Affordability) Requirements, Including Low Defaults

A responsible lending program must ensure that the borrower can afford the loan. Meaningful interest rate caps are the most effective way of ensuring that the interests of lenders and borrowers are aligned, so that lenders have an incentive to make only loans that borrowers can afford to repay.[156] But even with rate caps, an explicit requirement that lenders focus on borrowers' ability to repay is also essential. The OCC must ensure that the loans are truly affordable to the borrowers, not just that the lenders are assured of being repaid. Ability to repay is not the same thing as the lender's ability to collect.[157]

The OCC has issued many guidance letters over the years that emphasize banks' obligation to consider borrowers' ability to repay. Some of the letters have criticized lending based on the liquidation value of the borrower's home or other collateral.[158] Others have focused on frequent refinancing or renewal of payday loans as an indication of inability to repay.[159]

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152 *See* § 3.4, *supra*. *See also* NCLC, Installment Loans at 13-17.

153 *See* 32 C.F.R. § 232.4(c), as amended by 80 Fed. Reg. 43,560 (July 22, 2015). *See* National Consumer Law Center, Consumer Credit Regulation § 2.2.5.7.2 (2d ed. 2015), updated at www.nclc.org/library.

154 81 Fed. Reg. 47864, 47909 (July 22, 2016) (describing proposed 12 C.F.R. § 1041.2(a)(18)).

155 The $30 fee limit is consistent with the fees permitted by bills in Congress that would otherwise limit the total cost of credit to 36% per year. *See* H.R. 1565 (Cartwright) & S. 838 (Durbin), Protecting Consumers from Unreasonable Credit Rates Act. *See also* Or. Rev. Stat. § 725A.064(2) (limiting fees to $10 per $100 up to a maximum of $30). A recent survey of community banks making small loans found that the average origination fee was 3% of the credit extended, but the average maximum interest rate was only 16.7%. CFPB Payday NPR, 81 Fed. Reg. at 47891 (citing Letter from Viveca Y. Ware, Executive Vice President, Independent Cmty. Bankers of America (ICBA), to David Silberman, Associate Director, CFPB (Oct. 6, 2015); Ryan Hadley, ICBA, 2015 ICBA Community Bank Personal Small Dollar Loan Survey (Oct. 29, 2015); Letter from Viveca Y. Ware, Executive Vice President, ICBA, to David Silberman, Associate Director, Consumer Fin. Prot. Bureau (Nov. 3, 2015)).

156 *See* NCLC, Misaligned Incentives.

157 *See also* Fintech Charter Comments of Responsible Business Lending Coalition at 6 ("Lenders should not make loans that the borrower cannot truly afford, even if the lender can find a way to be repaid.").

158 *See, e.g.,* OCC Bulletin 2013-40, Guidance on Supervisory Concerns and Expectations Regarding Deposit Advance Products, 78 Fed. Reg. 70624, 70629 n. 25 (Nov. 26, 2013) ("[L]oans to borrowers who do not

These guidances are helpful, and they illustrate a consistent OCC expectation of sound underwriting. But unaffordable lending can take many forms, and it is not always tied to collateral based-lending or rollovers of short-term loans. Preauthorized electronic payments, security interests in personal property (even if worthless as collateral), or aggressive debt collection practices can also allow lenders to recover payments even if the borrower cannot afford to repay the loan while meeting other expenses.[160] Fintech companies that receive the bulk of their revenues from the origination process rather than from performance of the loan may also have weaker incentives to properly ensure long-term affordability,[161] just as pre-2008 mortgage lenders did.

In order to make clear that concerns about insufficient underwriting for ability to repay are not limited to the particular contexts or practices discussed in past guidances, the OCC should explicitly impose a general ability to repay requirement on any special purpose national bank:

> *The bank must make a determination that the borrower has the capacity to make the scheduled payments under the terms of the loan, without reborrowing, based on the borrower's current and expected income, current obligations, employment status, and other relevant financial resources.*

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demonstrate the capacity to repay the loan, as structured, from sources other than the collateral pledged, in this case the customer's direct deposit, are generally considered unsafe and unsound. Such lending practices should be criticized in the Report of Examination as imprudent."); OCC Advisory Letter 2003-2, Guidelines for National Banks to Guard Against Predatory and Abusive Lending Practices (Feb. 21, 2003) ("[A] fundamental characteristic of predatory lending is the aggressive marketing of credit to prospective borrowers who simply cannot afford the credit on the terms being offered. Typically, such credit is underwritten predominantly on the basis of the liquidation value of the collateral, without regard to the borrower's ability to service and repay the loan according to its terms absent resorting to that collateral. This abusive practice leads to 'equity stripping.' When a loan has been made based on the foreclosure value of the collateral, rather than on a determination that the borrower has the capacity to make the scheduled payments under the terms of the loan, based on the borrower's current and expected income, current obligations, employment status, and other relevant financial resources, the lender is effectively counting on its ability to seize the borrower's equity in the collateral to satisfy the obligation and to recover the typically high fees associated with such credit."); OCC Advisory Letter 2000-11, Title Loan Programs (Nov. 27, 2000) ("Prudent lending standards require a bank to determine the borrower's financial capacity, the value of the collateral, and the condition and location of the collateral. Some title loans are made based on the value of the collateral and not on the borrower's ability to repay the loan at its stated maturity. Such loans are inconsistent with safe and sound lending principles."); OCC Advisory Letter 2000-7, Abusive Lending Practices (July 25, 2000) (describing as an indication of abusive lending: "Collateral or Equity 'Stripping' - loans made in reliance on the liquidation value of the borrower's home or other collateral, rather than the borrower's independent ability to repay, with the possible or even intended result of foreclosure or the need to refinance under duress.").

159 OCC Advisory Letter 2000-10, Payday Lending (Nov. 27, 2000) ("[A] bank must adopt explicit standards that control the use of renewals, and the standards must be based on the borrower's willingness and ability to repay the loan. …A bank should not renew a payday loan except upon a written request by the borrower that certifies an inability to repay the loan, states a specific reason that occurred subsequent to the date of origination or last renewal, and states why the borrower will be able to repay the loan at the new maturity date.").

160 NCLC Payday RFI Comments at 6-20.

161 *See, e.g.,* Moody's Investor Services, Press Release, Moody's: Unique risks in marketplace versus traditional lending (May 5, 2015), https://www.moodys.com/research/Moodys-Unique-risks-in-marketplaceversus-traditional-lending--PR_324544.

Notably, the Responsible Business Lending Coalition is urging to OCC to adopt a similar standard, recognizing that ability-to-pay standards are important to small business borrowers and lenders as well as to consumers.[162]

In the first instance, an ability-to-repay standard requires front-end underwriting standards and application criteria.

It is also critical to evaluate compliance with the ability-to-repay requirement by imposing back-end standards to measure the effectiveness of lenders' underwriting practices. A determination of ability to repay is not reasonable if it is based on criteria that have led to high default or reborrowing rates in the past.

<u>The OCC should expect national banks to aim for a default rate that does not exceed 5%. Defaults of more than 10% should be considered unacceptable, triggering a requirement that the lender tighten its underwriting standards.</u> The OCC should also evaluate other indicators that borrowers are unable to afford their loans (such as late payments, delinquencies, bounced payments, and high rates of refinancing). Monitoring how loans perform in practice ensures that front-end underwriting standards are meaningful and are accomplishing their goal.

A goal of defaults under 5% and an expected maximum of 10% defaults is consistent with the standards in many lending markets. The national credit card charge-off rate is currently (third quarter of 2016) 3.07%.[163] At its peak during the Great Recession, the credit card charge-off rate was 10.8%,[164] a rate that was considered far too high and the result of unusually severe economic conditions.

A survey provided to the CFPB found that the charge-off rates for community bank loans that would be covered by the proposed payday loan rule are between 0.54% and 1.02%.[165] The loans in the survey have a total cost of credit above 36%, are under $1,000, and are repaid automatically. Another trade association survey of small dollar loans by banks of all sizes found that a third had no charge-offs at all. The remainder had charge-offs of only about 3%.[166]

The National Credit Union Administration (NCUA) estimates that the charge-off rate for loans under NCUA's Payday Loan Alternative program is 7.5%.[167] Notably, these loans are often made to subprime borrowers without detailed underwriting.

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162 *See* Fintech Charter Comments of Responsible Business Lending Coalition at 6 (urging the OCC to require lenders to "Offer financing only with high confidence that the borrower can repay its entire debt burden without defaulting or re-borrowing.").
163 Board of Governors of the Federal Reserve System, Charge-Off and Delinquency Rates on Loans and Leases at Commercial Banks, *available at* http://www.federalreserve.gov/releases/chargeoff/chgallsa.htm.
164 *See id.* (second quarter of 2010).
165 CFPB Payday NPR, 81 Fed. Reg. at 48045 n.756 (citing ICBA Letter Oct. 6, 2015)), *available at* http://consumerfed.org/wp-content/uploads/2016/10/10-7-16-Payday-Rule_Comment.pdf.
166 CFPB Payday NPR, 81 Fed. Reg. at 48045 n.756 (citing ABA Letter Dec. 1, 2015).
167 CFPB Payday NPR, 81 Fed. Reg. at 47892 ("Over 700 Federal credit unions, nearly 20 percent of Federal credit unions nationally, made approximately $123.3 million in Payday Alternative Loans during 2015. In 2014, the average loan amount was $678. Three-quarters of the participating Federal credit unions reported consumer payment history to consumer reporting agencies. The annualized net charge-off rate, as a percent of average loan balances outstanding, in 2014 for these loans was 7.5 percent."), *available at*

A survey by North Carolina Office of the Commissioner of Banks of lenders operating under the state's Consumer Finance Act found charge-off rates of 5.2% to 8.6%,[168] with some lenders having negligible or no charge-offs.[169] The average FICO score of consumer finance company borrowers was 578.[170] For all lenders, the average interest rate charged was 24%.[171]

A report on loans made under California's small dollar loan pilot program showed that only 3.9% of loans made in 2014 were 60 or more days delinquent.[172] Nearly two-thirds of the loans were made in lower- or moderate-income neighborhoods, with most of the remainder in middle-income neighborhoods.

Thus, defaults are generally in the single-digits outside of predatory lending markets. Charge-off rates are in that range even for lenders that serve consumers with subprime credit scores. High-cost lenders, on the other hand, typically have much higher default rates of 20% or even higher.[173] An OCC rule that default rates generally be kept under 5%, with rates above 10% triggering action, will promote expectations that the vast majority of borrowers should be able to repay their loans.

To the extent possible, default rates should be measured as a cumulative cohort, per-consumer default rate, taking into account any reborrowing. That is, for a given group of borrowers, what share of them ultimately default, either on the original loan or after refinancing? That is the best measure of what proportion of consumers ultimately are unable to repay their loans. If cumulative cohort default rates are too difficult to track uniformly, then the OCC should use an annualized charge-off rate (dollars charged off as a percent of dollars outstanding).[174]

Focusing on a per-consumer and not per-loan default rate is essential, because reborrowing and refinancing can dramatically mask default rates. Per-loan default rates are artificially low in

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https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/Rulemaking_Payday_Vehicle_Title_Certain_High-Cost_Installment_Loans.pdf.

168 North Carolina Office of the Commissioner of Banks, The Consumer Finance Act: Report and Recommendations to the 2011 General Assembly at 40 (Feb. 2011), *available at* http://ccc.sites.unc.edu/files/2013/02/NCCOB.CFA_.Report.pdf.

169 *Id.* at 48.

170 *Id.* at 19 (summarizing 2009 report by Equifax covering the prior seven years).

171 *Id.* at 34.

172 Calif. Dept. of Business Oversight, Report of Activity Under Small Dollar Loan Pilot Programs at 4 (June 2015), *available at* http://www.dbo.ca.gov/Licensees/Finance_Lenders/pdf/Pilot%20Program%20Report%202015%20Final.pdf.

173 *See* NCLC, Misaligned Incentives at 31-35.

174 As long as the denominator is loans outstanding at a given time (rather than total dollars of credit extended throughout the year), charge-off rates generally avoid double counting of consumers who reborrow. However, the percentage of dollars charged off is generally lower than the percentage of consumers who default, because most defaulters make some payments before defaulting. For example, if a lender made five $100 loans and one borrower defaulted after paying $50, the charge-off rate would be 10% ($50/$500 dollars charged off) but the per-consumer default rate would be 20% (1/5 consumers). Because the charge-off rate may not reflect the full percentage of consumers who default, the OCC should also keep an eye on the cumulative cohort per-consumer default rate to the extent possible.

some loan markets, such as payday loans and high-cost installment loans, where refinancing rates are significant.[175]

4.2.1.3. Limits on Refinancing and Loan Flipping.

As the OCC has seen in both the mortgage[176] and deposit advance loan markets,[177] refinancing can be an abusive lending practice. The CFPB and many states have taken action to restrain payday lending because of the documented harm from repeat refinancing of short-term loans.[178] High refinancing rates are also a problem in the longer-term loan market.[179] Abusive refinancing and loan flipping practices have been a problem in the small business loan market as well as in the consumer market.[180]

Refinancing of either short- or longer-term loans raises a host of concerns. Refinancing is often triggered by the unaffordability of the prior loan, yet it masks high default rates. Thus it can impede enforcement of any ability-to-pay requirement. If a lender can re-impose origination and other fees upon refinancing without a full actuarial rebate of the prior fees, flipping can make a loan much more expensive. Loan flipping also extends the term beyond what the borrower anticipated and can lead to a long-term debt trap. The prospect of profitable flipping increases the lender's incentives to make unaffordable loans and the likelihood that the lender will can make a profit even on a borrower who ultimately defaults.

The OCC must ensure that special purpose national banks do not engage in inappropriate refinancing practices. For short-term loans (which generally have unaffordable balloon payments and should be discouraged), the OCC's existing guidance on payday loans should be enforced. That guidance states that a payday loans should not be refinanced "except upon a written request by the borrower that certifies an inability to repay the loan, states a specific reason that occurred subsequent to the date of origination or last renewal, and states why the borrower will be able to repay the loan at the new maturity date."[181]

For longer-term loans, the OCC already has issued some guidances that deal with refinancing practices. But existing guidances tend to focus on particular problems in specific markets (such as equity stripping and generating additional fees) and not to be broadly applicable. General principles that we suggest include:

175 *See* CRL/NCLC CFPB Payday Comments at 118-21, 126-27; NCLC, Misaligned Incentives at 27-28.
176 *See, e.g.,* OCC Advisory Letter 2003-2, Guidelines for National Banks to Guard Against Predatory and Abusive Lending Practices (Feb. 21, 2003).
177 *See* OCC Bulletin 2013-40, Guidance on Supervisory Concerns and Expectations Regarding Deposit Advance Products, 78 Fed. Reg. 70624, 70627 (Nov. 26, 2013) ("Specifically, deposit advance customers may repeatedly take out loans because they are unable to fully repay the balance in one pay period while also meeting typical recurring and other necessary expenses (e.g., housing, food, and transportation). Customers may feel compelled to take out another loan very soon thereafter to make up for the shortfall. This is similar to the practice of 'loan flipping,' which the OCC, the FDIC, and the Board have previously noted to be an element of predatory lending.").
178 CRL/NCLC CFPB Payday Comments at 17-19.
179 For a longer discussion of the problems with refinancing, see CRL/NCLC CFPB Payday Comments at 189-205; NCLC, Installment Loans at 19-25.
180 *See* Fintech Charter Comments of Responsible Business Lending Coalition at 5-7.
181 OCC Advisory Letter 2000-10, Payday Lending, at 7 (Nov. 27, 2000), *available at* https://www.occ.gov/static/news-issuances/memos-advisory-letters/2000/advisory-letter-2000-10.pdf.

Refinancing[182] *should not be used to mask consumers' ability to repay loans on their original terms, to increase the cost of the loans, or to lead to long-term debt. Practices that, depending on the circumstances, could violate these principles, include:*

- *Refinancing a loan before the consumer has made significant*[183] *progress in repaying the original loan;*
- *Charging additional fees upon refinancing in a manner that significantly increases the cost of the loan; and*
- *Refinancing a loan more than once.*

Even with updated guidance, past guidance has only been minimally effective, and more hard limits on refinancing might be appropriate. For example, the California small dollar loan pilot program prohibits refinancing a loan until 60% of the loan has been repaid.[184] However, we believe that a 75% standard would be more appropriate in order to ensure that the consumer has been able to repay the bulk of the loan without reborrowing.

4.2.1.4. Other lending protections

State lending laws include a number of other substantive protections beyond interest rate caps. While some lenders might point to these laws as evidence of the difficulty of lending under 50 different sets of laws, state lending laws tend to restrict practices in which fair and responsible lenders do not engage. These laws restrain abusive lending practices, and preempting these laws makes it easier to engage in unfair practices unless they are replaced by strong national protections.

The OCC must impose conditions that contain substantive protections for consumers and small businesses at least as strong as those in the strongest state laws. In some areas and in some states, state law protections are weak, and the OCC could greatly improve on them. The OCC has already issued guidances that cover most of these areas, but more clear conditions should be imposed on any special purpose national bank charter. Protections that the OCC should adopt include:

Require substantially equal installments at equal intervals without balloon payments. Some state laws require loans to have substantially equal payments and prohibit balloon payments. Uneven or balloon payments can make it hard for consumers to repay their loans and can drive refinancing abuses.[185]

Ban negative amortization and interest-only payment schedules. Non-standard amortization schedules make it harder for consumers to make reasonable progress repaying their loans and fuel loan flipping practices. [186]

Limit loan lengths. Many states place maximum term limits on loans. An outer limit of 24 months for a loan of $1000 or less[187] and 12 months for a loan of $500 or less might be appropriate

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182 Refinancing should be defined to include early repayments followed by a new loan in the next 30 days.
183 "Significant progress" should be measured as repayment of at least 75% of the principal.
184 Cal. Fin. Code § 22370(c)(3)(A).
185 *See, e.g.,* OCC Advisory Letter 2003-2, Guidelines for National Banks to Guard Against Predatory and Abusive Lending Practices (Feb. 21, 2003).
186 *See id.*

(although a shorter 6-month term should be the maximum for high-rate loans). Loans with excessively long terms for the size of the loan can put consumers in long term debt for a small principal and can result in payments that are little more than interest for much of the term.[188] These loans can result in misaligned incentives and profitable defaults.[189]

Ban prepayment penalties.[190] Prepayment penalties (including the use of the Rule of 78s[191]) can trap borrowers in high-rate unaffordable loans. When the Office of Thrift Supervision (OTS) preempted state laws banning prepayment penalties under the Alternative Mortgage Transactions Parity Act, abuses shot up, and the OTS was forced to reinstate the ban[192]

Ban coercive security interests.[193] In 1980, after years of study, the FTC declared that it is an unfair practice for a lender to take a security interest in household goods. These security interests are used primarily for their *in terrorem* impact on consumers, not as genuine collateral. However, the FTC rule has become outdated. The OCC should prohibit lenders from using devices, such as security interests in mobile devices, computers, auto titles and postdated checks. These security interests coerce repayment of unaffordable loans.[194]

Ban low-value credit insurance and other deceptive add-on products.[195] Lenders often use add-on products such as credit insurance and debt protection products to pad loan rates with overpriced and often worthless products. The CFPB and OCC have taken a series of actions against credit card lenders due to abusive add-on practices. The OCC should ban the sale of add-on products unless they meet or exceed the National Association of Insurance Commissioners' recommended 60% loss ratio.[196] Preferably the OCC should ban their sale unless the loss ratio is at least 80%, unless the lender provides a pro rata rebate of premiums if a loan is repaid early or refinanced.[197] Lenders should generally not be allowed to add other products on top of a loan at the time of origination,

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187 For a $1,000 loan, 22 states have term limits that range from 18 to 38 months. *See* NCLC, Installment Loans at 28-31.
188 *Id.* at 14-22.
189 *Id.*
190 *See, e.g.,* OCC Advisory Letter 2003-2, Guidelines for National Banks to Guard Against Predatory and Abusive Lending Practices (Feb. 21, 2003).
191 The rule of 78s is prohibited by federal law for consumer credit transactions longer than 61 months. 15 U.S.C. § 1615. Courts have generally disfavored the rule of 78s, and sometimes have found that the rule operates as a prohibited prepayment penalty. See National Consumer Law Center, Consumer Credit Regulation §§ 5.8.7.3.1, 5.8.8.5 (2d ed. 2015), updated at www.nclc.org/library.
192 *See* National Consumer Law Center, Mortgage Lending § 8.5.5 (2d ed. 2014), updated at www.nclc.org/library.
193 *See, e.g.*, OCC Advisory Letter 2000-11, Title Loan Programs (Nov. 27, 2011).
194 *See* Margot Saunders, National Consumer Law Center, Time to Update the Credit Practices Rule (Dec. 2010), *available at* https://www.nclc.org/images/pdf/debt_collection/credit-practices-rule-update.pdf.
195 *See, e.g.,* OCC Advisory Letter 2003-2, Guidelines for National Banks to Guard Against Predatory and Abusive Lending Practices (Feb. 21, 2003) (discussing packing of excessive and sometimes hidden fees in the amount financed, and single premium credit life insurance); OCC Advisory Letter 2000-7, Abusive Lending Practices (July 25, 2000) (listing credit insurance where the consumer does not receive a net tangible financial benefit as an abusive lending practice).
196 GAO Credit Cards Report at 23.
197 For additional recommendations on credit insurance and add-on products, see NCLC, Installment Loans at 17.

and the OCC should closely scrutinize penetration rates for add-on products to ensure that they are purely voluntary.

As discussed above, any add-on products should also be considered part of the cost of credit subject to the interest rate cap. Setting a reasonable interest rate cap (36% for small loans and lower for larger ones) and including the cost of add-on products in it means that lenders cannot use these add-on products to increase the cost of the loan beyond the cap. This greatly reduces the incentive of lenders to pad loans with unneeded low-value products.

5.1.1.5 Money Transmitters and Other Payment Providers.

Consumers rely on money transmitters to pay for the necessities of life and send money to family. The failure of a money transmission business, if appropriate protections are not in place, will cause consumers direct harm. State money transmitter laws ensure that businesses that come between consumers and their funds are held accountable. To that end, any national charter should adopt requirements on par with or superior to those required by California[198] and New York.[199] Applicants for charters should be subject to extensive background checks on principals, and vigorous review of the business and its activities to date. The OCC must ensure the safety and soundness of firms, with minimum capitalization and bonding requirements strictly enforced. Businesses should be required to hold permissible investments in amounts equivalent to outstanding obligations to consumers. Consumer-facing materials should be subject to review.

State regulators provide examination and supervision of licensed money transmitters. The OCC should regularly examine businesses to ensure compliance with laws and safety and soundness of the licensee. Specifically, examinations must ensure providers' strong financial condition, appropriate internal controls, and adherence to applicable state and federal laws and regulations. Firms should also be subject to having their systems and technology reviewed for strength and resiliency. The OCC should consider following the example of New York and require businesses to establish and maintain cybersecurity programs to protect consumers and ensure safety and soundness.[200]

The OCC's broad interpretation that a charter is potentially available to any business providing the functional definition of "paying checks"[201] may mean that virtual currency businesses will apply for a special purpose national bank charter.[202] The technology behind virtual currencies,

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198 Cal. Fin Code §§ 2000 *et seq*. (Money Transmission Act).

199 N.Y. Banking Law §§ 640 through 652-B) (Transmitters of Money).

200 The regulations governing cybersecurity requirements for financial services companies are set to go into effect in March 2017. The full text is available at http://www.dfs.ny.gov/legal/regulations/proposed/rp500t.pdf.

201 As discussed in section 1.1 above, we do not believe that the definition of "check" in the National Bank Act can be read as any form of payment.

202 We define virtual currency using the CSBS definition: "Virtual Currency is a digital representation of value used as a medium of exchange, a unit of account, or a store of value, but does not have legal tender status as recognized by the United States Government." *See* State Regulatory Requirements for Virtual Currency Activities, CSBS Model Regulatory Framework, at 2 (Sept. 15, 2015), *available at* https://www.csbs.org/regulatory/ep/Documents/CSBS-Model-Regulatory-Framework(September%2015%202015).pdf.

called distributed ledger, is being used by some as a new payments rail; other service providers are more akin to cashless payments, such as mobile wallets that permit virtual currency transactions.

The use of virtual currency technologies in the payment of checks, money transmission or other payments functions poses novel legal questions, not the least of which is whether and how the Uniform Commercial Code[203] or Regulation E[204] applies to these transactions. The OCC should not take any action to charter virtual currency businesses until the outstanding legal questions are resolved and clear consumer protections are firmly established.

Because of the confusion surrounding the applicability of state and federal laws and rules, virtual currency businesses pose significant risks to the broader financial system. Because very few of these businesses have full access to the United States' payments system, they see the OCC charter as a means of entry.[205] However, the enhanced interconnectedness that would be facilitated by the OCC charter could lead to serious systemic financial risks.[206] Currently, virtual currencies are not used widely enough to have significant effects on monetary policy.[207] Should the OCC extend a charter to an entity that uses virtual currencies, the use of these currencies may increase, with unknown implications for monetary policy.

Distributed ledger and virtual currency wallets are based on a system designed to eliminate the need for trusted third parties. However, many of the new virtual currency protocols are acting as financial intermediaries, accepting consumers' value with the promise of storing, transmitting or exchanging those values. As novel—and creative—as these technologies are, they do not appear to include any particular attributes that clearly protect consumers from the risk of loss. This is very troublesome.

Many proponents of virtual currencies tout the potential to increase financial inclusion.[208] It is precisely because of the targeting of underserved consumers that strong consumer protections must be in place *before* consumers patronize virtual currency providers. For low- and moderate-income consumers in particular, loss of household funds would be especially devastating. Any

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203 *See, e.g.,* Jeanne L. Schroeder, *Bitcoin and the Uniform Commercial Code*, 24 U. Miami Bus. L. Rev. 1 (2016), *available at* http://repository.law.miami.edu/umblr/vol24/iss3/3. *See also* Jessie Cheng and Benjamin Geva, *Understanding Block Chain and Distributed Financial Technology: New Rails for Payments and an Analysis of Article 4A of the UCC*, American Bar Association, Business Law Today, Mar. 2016, *available at* http://www.americanbar.org/publications/blt/2016/03/05_cheng.html.
204 CFPB, Prepaid Accounts Under the Electronic Fund Transfer Act (Regulation E) and the Truth In Lending Act (Regulation Z), 12 CFR Parts 1005 and 1026, Docket No. CFPB-2014-0031, RIN 3170-AA22, 81 Fed. Reg. 83934, 83978-83979 (Nov. 22, 2016) (declining to resolve specific issues with respect to the application of either existing regulations or the proposed prepaid card rule to virtual currencies and related products and services).
205 *See* Peter Van Valkenburgh, Coin Center, Why We Need a Federal Fintech Charter (Jun. 1, 2016), *available at* https://coincenter.org/entry/why-we-need-a-federal-fintech-charter.
206 *See* International Monetary Fund, IMF Staff Discussion Note: Virtual Currencies and Beyond: Initial Considerations 31-32 (Jan. 2016), *available at* https://www.imf.org/external/pubs/ft/sdn/2016/sdn1603.pdf.
207 *Id.* at 33-34.
208 *See* Michael J. Casey, *World's 'Unbanked' En Route to Financial Inclusion*, Wall Street Journal, Nov. 5, 2014, *available at* http://blogs.wsj.com/moneybeat/2014/11/05/worlds-unbanked-en-route-to-financial-inclusion-with-mobile-money/.

evaluation of the potential of providers to increase financial inclusion must be based on sound data and consumer protections, not wishful thinking or marketing slogans.

Unfair and deceptive acts and practices crop up in all kinds of industries, but seem particularly prevalent in new ones. Virtual currencies have been no exception. In the past several years, there have been problems with fraudulent investments, evidence of price manipulation,[209] and scams related to mining bitcoins.[210] Regulators and law enforcement should stand ready to act against any company engaged fraud, misrepresentation, deceit, gross negligence, or any other legal violations. Additionally, consumers should be clearly permitted to bring private actions against these providers and state attorneys general must be empowered to investigate and ameliorate problems with these providers, as discussed below.

To ensure that consumers are effectively protected from all current, known risks, the OCC should adopt all of the recommendations in the Conference of State Bank Supervisors' Model Regulatory Framework for State Regulation of Certain Virtual Currency Activities.[211] To summarize, the OCC should require any business dealing in virtual currencies or relying on virtual currency technology to abide by the following requirements:

- Full application of the Electronic Fund Transfers Act[212] to all of these transactions, whether the customer is a consumer or a small business. The EFTA provides robust error resolution policies, caps on consumer losses, and streamlined policies and procedures to re-credit consumers;
- Providers must retain 100% liquidity in U.S. dollars matching all values held for consumers, regardless of whether that value is denominated in fiat or virtual currency;
- Living wills (or full application of FDIC protections), which should include procedures to ensure consumers are made whole in the event of non-performance, bankruptcy or catastrophe;
- Updated, comprehensive consumer disclosures tailored to the activities of the covered entity;
- The highest data security standards; and
- Ample cyber insurance.

The OCC should not take any action to charter these businesses until the OCC and other federal regulators have done a thoroughgoing assessment of potential risks and put in place satisfactory mitigation strategies.

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209 The Bitcoin Savings and Trust is alleged by the SEC to have been a Ponzi scheme. *See* SEC v. Shavers and Bitcoin Sav. & Tr. (E.D. Tex. filed July 23, 2013) (complaint), *available at* http://www.sec.gov/litigation/complaints/2013/comp-pr2013-132.pdf). The latest allegation is that Mt Gox may have been a Ponzi scheme, attempting to drive-up the price of bitcoins, before Mt Gox itself failed. *See* PYMNTS, Report Reveals Evidence of Bitcoin Ponzi Scheme (May 26, 2014), *available at* http://www.pymnts.com/news/2014/report-reveals-evidence-of-bitcoin-ponzi-scheme/#.U4Uu23JdWPY.

210 Butterfly Labs, a company that sells mining equipment, has been the subject of numerous complaints to the FTC. *See* Joon Ian Wong, CoinDesk, Breaking Down the Butterfly Labs FTC Complaints Data (May 17, 2014), *available at* http://www.coindesk.com/breaking-down-butterfly-labs-ftc-complaints-data/.

211 *See* State Regulatory Requirements for Virtual Currency Activities, CSBS Model Regulatory Framework (Sept. 15, 2015), *available at* https://www.csbs.org/regulatory/ep/Documents/CSBS-Model-Regulatory-Framework(September%2015%202015).pdf.

212 15 U.S.C. §§ 1693 to 1693r.

5.1.1.6 Deposits

Any national bank that takes deposits must be required to obtain deposit insurance. A special purpose national bank without deposit insurance is absolutely unacceptable for an entity that takes deposits.

Even if holding small amounts of consumer funds is ancillary to the core purpose of a company, deposit insurance should still be required if the company wishes to become a national bank. For example, a company that is primarily in the payments business but has prepaid and other stored value accounts should be required to obtain deposit insurance for those deposits, either through a full service national bank charter or by holding the funds in an account at another bank where the deposits would receive pass-through insurance. The OCC should not sanction a model that involves holding consumers funds without deposit insurance.

Holding consumer funds in a manner that provides deposit insurance should be required even if the company follows a state licensing model. Similarly, prepaid card providers or providers of mobile equivalents must be required to have deposit insurance.

4.3. Conditions that Should Apply to All Special Purpose National Banks.

4.3.1. Codify that UDAP Laws are Not Preempted.

We appreciate Comptroller Curry's explicit statement that state laws prohibiting unfair or deceptive acts or practices (UDAP statutes) are not preempted by the OCC's preemption regulations (whether for full service national banks for any new special purpose national bank).[213] UDAP laws provide an essential bulwark against predatory practices. These flexible state laws are especially important in new areas like financial innovation, where problematic practices arise in new and creative ways that may not be well addressed by more specific laws.

The Federal Trade Commission Act[214] and the federal Consumer Financial Protection Act[215] also prohibit unfair, deceptive or abusive practices. In addition, OCC regulations prohibit unfair or deceptive lending practices by national banks.[216] However, none of these federal statutes or regulations provides a private right of action that enables consumers to protect themselves when harmed. No regulator can be counted on to step in and protect every consumer. Individuals need the ability to go to court and challenge unfair or deceptive conduct that injures them. State UDAP laws in many states give consumers critical tools to remedy injustices.

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213 Fintech Chart White Paper at 5 ("the OCC has taken the position that state laws aimed at unfair or deceptive treatment of cusomters apply to national banks"). *See also* Remarks by Thomas J. Curry Regarding Special Purpose National Bank Charters for Fintech Companies, at 6-7, Georgetown Univ. Law Ctr. (Dec. 2, 2016) ("The OCC has taken the position that state laws aimed at unfair or deceptive treatment of customers also *apply* to national banks.") (emphasis in original).

214 *See* 15 U.S.C. § 45(a)(1) (prohibiting unfair or deceptive acts or practices).

215 *See* 12 U.S.C. § 5531 (prohibiting "unfair, deceptive, or abusive acts or practices").

216 *See* 12 C.F.R. §§ 7.4008(c) (prohibiting unfair or deceptive practices in connection with loans not secured by real estate), 34.3(c) (prohibiting unfair or deceptive practices in connection with real estate loans).

The OCC's position that state UDAP statutes apply to national banks and are not preempted is a long-standing one, dating back to the time of the original adoption of its preemption regulation.[217] Indeed, since state UDAP laws parallel, rather than conflict with, federal prohibitions of unfair and deceptive acts, they cannot be considered to "significantly interfere" with national banks' powers.[218] UDAP statutes are also consistent with, and supportive of, principles such as the duty of good faith and the prohibition against unconscionability, which are embedded in such broadly applicable, nonpreempted laws as the Uniform Commercial Code.[219]

Nonetheless, courts have often found state UDAP laws preempted by the regulations under the National Bank Act (NBA).[220] For example, courts have found that the NBA preempts use of state UDAP laws to challenge:

- The unfairness of national banks' practice of manipulating the order of debits and checks from consumers' bank account to increase the number of overdraft fees triggered;[221]
- Lending without concern for the borrower's ability to repay.[222]

Some courts have even held that federal law and the OCC regulations preempt claims regarding deceptive conduct by banks.[223] The problem is exacerbated by the fact that the application of NBA

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217 Hearing Before the Subcomm. on Oversight & Investigations of the H. Comm. on Fin. Services, 108th Cong. (Jan. 28, 2004) (testimony of Julie Williams, First Senior Deputy Comptroller & Chief Counsel, Office of the Comptroller of the Currency), *available at* http://commdocs.house.gov (click on "Hearing transcript"); OCC Advisory Letter 2002-3, Guidance on Unfair or Deceptive Acts or Practices (Mar. 22, 2002), *available at* 2002 WL 521380 (cautioning banks that they may be subject to laws that prohibit unfair or deceptive acts or practices).

218 *See* Barnett Bank v. Nelson, 517 U.S. 25 (1996). *See* also National Consumer Law Center, Mortgage Lending § 5.5 (2d ed. 2014), updated at www.nclc.org/library.

219 *See, e.g.,* 12 C.F.R. § 7.4008(e) (contract laws not preempted); OCC Interpretive Letter No. 1005 (Sept. 2004) (UCC not preempted).

220 *See generally* National Consumer Law Center, Mortgage Lending § 5.8.4.9 (2d ed. 2014), updated at www.nclc.org/library; National Consumer Law Center, Unfair and Deceptive Acts and Practices § 2.5.3.3 (9th ed. 2016), updated at www.nclc.org/library.

221 *See* Gutierrez v. Wells Fargo Bank, 704 F.3d 712 (9th Cir. 2012) (bank's use of high-to-low posting order as means of maximizing fees for dishonored checks is pricing decision, and claim that calculation method was imposed in bad faith and therefore violated UDAP statute is preempted).

222 *See* Austin v. Provident Bank, 2005 WL 1785285 (N.D. Miss. July 26, 2005) (predatory lending claims based on overpriced loans, inability to repay, and charging excessive and fraudulent fees are preempted, as these claims relate to "terms of credit" and "disclosure").

223 *See, e.g.*, New Mexico v. Capital One Bank, 980 F. Supp. 2d 1314 (D.N.M. 2013) (treating OCC's debt cancellation agreement regulation as preempting the field, without citing section 25b(b)(4)'s explicit repudiation of field preemption; holding that claims of deception are preempted simply because they relate to sale of debt cancellation agreements); Bohnhoff v. Wells Fargo Bank, 853 F. Supp. 2d 849, 857–858 (D. Minn. 2012) (stating without analysis that OCC regulations preempt Minn. Stat. § 58.13(a)(9), which prohibits lenders from making misrepresentations in connection with mortgage loans); Pradhan v. Citibank, 2011 WL 90235, at *9-10 (N.D. Cal. Jan. 10, 2011) (claim that lender promised borrowers a fixed-rate mortgage with lower payments than their credit union offered, induced them to abandon their credit union application, and then gave them loans whose payments exceeded their monthly income and stripped them of $200,000 in equity is preempted); Weiss v. Wells Fargo Bank, 2008 WL 2620886 (W.D. Mo. July 1, 2008) (dismissing UDAP claim; misrepresentations to customers in advertisements are preempted by 12 C.F.R. § 34.4(a)(9)).

preemption regulations to state UDAP claims has varied court to court, creating unpredictability for both consumers and banks.

Holdings like these cause reputational and compliance risk for national banks, creating the perception that they are above the law. Errant decisions finding national banks immune from state UDAP claims could also encourage banks to engage in practices that later make them the target of CFPB or OCC enforcement actions.

We urge the OCC to codify in regulation the nonpreemption of state UDAP laws. Specifically, the OCC should add "unfair and deceptive practices statutes" to the list of state laws that are not generally preempted in 12 C.F.R. §§ 7.4007(c) (deposit taking), 7.4008(e) (lending) and 34.4(b) (real estate lending and appraisals), and should add a statement that UDAP laws are not generally preempted to 12 C.F.R. §§ 7.4002(d) (charges), 7.5002(c) (furnishing of products and services by electronic means and facilities), and 37.1(c) (debt cancellation products).

Preserving state UDAP claims is essential to giving consumers and state attorneys general the ability to address emerging problems by special purpose national banks. Consumers and state attorneys general cannot directly enforce the Dodd-Frank UDAAP prohibition against national banks.[224] Clarification by the OCC is critical to prevent a fintech entity with a federal charter from raising an inappropriate preemption defense to UDAP claims.

4.3.2. Give Consumers a Private Right of Action to Enforce the Conditions that Protect Them.

While we appreciate the OCC's commitment to ensuring compliance with consumer protection rules and the conditions of any charter, a federal agency cannot be expected to take action to protect every consumer or small business. No supervisor can examine every transaction or catch every problem. Moreover, agencies have limited resources, and they may not prioritize addressing problems that appear to be on a small scale, even though the impact on the affected consumers may be profound. Finally, even large problems often get insufficient attention by federal regulators. The OCC's supervision of national banks has not prevented mortgage servicing problems, unfair overdraft fee practices, or Wells Fargo's blatant creation of fraudulent accounts.

For these reasons, it is absolutely critical that consumers have tools to protect themselves if special purpose national banks violate the law. We urge the OCC to make clear that consumers have the right to bring civil actions in court to enforce any consumer protection conditions that the OCC imposes, including compliance with laws banning unfair, deceptive or abusive practices.

Many of the state consumer protection rules that would be preempted by a national bank charter specifically include private rights of action or are otherwise privately enforceable. For example, state usury caps and other lending laws are generally privately enforceable,[225] as are state

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[224] States can enforce against national bank regulations adopted by the CFPB under its UDAAP authority but not the general ban on UDAAPs. *See* 12 U.S.C. § 5552(a)(2).

[225] The laws may have an explicit private right of action, may provide that a usurious loan is void or voidable, or may state that the loan might otherwise be actionable through a contract law claim. *See generally* National Consumer Law Center, Consumer Credit Regulation § 7.8 (2d ed. 2015), updated at www.nclc.org/library.

money transmitter laws.[226] OCC-imposed protections that supplant those state laws but do not include a means for consumers to seek redress for violations could leave victims of those violations without protections.

The National Bank Act provides a private right of action for violation of its interest rate provision, 12 U.S.C. § 85.[227] However, this rate cap has little effect, because banks locate in states that do not cap interest rates and then export those rates nationwide. If the OCC agrees to cap the interest rates for special purpose national banks, it could do so through a regulation under § 85. The OCC could also adopt a regulation under § 85 that limits banks to the rate permitted in their operating agreement. Either approach should make the rate limit enforceable through the private right of action in 12 U.S.C. § 86.

In addition, the OCC should require banks to include in their contracts with consumers language that incorporates the conditions of their charter and commits the bank to comply with those conditions. Thus, there would be no question that the bank has an agreement with the consumer, not just with the OCC, and that the conditions are directly enforceable through a contract law claim.

The OCC could also include language in the bank's operating agreement making consumers third party beneficiaries of the agreement. This approach might be helpful as a boot-and-suspenders addition to a requirement for language in consumer agreements. But on its own it is less effective, because many consumers and courts might not know about the operating agreement or its language. Therefore, we urge the OCC to require banks to incorporate the conditions of their charters into their contracts with their customers.

A more indirect alternative would be for the OCC to declare that it would be unfair, deceptive, and a violation of the implied covenant of good faith and fair dealing for a bank to violate its operating conditions. An OCC statement to this effect would bolster a claim under a state UDAP statute or under the contract. However, it would require the consumer's attorney and the courts to be aware of the OCC's position and to credit it in interpreting a state law claim. In addition, not all state UDAP statutes cover credit, and some exclude banks altogether.[228] Thus, this approach is less preferable than putting the language directly into the contract where everyone can see it and it directly becomes part of a state contract law claim.

One way or another, the OCC must make sure that consumers have rights that they can enforce if their state law rights are preempted. Even with rigorous supervision, the OCC cannot ensure that every bank is always complying with the law and cannot promise to protect every consumer. Consumers must have the ability to protect themselves.

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[226] *See, e.g.*, Cal. Fin. Code §§ 2037(g), 2101(c); Mass. Gen. Laws ch. 169, §§ 3, 5; Tex. Fin. Code Ann. § 151.308(d); 7 Tex. Admin. Code § 33.51.

[227] 12 U.S.C. § 86. *See* National Consumer Law Center, Consumer Credit Regulation § 7.8.6.1 (2d ed. 2015), updated at www.nclc.org/library.

[228] *See* National Consumer Law Center, Unfair and Deceptive Acts and Practices § 2.3.1 (9th ed. 2016), updated at www.nclc.org/library.

4.3.3. Ban Forced Arbitration Clauses and Class Action Bans.

The OCC should bar banks from using forced arbitration clauses and class action bans. The OCC has previously warned national banks that the "use of mandatory arbitration clauses" is a practice that may accompany predatory lending.[229] Especially when combined with class action bans, forced arbitration clauses can encourage banks to engage in unfair, deceptive and abusive practices.

As the Wells Fargo case shows, banks use forced arbitration clauses to insulate unlawful conduct from public scrutiny and to prevent courts from remedying widespread wrongdoing. Consumers started bringing cases against Wells Fargo as early as 2013,[230] but they were forced into arbitration and courts were unable to address all 2 million fake accounts.[231] Even today, Wells Fargo continues to try to assert forced arbitration clauses and class action bans to prevent justice for the consumers that it injured.[232]

The importance of class actions and the danger of forced arbitration clauses are also clearly seen in the actions challenging unlawful practices involving overdraft fees on bank accounts. Many banks have become part of the Multi-District Litigation (MDL) involving overdraft fees and have paid hundreds of millions of dollars to members of class actions involving overdraft fees. An academic study found that consumer class actions against illegal overdraft fees "deliver[ed] fair compensation to a significant portion of class members."[233] Plaintiffs in these cases recovered up to "65% of damages, with the variation based largely on the strength of the class's claims and the likelihood of winning certification of the class."[234] As a result of private, class action litigation, the CFPB found that the banking industry has "largely abandoned" the practice of reordering debit transactions in a day to maximize the number of overdraft charges.[235]

But some banks have escaped liability for unfair and abusive overdraft fee practices because of forced arbitration clauses and class action bans. Unknown thousands of consumers subject to the same practices addressed in the MDL overdraft litigation likely got little or no relief when class actions against their banks were dismissed due to arbitration clauses.[236]

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229 OCC Advisory Letter 2003-2, Guidelines for National Banks to Guard Against Predatory and Abusive Lending Practices, at 3 (Feb. 21, 2003).

230 *See* Rebekah Kearn, *Man Complains of Forgery at Wells Fargo*, Courthouse News Service, Sept. 13, 2013, *available at* http://www.courthousenews.com/2013/09/13/61123.htm.

231 *See* James Rufus Koren, *Even in Fraud Cases, Wells Fargo Customers are Locked into Arbitration*, Los Angeles Times, Dec. 5, 2015, *available at* http://www.latimes.com/business/la-fi-wells-fargo-arbitration-20151205-story.html.

232 *See* Reuters, *Wells Fargo Asks Court to Force Customers to Arbitration in Fake Accounts Cases*, New York Times,Nov. 24, 2016, *available at* http://www.nytimes.com/2016/11/24/business/wells-fargo-asks-court-to-force-customers-to-arbitration-in-fake-accounts-cases.html?_r=0.

233 Brian T. Fitzpatrick and Robert C. Gilbert, *An Empirical Look at Compensation in Consumer Class Actions* 11 N.Y.U. J.L. & Bus. 767, 792 (2015).

234 *Id.*

235 *See* 81 Fed. Reg. 32830, 32863 (May 24, 2016) (CFPB proposed rules).

236 *See, e.g., In re* Checking Account Overdraft Litigation, 459 Fed. Appx. 855 (11th Cir. 2012) (finding arbitration contract was not unconscionable).

The CFPB's arbitration study and careful rulemaking have shown that forced arbitration clauses with class action bans do not merely steer consumers into a different conflict resolution forum; these clauses suppress claims and prevent relief altogether.[237] The evidence is also clear that forced arbitration clauses harm consumers who bring individual claims.[238]

While we are hopeful that the CFPB's proposed arbitration rule will be finalized, industry lobbyists may succeed in pushing Congress to block it. Moreover, the CFPB's rule will not protect small businesses and does not prevent forced arbitration of individual consumer claims.

Thus, to protect consumers and small businesses, and to send a clear signal to banks that all conditions on their charters are real and enforceable, the OCC should prohibit all national banks from using forced arbitration clauses or class action bans.

4.3.4. Require Special Purpose National Banks To Submit To Investigations By State Attorneys General.

Maintaining the consumer protection role of state attorneys general in the fintech area is especially important. New business models pose different kinds of risks that may not be clear to federal regulators, and new problems can start small and local.

Under the Supreme Court's decision in *Cuomo v. Clearing House Association*, state attorneys general can enforce nonpreempted laws against national banks, but they cannot exercise "visitorial" powers.[239] The Court held that the New York Attorney General's letters to banks requesting information were visitorial in nature, not an exercise of law enforcement power, and therefore violated the National Bank Act and the OCC's preemption regulations.

AGs' inability to investigate potential violations before bringing enforcement actions poses a serious hurdle to enforcement activities. In many cases, states may have indications that the law has been violated, but they will not want to take the strong step of filing an enforcement action until they have done their homework and gathered the available evidence.

In order to preserve states' role in protecting consumers, we urge the OCC to require special purpose national banks to submit to state requests for information about potential violations of the law, notwithstanding the decision in *Cuomo*. Investigative requests are not the same thing as conducting routine supervisory examinations on a regular basis. If an AG has evidence indicating that there may be violations of nonpreempted state or federal laws, the AG should be allowed to investigate in order to determine whether an enforcement action is warranted.

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[237] *See* Consumer Fin. Prot. Bureau, Arbitration Study: Report to Congress (Mar. 10, 2015) (conducted pursuant to Dodd–Frank Wall Street Reform and Consumer Protection Act § 1028(a)), *available at* http://www.consumerfinance.gov/reports/arbitration-study-report-to-congress-2015/. *See also* 81 Fed. Reg. 32830 (May 24, 2016) (proposed rule on arbitration agreements), *available at* http://files.consumerfinance.gov/f/documents/CFPB_Arbitration_Agreements_Notice_of_Proposed_Rulemaking.pdf.

[238] *See, e.g.,* Public Citizen, *The Arbitration Trap: How Credit Card Companies Ensnare Consumers* (Sept. 2007), http://www.citizen.org/publications/publicationredirect.cfm?ID=7545.

[239] 129 S.Ct. 2710 (2009).

4.3.5. Insist on a Strong Commitment To Financial Inclusion.

4.3.5.1. In General

The Community Reinvestment Act requires national banks to serve their entire communities in order to make sure that all consumers and small businesses have access to critical financial services. However, the CRA applies only to depository institutions and would not directly apply to a non-depository national bank.

As part of any chartering process, the OCC must require non-depository national banks to have a strong commitment to financial inclusion and to serve all consumers, particularly people of color and low- and moderate-income consumers, in the areas where they operate. This requirement must be rigorously implemented, affirmative and continuing; must insist on responsible and sustainable lending; must be enforced by measurable performance goals that are updated periodically; and must involve community participation and input.

Currently, banks are assessed for CRA compliance based on their financial inclusion efforts within the geographic footprint of their physical branches. Yet many fintech companies (and some existing national banks) operate primarily or exclusively online. Thus, traditional models of assessment need to be modernized – both for special purpose national banks and for full service ones. In today's internet and mobile age, narrow assessment areas tied to a few physical offices or branches would not reach the communities where companies operate. Financial institutions that receive a national bank charter must be required to invest in financial inclusion efforts throughout their entire service areas.

Financial inclusion commitments must also be measured by results, not by meaningless gestures. Financial institutions should be assessed based on effective access to affordable services, not the mere fact that a product is offered. Companies must affirmatively market products aimed at underserved communities and design them so that they are affordable and desirable. CRA exams should look at the number of accounts actually used, opened and closed by LMI people and in LMI geographies and in communities of color.

Access to human assistance is an important component of financial inclusion, even – or especially – for services that are offered primarily online. The OCC should encourage some access to in-person services. In-person interactions can be important for serving seniors, lower income individuals and immigrants; for resolving problems; and for understanding the needs of a community. In addition, the ability to access live telephone customer service without undue hurdles should be a part of any financial inclusion examination.

Companies that engage in harmful practices should receive lower community reinvestment grades. For example, the fact that a financial institution has significant revenue from penalty fees, or engages in other unlawful or abusive practices, should be taken into account in its financial inclusion score.

Transparency and public input are also critical to the assessment process. The public should have full, easy access to community reinvestment plans without the need of a public records act request. Regulatory benchmarks for an Outstanding rating should be transparent and informed by community needs. Public participation needs to be sought more affirmatively and encouraged through simple ways to comment.

4.3.5.2. Access for Customers of Limited English Proficiency

One key aspect of financial inclusion is providing access to consumers with limited English proficiency ("LEP consumers"). LEP access is a critical way that all banks, including special purpose national banks and those that do not engage in lending, can promote financial inclusion.

Access to the financial marketplace for LEP consumers has increasingly drawn the focus of regulators, lenders, and consumer advocates. The CFPB recently requested input on several proposals for extending debt collection protections to better protect LEP debtors.[240] Members of Americans for Financial Reform have made extensive recommendations regarding LEP access in the mortgage arena,[241] and the Mortgage Bankers Association has made this issue one of its major priorities in 2017.[242]

As the demographics of the United States evolve, the number of U.S. residents for whom English is not a first language and who speak English with limited proficiency has increased dramatically. In 2015, approximately 25.9 million individuals, some 9 percent of the U.S. population, were considered LEP. LEP refers to anyone above the age of 5 who reported speaking English less than "very well," according to the U.S. Census Bureau. Approximately five-sixths (83.4%) of all LEP residents speak one of eight languages: Spanish, Chinese, Vietnamese, Korean, Tagalog, Russian, Arabic, and Haitian Creole. About 64% of the LEP population speaks Spanish, followed by Chinese, spoken by 7% of the LEP population.[243] These individuals use financial products and services, but those who are not proficient in English have greater difficulty navigating the marketplace and resolving challenges when they arise.

LEP individuals need to access services in their own language before, during, and after a financial transaction. While marketing may occur in the person's preferred language, often the financial transaction documents and any subsequent contact (oral or written) is English-only. The CFPB has acknowledged the need for ongoing language access through its recent Fair Debt Collection Practices Act proposal addressing provision of key disclosures in Spanish and other languages.[244] In the same way, the OCC should promote inclusion by emphasizing language access standards for all national banks across the range of products and services they may provide.

While language access is important for customers of all national banks, it is especially important for special purpose national banks and others that conduct services primarily online or through mobile devices and do not give consumers the option of visiting a brick and mortar branch. While LEP consumers have challenges with in-person transactions as well, the difficulty of

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240 Consumer Financial Protection Bureau, Small Business Review Panel for Debt Collector and Debt Buyer Rulemaking (July 28, 2016), http://files.consumerfinance.gov/f/documents/20160727_cfpb_Outline_of_proposals.pdf.
241 Americans for Financial Reform, Fair Treatment of Homeowners with Limited English Proficiency (May 26, 2016), http://ourfinancialsecurity.org/2016/05/language-access-press-release/.
242 Mortgage Bankers Association, Language Access in Mortgage Banking, https://www.mba.org/issues/residential-issues/language-access-in-mortgage-banking.
243 Jeanne Batalova and Jie Zong, "Language Diversity and English Proficiency in the United States," Migration Policy Institute (Nov. 11, 2016), http://www.migrationpolicy.org/article/language-diversity-and-english-proficiency-united-states.
244 CFPB, Small Business Review Panel for Debt Collector and Debt Buyer Rulemaking Outline of Proposals Under Consideration and Alternatives Considered at 16-17, 61-62 (July 28, 2016), http://files.consumerfinance.gov/f/documents/20160727_cfpb_Outline_of_proposals.pdf.

overcoming limited English proficiency is even greater when communications are entirely through written communications. Even telephone communications can be more difficult when language is a barrier than talking to someone face to face.

In order to demonstrate a commitment to financial inclusion, special purpose national banks should provide information to the OCC on several aspects of service to LEP borrowers and communities. Special purpose national banks should document:

- Marketing efforts in LEP communities and any effort to disclose the extent of LEP services available in association with the relevant product;
- Availability of written disclosures in languages other than English;
- Whether any disclosures, notices, statements or other written communications automatically are distributed in other languages, in addition to English, such as Spanish;
- Language access for web portals;
- Mechanisms for collecting and retaining customers' language preference;
- Transfer of existing language preference information to assignees, collectors, or other relevant parties;
- Whether documents, such as applications, can be submitted by consumers in any languages other than English; and
- Availability of oral interpretation through in-house staff or third-party vendors.

While different companies may provide varied types of services for LEP consumers, this list represents a range of information that could enhance market access. Which of these elements are most important or relevant would vary depending on the services provided by a special purpose national bank.

The OCC could help to encourage banks to provide required disclosures and other key documents to LEP consumers in-language by developing model translations, first in Spanish and eventually in other languages. The OCC could work with the CFPB and other regulators to develop these approved translations. The OCC could also improve the quality of oral interpretation and banks' willingness to offer this service to consumers by developing glossaries of financial terms in the most common eight languages, beginning with Spanish.

Banks that offer innovative services primarily online have a tremendous opportunity to support inclusion by offering language access. By developing websites and applications that are available in Spanish, with the goal of including other top languages over time, as well as telephone or online chat support in-language, these banks could provide access to the LEP community with great impact at a relatively low cost.

The OCC should reiterate that fair lending laws, including the Equal Credit Opportunity Act, apply to special purpose national banks. The OCC should provide guidance on how such banks can provide services for LEP borrowers while abiding by fair lending laws and avoiding unfair or deceptive practices. The CFPB's Fall 2016 Supervisory Highlights provided guidance on these issues.[245] For example, the document discussed marketing and advertising in non-English languages

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[245]CFPB, Supervisory Highlights, Issue 13 (Oct. 2016), http://www.consumerfinance.gov/data-research/research-reports/supervisory-highlights-issue-no-13-fall-2016/.

and the provision of disclosures regarding the availability of non-English services during the life of a financial product. It also flagged the importance of avoiding steering by not having differential product offerings for LEP and non-LEP borrowers.

More generally, beyond LEP access, companies can show financial inclusion by providing demographic data to the OCC regarding marketing, access to products, loan performance and other measures of fair lending.

4.3.6. Protect Consumers' Financial Privacy and Security

Many fintechs that might consider applying for a national bank charter have business models that involve collection and use of consumer data. Financial institutions must follow privacy rules under the Gramm-Leach-Bliley Act (GLB),[246] but the protections that these rules provide are too weak and outdated. Consumers have no control over financial institutions' sharing their personal information with affiliates. While they have the right to opt out of their personal information being shared with third parties, this does not apply to third-party sharing to market the financial institution's products or services or in joint marketing ventures with other financial institutions.

Advances in technology enable an increasingly broad spectrum of personal information to be collected and used to make financial decisions about consumers and for other purposes. The rules under GLB cite data collected through internet cookies as an example of personally identifiable financial information.[247] Personal information is now available from many other sources. For instance, some lenders are now using information about consumers from social media in credit decision making, raising questions about privacy, discrimination and accuracy.[248] Information gleaned from consumers' use of financial services may be shared for purposes that that they would not expect and that might cause concern. For example, MasterCard has recently applied for a patent to use information about card holders' purchases to estimate their weight and sell that information to airlines.[249] Mobile payment services will facilitate collection of consumer's geolocation. The use of "big data" – large datasets that may be analyzed computationally to reveal patterns, trends, and associations -- has the potential to help more consumers gain access to credit, but also raises civil rights concerns.[250]

In a 2012 report,[251] the Federal Trade Commission (FTC) makes several recommendations that, while not directed at entities such as financial institutions that are already covered by specific privacy laws, are useful to consider here. The FTC recommended:

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246 *See* Regulation P, 12 CFR pt. 1016. The term "financial institution" in GLB should cover all national banks, including ones that are not depositories.
247 *Id.* § 1016.3 (q) (2) (i) (F).
248 *See* Solomon Semere, To Like or Not to Like: Social Media and Credit Scoring, Lexis Nexis Credit Risk Insights, Dec. 15, 2015), *available at* http://insights.lexisnexis.com/creditrisk/2015/12/15/to-like-or-not-to-like-social-media-and-credit-scoring/.
249 Gulliver Business Travel blog, The Economist, (Jan. 9, 2017), *available at* http://www.economist.com/blogs/gulliver/2017/01/weigh-forward.
250 S*ee Big Data: A Report on Algorithmic Systems, Opportunity, and Civil Rights*, Executive Office of the President (May 2016), *available at* https://www.whitehouse.gov/sites/default/files/microsites/ostp/2016_0504_data_discrimination.pdf.
251 Federal Trade Comm'n, Protecting Consumer Privacy in an Era of Rapid Change: Recommendations for Business and Policymakers (Mar. 2012), *available at*

- Affiliates should be regarded as third parties, and a choice mechanism should be provided for sharing data with them, unless the affiliate relationship is clear to consumers;[252]
- Consumers' express affirmative consent should be obtained to use sensitive personal information such as financial and health data, information about children, precise geolocation, and Social Security numbers for any marketing, first or third-party;[253] and
- Companies should get consumers' express affirmative consent before collecting these types of data.[254]

Since the FTC lacks rulemaking authority in this area, the report is intended to encourage companies to voluntarily adopt best practices. The Federal Communication Commission (FCC), which does have rulemaking authority, recently adopted rules[255] requiring broadband and telephone service providers to obtain opt-in content to use and share sensitive personal information[256] and to provide an opt-out mechanism for personal information not deemed sensitive.[257] Importantly, the FCC prohibited "take it or leave it" offerings – consumers cannot be denied services because they decline to surrender their privacy rights.

The FTC also encouraged companies to adopt privacy by design, including limiting the data they collect to that consistent with the context of the transaction or the relationship with the consumer, and to implement sound data retention and security policies.[258] While the safeguards rules under the Gramm-Leach-Bliley Act require financial institutions to reasonably secure the data they hold,[259] the rules do not provide guidance concerning data retention and disposal.

The OCC should develop additional controls for the collection, use and security of consumers' personal information. All financial institutions, including special purpose national banks, should be required to adhere to more rigorous privacy and security standards to protect consumers in the 21st century.

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https://www.ftc.gov/sites/default/files/documents/reports/federal-trade-commission-report-protecting-consumer-privacy-era-rapid-change-recommendations/120326privacyreport.pdf.

252 *Id. at* 41.

253 *Id.* at 47.

254 *Id. at* 59.

255 *See* 81 Fed. Reg. 87274 (Dec. 2, 2016).

256 Building on the FTC's framework, the FCC found that sensitive customer personally identifiable information includes financial and health information, Social Security numbers, precise geolocation, and information about children, as well as the content of communications, web browsing history, app usage history, and call detail information.

257 *See* 81 Fed. Reg. 87274, 87275 (Dec. 2, 2016) (with a narrow exception: no opt-out is required to use non-sensitive information to solicit customers for other communications services that are commonly marketed with the services to which they already subscribe).

258 *See* Federal Trade Comm'n, Protecting Consumer Privacy in an Era of Rapid Change: Recommendations for Business and Policymakers 27 (Mar. 2012), *available at* https://www.ftc.gov/sites/default/files/documents/reports/federal-trade-commission-report-protecting-consumer-privacy-era-rapid-change-recommendations/120326privacyreport.pdf.

259 *See* 16 CFR pt. 314 (Standards for Safeguarding Customer Information).

5. Protect Small Businesses.

While our comments have focused on protecting consumers, the OCC has asked whether it should address gaps in the protections for small businesses. It should. The Treasury White Paper on Marketplace Lending noted that the "uneven regulatory and supervisory regime [for small business lending] creates risks with respect to existing consumer protection laws and traditional consumer protection issues."[260] Small businesses need many of the same protections that consumers have, yet most of the laws that protect consumers do not extend to businesses.

Interest rate caps, ability-to-repay requirements and other lending protections are just as important for small businesses as for consumers. As discussed earlier in these comments, small businesses have been targeted for triple-digit, high-rate, short-term merchant cash advances that function in much the same way as payday loans with the same problems. The same interest rates caps should protection both consumer and small business loans.

Small businesses also need APR disclosures and other protections that are routine in consumer transactions. The OCC should generally require that national banks treat small businesses in the same manner that they treat consumers, including complying with:

- Truth in Lending Act, including APR disclosure requirements and credit card rules, among others;
- Fair Credit Reporting Act, especially as to any business loan that requires personal security or a personal credit check;
- Fair Debt Collection Practices Act;
- Electronic Fund Transfer Act;
- Truth in Savings Act;
- Consumer Leasing Act;
- The Expedited Funds Availability Act;
- Credit Repair Organizations Act;
- Graham-Leach-Bliley Act.

These laws provide common sense protections that would benefit small businesses as well as consumers.

We also urge the OCC to consider our other recommendations above and those submitted by other commenters to address the following problems that the Responsible Business Lending Coalition has identified in the small business loan market:

- Obfuscation of very high financing costs
- Misaligned incentive between lenders and borrowers
- Double-charging borrowers when loans are renewed by "double dipping"
- Mismatch between financial product's use as suggested to the borrower and actual use behavior encouraged by the lender

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260 United States Dept. of the Treasury, Opportunities and Challenges in Online Marketplace Lending 23 (May 10, 2016), available at https://www.treasury.gov/connect/blog/Documents/Opportunities_and_Challenges_in_Online_Marketplace_Lending_white_paper.pdf.

- Hidden prepayment charges
- Misaligned broker incentives steering small businesses into expensive products
- "Stacking" of too much debt
- Lack of legal protections in collections, and
- Need for financial inclusion.[261]

Many of these problems are all too familiar in the consumer market and are no more acceptable in the small business market.

6. Conclusion

Thank you for your efforts to promote financial innovation, financial inclusion and consumer protection. We appreciate the opportunity to submit these comments.

Sincerely,

National Consumer Law Center (on behalf of its low income clients)
Consumer Federation of America
Consumers Union
Main Street Alliance
U.S. PIRG

[261] *See* Fintech Charter Comments of Responsible Business Lending Coalition at 1-2.

Exhibit A: Organizational Descriptions

Since 1969, the nonprofit **National Consumer Law Center® (NCLC®)** has worked for consumer justice and economic security for low-income and other disadvantaged people, including older adults, in the U.S. through its expertise in policy analysis and advocacy, publications, litigation, expert witness services, and training.

The **Consumer Federation of America** is an association of nearly 300 nonprofit consumer groups that was established in 1968 to advance the consumer interest through research, advocacy and education.

Consumers Union is the public policy and advocacy division of Consumer Reports. Consumers Union works for telecommunications reform, health reform, food and product safety, financial reform, and other consumer issues. Consumer Reports is the world's largest independent product-testing organization. Using its more than 50 labs, auto test center, and survey research center, the nonprofit rates thousands of products and services annually. Founded in 1936, Consumer Reports has over 8 million subscribers to its magazine, website, and other publications.

The **Main Street Alliance** is a national, nonprofit organization dedicated to raising small business owners' voices on issues that impact their businesses, their employees, and the communities they serve. Founded in 2008, MSA has become a national network, representing 30,000 small business owners across the United States, with chapters and affiliates in 13 states. MSA represents a diverse group of small business owners in industries ranging from storefront service, retail and restaurants, to light manufacturing and food processing.

U.S. Public Interest Research Group (U.S. PIRG) serves as the Federation of State PIRGs, which are non-profit, non-partisan public interest advocacy organizations that take on powerful interests on behalf of their members. For years, U.S. PIRG's consumer program has designated a fair financial marketplace as a priority. Our advocacy work has focused on issues including credit and debit cards, deposit accounts, payday lending, student loans, credit report accuracy, privacy of customer information (including data breaches) and, generally, any unfair and deceptive practices.