

November 2016

Mr. Thomas J. Curry
Comptroller of the Currency
Office of the Comptroller of the Currency
Washington, DC
regs.comments@occ.treas.gov

Re: Receiverships for Uninsured National Banks
OCC–2016–0017

Dear Comptroller Curry:

The undersigned consumer, civil rights, small business, and other community organizations write to express our strong opposition to new federal nonbank lending charters that would enable chartered entities to avoid state interest rate caps, other state consumer protection laws, and state oversight, putting consumers and small businesses at risk.¹

The Office of the Comptroller of the Currency (OCC) has expressed interest in granting a new type of special purpose “national bank” charter for financial technology (“fintech”) firms, including firms that engage in lending and other activities but do not take deposits.² The OCC’s legal authority to charter nondepository lenders unilaterally and without Congressional assent is doubtful,³ but the OCC should not charter such entities even if it has power to do so.

If new entities were chartered as national banks under the National Bank Act (NBA), they would be covered by the NBA’s interest rate exportation provisions⁴ even if they are not insured deposit-taking institutions.⁵ In addition, under the OCC’s current regulations, national banks enjoy the benefit of the broad preemption under the NBA.⁶ Given the general absence of federal

¹ Many of our groups also have serious concerns about non-lending limited-purpose charters as well, but we focus this letter on lending issues.

² Office of the Comptroller of the Currency, *Recommendations and Decisions for Implementing a Responsible Innovation Framework* (Oct. 26, 2016).

³ See *National State Bank of Elizabeth, NJ v. Smith*, No. 76-1479 (D.N.J. Sept. 16, 1977), *rev’d as superseded by statute* 591 F.2d 223 (3d Cir. 1979); cf. *Independent Bankers Ass’n of Am. v. Conover*, Fed. Banking L. Rep. (CCH) ¶ 86,178 (M.D. Fla. 1985) (“The case law takes for granted that the core of the business of banking as defined by law and custom is accepting demand deposits and making commercial loans.”).

⁴ 12 U.S.C. §§ 85, 86; *Marquette National Bank v. First of Omaha Serv. Corp.*, 439 U.S. 299 (1978).

⁵ Office of the Comptroller of the Currency, *Receiverships for Uninsured National Banks*, 81 Fed. Reg. 62835 (Sept. 13, 2016).

⁶ In response to the damage caused by the OCC’s preemption regulations, Congress in 2010 curtailed the OCC’s ability to preempt state laws. Among other restrictions, the OCC can preempt “only if” the OCC determines on a “case-by-case basis” that a “particular” state law, or a substantially equivalent one,

usury caps, chartered entities would have no functional limit on the interest rates and related fees they could charge.⁷

Most states cap interest rates, providing essential protection from predatory lending.⁸ For example, a \$2,000, two-year consumer installment loan that has an annual percentage rate (APR) above 36% including fees⁹ would violate the law of 31 states and the District of Columbia (D.C.).¹⁰ The loan would violate the law in 12 additional states if the fee-inclusive rate is above 41%.¹¹ For a smaller \$500 six-month consumer installment loan, a rate over 36% would violate the law in 19 states and D.C., and a rate above 40% would violate the law of 30 states.¹² Some state interest rate caps also protect small businesses as well as consumers.¹³

The American public broadly supports interest rate caps, as shown by the South Dakota vote this week to approve a 36% rate cap and the rate caps approved by voters in Montana, Ohio, and Arizona in recent years. The OCC should not nullify those rate caps by fiat.

Interest rate caps are the simplest, most effective way to protect borrowers from unaffordable loans and to align the interests of lenders and borrowers.¹⁴ When interest rates are high, lenders

prevents or significantly interferes with the exercise of bank powers. 12 U.S.C. § 25b(b)(1)(B), (b)(3)(A). 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. 12 U.S.C. § 25b(c). Yet after Dodd-Frank passed, the OCC made only superficial changes to its preemption regulations, and largely re-promulgated them. We believe that the current regulations violate the Dodd-Frank standards even as applied to traditional national banks, and that the OCC would be required to follow the Dodd-Frank case-by-case rules if it attempted to preempt state laws for a new type of entity. *See* Press Release, Statement of NCLC Managing Attorney Lauren Saunders on OCC Final Preemption Rule (July 20, 2011), <http://www.nclc.org/images/pdf/preemption/occ-preemption-statement.pdf>.

⁷ Other than for loans to service members, there are no federal interest rate caps that cover national banks.

⁸ Lauren K. Saunders, *Why 36%? The History, Use, and Purpose of the 36% Interest Rate Cap* (April 2013), available at <http://www.nclc.org/images/pdf/pr-reports/why36pct.pdf>.

⁹ Not all fees are included in the APR as calculated by the Truth in Lending Act (TILA).

¹⁰ *See* National Consumer Law Center, *Installment Loans: Will States Protect Borrowers from a New Wave of Predatory Lending?* at 26 (July 2015), available at <http://www.nclc.org/issues/installment-loans.html>. (Since the publication of this report, New Hampshire raised its interest rate cap, but South Dakota voters approved a 36% rate cap.)

¹¹ *Id.*

¹² *Id.*

¹³ *See, e.g.*, N.Y. Gen. Oblig. Law §§ 5-501(6)(b), 5-526(1).

¹⁴ *See* Consumer Financial Protection Bureau, Payday, Vehicle Title, and Certain High-Cost Installment Loans; Proposed Rule, 81 Fed. Reg. 47863, 47903 (July 22, 2016) (“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”); National Consumer Law Center, *Misaligned*

have weak incentives to ensure that borrowers are able to repay their loans while meeting other expenses.¹⁵ Lenders can profit despite high default rates and despite high unaffordable costs that make it difficult for borrowers to manage their finances. An OCC-chartered lender would only be required to follow the interest rate of its home state – and would therefore choose a home state without interest rate caps – effectively nullifying critical state interest rate caps that protect consumers and small businesses.¹⁶

After the Supreme Court upheld an OCC regulation exempting credit card fees from state laws and interest rate caps,¹⁷ credit card fees shot up,¹⁸ leading directly to the credit card abuses that Congress had to address in 2009. The evasion of state interest rate caps also allowed national banks to make 150% to 650% payday loans (so-called “deposit advance products”) even in states that prohibit payday lending.¹⁹ The OCC, under your leadership, eventually issued guidance that led to the discontinuance of bank payday loans.²⁰ However, high-cost lending by nationally chartered fintechs would occur in the future, and it would be far more difficult for the OCC to attempt to curb it than was the case with bank payday loans. Because of the balloon loan structure, bank payday loans were on their face unaffordable for the vast majority of consumers. With high-cost installment loans, the impact of payments over time on the consumer’s ability to meet expenses during the full term of the loan, while extremely damaging, will be less obvious on its face. Curbing unaffordable lending is much harder without an interest rate cap.

The OCC would examine chartered entities for safety and soundness and compliance with federal law, but that is not enough to protect consumers and small businesses from the problems caused by high-rate lending. Regulation that is focused on making sure that an entity does not fail is very different from enforcing interest rate caps. An emphasis on sound underwriting (a component of safety and soundness and avoidance of unfair, deceptive or abusive practices) is important, but it has not prevented exceedingly harmful lending abuses, as abuses in the mortgage, credit card, overdraft fee, bank payday loan, and payday installment loan contexts show.

Incentives: Why High-Rate Installment Lenders Want Borrowers Who Will Default (July 21, 2016), available at <http://www.nclc.org/issues/misaligned-incentives.html>.

¹⁵ National Consumer Law Center, *Misaligned Incentives*.

¹⁶ 12 U.S.C. §§ 85, 86; *Marquette National Bank v. First of Omaha Serv. Corp.*, 439 U.S. 299 (1978).

¹⁷ *Smiley v. Citibank (S.D.), N. A.*, 517 U.S. 735 (1996); 12 C.F.R. § 7.4001.

¹⁸ See Mark Furlletti, Payment Cards Center, The Federal Reserve Bank of Philadelphia, *Credit Card Pricing Developments and Their Disclosure*, at 32 (Jan. 2003).

¹⁹ National Consumer Law Center, *Bank Payday Loans ... They're Baaaaaaaack* (June 2009), available at https://www.nclc.org/images/pdf/banking_and_payment_systems/prepaid_payday_loans.pdf.

²⁰ Office of the Comptroller of the Currency, *Guidance on Supervisory Concerns and Expectations Regarding Deposit Advance Products*, Docket No. OCC-2013-0005 (Nov. 20, 2013).

The Consumer Financial Protection Bureau (CFPB) would continue to have jurisdiction over any consumer lending, but the CFPB does not have authority to cap interest rates. The CFPB's proposed payday lending guidelines are a case-in-point about the complexity and difficulty of protecting consumers in the absence of interest rate caps. The ability-to-repay rules that the CFPB has proposed do not draw bright lines and will likely permit some forms of unaffordable high-rate lending to continue. The proposed rules are far weaker than the protections of state laws that cap interest rates.²¹ Moreover, the CFPB does not have authority to protect small businesses.

In addition to interest rate caps, many other state laws provide protections against lending abuses, which could be preempted by a federal charter for a fintech lender. California recently took action against the fintech start-up LendUp, which charged improper "expedited fees" and required borrowers to take out both a payday loan and an installment loan.²² When a national bank is involved state consumer protection laws are often preempted. For example, courts have held that OCC regulations preempt state laws that prohibit late fees if a due date falls on a holiday²³ and laws that prohibit unfair manipulation of bank account transactions in order to increase overdraft fees.²⁴ The OCC's regulation preempting laws governing overdraft fees²⁵ has allowed banks to use overdrafts as a high-cost form of lending and has led to numerous overdraft fee abuses by national banks that continue to this day.²⁶

Although the Federal Trade Commission Act and the federal Consumer Financial Protection Act prohibit unfair or deceptive acts or practices, neither of those federal statutes creates a private right of action that enables customers to take action to protect themselves when harmed. No

²¹ See, e.g., Comment Letter from New York, CFPB-2016-0025, available at <http://www.neweconomynyc.org/wp-content/uploads/2016/10/2016-10-7-Sign-on-Letter-from-NY-FINAL.pdf>.

²² 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), http://www.dbo.ca.gov/Press/press_releases/2016/LendUp%20Settlement%20Release%2009-26-16.pdf. The CFPB also brought an action against LendUp the same day, but the CFPB had to focus on deception. CFPB, Press Release, 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), <http://www.consumerfinance.gov/about-us/newsroom/lendup-enforcement-action/>.

²³ *Miller v. Bank of Am., N.A. (USA)*, 170 Cal. App. 4th 980 (Cal: Ct. App. 2009).

²⁴ *Gutierrez v. Wells Fargo, N.A.*, 704 F.3d 712, 722-25 (9th Cir. 2012) (holding a California prohibition on unfair acts or practices preempted by the National Bank Act).

²⁵ 12 C.F.R. § 7.4002; OCC Interpretive Letter No. 916 (May 22, 2001); OCC Interpretive Letter No. 997, (Apr. 15, 2002); OCC Interpretive Letter No. 1082 (May 17, 2007).

²⁶ Rebecca Borné, Peter Smith, and Rachel Anderson, Center for Responsible Lending, *Broken Banking: How Overdraft Fees Harm Consumers and Discourage Responsible Bank Products* (May 2016), http://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/crl_broken_banking_may2016.pdf.

supervisor can examine every transaction or catch every problem; customers' ability to go to court and challenge unfair or deceptive conduct that injures them is crucial, especially for catching problems before they are widespread. Moreover, while there is little precedent applying these federal statutes to business-to-business transactions, there are more robust protections in many state laws.²⁷

A federal charter would also displace state regulators from examining or even investigating lenders²⁸ and would make it much harder for state attorneys general to protect consumers and small businesses.²⁹ Another set of eyes to protect consumers and small businesses is especially important in the fintech area, which presents new issues and new potential problems. States are closer to the ground and are more likely to take quick action when problems are still small and local, before abuses become nationwide problems attracting the attention of the OCC. While state attorneys general have authority to enforce the Dodd-Frank Act's ban on unfair, deceptive and abusive acts and practices (UDAAPs), their enforcement authority is considerably weaker with regard to federally-chartered entities. With respect to national banks, states effectively cannot investigate potential violations,³⁰ and they can enforce only specific CFPB regulations but not the broad ban on UDAAPs.³¹ In addition, a non-depository lender would not have the same statutory affirmative obligation that a depository bank has to meet the credit needs of its community under the Community Reinvestment Act.³²

We are deeply skeptical of assurances that it will be possible to maintain the same range of consumer protections as exist in state law under a Federal charter regime. Fundamentally, the primary reason for a lender to seek a federal charter is to avoid state licensing regimes and their accompanying laws and oversight. Should federal regulation be seen by lenders as more stringent than state regulation, presumably lenders would no longer seek a charter. For this reason, we doubt that it is possible to create a functioning federal charter system that did not result in significant pre-emption of state consumer protection laws. Moreover, the creation of a federal charter would not eliminate problematic practices by fintechs that do not seek a charter, and the optional nature of the charter will make it difficult for the OCC to institute robust regulation of fintechs.³³ By contrast, while CFPB authority alone is not sufficient to protect consumers, its

²⁷ 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).

²⁸ 12 C.F.R. § 7.4000.

²⁹ *Cuomo v. Clearing House Association, L.L.C.*, 557 U.S. 519 (2009) (holding that the New York Attorney General could not subpoena information from a national bank without filing a lawsuit first).

³⁰ *Id.*

³¹ Dodd-Frank Act § 1042(a)(2).

³² 12 U.S.C. § 1292(2).

³³ *Cf. generally* Marcelo Rezende, *The Effects of Bank Charter Switching on Supervisory Ratings* (March 5, 2014), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1926324.

enforcement authority covers all lenders, cannot be avoided, and does not displace more protective state laws.³⁴

We therefore strongly oppose any new federal lending charter that would enable companies to avoid state interest rate caps, other consumer and small business protections, or state oversight. We very much appreciate your attention to our concerns, and look forward to continuing to discuss these issues with you.

Sincerely,

Americans for Financial Reform
Arkansans Against Abusive Payday Lending
AFSCME DC 37
Bell Policy Center
California Reinvestment Coalition
Center for Economic Integrity
Center for Responsible Lending
Community Legal Services, Inc. of Philadelphia
Connecticut Association for Human Services
Connecticut Legal Services, Inc.
Consumer Action
Consumer Federation of America
Consumer Rights Unit, Greater Boston Legal Services
Empire Justice Center
Florida Alliance for Consumer Protection
Georgia Watch
Hebrew Free Loan Society
Jacksonville Area Legal Aid, Inc.
Kentucky Equal Justice Center
Klein & Sheridan, LC
Leadership Conference for Civil and Human Rights
Legal Aid of Manasota, Inc.
Legal Services of New Jersey
Legal Services NYC
Main Street Alliance
Maryland Consumer Rights Coalition
Montana Organizing Project
National Association of Consumer Advocates
National Community Reinvestment Coalition
National Consumer Law Center (on behalf of its low-income clients)
New Economy Project
New Jersey Citizen Action
North Carolina Council of Churches

³⁴ The CFPB can assert supervisory authority over any larger participant as well as other entities found to put consumers at risk. 12 U.S.C. § 5514(a).

North Carolina Justice Center
People's Action
Public Citizen
Public Good Law Center
Public Justice Center
Reinvestment Partners
Tennessee Citizen Action
Texas Appleseed
U.S. PIRG
Virginia Poverty Law Center
Woodstock Institute