**Testimony of**

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**on behalf of its low income clients**

**Before the House Financial Services Committee**

**on**

**Rent-A-Bank Schemes and New Debt Traps:**

**Assessing Efforts to Evade**

**State Consumer Protections and Interest Rate Caps**

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# I. Introduction and Summary

Chairwoman Waters, Ranking Member McHenry, and members of the committee, thank you for the opportunity to testify on the National Consumer Law Center's low income clients. Since 1969, NCLC has worked for consumer justice and economic security for low-income and other disadvantaged people in the U.S. through its expertise in policy analysis and advocacy, publications, litigation, expert witness services, and training.

Today we are facing the biggest threat in decades to states' historic power to prevent predatory lending: "Rent-a-bank" lending, where state-regulated lenders launder their loans up to 160% annual percentage rate (APR) through banks in order to evade state interest rate caps. These schemes are spreading around the country and are starting to explode. Payday lenders have state brazenly and openly that they plan to use rent-a-bank schemes to evade California's new law outlawing their destructive products. Every state is at risk.

The rogue banks that enable these schemes clearly feel comfortable that today's regulators will turn a blind eye to this misuse of the bank charter. That is not surprising, because the Federal Deposit Insurance Corp. (FDIC) and Office of the Comptroller of the Currency (OCC) have directly supported a predatory rent-a-bank lender that is making mortgages to small business owners at APRs up to 139% and have proposed rules that would encourage these schemes. Those proposed rules are outside the agencies' authority, are unnecessary, and are extremely dangerous for consumers and small businesses.

Congress can help stop predatory rent-a-bank lending by:

- Passing the Veterans and Consumers Fair Credit Act, H.R. 5050 (Garcia) and S. 2833 (Merkley), which would cover banks and extend to veterans and all consumers the 36% rate cap that today protects active duty servicemembers and their families.
- Supporting the power of states to protect their residents through interest rate limits, including by opposing the FDIC and OCC proposed rent-a-bank rules.
- Passing the Forced Arbitration Injustice Reform (FAIR) Act, H.R. 1423 (Johnson) and S. 610 (Blumenthal).

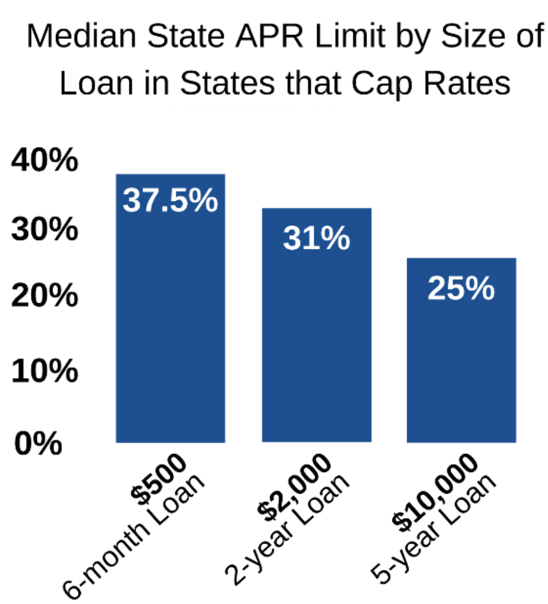
I will discuss each of these issues in more detail below.

## II. The Importance of States' Historic Power to Limit Interest Rates

Since the founding of our nation, states have limited interest rates as the primary protection against predatory lending. At the time of the American Revolution, every state had interest rate limits.[1] Interest rate limits are the simplest and most effective protection against predatory lending.[2]

Starting with a 1978 Supreme Court decision, a deregulatory race to the bottom eliminated interest rate caps for most banks.[3] The Court interpreted the National Bank Act to allow national banks to charge any rate allowed by their home state and export that rate to other states. In response, many states exempted banks from rate caps and banks moved to those states. Federal and state law changes eventually exempted most state- and federally-chartered banks from rate caps. A handful of states entirely eliminated their rate caps for nonbank lenders as well. Others retained their limits on nonbanks but carved out limited exceptions for short-term payday loans.

Today, the vast majority of states retain interest rate caps for many nonbank installment loans and other forms of loans. For example, 45 states and the District of Columbia (DC) limit the interest rate on a $500, 6-month loan. In most states, rate caps decrease as the loan size increases. The median rate among states with caps is 37.5% APR for a $500, 6-month loan; 31% APR for a $2,000, 2-year loan, and 25% APR for a $10,000, 5-year loan.[4]



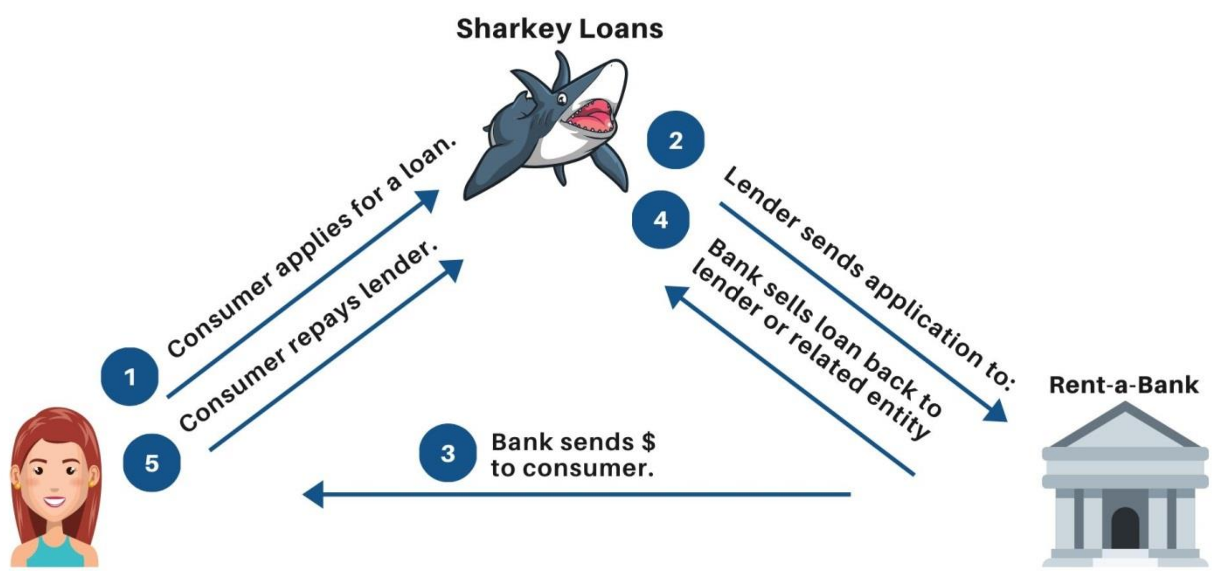
The American public strongly supports interest rate caps. In recent years, overwhelming, bipartisan majorities in have capped rates at 36% or less in Arizona (2008), Colorado (2018), Montana (2010), Ohio (2008), and South Dakota (2016).[5]

## III. Rent-a-Bank Lending Joins a Long Line of Usury Evasions

Attempts to evade usury laws are as old as the laws themselves. But courts consistently look beyond form to the substance of the transaction to prevent subterfuge. For example, in one case in 1835, the U.S. Supreme Court described courts' abhorrence of usury evasions:

> "The ingenuity of lenders has devised many contrivances by which, under forms sanctioned by law, the [usury] statute may be evaded. [ . . .] Yet it is apparent, that if giving [its stated] form to the contract will afford a cover which conceals it from judicial investigation, the statute would become a dead letter. Courts, therefore, perceived the necessity of disregarding the form, and examining into the real nature of the transaction."[6]

Rent-a-bank lending is one of the newer forms of evasion. After banks escaped interest rate limits, high-cost lenders started using arrangements with banks. In rent-a-bank lending, a state-regulated entity claims that it is merely the agent, service provider or assignee of the bank that funds the loan but then quickly sells the loan or receivables. Because the funds originally come from the bank, the lender claims that state usury laws are preempted, even if the loan has



been assigned to a non-bank entity that is charging interest above what it can charge directly.

Two decades ago, payday lenders making short-term balloon-payment loans first tried using rent-a-bank schemes. In 2000, the OCC described the older payday loan rent-a-bank arrangements in terms that are strikingly similar to today's schemes:

> "[S]ome national banks have entered into arrangements with third parties in which the national bank funds payday loans originated through the third party. In these arrangements, national banks often rely on the third party to provide services that the bank would normally provide itself. These arrangements may also involve the sale to the third party of the loans or the servicing rights to the loans."[7]

Payday lenders argued that they were only the agent, service provider or assignee of the bank.[8] For example, as described in one case, Advance America was identified as "the fiscal agent and loan marketer/servicer." Advance America "procures the borrower and submits a loan application to BankWest. BankWest then approves (or denies) the application and advances all funds." The bank "used a separate third-party 'loan processing agent' (an automated-consumer-information database that the payday lender itself used in other states) to electronically approve applications."[9]

In these older payday loan rent-a-bank schemes, the payday lenders not only performed services as an agent of the bank but also were assignees of loans or participation interests that banks chose to sell to the secondary market: "BankWest 'owns' all the loans initially, but retains the right to sell a loan to any third party; Advance America, as the payday store has a right of first refusal on any loan the BankWest chooses to sell."[10] Another lender made arguments reminiscent of current arguments that an assignee steps into the bank's shoes: "preemption applies to any challenge of interest or fees on a bank-issued loan … [and] preemption rights do not disappear when a loan is assigned or transferred from the bank."[11]

In the early 2000s, all of the federal bank regulators eventually shut down the rent-a-bank arrangements with short-term payday lenders. Former Comptroller of the Currency John Hawke explained in a 2002 speech:

> "The benefit that national banks enjoy by reason of this important constitutional doctrine [preemption] cannot be treated as a piece of disposable property that a bank may

rent out to a third party that is not a national bank. Preemption is not like excess space in a bank-owned office building. It is an inalienable right of the bank itself….

"Not only do these arrangements constitute an abuse of the national charter, but they are highly conducive to the creation of safety and soundness problems at the bank, which may not have the capacity to manage effectively a multistate loan origination operation that is in reality the business of the payday lender."[12]

Despite the success of shutting down short-term loan rent-a-bank schemes, high-cost lenders that make longer-term installment loans have periodically tried to use banks regulated by the FDIC to evade state interest rate limits. When given the opportunity, courts have often shut down these schemes.[13]

Applying the longstanding anti-evasion principle, courts have recognized that federal bank preemption does not apply where a nonbank lender is the true lender. A true lender analysis often focuses on which party has the "predominant economic interest." Other factors include what party designed, brands or holds the intellectual property on the loan product and collateral; markets, offers, and processes loan applications; services the loans and handles customer service, purchases, has first right of refusal, or ultimately holds the bulk of the loans, receivables or participation interests; or has the ability to change the entity that originates the credit or to whom the credit or receivables are sold.[14] No single fact defines a rent-a-bank scheme, just as there is no single form of usury evasion. Rent-a-bank schemes continually evolve and must be challenged.[15]

Despite some successful challenges in the past, rent-a-bank lending is now making a comeback, aided by several developments:

- Forced arbitration clauses have taken away consumers' access to the courts when the law has been violated, and class action bans prevent them from joining together to challenge a well-heeled lawbreaker that is harming thousands or millions of people.
- The willingness and resources of state enforcement authorities to challenge rent-a-bank schemes have been uneven, even in states where voters have strongly endorsed rate caps.

- Rent-a-bank schemes have become more sophisticated, cloaking themselves as "fintech" lenders, using lines of credit without APR disclosures, or using complicated arrangements with the sale of receivables instead of whole loans to special purpose vehicles that benefit, but are not directly owned by, the nonbank lender.
- Lower-cost lenders have tested the waters and paved the way for high-cost lenders.
- Federal and state bank regulators have been unwilling to police their banks and are, to the contrary, actively supporting legal theories that benefit rent-a-bank lenders, as discussed below.

## IV. High-Cost Rent-a-Bank Lending is Starting to Explode

We are now seeing an alarming explosion of blatant high-cost rent-a-bank schemes in the last two years, most in the last year, with more threatened. Evasion of state usury laws by state-regulated lenders should never be permitted, even if the rate charged is not stratospheric.[16] But in this testimony I will focus on the most outrageous high-cost lenders.

Today's high-cost rent-a-bank loans are mostly installment loans from $400 to $10,000, generally at rates of 100% APR to 160% APR, though some are lines of credit. These longer-term high-cost loans are an even bigger, deeper and harder to escape debt trap than short-term payday loans.[17] We have included many stories of the distress caused by high-cost longer-term loans in our comments recently submitted to the OCC.[18] Here is one example from Elevate, one of the lenders that is planning to move to a rent-a-bank model in California to evade the state's new rate caps designed to address precisely these loans:

> "I was misled by Rise Credit to believe that they were unlike other predatory loan companies. By the time I understood what I had [signed], I had paid them thousands of dollars in interest. I have recently become temporarily unemployed and called them to ask for help during my time of financial hardship. They refused any solution and my account is headed to collections now . . . . [T]he total paid is far over the amount I initially borrowed from Rise . . . . This is robbery and all of the necessities I have for myself and my children are suffering because of it . . . . How is it that they can do this? I am asking for help for not only my family, but for all of the families targeted by these

predatory loans meant to target those living in poverty and struggling to live paycheck to paycheck."[19]

Only a small number of banks are involved in rent-a-bank lending, but they can have a big impact. I am currently aware of six banks currently facilitating high-cost loans offered by non-bank companies at rates well over 36% and usually well above 100% APR: **Axos Bank (formerly Bank of Internet or BOFI Bank), Bank of Lake Mills (Wisconsin), Capital Community Bank (Utah), FinWise Bank (Utah), Republic Bank & Trust (Kentucky),** and **TAB Bank (Utah)**.

All but one of these banks, Axos Bank (a federal savings association), are state-chartered banks that are regulated by the FDIC and by their chartering states: Utah for three of them and Kentucky and Wisconsin for the other two.

These six banks are, so far, helping several nonbank lenders make usurious loans in excess of what states allow.[20] We are currently aware of the following loans being made through rent-a-bank schemes in states that do not allow these rates:[21]

- ChoiceCa$h (LoanMart)/Community Capital Bank: car title loans up to $2,500 with APRs up to **170% APR** (16 states and DC);[22]
- EasyPay Finance/TAB Bank: loans for auto repairs, furniture, home appliances, pets, and wheels and tires, such as a $1,500 loan at **188.99% APR** (30 states)**.**[23]
- Elastic (Elevate)/Republic Bank & Trust: lines of credit from $500 to $4,500 with effective APRs up to **109%** (above state limits in 14 states and DC);[24]
- NetCredit (Enova)/Republic Bank & Trust: installment loans of $2,500 to $10,000 with APRs up to **99.99% APR** (22 states and DC);[25]
- OppLoans/FinWise Bank: installment loans of $400 to $5,000 with APRs of **160%** (24 states and DC);[26]
- Rise (Elevate)/FinWise Bank: installment loans of $500 to $5,000 with APRs of **99% to 149%** (16 states and DC);[27]

- World Business Lenders/Axos Bank or Bank of Lake Mills: small business loans (or disguised personal loans), typically secured by the owner's personal residence, with APRs of **75% to 139%** or higher (various states).[28]

In addition, as discussed in the next section, CURO Group Holdings Corp., which currently offers both short-term and long-term payday loans through its SpeedyCash brand, has told investors that it plans to begin a rent-a-bank operation in California.

## V. Plans to Evade California's New Law Show High-Cost Rent-a-Bank Lenders Feel Comfortable with Today's Regulators

Rent-a-bank schemes are getting increasingly bold. In California, a new law that took effect January 1, 2020 limits the rates on loans up to $10,000. The bill was passed to address the harmful effects of installment loans over $2,500 at rates up to 200%.[29]

Yet before the bill had even passed, several California payday lenders informed their investors that they would nonetheless continue to charge triple-digit interest rates by blatantly evading the new usury law through forging rent-a-bank relationships with banks.[30] Three publicly traded payday lenders in California have announced plans to begin new rent-a-bank operations. Elevate, CURO Group Holdings (which includes the Speedy Cash brand, among others) and Enova International (with subsidiaries that include NetCredit and CashNetUSA) told investors that they plan to use banks to continue business as usual so that they can disregard California law and continue to make high-cost loans.[31] Shortly thereafter, Enova's NetCredit began making rent-a-bank loans through Republic Bank & Trust in several states, discussed above.

At least two high-cost lenders, OppLoans and LoanMart, appear to be already offering usurious rent-a-bank loans in California. To my knowledge, other rent-a-bank loans in California have not yet been rolled out.

The willingness of payday lenders to speak publicly and brazenly about using rent-a-bank schemes to evade state interest rate limits speaks volumes about the comfort they have with today's bank regulators. While both the OCC and FDIC have said that they view these schemes "unfavorably,"[32] they are well aware of the predatory rent-a-bank schemes operating today at their banks and they have done nothing about it.  The same holds for the state bank regulators in Kentucky, Utah and Wisconsin, the home states of the state-chartered banks involved in these schemes.  The clear signal predatory lenders have gotten is that the coast is clear.

If these brazen efforts to flout the law succeed, every state may see high-cost lenders laundering their loans through banks to evade state usury laws.  Rent-a-bank schemes could also be used not only for installment loans but also for short-term payday loans, as in the 1990s.  The OCC's repeal of its guidance against bank payday loans (aka "deposit advance products")[33] – and the possibility that the FDIC will soon do the same – heightens the risk that rent-a-bank short-term payday loans will return.

## VI. The OCC and FDIC are Supporting a Rent-a-Bank Lender that Makes Mortgages Up to 139% APR that Endanger the Homes of Small Business Owners

The FDIC and OCC are actively supporting a predatory rent-a-bank scheme despite a truly shocking fact pattern. In July 2019, the FDIC filed an amicus brief supporting World Business Lenders (WBL) in a district court bankruptcy case, *Rent-Rite Super Kegs v. World Business Lenders.*[34] The FDIC is defending WBL's ability to charge 120% APR on a $550,000 loan despite Colorado's lower (but still hefty) 45% business interest rate cap because the loan was originated through a bank, FDIC-supervised Bank of Lake Mills in Wisconsin.

The brief makes the same arguments in support of WBL's right to charge 120% APR as the OCC and FDIC raise to justify new proposed federal interest rate rules, discussed below. Not one word of the agencies' brief expresses any concern about the astonishing interest rate. The FDIC and OCC chose to side with a predatory lender in a case that is not at the appellate level, when the bank is not involved in the case, and where there is no argument that the bank would be impacted if WBL were limited to collecting 45% APR instead of 120% APR. The agencies did not raise the possibility that the bank might not be the true lender or qualify their support for WBL's right to charge 120% APR in any way.

The FDIC's and OCC's support for WBL shows exactly the kind of abusive lending that will flourish if their rent-a-bank rulemaking is finalized. The *Rent-Rite* case is not an aberration. Several cases filed against WBL – including some that were publicly available before the OCC and FDIC made the decision to support WBL – reveal a company with a predatory business model of approaching struggling businesses and charging exorbitant rates, using a bank as a front to escape interest rate limits.

The facts described below are taken from the complaints as alleged. There is a striking similarity among them. The loans are secured by personal residences, making the high rates truly shocking, and in some cases the business aspect of the transaction appears to be trumped up to disguise that these are loans for personal purposes and are covered by consumer laws. The bank has little if anything to do with the loans.  WBL even appears to have use of a power of attorney for both Bank of Lake Mills and Axos Bank.

In *Speer v. Danjon Capital et al.,* filed in Connecticut in late 2019, Elissa Speer is facing a civil action in Nevada and a foreclosure of a residential property in Connecticut after taking out a $30,000 loan alleged to be at 400% and a second loan of $20,000, alleged to be at 121% APR.[35] The loans were offered by Danjon Capital in collusion with World Business Lenders, but were purportedly with funds lent by Bank of Lake Mills. After executing the first note and mortgage, Danjon refused to release the funds unless Speer executed a lease agreement for "restaurant equipment" despite the fact that Speer was never in the restaurant business and the equipment referenced included two backpack leaf blowers unrelated to restaurant use. The complaint alleges that the defendants disguised residential mortgage loans made to consumers primarily for personal, family, or household use as commercial loans in order to avoid Connecticut's licensure and other laws.

In *Vincent Deramo Jr. et al. v. World Business Lenders, LLC*, filed in Florida in 2017, a general contractor and his wife allege that a representative of World Business Lenders contacted them, claiming to be an agent for Bank of Lake Mills, and offered a $400,000 loan, secured by their home.[36] Despite the promise of 15% APR, they allege that WBL actually charged them over 72% APR. The documents were prepared by WBL and were mailed to WBL and the plaintiffs had no contact with the bank. The mortgage was assigned from the bank to WBL through a signature of the vice president of WBL as power of attorney for the bank.

In *B&S Medical Supply et al v. World Business Lenders et al*., filed in New York in 2017, the complaint alleges that WBL solicited Boris Simon, the owner of B&S Medical Supply, for a $28,000 business loan at 73% APR, provided by Liberty Bank, that was secured by Simon's home.[37] The business loan application contained both the business logo and contact information of WBL and Liberty. The loan was immediately assigned from Liberty to WBL. WBL corresponded with Simon, referring to itself as the "Lender" and saying that it would service the loan and have the right to collect payments.

In *Kaur et al. v. World Business Lenders et al*., filed in Massachusetts in April 2019, a married couple was threatened with foreclosure after borrowing $175,000 at 92% APR from World Business Lenders for their business, New England Distributors, secured by a mortgage on their house.[38] The loan paperwork listed BOFI/Axos Bank as the lender, but the loan was presented by WBL. All the forms were WBL forms, and the application discussed WBL's role including ordering a valuation of the collateral. The mortgage was assigned from BOFI to WBL and that assignment by BOFI "was signed by World Business Lenders, LLC, as attorney-in-fact for BOFI Federal Bank."[39]

In *Adoni et al. v. World Business Lenders, LLC, Axos Bank and Circadian Funding,* filed in New York in October 2019, Jacob Adoni alleges that he has been threatened with threats to foreclose on his home after receiving a $90,000 loan at 138% APR secured by his personal residence.[40] Adoni was contacted by Circadian Funding with an offer of a personal loan that would be funded by WBL and Axos Bank. He was told that the loan documents would be provided to him at 12:00 pm and he must execute them by 6:00 pm or the offer would no longer be valid. Adoni was told by Circadian that the loan was meant to be a personal loan to him but it was necessary for the loan documents to make reference to his business. The defendants "have inundated Mr. Adoni with multiple threats to foreclose on his home and on the mortgage."[41]

That is the lender the FDIC and OCC are supporting. Their supervision of their banks is not stopping the bank from letting itself be used—up to the point of handing over a power of attorney for the bank—by a predatory lender in order to evade state interest rate limits. The bank itself has been named in some of these lawsuits, so the bank's supervisors should surely know about them. These practices have been going on for some time. A 2014 article describes how WBL employs some of the worst actors and practices from the foreclosure crisis for its predatory lending practices towards small businesses.[42]

The FDIC's and OCC's direct support for World Business Lenders on the same grounds used to justify proposed rent-a-bank rules shows exactly what should be expected to happen if the rules are finalized: predatory lending, which not only may leave people in financial ruin but jeopardizes their homes and businesses.

## VII. The Proposed Rules by the FDIC and OCC are Unlawful, Unnecessary, and Harmful

The FDIC and OCC have proposed rules that state that when a bank sells, assigns, or otherwise transfers a loan, interest permissible prior to the transfer continues to be permissible following the transfer. In other words, if a bank originates a loan at 160% in Colorado, where voters adopted a 36% interest rate cap in 2018, the loan could be sold to a nonbank lender that could charge new interest at 160%.

The proposals do not include any exception for transactions structured to evade state usury laws. The proposed rules are stated as a flat rule without exceptions. Thus, it does not appear to matter to the FDIC or OCC if the bank is a mere fig leaf, quickly originating and reselling the loans or receivables, with little interest or involvement in a lending program primarily run by a state-regulated business that makes the lion share of the profits.

The FDIC and OCC claim that view rent-a-bank schemes "unfavorably" and that their proposals do not address the question whether the bank "is a real party in interest with respect to a loan or has an economic interest in the loan under state law, e.g., which entity is the "true lender."[43] But that is cold comfort. There is no stated exception in the proposed rules for situations where the bank is not the real party in interest. Courts may simply rely on the rules on their face to permit any assignee of a loan, including one where the bank is not the true lender, to ignore state usury laws. States may challenge rent-a-bank schemes, but legal challenges take resources and years. The FDIC and OCC have demonstrated the impact they expect their proposals to have by directly supporting World Business Lenders' 120% APR loan and by failing to stop rent-a-bank schemes.

Rent-a-bank schemes also undermine the goals of the Community Reinvestment Act (CRA), yet the FDIC and OCC are encouraging these schemes at the same time that they are proposing to weaken the CRA.[44] Rent-a-bank schemes enable banks to help predatory lenders target communities that the banks are not serving with responsible products, offering loans the banks do not directly offer in their own branches. This is exactly the kind of predatory lending that the CRA is designed to prevent.

The FDIC and OCC claim that the proposed rules are necessary to address the "uncertainty" caused by a Second Circuit decision, *Madden v. Midland*,[45] and to protect banks' ability to manage liquidity and risks. But even the FDIC admits that it "is not aware of any widespread or significant negative effects" due to the nearly 5-year old *Madden* decision.[46] The OCC, as well, offers no evidence to the contrary. Neither agency has disputed the *Madden* court's finding that limiting debt buyer interest does not significantly impact banks. Nor have they cited any actual or significant secondary market problems impacting banks in other contexts. Even the recent cases filed against credit card securitization trusts – which neither agency cites – do not support the proposed rules.[47] Mere allegations early in a lawsuit with an uncertain impact do not justify overbroad rules that will have certain, tremendous, and far-reaching harm to consumers.[48]

The legal issues posed by the proposed rules are discussed at length in our comments.[49] I will only summarize them here:

- Neither the FDIC nor the OCC has the authority to preempt state usury laws as applied to nonbank companies, and the OCC has failed to follow the procedures and standards required by Congress in 2010 in the Dodd-Frank Act.
- The older, so-called "valid-when-made" state usury law cases that the FDIC and OCC cite arise in a very different context (primarily about whether later events change how a rate is calculated) than assignment of loans to an entity with different rights and obligations under the law.[50] A bank's legal rights as a bank cannot be assigned, just as a doctor could sell a medical practice but could not assign the right to operate that practice to a doctor without a license in the state.
- The proposed rules oversimplify diverse rulings in many different contexts to an absolute rule so overbroad that it appears to allow a bank to increase the interest rate after the fact to a level not even permitted under the NBA or the Federal Deposit Insurance Act.

Perhaps most strikingly, neither the FDIC nor the OCC considered the harm that their proposals could cause or the likelihood that predatory lenders will be all too happy to step into the shoes of banks that can charge sky-high interest rates without limit.

## VIII. Congress Should Cap Interest Rates for All Lenders at 36% and Support States' Power to Impose Lower Rate Caps

Predatory rent-a-bank lending exists for two simple reasons: there are no federal interest rate limits for most lenders, and most banks are exempt from state rate caps. We can prevent an explosion of predatory lending and protect consumers and small businesses from loan sharks by adopting a national interest rate cap and by preventing banks from being used to evade state rate caps. Congress can also help by restoring consumers' access to the courts.

First, Congress must pass the Veterans and Consumers Fair Credit Act, H.R. 5050 (Garcia) and S. 2833 (Merkley), which would apply to all lenders, bank and nonbank, and would extend to veterans and all consumers the 36% interest rate cap that current applies to servicemembers and their families.  The VCFCA would address the most harmful loans and the most abusive misuse of bank charters by preventing banks from originating high-cost loans with triple-digit APRs.

Consumers benefit when rate caps drive out predatory lending.  In states that have capped rates, consumers are better off and find better ways to cope with financial challenges:

- Former borrowers generally agree that they are better off without payday loans and express relief that the loans are no longer available.
- People use a variety of strategies to manage their finances, including borrowing from family and friends, negotiating payment plans with utility companies or other creditors, and using pawn shops or traditional credit products like credit cards.
- Consumers do not turn to illegal internet loans in large numbers.[51]

Second, we must uphold the states' historic power to limit interest rates.  This is especially important in the absence of a federal rate cap, but even if Congress caps rates at 36%, states have appropriately set lower rates for large loans.  The FDIC and OCC must abandon their proposed rules and the agencies, along with the state bank regulators in Kentucky, Utah and

Wisconsin, must stop their banks from engaging in rent-a-bank lending. Legislation to strengthen the integrity of state rate caps and prevent rent-a-bank lending should be considered. State attorneys general, state regulators, and private litigators can also address rent-a-bank lending in court.

Third, Congress must restore accountability and consumers' access to the courts by passing the Forced Arbitration Injustice Repeal (FAIR) Act, H.R. 1423 (Rep. Johnson) and S. 610 (Sen. Blumenthal). Rent-a-bank lenders violate state usury laws and other consumer protection laws. But forced arbitration clauses and class action bans take away consumers' and small businesses' day in court and their ability to band together when thousands or millions of people are harmed. Congress must eliminate this get-out-of-jail-free card.

## IX. Conclusion

Rent-a-bank schemes jeopardize the states' role under our federalist system in protecting consumers. These schemes eviscerate the oldest, simplest and most effective protection against predatory lending: interest rate limits. Control over predatory lending is taken away from states and handed over to a few rogue banks that facilitate outrageous loans they do not make in their own branches. Allowing state-regulated lenders to launder their loans through banks is having the very result that the Second Circuit in *Madden* was trying to prevent: "an end-run around usury laws."[52]

Thank you for inviting me to testify today. I look forward to your questions.

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[1] James M. Ackerman, *Interest Rates and the Law: A History of Usury*, 1981 Ariz. St. L.J. 61 (1981).

[2] *See* NCLC, *Misaligned Incentives: Why High-Rate Installment Lenders Want Borrowers Who Will Default* (July 2016), https://www.nclc.org/issues/misaligned-incentives.html (NCLC, *Misaligned Incentives*).

[3] *Marquette Nat'l Bank v. First of Omaha Corp*., 439 U.S. 299 (1978); *see generally* NCLC, Consumer Credit Regulation (2d ed. 2015), *updated at* www.nclc.org/library.

[4] The median APR for the $500 loan is slightly different from what we calculated last year as two states that previously did not have rate caps, New Mexico and Ohio, now cap the rate for a $500 loan but at fairly high levels. The APR for the $2000 loan has not changed. We have not updated the calculations for the $10,000 loan since 2018. *See* NCLC, Fact Sheet, State Annual Percentage Rate (APR) Caps for $500, $2,000, and $10,000 Installment Loans (March 2019), https://www.nclc.org/images/pdf/high_cost_small_loans/fact-sheet-apr-caps-for-installment-loans.pdf, and Carolyn Carter et al., NCLC, A Larger and Longer Debt Trap? Analysis of States' APR Caps

for a $10,000 Five-Year Installment Loan (2018), https://www.nclc.org/issues/a-larger-and-longer-debt-trap-installment-loan.html.

[5] *See, e.g.,* Pat Ferrier, Fort Collins Coloradoan, "Colorado election: Proposition 111, capping interest on payday loans, passes" (Nov. 6, 2018) (77% of voters voted to approve a 36% rate cap); South Dakota Official Election Returns and Registration Figures, Primary Election (June 7, 2016), https://sdsos.gov/elections-voting/assets/ElectionReturns2016_Web.pdf (76% in favor of a 36% rate cap); Matt Volz, Missoulian, Montana voters approve payday loan, real estate tax initiatives (Nov. 3 2010). http://bit.ly/2KqQ7rb (73% of Montana voters approved a 36% rate cap); Ohio Payday Lender Interest Rate Cap, Referendum 5 (2008), https://ballotpedia.org/Ohio_Payday_Lender_Interest_Rate_Cap,_Referendum_5_(2008)#cite_note-ohsos-1 (63% in favor of a 28% rate cap); Arizona Payday Loan Reform, Proposition 200 (2008), https://ballotpedia.org/Arizona_Payday_Loan_Reform,_Proposition_200_(2008) (60% of voters opposed continuing an exemption from the state's rate cap) . In Arizona, the payday lenders later found a loophole for auto title loans. In Ohio, the payday lenders found a loophole in the mortgage laws. The Ohio legislature later closed that loophole but allowed higher-cost loans than the voters had approved.

[6] *Scott v. Lloyd*, 34 U.S. 418, 419 (1835).

[7] OCC Advisory Letter No. 2000-10 (Nov. 27, 2000).

[8] *BankWest, Inc. v. Baker*, 411 F.3d 1289, 1295 (11th Cir. 2005) ("To avoid this direct prohibition, however, payday stores have entered into agency agreements whereby the stores procure such payday loans for out-of-state banks …"), *reh'g granted, op. vacated*, 433 F.3d 1344 (11th Cir. 2005), *op. vacated due to mootness*, 446 F.3d 1358 (11th Cir. 2006); *Flowers v. EZPawn Oklahoma, Inc.,* 307 F.Supp.2d 1191, 1196, 1205 (2004) ("Defendants assert that they acted as servicers for the loan made by County Bank… Defendants submit that County Bank developed the loan product at issue, approved and made the extension of the loan to the Plaintiff and all others similarly situated, funded the loan …"); *Colorado ex rel. Salazar v. Ace Cash Express*, 188 F.Supp.2d 1282 (D. Colo. 2002) ("Defendant admits that it is a 'loan arranger/agent.'"); *Commonwealth v. Think Finance, Inc*., 2016 WL 183289 (E.D. Pa. Jan. 14, 2016).

[9] *BankWest, Inc. v. Baker*, 411 F.3d 1289 (11th Cir. 2005) ("To avoid this direct prohibition, however, payday stores have entered into agency agreements whereby the stores procure such payday loans for out-of-state banks …"), *reh'g granted, op. vacated*, 433 F.3d 1344 (11th Cir. 2005), *op. vacated due to mootness*, 446 F.3d 1358 (11th Cir. 2006).

[10] *BankWest*, 411 F.3d at 1295 n.6; *see also People ex rel. Spitzer v. Cty. Bank of Rehoboth Beach*, Del., 45 A.D.3d 1136, 1137, 846 N.Y.S.2d 436, 438 (2007) ("County Bank and TC [Telecash] entered into an agreement wherein County Bank agreed to make and TC agreed to market and service such payday loans….TC and CRA purchased a 95% participation interest in each and every loan made."); *Hudson v. ACE Cash Express,* 2002 WL 1205060, 2002 U.S.Dist. LEXIS 11226 (S.D. Ind. 2002) ("The Master Agreement provides that Goleta will sell an undivided participation interest in certain 'Bank Loans' to ACE [Cash Express]…. At the time of Goleta's loan to Hudson, ACE was required to purchase an undivided 95% participation interest in these loans."); *Georgia Cash America v. Greene*, 734 S.E.2d 67, 73 (Ct. App. Ga. 2012) (agreeing that there existed "a genuine issue of material fact regarding whether Cash America actually received [only] a 49 percent economic interest for its services and even if it did so, whether it nevertheless, by contrivance, device, or scheme, attempted to avoid the provisions" of Georgia law making an entity the true lender if it held the predominant economic interest).

[11] *Think Finance*, 2016 WL 183289 at *13 (rejecting the argument).

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

[13] *See, e.g., CashCall, Inc. v. Morrisey,* 2014 WL 2404300 (W. Va. May 30, 2014); CashCall, Inc. v. Maryland Commissioner of Financial Regulation, 139 A.3d 990 (Md. 2016).

[14] *See, e.g., Ubaldi v. SLM Corp.,* 852 F. Supp. 2d 1190 (N.D. Cal. 2012) (nonbank defendant used its own copyrighted forms, promissory notes, brands and platforms); *Flowers v. EZPawn Oklahoma, Inc.*, 307 F. Supp. 2d 1191 (N.D. Okla. 2004) (adopting report of magistrate indicating that payday lenders that owned and controlled

the branding of the loans were the true lenders); *Glaire v. La Lanne-Paris Health Spa, Inc.,* 12 Cal. 3d 915, 924-25 (1974) (finance company's practice of purchasing vast majority of gym's membership installment contracts contemporaneously with their execution was functional equivalent of extending loans directly); *Eul v. Transworld Systems*, 2017 WL 1178537 (N.D. Ill. Mar. 30, 2017) (the nonbank designated who would administer the loans, designated the servicer, and directed who the loans would be sold to after origination).

[15] *See, e.g., Georgia Cash America v. Greene*, 734 S.E.2d 67 (Ct. App. Ga. 2012) (after defendant adjusted its contract with bank to receive only a 49% participation interest, triable issue remained on whether it used a contrivance, device or scheme to evade the law).

[16] *See* Amicus Brief of National Consumer Law Center, Center for Responsible Lending and Colorado Public Interest Research in support of plaintiff in Martha Fulford v Avant of Colorado LLC et al and Web Bank, (Jan. 14, 2019), https://www.nclc.org/images/pdf/litigation/AmicusBrief-Avant.pdf.

[17] NCLC, *Misaligned Incentives, supra*.

[18] Comments of Center for Responsible Lending, NCLC et al., OCC Interest Rate Proposal at 38-48 & Appx. B (Jan. 21, 2020), https://www.nclc.org/images/pdf/rulemaking/comments-occ-interest-rates-and-apps.pdf.

[19] #1487339 (California borrower)

[20] In addition, FinWise Bank is also involved in partnerships with other very high-cost lenders such as American First Finance but it is not clear if the loans are evading state interest rate limits.

[21] Some of these loans are summarized in our 2-page fact sheet, "Stop Payday Lenders' Rent-a-Bank Scheme" (Nov. 2019), http://bit.ly/StopRent-a-BankSchemes, which is attached as an appendix to this testimony.

[22] *See* https://www.800loanmart.com/ ("Loans for certain California residents, and residents of Delaware, District of Columbia, Florida, Illinois, Indiana, Kansas, Kentucky, Michigan, Mississippi, Oklahoma, Ohio, Oregon, South Dakota, Tennessee, Texas, and Washington residents are made by Capital Community Bank, a Utah chartered bank located in Provo, UT, Member FDIC. Loans made by Capital Community Bank will be governed by Utah law and serviced by LoanMart."); https://www.800loanmart.com/choicecash/. The original version of this testimony mistakenly stated that ChoiceCa$h made loans through Community Capital Bank up to 222% APR instead of 170% APR.

[23]EasyPay is not available in New York. Loans are offered through TAB Bank to residents in Alabama, Arkansas, Colorado, Connecticut, Florida, Georgia, Hawaii, Iowa, Indiana, Louisiana, Massachusetts, Maryland, Maine, Michigan, Minnesota, Mississippi, Montana, North Carolina, Nebraska, New Jersey, Ohio, Oklahoma, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Vermont, West Virginia, Wyoming and District of Columbia. Loans all other states is administered by EasyPay Finance. *See* https://www.easypayfinance.com/privacy-policy/ ("Additional Important Information)". The individual loan documents, which indicate that EasyPay Finance is the "servicer" and "agent" of TAB Bank, are on file at NCLC.

[24] Until January 2020, Elastic's website had an FAQ that listed the states where Elastic was not available. Elastic was and likely still is available in DC and 14 states that do not allow a 100% APR on a line of credit: Alaska, Arizona, Arkansas, Florida, Kentucky, Louisiana, Maryland, Minnesota, Montana, Nebraska, Nevada, Oregon, SouthDakota, Texas. Elevate uses Republic Bank & Trust of Kentucky to originate the Elastic product. Republic sells a 90% interest in the loans to an entity controlled by Elevate for which Elevate is the primary beneficiary. Elevate Credit, Inc., Form 10-Q for the period ending Sept. 30, 2019, S.E.C. file no. 001-37680 at 21, https://www.sec.gov/Archives/edgar/data/1651094/000165109419000048/elevate10-qxq22019.htm ("Elevate 10-Q").

[25] NetCredit loans are available directly in some states and through Republic Bank & Trust in DC and 22 states: Alaska, Arizona, Arkansas, Florida, Hawaii, Indiana, Kansas, Kentucky, Michigan, Minnesota, Mississippi, Montana, Nebraska, New Jersey, Ohio, Oklahoma, Oregon, Rhode Island, Texas, Tennessee, Washington, Wyoming. *See* https://www.netcredit.com/ (bottom of page); https://www.netcredit.com/rates-and-terms.

[26] Loans are available directly through OppLoans in 12 states and through FinWise Bank in DC and 24 states that do not allow 160% APR: Alaska, Arizona, California, District of Columbia, Florida, Hawaii, Indiana, Kansas, Kentucky, Louisiana, Maine, Michigan, Minnesota, Montana, Nebraska, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, South Dakota, Tennessee, Virginia, Washington, and Wyoming. *See* https://www.opploans.com/rates-and-terms/. FinWise sells the receivables back to OppLoans or a related entity.

[27] Rise offers loans directly in some states and through FinWise Bank in DC and 16 states that do not allow its rates: Alaska, Arizona, Florida, Hawaii, Kentucky, Louisiana, Michigan, Minnesota, Montana, Nebraska, Nevada, Ohio, Oklahoma, Oregon, South Dakota, Texas, and Wyoming. *See* https://www.risecredit.com/how-online-loans-work#WhatItCosts (select each state). FinWise sells a 95% interest in the loans to an entity controlled by Elevate for which Elevate is the primary beneficiary. *See* Elevate 10-Q at 22, 43.

[28] *See* https://www.wbl.com/. ("Business loans are offered by Axos Bank®, Member FDIC, or by World Business Lenders, LLC or its affiliate, WBL California, LLC, dba WBL …"). These loans are described in Section V.

[29] Calif. Office of the Governor, Press Release, "Governor Newsom Signs Legislation to Fight Predatory Lending in California" (Oct. 10, 2019), https://www.gov.ca.gov/2019/10/10/governor-newsom-signs-legislation-to-fight-predatory-lending-in-california/; Calif. Assembly Bill No. AB 539 (effective Jan. 1, 2020).

[30] *See* NCLC, "Payday Lenders Plan to Evade California's New Interest Rate Cap Law Through Rent-A-Bank Schemes" (Oct. 2019), http://bit.ly/rent-a-bank-ib (quoting earnings calls).

[31] *See* NCLC, Issue Brief: Payday Lenders Plan to Evade California's New Interest Rate Cap Law Through Rent-A-Bank Schemes (October 2019), https://www.nclc.org/issues/ib-rent-a-bank.html.

[32] *See, e.g,* FDIC, Proposed Rule, Federal Interest Rate Authority, 84 Fed. Reg. 66845, 66846 (Dec. 6, 2019) ("FDIC Proposal").

[33] OCC, News Release 2017-118, Acting Comptroller of the Currency Rescinds Deposit Advance Product Guidance (Oct. 5, 2017).

[34] *See Amicus Brief of the [FDIC] and the [OCC] in Support of Affirmance and Appellee, In Re: Rent-Rite Super Kegs West Ltd.*, https://www.consumerfinancemonitor.com/wp-content/uploads/sites/14/2019/09/Amicus_Brief.pdf (Sept. 10, 2019); *see also* Letter to the OCC and FDIC from NCLC, CRL, and additional groups opposing the agencies' support of a predatory small business lender using a rent-a-bank scheme (Oct. 24, 2019), https://www.nclc.org/issues/ltr-opp-rent-a-bank.html.

[35] Complaint, Speer v. Danjon Capital et al., No. 3:19-cv-01778 (D. Conn. filed Nov. 12, 2019), https://www.nclc.org/images/Speerv.DanjonCapital.pdf.

[36] Complaint, Vincent Deramo Jr. et al. v. World Business Lenders, LLC and WBL SPE II, LLC, (filed May 16 2017 in Cir. Ct., Sarasota, FL, removed to federal court June 16, 2017 as No, 8:17-cv-1435-RAL-MAP), https://www.nclc.org/images/Deramov.WBL_.pdf.

[37] Complaint, *B&S Medical Supply, Boris Simon v. World Business Lenders, Liberty Bank, Inc*., No. 1:17-cv-03234 (S.D.N.Y. filed May 2, 2017), https://www.nclc.org/images/BandSMedSupplyv.WBL_.pdf.

[38] Complaint, *Kaur et al v. World Business Lenders et al.* (removed to D. Mass. June. 19, 2019 as 1:19-cv-11364), https://www.nclc.org/images/Kaurv.WBL_.pdf.

[39] *Id.* at 21.

[40] Complaint, Adoni et al. v. World Business Lenders, LLC et al (removed to E.D.N.Y. Dec. 12, 2019 as No. 2:19-cv-06971), https://www.nclc.org/images/Adoni-v.-World-Business-Lenders.pdf.

[41] *Id.* at 5.

[42] Zeke Faux, Wall Street Finds New Subprime With 125% Business Loans, Bloomberg (May 22, 2014), https://www.bloomberg.com/news/articles/2014-05-22/wall-street-finds-new-subprime-with-125-business-loans.

[43] FDIC, Federal Interest Rate Authority, 84 Fed. Reg. 66845, 66846 (Dec. 6, 2019); *accord* OCC, Permissible Interest on Loans that are Sold, Assigned, or Otherwise Transferred, 84 Fed. Reg. 64229, 64232 (Nov. 21, 2019).

[44] *See* https://ncrc.org/treasurecra/.

[45] 786 F.3d 246 (2nd Cir. 2015).

[46] FDIC Proposal, "Federal Interest Rate Authority," 84 Fed. Reg. 66845, 66850 (Dec. 6, 2019).

[47] *See, e.g.,* Class Action Complaint, Petersen et al. v. Chase Card Funding, LLC, et al., No. 1-19-cv-0741 (W.D.N.Y. filed June, 6, 2019).

[48] Indeed, the magistrate in one case has recommended dismissing the case. While I take no position on those cases, I note that a bank's use of a passive securitization trust in an active credit card program run by the bank is very different from a rent-a-bank situation or the debt buyers in *Madden.*

[49] Comments of Center for Responsible Lending, NCLC et al., OCC Interest Rate Proposal (Jan. 21, 2020), https://www.nclc.org/images/pdf/rulemaking/comments-occ-interest-rates-and-apps.pdf.

[50] For example, *Nichols v. Fearson*, 32 U.S. (7 Pet.) 103 (1833) and *Gaither v. Farmers' & Mechanics' Bank of Georgetown*, 26 U.S. (1 Pet.) 37 (1828) both address the question whether subsequent transactions can retroactively change the *rate itself* to result in a higher, usurious rate.

[51] *See* NCLC, After Payday Loans: How do Consumers Fare When States Restrict High-Cost Loans? (Oct. 2018), https://www.nclc.org/images/pdf/high_cost_small_loans/payday_loans/ib_how-consumers-fare-restrict-high-cost-loans-oct2018.pdf.

[52] 786 F.3d at 251–52.