



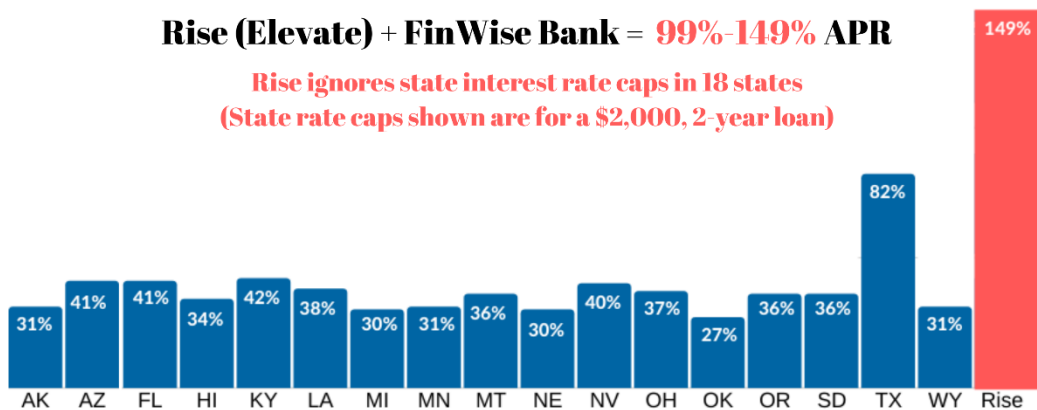
# 2021 Banking Agency Predatory Lending and Safe Banking Priorities

January 2021

The federal banking agencies (Office of the Comptroller of the Currency or OCC, Federal Deposit Insurance Corporation or FDIC, and the Federal Reserve or Fed) have a responsibility to ensure that bank products are safe, responsible, and accessible for all communities and that banks are not engaged in or enabling predatory lending. But in the last few years, we have seen federal bank regulators protect predatory lenders. Urgent action is needed to **stop the use of rent-a-bank arrangements and new types of bank charters to eviscerate state interest rate limits that stop predatory lending**. Banking agency leadership must be committed to that priority and to the other strong consumer protections discussed below, including safe faster payments, an end to overdraft fee abuses, and affordable bank small dollar loans.

## Stop Use of Rent-a-Bank Schemes to Eviscerate State Interest Rate Limits and Protect Predatory Lending (OCC and FDIC)

The vast majority of states impose interest rate caps on installment loans, at rates generally around 36% or lower, depending on the size of the loan.<sup>1</sup> American voters of all political stripes strongly support state interest rate caps. This month, 83% of Nebraska voters approved a 36% interest rate cap.<sup>2</sup> But banks are largely exempt from state rate caps, and the last couple of years have seen an explosion of predatory lenders that are laundering their loans through banks to evade state rate caps, including for installment loans, lines of credit, auto title loans, point-of-sale retail loans, and predatory small business loans.<sup>3</sup> For example, Elevate Credit offers its Rise installment loans at rates up to 149% in several states with far lower rate caps.



The OCC and FDIC enacted rules this year to protect rent-a-bank lending. Addressing those rules and pending litigation over them requires immediate attention. Rent-a-bank lending is spreading; the more entrenched it becomes, the more difficult it will be to root out.

## First 100 Days Priorities to prevent an explosion of predatory high-rate loans include:

- **Repeal the non-bank interest rate rules (aka “Madden-fix” rules).** The non-bank interest rules, effective August 2020, allow predatory lenders to ignore state interest rate limits when banks originate loans and immediately sell them.<sup>4</sup> The rules also prevent states from stopping debt buyers from piling on exorbitant interest indefinitely. Several state attorneys general (AGs) have sued to overturn the rules.<sup>5</sup> The OCC’s motion for summary judgment is due **January 14** and its reply to the AG’s motion is due **February 25**. While a rulemaking to repeal the rules will take time, the OCC and FDIC should immediately announce plans to withdraw the rules.
- **Repeal the OCC’s “true lender” rule by supporting a Congressional Review Act challenge and announcing a rulemaking to repeal the rule.** The true lender rule, effective Dec. 29, 2020, allows predatory nonbank lenders to ignore state rate caps merely by putting a bank’s name on the paperwork, prohibiting courts from looking through to the substance.<sup>6</sup> One predatory lender, Elevate, has already cited the rule in defense of the DC Attorney General’s rent-a-bank lawsuit,<sup>7</sup> and state attorneys general have challenged the rule.<sup>8</sup> The OCC should immediately announce that it supports a CRA resolution to overturn the rule and that, absent a CRA, it will withdraw the rule.
- **Commence the process to end partnerships between OCC – and FDIC-regulated banks and high-cost lenders, and put out strong statements that it is an abuse of a bank charter to help high-cost lenders evade state interest rate caps.**
  - **End OCC-regulated Stride Bank’s pilot rent-a-bank program with the payday lender CURO.** CURO’s [Avio Credit](#) launched a pilot program in 2019 using Stride Bank to make loans at [rates up to 130% APR](#). CURO has [told investors](#) that the Stride Bank program “will help us expand geographically, online and in some states where we — where we don’t operate right now.” CURO’s Avio Credit has also launched [VergeCredit](#), which makes installment loans up to 179% APR. Verge Credit is currently in 10 states and is expanding.
  - **End OCC-regulated Axos Bank’s partnership with predatory small business lender World Business Lenders.** WBL is among the worst of the rent-a-bank lenders; in addition to high rates, it imposes huge prepayment penalties, and default can lead to foreclosure.<sup>9</sup>
  - **End high-cost rent-a-bank partnerships with FDIC-regulated banks.** Transportation Alliance Bank, Community Capital Bank, FinWise Bank, First Electronic Bank, and Republic Bank & Trust (Kentucky) are all helping high-cost lenders make loans above 100% APR in states where high rates are illegal.
  - **The OCC and FDIC should consider enforcement actions** against some of these lenders, which appear to have engaged in fraud, deception or other legal violations in connection with the loans.
  - **Strengthen and put teeth into statements that bank regulators “view unfavorably” rent-a-bank schemes.** Both the FDIC and OCC have stated that they “view unfavorably” entities that partner with banks with “the sole goal of evading a lower interest rate established under the law of the entity’s licensing state(s).”<sup>10</sup> However, both agencies have supported, not discouraged, rent-a-bank schemes, and the “sole goal” language makes the statement meaningless.

- **Rescind the OCC’s interpretive rule that attempts to gut Dodd-Frank’s preemption limits.** On December 18, 2020, the OCC issued Interpretive Letter 1173, which attempts to re-write and gut the limits that Congress placed on the OCC’s ability to preempt state consumer protection law. The letter is a failed attempt to justify the OCC’s failure to follow the law in promulgating the rent-a-bank regulations that preempt state usury laws.

## Stop use of novel bank charters to evade state consumer protections and vigorous federal oversight.

The OCC and FDIC have granted, announced or considered several types of novel “bank” charters, including special purpose national bank (“fintech”) charters, industrial loan charters, payment charters, banking-as-a-service charters,<sup>11</sup> and trust bank charters. All of these bank charters would enable preemption of state consumer protection laws, including usury rates and money transmitter laws, and some would allow “banks” to hold funds without deposit insurance. Most of these new types of banks would also escape consolidated supervision of the holding company by the Federal Reserve Board, making it easier to gain the benefits of federal preemption while escaping vigorous federal oversight and permitting systemic risk issues by combining banking and commerce.

### First 100 Days Priorities

- **Withdraw the OCC’s appeal to the Second Circuit of the injunction against the nonbank “fintech” special purpose national bank charter.**<sup>12</sup> Briefing was completed in the summer. A hearing is expected early in 2021.
- **Deny the Figure, Anchorage national bank charter applications.** The application from Figure, which primarily makes home equity loans and will not take insured deposits, is an end-run around the injunction against the fintech charter.<sup>13</sup> The Anchorage application for a national bank charter for a trust company that holds cryptocurrencies is a novel and troubling use of the national bank charter.<sup>14</sup>
- **Withdraw efforts to create a payments charter<sup>15</sup> and stop accepting applications for industrial loan charters and other novel bank charters.**<sup>16</sup>

## The Federal Reserve Board must build consumer protections into its FedNow faster payment system.

We support the FRB’s efforts to build a FedNow faster payment system in order to provide competition to the private service by The Clearinghouse, to ensure that all communities and smaller financial institutions are well-served, and to provide a greater role for a public agency with a duty to ensure strong consumer protection. As part of this effort, it is critical for FedNow and other faster payment systems to put the incentives in the right place so that institutions do not prioritize speed and convenience over safety. Rules must, *inter alia*:

- protect consumers when they are defrauded and put responsibility on the institution that allowed the scammer to receive fraudulent payments;
- ban overdrafts and overdraft fees in the FedNow system; and
- require institutions to investigate and, if possible, correct consumer errors.<sup>17</sup>

## Restore guidance that promote affordable small dollar loans and that prevent predatory bank payday loans.

Banks are well-positioned to offer affordable small dollar loans. In the past, some banks have offered high-cost, balloon-payment bank payday loans (so-called “deposit advance products”), but guidance issued in 2013 by the OCC, FDIC and Fed curtailed those loans. However, the OCC and FDIC have repealed that guidance and, earlier this year, joined a set of principles that includes loans with “shorter-term single payment structures” among potentially “responsible” small loans. At the same time, the FDIC repealed its longstanding guidance that small dollar loans should be limited to 36%.

### First 100 Days Priorities to prevent a return to high-cost bank small dollar loans:

- The FDIC should reinstate its 36% guidance and the OCC and Fed should issue similar guidance;
- The FDIC and OCC should reinstate their deposit advance product guidances; and
- The joint principles should be strengthened and revised to omit references to single-payment loans.

## Stop banks from encouraging overdraft fees.

As the CEO of PNC Bank recently opined, banks need to move past “the gotcha fees that historically have supported the industry.”<sup>18</sup> Banks extract \$15 billion in overdraft fees each year, largely from the low-income consumers least able to pay them. Many banks use deceptive measures to induce people into incurring overdraft fees instead of making it easier to avoid or cover overdrafts at far lower cost.<sup>19</sup>

The most important measure to reduce overdraft fee abuses is for the CFPB to adopt a strong rule. But in the meantime, the bank regulators can play an important role to limit abuses.

### First 100 Days Priority

- Order depositories to stop charging overdraft and nonsufficient funds fees during the crisis, perhaps as a condition of borrowing from the Federal Reserve.

### Longer-Term Priorities

- Closely supervise overdraft practices to prevent unfair or deceptive practices or practices that promote overdraft coverage as a form of high-cost lending;
- Prevent banks from being overly dependent on overdraft fee revenue, which poses safety and soundness risks and leads banks into acting against their customers’ best interests.

*For more information, please contact National Consumer Law Center Associate Director Lauren Saunders ([lsaunders@nclc.org](mailto:lsaunders@nclc.org)).*

## Endnotes

- <sup>1</sup> See NCLC, [State Rate Caps for \\$500 and \\$2,000 Loans](#) (Feb. 2020).
- <sup>2</sup> [https://ballotpedia.org/Nebraska\\_Initiative\\_428,\\_Payday\\_Lender\\_Interest\\_Rate\\_Cap\\_Initiative\\_\(2020\)](https://ballotpedia.org/Nebraska_Initiative_428,_Payday_Lender_Interest_Rate_Cap_Initiative_(2020)).
- <sup>3</sup> See [Testimony of Lauren Saunders before the U.S. House Financial Services Committee on Rent-a-Bank Schemes and New Debt Traps](#) (Feb. 5, 2020). A list of rent-a-bank lenders and the states where they are evading state rate caps can be found on NCLC's [High-Cost Rent-a-Bank Loan Watch List](#).
- <sup>4</sup> See NCLC, [Press Release, Advocates Condemn FDIC Rule that Encourages Predatory High-Cost Loans; Call on Congress to Pass Federal 36% Interest Rate Cap Limit](#) (June 25, 2020).
- <sup>5</sup> [People v. OCC](#), No. 20-cv-5200 (N.D. Cal. filed July 29, 2020); [People v. FDIC](#), No. 4:20-cv-05860 (N.D. Cal. filed Aug. 20, 2020).
- <sup>6</sup> See NCLC, [Press Release, New OCC Rule Protecting Predatory Lenders Could Face Legal Challenge](#) (Oct. 27, 2020).
- <sup>7</sup> DC Attorney General, [Press Release, AG Racine Sues Predatory Online Lender For Illegal High-Interest Loans To District Consumers](#) (June 5, 2020).
- <sup>8</sup> NY Attorney General, [Press Release, Attorney General James Sues to Stop Trump Administration from Allowing Predatory Lenders to Take Advantage Of New York's Most Vulnerable Communities](#) (Jan. 5, 2021).
- <sup>9</sup> See [Saunders Rent-a-Bank Testimony at 10-13](#); The Capitol Forum, ["Axos Bank: World Business Lenders Targets Merchants Hurt by Pandemic; Extends High Interest Predatory Loans Backed by Small Business Owners' Homes; States Assume Regulatory Role over Rent-A-Bank Schemes After FDIC, OCC Decline"](#) (Sept. 4, 2020).
- <sup>10</sup> 85 Fed. Reg. 44146, 44147 (July 22, 2020); Office of the Comptroller of the Currency, [OCC Bulletin 2018-14: Installment Lending: Core Lending Principles for Short-Term, Small-Dollar Installment Lending](#) (May 23, 2018), rescinded by [OCC Bulletin 2020-54](#) (May 20, 2020).
- <sup>11</sup> "Banking as a service" is essentially a means for a bank that is not directly offering services to the public to rent out its rails and preemption privileges to a nonbank entity. See [Comments of National Community Reinvestment Coalition, NCLC and Center for Responsible Lending opposing application of Formative Bank, N.A.](#) (Sept. 23, 2020).
- <sup>12</sup> See [Amicus Curiae Brief of Center for Responsible Lending et al. in Support of Appellee, Lacewell v. OCC](#), No. 19-4271 (2d Cir. Filed July 30, 2020).
- <sup>13</sup> See [Comments of National Community Reinvestment Corp, et al opposing Figure Bank application](#) (Dec. 7, 2020).
- <sup>14</sup> Coindesk, ["Custodian Anchorage Seeks Charter From Crypto-Friendly US Bank Regulator OCC"](#) (Nov. 27, 2020).
- <sup>15</sup> Coindesk, ["Custodian Anchorage Seeks Charter From Crypto-Friendly US Bank Regulator OCC"](#) (Nov. 27, 2020).
- <sup>16</sup> See [Center for Responsible Lending, Industrial Loan Company Charters Pose Risks to Consumers and the Economy: A Moratorium Is Needed](#) (July 13, 2020); [Letter from ABA, NCLC et al. to OCC re Novel National Bank Charter Applications](#) (Nov. 20, 2020).
- <sup>17</sup> [Comments of NCLC et al. to Federal Reserve Board re Federal Reserve Actions to Support Interbank Settlement of Faster Payments](#) (Dec. 7, 2019).
- <sup>18</sup> Jon Prior, [American Banker, "Banks need to move past 'gotcha' overdraft fees, PNC chief Demchak says"](#) (Nov. 9, 2020).
- <sup>19</sup> [Center for Responsible Lending, Overdraft Fees: Banks Must Stop Gouging Consumers During the COVID-19 Crisis](#) (June 2020).