FDIC/OCC Proposal Would Encourage Rent-a-Bank Predatory Lending

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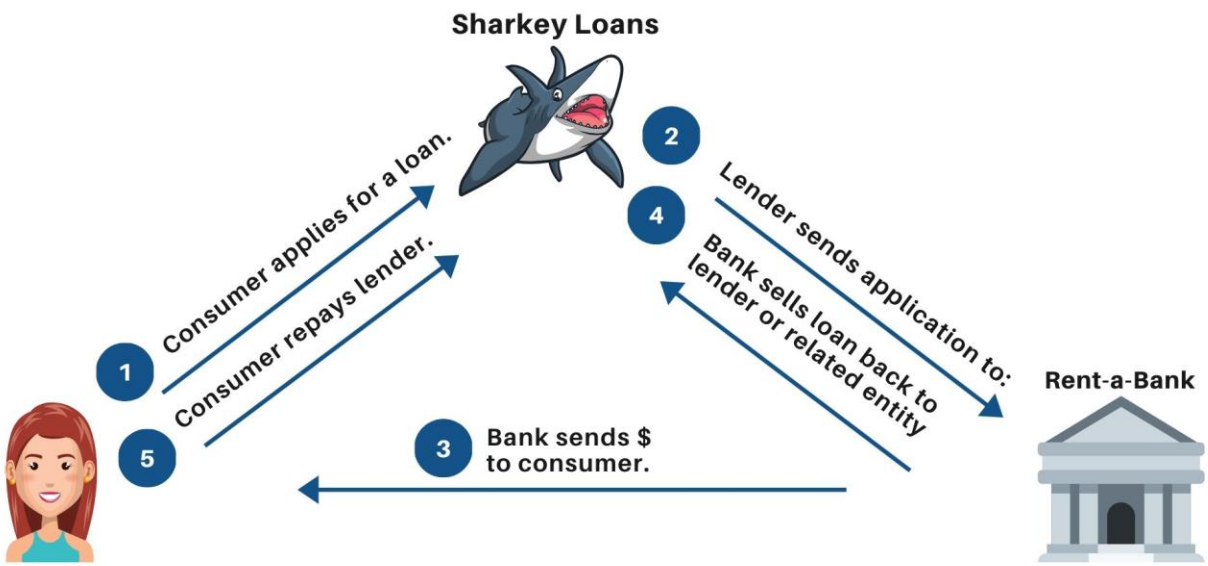
The Federal Deposit Insurance Corp. (FDIC) and the Office of the Comptroller of the Currency (OCC) have proposed a rule on "federal interest rates" that threatens to eviscerate the ability of states around the country to limit interest rates to protect their residents. **The proposal could encourage "rent-a-bank" schemes where payday and other high-cost lenders launder their loans through banks in order to make loans up to 160% APR in states where those high rates are illegal.**

Public comments on the proposal from the OCC, the regulator of national banks, are due **January 21, 2020**.[1] Comments on the proposal from the FDIC, which regulates many state banks, are due **February 4, 2020**.[2]



1. How do predatory lenders use rent-a-bank schemes to make usurious loans that are illegal for the lenders to offer directly?

Since the time of the American Revolution, states have set interest rate caps to protect their residents from predatory lending. In the last few decades, a few states eliminated their rate caps and many have carved out limited exceptions for short-term payday loans. But the vast majority of states still retain interest rate limits for longer-term loans by nonbank companies. For example, 43 states and the District of Columbia cap the rate on a $500, 6-month loan, at a median of about 36%.[3] In addition, in recent years, votes in many states, including Arizona, Colorado, Montana, and South Dakota have approved rate cap initiatives that eliminate both short-term and longer-term high-cost loans.

Beginning with a 1978 Supreme Court decision, a combination of federal and state law changes eliminated rate caps for most banks.[4] But the ability of banks to ignore state rate caps is a limited, modern exception to the general rule that states have always had, and still have, the authority to limit interest rates.

Payday lenders have long tried to use banks to evade state rate caps. In the late 1990s, payday lenders started entering into "rent-a-bank" arrangements under which the payday lender marketed and took applications for loans, the bank technically approved and funded the loans, and the bank then immediately sold the loan or servicing rights back to the payday lender. The payday lender claimed that because the bank funded the loans, state interest rate limits did not apply. These loans were "developed by non-bank vendors who have targeted national banks and federal thrifts as delivery vehicles... to avoid individual state laws …."[5]

In the early 2000s, all of the federal bank regulators shut down the rent-a-bank arrangements with short-term payday lenders. However, over the years, 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. Courts have generally shut down these schemes, but rent-a-bank lending is now making a comeback.

2. Which high-cost lenders and banks are engaged in rent-a-bank lending today?

With respect to consumer loans, two FDIC-regulated banks, **Republic Bank & Trust** (chartered in Kentucky) and **FinWise Bank** (chartered in Utah), are helping three high-cost lenders, **OppLoans, Elevate, and Enova**, make installment loans or lines of credit in excess of 100% APR in a total of at least 30 states and the District of Columbia (DC) that do not allow such high rates.[6] Other lenders are threatening to begin rent-a-bank operations as well.

OppLoans offers $500 to $4,000 installment loans through FinWise Bank at 160% APR in 24 states and the District of Columbia (DC) that do not allow that rate.[7] FinWise likely sells back the loans immediately. OppLoans makes loans directly through a state license in states that allow high rates.

Elevate Credit uses FinWise Bank to originate Rise installment loans at 99% to 149% APR in 16 states and DC that do not allow those rates and in other states through a state license.[8] FinWise sells a 95% interest in the loans to an entity controlled by Elevate for which Elevate is the primary beneficiary.[9] Elevate also offers a line of credit called Elastic that carries an effective APR of up to 109% in 14 states and DC that do not allow that rate on a line of credit.[10]

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.[11]

Enova recently began using Republic to fund $1,000 to $10,000 installment loans with APRs up to 99.9% in 22 states and DC that do not allow that rate.[12] Enova or a related entity likely purchase the loans or receivables shortly after origination.

In the small business area, two other banks – FDIC-regulated **Bank of Lake Mills** in Wisconsin and OCC-regulated **Axos Bank** – have helped **World Business Lenders** (WBL) originate loans. For example, WBL used Bank of Lake Mills to originate a 120% APR $550,000 loan[13] and a 74% APR mortgage,[14] and WBL uses Axos Bank to originate a mortgage that exceeded 138% APR.[15] The loans appear to be resold to a WBL-related entity.

Three publicly traded payday lenders in California have announced plans to begin new rent-a-bank operations in order to evade California's new interest rate limit on installment loans over $2,500 that goes into effect January 1, 2020. Elevate, CURO Group Holdings (which includes the Speedy Cash brand, among others) and Enova International (with subsidiaries that include NetCredit and CashNetUSA) have told investors that they plan to use banks to continue business as usual so that they can disregard California law and continue to make 100% to 200% APR loans over $2,500.[16]

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.

3. Are rent-a-bank schemes legal? What are "Madden," "valid when made," and "true lender"?

Many courts have affirmed the states' historic authority to limit the interest charged by nonbank companies and have seen through efforts to evade those laws. This is true even when loans are structured to technically originate with banks. But high-cost lenders and the banks that enable them have come up with new theories to attempt to justify rent-a-bank operations.

Courts have long rejected efforts to evade usury laws, looking beyond the technical form of a transaction. As the Supreme Court said in one case in 1835:

> The ingenuity of lenders has devised many contrivances by which, under forms sanctioned by law, the [usury] statute may be evaded….[I]f giving this form to the contract will afford a cover which conceals it from judicial investigation, the [usury] statute would become a dead letter. Courts, therefore, perceived the necessity of disregarding the form, and examining into the real nature of the transaction.[17]

Following this longstanding anti-evasion principle, under the ***"true lender" doctrine***, courts will go beyond the fine print of a loan contract or the technical fact that the money flowed from the bank to the consumer and will ask whether the nonbank lender is the true lender. If the nonbank company has the predominant economic interest and thus is the true lender, then state interest rates apply. For example, one court found that even though a bank originated the loans that nonbank lender CashCall offered to consumers, state

True lender: If the nonbank company has the predominant economic interest, it is the true lender and state interest rate laws applies.

interest rate limits applied because CashCall had the predominant economic interest in the loan program and was thus the true lender:

> The purpose of the lending program was to allow CashCall to hide behind [First Bank and Trust of Millbank, South Dakota's] South Dakota charter and FB & T's resulting right to export interest rates under federal banking law, as a means for CashCall to deliver its loan product to states like West Virginia, who have lender licensing and usury laws.

Even if the original loan was not designed to evade usury laws, if a bank loan is sold to a state-regulated entity, state usury laws may apply to new interest charged by that entity. In the 2015 case ***Madden v. Midland Funding***, the Second Circuit Court of Appeals held that state usury laws, as applied to a debt buyer that bought charged off credit card debt, were not preempted by the National Bank Act (NBA).[18] The court found that the NBA does not regulate what nonbank assignees may charge, and that limiting the interest charged by debt buyers that bought debt for pennies on the dollar did not significantly interfere with the business of banking. The *Madden* decision is consistent with the longstanding power of the states to regulate interest rates charged by nonbank entities, and with the traditional rule that state consumer protection laws are not preempted unless they significantly interfere with banks – a standard that Congress reaffirmed in 2010.

But industry groups, and now the OCC and FDIC, have claimed that the *Madden* decision was contrary to **a purported "*valid when made*" theory** going back to the 19th century. Under that theory, if the interest rate on a loan was "valid" – i.e., legal – for the originator when the loan was made, then subsequent purchasers of the loan can continue to charge that rate even if they are covered by different laws than the originator (such as a bank).

To begin with, the valid-when-made theory is an (incorrect) interpretation of state usury laws, not of the federal banking law at issue in *Madden*, and says nothing whatsoever about the power of the National Bank Act to preempt state usury law. In fact, the court in *Madden* did not address whether New York usury law even applied (as opposed to Delaware law (which does not limit interest rates), as specified in the contract).

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Moreover, the "valid when made" theory is a modern invention that misinterprets older cases that did not involve the permissible interest charged by lenders that buy loans from banks that are not covered by state usury laws.[19] Rather, the cases address a different situation: whether subsequent transactions can change *the rate itself* – potentially resulting in a higher, usurious rate. For example, courts have held that the interest rate on a loan does not rise (becoming usurious) if it is sold at a discount (so that the effective rate of return for the purchaser is higher than for the original lender).[20]

None of these older cases address the situation where a bank (or other entity) that is exempt from interest rate limits sells a loan to a state-regulated nonbank lender governed under state usury law. That is because banks were covered by usury laws prior to 1978. ***The cardinal rule of usury relevant to rent-a-bank schemes is that courts abhor evasions of usury laws and will look beyond form to substance***.

4. What does the OCC/FDIC proposal do?

The OCC and FDIC proposals 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 South Dakota, where voters adopted a 36% interest rate cap in 2016, the loan could be sold to a nonbank lender that could continue to charge new interest at 160%. The FDIC and OCC have stated that the proposal codifies or is consistent with the purported "valid-when-made" doctrine and is intended to address uncertainty created by the *Madden* decision.

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.

5. Why is the proposal so dangerous, given that it does not address "true lender" and the OCC and FDIC say that they look "unfavorably" on rent-a-bank schemes?

In the discussion of the proposal but not in the rule itself, the OCC and FDIC both note that they are not addressing the question whether the bank is the real party in interest or the "true lender" on a loan.[21] That is, the proposal does not address arguments that a state-regulated entity, not the bank, is the true lender, and thus the interest rate was *not* permissible prior to the transfer and is also usurious after the transfer. The FDIC has also endorsed a position that the OCC has long taken: It "will view unfavorably entities that partner with a State bank with the sole goal of evading a lower interest rate established under the law of the entity's licensing State(s)."[22]

This possibility is cold comfort and does not mitigate the dangers of the proposed rule. Lenders can always concoct additional rationales for their arrangements with banks. In fact, the rent-a-bank schemes previously noted are already going unchecked on the FDIC's and OCC's watch, and the proposal offers no indication that they intend to stop current or future schemes. The proposed rule itself contains no exceptions, and courts may find it easier to reject true lender challenges and evidence of evasions without analysis, and instead simply enforce a rule that the assignee may charge whatever interest the bank can charge.

The proposed rule broadly preempts state usury laws in a broad variety of settings without any showing that those laws interfere with the powers of the bank. In the Madden case, for example, the court found that limiting the interest that debt buyers could add to charged off credit card debt bought for pennies on the dollar had no significant impact on the bank – a finding that neither the OCC nor the FDIC disputes.

The national banking regulators' proposals will encourage high-cost lenders to enter into rent-a-bank arrangements and hope that they are not challenged or that they can use forced arbitration clauses or other means to defeat challenges. Placing the burden of proving that the bank is not the "true lender" on states and private litigants is unworkable.

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While it is easy to determine what interest rate is permissible for a nonbank entity, neither states nor consumers can know the precise relationship between the bank and the lender prior to filing a lawsuit.

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The OCC's and FDIC's own support for a predatory small business lender attempting to collect 120% interest on a $550,000 small business rent-a-bank loan illustrates the danger of their proposed rules. The agencies filed an amicus brief in *Rent-Rite Super Kegs v. World Business Lenders* (WBL) defending WBL's 120% APR loan made, through the Bank of Lake Mills in Wisconsin, to a business in Colorado, where that rate is illegal. WBL has been profiled for its predatory lending practices towards small businesses.[23] WBL used Bank of Lake Mills as a rent-a-bank in another case to make a mortgage at 74%; the bank had no contact with the borrower and WBL had a power of attorney for the bank.[24] Yet in their *Rent-Rite* amicus brief, the OCC and FDIC did not even suggest that the Bank of Lake Mills might not be the true lender or that there are any exceptions to the valid-when-made theory they were promoting to defend the 120% APR rate.[25] ***Thus, the OCC and FDIC both are promoting the theory codified in the proposed rule to support a predatory lender even when the bank is not a party to the case, has no remaining interest in the loan, and is likely not the true lender.***

6. Is it necessary to overrule the Madden decision or adopt the proposed rule to protect secondary markets for legitimate bank loans?

The *Madden* decision is nearly five years old. Yet neither the OCC nor FDIC has produced any significant evidence that the decision has impacted secondary markets or that the proposed rule is necessary to protect legitimate bank activities. That is because it is not.

Indeed, the FDIC proposal directly states: **"The FDIC is not aware of any widespread or significant negative effects on credit availability or securitization markets having occurred to this point as a result of the *Madden* decision."[26]** The FDIC has only raised the "*the possibility* that State banks' ability to sell loans *might* be impaired in the future."[27] The FDIC also noted that, with marketplace lending, often "a bank originates and immediately sells loans to a nonbank partner," and the *Madden* decision "*could* adversely affect the viability of the marketplace lending model."[28] That is not only speculation, but says nothing whatsoever about any impact of Madden on *banks*, as opposed to the viability of a model when it is used by nonbanks to evade state rate caps.

The OCC's proposal does not even attempt to claim that *Madden* has caused any problems in legitimate secondary markets. The OCC says only that banks use loan assignments and securitizations as a risk management tool that "*would be* significantly weakened *if* the permissible interest on assigned loans were uncertain or if assignment of the permissible interest were limited only to third parties that would be subject to the same or higher usury caps."[29] Yet the OCC does not even assert, let alone show evidence, that *Madden* has impacted banks' risk management activities.

While there are three recent lawsuits that attempt to use the *Madden* decision to challenge the securitization of credit card receivables,[30] those cases are readily distinguishable from the *Madden* decision.[31] There is no indication that the *Madden* ruling will impact legitimate bank credit cards, and neither the OCC nor the FDIC claimed any impact on that market.

7. Do the OCC and FDIC have the authority to authorize state-regulated nonbank lenders to charge new interest that violates state interest rate limits?

The OCC and FDIC have authority over banks, not nonbank entities. Yet they have proposed a rule that governs the interest that state-regulated nonbanks may charge. Both proposals are far outside the agencies' authority.

a. The National Bank Act provision governing interest rates charged by banks does not give the OCC the power to preempt state usury laws that apply to nonbank assignees, and the OCC has failed to follow the other preemption conditions of the Dodd-Frank Act.

Section 85 of the NBA gives national banks the ability to charge any interest rate allowed by its home state.[32] The OCC primarily relies on its authority under that provision of the NBA. But Section 85 only dictates the rate that national banks may charge; it does not impact what *nonbanks* may charge or collect after the bank sells or assigns the debt.

The OCC also has some authority to preempt state consumer financial laws that interfere with the exercise of national bank powers. The OCC observes that national banks have the power to sell and assign loans, and that the *Madden* decision might impact that power. But the OCC has failed to meet either the procedural or the substantive requirements under the Dodd-Frank Act for preempting state laws that impede banks' sales or assignments.

The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 put important constraints on the OCC's preemption powers. Dodd-Frank states that the OCC may preempt state consumer financial laws[33] "only if" the law discriminates against national banks or:

> the State consumer financial law **prevents or significantly interferes with the exercise by the national bank of its powers**; and any preemption determination under this subparagraph may be made by a court, or by regulation or order of the Comptroller of the Currency on a case-by-case basis, in accordance with applicable law.[34]

The "prevents or significantly interferes" standard codifies the Supreme Court case *Barnett Bank v. Nelson.*[35]

Dodd-Frank further requires that, to make a "case-by-case basis" determination, the OCC must consider "the **impact of a particular State consumer financial law** on any national bank that is subject to that law"[36] and must first consult with the Consumer Financial Protection Bureau.[37] Moreover, "No regulation or order" of the OCC may "invalidate, or otherwise declare inapplicable to a national bank, the provision of the State consumer financial law, unless **substantial evidence, made on the record of the proceeding**, supports the specific finding regarding the preemption of such provision **in accordance with the legal standard** of …*Barnett Bank* ….”[38]

The OCC does not even mention or make any showing to satisfy the Dodd-Frank requirements to:

- consult with the CFPB;
- make a record of substantial evidence;
- consider a particular State consumer financial law;[39]
- evaluate whether there is significant interference under the *Barnett Bank* standard.

And clearly the OCC cannot meet these requirements. The *Madden* decision itself found the opposite: that state usury laws as applied to a debt buyer are not preempted because they do *not* significantly interfere with the business of banking. The OCC has not disputed that finding in the debt buyer context and has offered only speculation that does not meet the Dodd-Frank requirements for preempting state usury laws that apply in other contexts.

b. The FDIC has no authority to preempt state usury laws.

The FDIC's authority to preempt state usury laws is even more attenuated. The FDIC relies on section 27 of the Federal Deposit Insurance Act (FDIA), which governs the interest rate that state banks may charge.[40] But the FDIA, like the NBA, does not address and does not apply to the rate nonbank entities can charge after they purchase a loan. The FDIC also relies on section 24(j) of the FDIA, which provides that state consumer protection laws apply to branches of out-of-state banks to the same extent that they apply to national banks. But that section, again, says nothing about state laws that apply to *nonbank entities* after a bank sells a loan.

Unlike the OCC, the FDIC does not have any broader preemption power except to the extent there is a conflict with another federal law the FDIC administers. The FDIC's proposal has not pointed to any federal laws that conflict with state usury laws that apply after a bank sells a loan.

The FDIC claims that the *Madden* decision has caused legal ambiguity that "may hinder or frustrate loan sales, which are crucial to the safety and soundness of State banks' operations ….”[41] But the FDIC does not produce any evidence of an actual safety and soundness issue. To the contrary, as noted, the FDIC acknowledges that the *Madden* decision has *not* had a significant impact.

8. What would be the primary impact of the proposed FDIC and OCC rules?

As previously discussed, neither the OCC nor the FDIC has shown that the proposed rule is necessary to address a significant problematic impact on national banks or state banks. Instead, the primary impact of the proposed rule would be to give a green light to arrangements where banks fund loans that are sold or assigned to state-regulated nonbank entities that then charge high interest in excess of the rates allowed under

Contrasted with the weak speculation about harm to banks stemming from the Madden decision, there is a clear and present danger that the FDIC and OCC proposed rules will lead to an explosion of harmful predatory lending and the evisceration of states' historic ability to protect their residents.

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Endnotes

1. OCC, Permissible Interest on Loans that are Sold, Assigned, or Otherwise Transferred, 84 Fed. Reg. 64229 (Nov. 21, 2019) ("OCC Proposal").
2. FDIC, Federal Interest Rate Authority, 84 Fed. Reg. 66845 (Dec. 6, 2019) ("FDIC Proposal").
3. *See* National Consumer Law Center, State Annual Percentage Rate (APR) Caps For $500, $2,000 and $10,000 Installment Loans. (Note: Some rates have changed somewhat in the last year.)
4. In *Marquette Nat'l Bank v. First of Omaha Corp*., 439 U.S. 299 (1978), the Supreme Court interpreted the National Bank Act to allow national banks to charge any rate allowed by the state of their headquarters, not the state where their branches were located. That set off a race to the bottom where national banks relocated to states that repealed their interest rate caps and both Congress and states enacted laws to allow most state banks to copy national bank rates.
5. Press Release, Office of the Comptroller of the Currency, Office of Thrift Supervision, NR 2000-88, "Agencies Urge Banks and Thrifts to Evaluate Risks with Vendors Engaged in Practices Viewed as Abusive to Consumers" (Nov. 27, 2000).
6. For details on rent-a-bank lending by OppLoans and Elevate, see NCLC, Fact Sheet: Stop Payday Lenders' Rent-a-Bank Schemes! ("Rent-a-Bank Issue Brief"). In addition, the states where NetCredit uses a rent-a-bank scheme can be seen on the bottom of its website, https://www.netcredit.com/.
7. *See* https://www.opploans.com/rates-and-terms/.
8. *See* https://www.risecredit.com/how-online-loans-work#WhatItCosts (select each state); Rent-a-Bank Issue Brief, *supra.*
9. *See* Elevate Credit, Inc., Form 10-Q for the period ending Sept. 30, 2019, S.E.C. file no. 001-37680 at 22, 43, https://www.sec.gov/Archives/edgar/data/1651094/000165109419000048/elevate10-qxq22019.htm ("Elevate 10-Q").
10. Elevate 10-Q at 46; Rent-a-Bank Issue Brief, *supra.*
11. Elevate 10-Q at 21.
12. *See* https://www.netcredit.com/ (bottom of page); https://www.netcredit.com/rates-and-terms.
13. *See* Rent-Rite Super Kegs West, Ltd., v. World Business Lenders, LLC, 603 B.R. 41 (Bk. Ct. D. Colo. 2019).
14. *See* Complaint, Deramo et al. v. World Business Lenders, LLC, et. al, No. 8:17-cv-01435-RAL-MAP (Cir. Ct. of 12th Jud'l Cir., Sarasota Co., FL June 16, 2017).
15. *See* Adoni, Harbor Park Realty, LLC v. World Business Lenders, LLC, Axos Bank f/k/a B-of-I Federal Bank, filed Oct. 17, 2019 in Supreme Court of the State of N.Y., County of Suffolk, removed to E.D.N.Y on Dec. 12, 2019 as No. 2:2019cv06971-JMA-GRB.
16. *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.
17. Scott v. Lloyd, 34 U.S. (9 Pet.) 418 (1835).
18. 786 F.3d 246 (2d Cir. 2015).
19. For a longer discussion, *see* Amicus Curiae Brief of Professor Adam J. Levitin In Support Of Appellant, Rent-Rite Super Kegs West., Ltd., No. 1:19-cv-01552-REB (D. Colo. Sept. 19, 2019).

20. *See* Nichols v. Fearson, 32 U.S. (7 Pet.) 103 (1833). Courts have also held that the interest rate on the original note remains unchanged and legal even if the note is pledged as security for a second, usurious transaction. *See* Gaither v. Farmers' & Mechanics' Bank of Georgetown, 26 U.S. (1 Pet.) 37 (1828).

21. OCC Proposal, 84 Fed. Reg. at 64232; FDIC Proposal, 84 Fed. Reg. at 66846.

22. FDIC Proposal, 84 Fed. Reg. at 66846.

23. Zeke Faux, Wall Street Finds New Subprime With 125% Business Loans, Bloomberg (May 22, 2014).

24. Complaint, Deramo, Jr. et al. v. World Business Lenders, LLC & WBL SPE II, LLC, No. 8:17-cv-01435-RAL-MAP (Cir. Ct. of 12th Judicial Cir., Sarasota Co., FL May 16, 2017).

25. Amicus Brief Of The Federal Deposit Insurance Corporation And The Office Of The Comptroller Of The Currency In Support Of Affirmance And Appellee Rent-Rite Super Kegs West., Ltd., No. 1:19-cv-01552-REB (D. Colo. Sept. 10, 2019).

26. 84 Fed. Reg. at 66850.The FDIC points to scant evidence of any impact even on the marketplace loan market beyond early speculation by one commentator and one study that found an impact on a tiny segment of the market.

27. 84 Fed. Reg. at 66850.

28. *Id.* For information on marketplace lending, see http://marketplacelendingassociation.org/.

29. 84 Fed. Reg. at 64231 (emphasis added).

30. Petersen et al. v. Chase Card Funding, LLC, No. 1:19-cv-00741 (W.D. N.Y. filed June 6, 2019); Cohen et al. v. Capital One Funding, LLC, et al., No. 1:19-cv-03479-KAM-RLM (E.D. N.Y. filed June 12, 2019); Filer, et al. v. BA Credit Card Funding LLC, No. 1:19-cv-01507-LJV (W.D. N.Y. filed Nov. 6, 2019).

31. In a far cry from the high-cost rent-a-bank market or even the marketplace loan market, the banks in the credit card cases market, offer, take applications for, underwrite, approve, issue and set the terms of the credit and have a continuing interest in the credit by owning and servicing the accounts (and, likely, have a significant interest in the interest paid). No one of these factors is determinative, as in some high-cost rent-a-bank schemes, such as Elevate's Elastic line of credit, the bank may technically "own" the account and "charge" the interest. But unlike the credit card securitization trusts, Elevate is itself a lender and performs the majority of the functions, including marketing and providing underwriting software and other services to evaluate applications, and is using the bank so it can charge 100% APR on credit in states where rates may be as low as 17%. The credit card securitization trusts, on the other hand, are not independent lenders; the banks already have the right to charge the rate permitted by their home state and have no need to create vehicles to evade usury laws; and the difference in the rate charged on the cards (17.24% and 18.24% in the Chase case) and the rate allowed under New York law (16%) is small.

32. 12 U.S.C. § 85. The NBA also gives banks the choice of an alternative federal rate, but that rate is extremely low, generally under 10%.

33. Even if it meets the Dodd-Frank standard, the OCC likely does not have the power to preempt the *Madden* decision, which does not meet the definition of a "state consumer financial law:": a law that does not "discriminate against national banks and that directly and specifically regulates the manner, content, or terms and conditions of any financial transaction (as may be authorized for national banks to engage in, or any account related thereto, with respect to a consumer." 12 U.S.C. § 25b(a)(2).

34. 12 U.S.C. § 25b(b)(1)(B).

35. 517 U.S. 25 (1996).

36. 12 U.S.C. § 25b(b)(3)(A).

37. 12 U.S.C. § 25b(b)(3)(B).

38. 12 U.S.C. § 25b(c).

39. The *Madden* decision itself is not a particular state consumer financial law, which is a law that does not "discriminate against national banks and that directly and specifically regulates the manner, content, or terms and conditions of any financial transaction (as may be authorized for national banks to engage in), or any account related thereto, with respect to a consumer." 12 U.S.C. § 25b(a)(2). At best, the usury laws at issue in the Madden case could be particular state consumer financial laws. But the OCC does not and cannot make a case for preempting usury laws that go back to the founding of our nation when those laws are only being applied to nonbank entities.

40. 12 U.S.C. § 1831d.

41. 84 Fed. Reg. at 66845.