

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

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OCC Proposes Rent-a-Bank Rule Today; Proposed Rule is on Agenda for FDIC Meeting on Nov. 19

Washington, D.C. - Advocates reacted with outrage to a new proposal from two federal bank regulators that could make it easier for payday and other high-cost lenders to use banks as a fig leaf so that online lenders can offer predatory loans at interest rates that are prohibited under state law. Online lenders have become increasingly bold in using rent-a-bank schemes to offer loans up to 160% in states where their rates are illegal. The Office of the Comptroller of the Currency (OCC) proposed such a rule today and a **proposed rule is on the agenda for the FDIC board meeting on November 19 beginning at 10:00 a.m.**

Banks are generally exempt, when they offer credit, from state rate caps that cover payday lenders and other online lenders. For many years, payday lenders and others have attempted to take advantage of this exemption by entering into rent-a-bank schemes where they launder their loans through banks and then purchase those loans back but continue to charge high rates that would be illegal for the online lenders to charge directly. The OCC and FDIC are now proposing a rule that would 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. The proposal does not include any exception for assignments that are intended to evade state interest rate limits. The Supreme Court has held since the 19th century that contracts governing the interest rate on a loan will not be upheld if they were formed with the intent to evade usury laws. The OCC's proposal notes that it does not address whether the bank is the "true lender" that is fronting for a high-cost lender.

"The FDIC and OCC proposal will encourage predatory lenders to try to use rent-a-bank schemes with rogue out-of-state banks to evade state laws that prohibit 160% loans," **said Lauren Saunders, associate director of the National Consumer Law Center.** "States have had the power to limit interest rates since the time of the American Revolution," **she added.**

"The courts rejected the OCC's first effort to eviscerate state interest rate caps through a fintech 'bank' charter that would give companies that are not banks the power to ignore state law, and I expect courts to strike down this effort as well, which risks gutting the laws of more than 40 states that prohibit high-cost lending" **Saunders emphasized.** On October 21, 2019, a New York court upheld a claim by the New York Department of Financial Institutions that the OCC did not have the authority to give national bank charters to companies that do not accept deposits. "In 2010 in the Dodd-Frank Act, Congress limited the bank regulators' authority to preempt state consumer protection laws, yet the OCC and FDIC are ignoring those limits," **she added.**

"Voters of both parties overwhelmingly support limiting interest rates to 36% or lower, and we encourage all to speak up loudly against the proposal to let banks help predatory lenders charge rates that voters have said should be illegal," **said Rebecca Borné, senior policy counsel at the Center for Responsible Lending.**

Recent developments have highlighted the threat posed by allowing predatory lenders to use rent-a-bank schemes to evade state interest rate limits:

1. Three large payday lenders (Elevate, Enova and Curo) have announced to investors that they plan to use rent-a-bank schemes to evade a new 36% California rate cap effective January 1, 2020, which will outlaw their loans that currently go up to 191%.
2. A new analysis shows that two banks are helping online predatory lenders to evade state rate caps:
 - OppLoans charges 160% APR in 20 states and D.C. through a rent-a-bank scheme with FinWise Bank, chartered in Utah. For example, OppLoans charges 160% on a \$500, 9-month loan in Maine, where the legal maximum rate is 36%.
 - FinWise Bank also helps Elevate's Rise online loans charge 99% to 149% APR in 16 states and D.C. where that rate is illegal. In D.C., for example, the legal rate on a \$2,000, 2-year loan is 25%, but Rise charges 99% to 149%.
 - Elevate also uses this rent-a-bank scheme to offer an online line of credit, Elastic, at an effective APR up to 109%, in 14 states and D.C. that prohibit triple-digit rates. For example, Elastic is available in South Dakota, where voters in 2016 adopted a 36% rate cap by an overwhelming bipartisan vote, but Elevate makes Elastic brand loans there that exceed this cap.

In the early 2000s, the federal bank regulators shut down rent-a-bank arrangements like these, but now the OCC and FDIC are taking actions that could enable them. The OCC and FDIC recently filed an amicus brief in support of a predatory small business lender, World Business Lenders, used a Wisconsin bank to camouflage the illegality under state law of a \$550,000 loan at 120% to a business in Colorado.

Some states are fighting these rent-a-bank evasions of their laws. For example, the Colorado Attorney General has sued two online lenders, Avant and Marlette (BestEgg), for charging high rates on loans up to \$75,000 despite Colorado's 21% interest rate limit. In the Avant case, the court noted that WebBank "plays only an ephemeral role in making the loans," that Avant and other nonbank entities keep 99% of the profits, and that "Avant is for all practical purposes in control of the Avant loans, and it has indemnified WebBank, whose role was short-lived and is now entirely in the past."

"This is why banks must be subject to interest rate limits and why Congress must pass the Veterans and Consumers Fair Credit Act, which would extend the 36% rate cap which servicemembers and their immediate families enjoy to veterans and other consumers while allowing states to set lower limits," **said Linda Jun, senior policy counsel at the Americans for Financial Reform.**

For more information

Issue Brief: Stop Payday Lenders' Rent-a-Bank Schemes!, November 2019 (showing the states in which lenders are evading state interest rate caps)

Issue Brief: Payday Lenders Plan to Evade California's New Interest Rate Cap Law through Rent-A-Bank Partnership, October 2019

Press Release: "Groups: FDIC & OCC Are Wrong to Support Predatory Small Business Lender" (Oct. 24, 2019)

Lauren Saunders, *The Hill*, Op-ed: Rent-a-bank schemes trample voters' and states' rights (Feb. 8, 2018)