October 18, 2021

Ms. Ann E. Misback, Secretary
Board of Governors of the Federal Reserve System
20th St. and Constitution Avenue NW
Washington, DC 20551
Docket No. OP–1752

Mr. James P. Sheesley, Asst. Executive Secretary
Attention: Comments-RIN 3064-ZA26, Legal ESS
Federal Deposit Insurance Corporation
550 17th Street NW
Washington, DC 20429

Chief Counsel's Office
Attention: Comment Processing
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Docket ID OCC 2021-0011

Submitted via regulations.gov, regs.comments@federalreserve.gov, comments@FDIC.gov

Re: Proposed Interagency Guidance on Third-Party Relationships: Risk Management

I. Introduction and Overview

The Center for Responsible Lending (CRL), the National Consumer Law Center (NCLC) (on behalf of its low-income clients), the Consumer Federation of America (CFA), and the National Fair Housing Alliance (NFHA), appreciate the opportunity to comment on the Proposed Interagency Guidance on Third-Party Relationships.[1]

[1] Federal Reserve System [Docket No. OP--1752], Federal Deposit Insurance Corporation (FDIC) [RIN 3064-ZA26], Department of the Treasury, Office of the Comptroller of the Currency (OCC) [Docket ID OCC-2021-0011],

We appreciate the agencies' efforts to offer banks an updated framework for managing third-party relationships based on sound risk management principles. However, we are deeply concerned by the proposal's failure to highlight the significant risks associated with high-cost lending involving third-party relationships. The proposal states that the guidance is "especially important" for "relationships that entail greater risk" and for those that "involve critical activities."[2] Yet it is silent on high-cost lending, even as several FDIC-supervisee banks are currently enabling high-cost lending through rent-a-bank schemes. Four of these schemes are even current subjects of state enforcement actions or investigations – clearly posing risks to the banks and consumers alike.

These schemes reflect the ongoing failure of the FDIC to stop these six supervisee banks from renting their charters to non-bank lenders making illegal high-cost loans. They are causing severe harm to consumers, as well as posing risks to the banks. CRL and NCLC provided a number of accounts of individual consumers' painful experiences with the predatory lenders using these rent-a-bank schemes in an appendix to our September 2020 comments filed with the OCC in opposition to its so-called "true lender" rule.[3] The FDIC should take immediate action to stop these harmful schemes.

At the same time, it is critical that the agencies ensure that this joint guidance is not, by its silence, interpreted as permission for banks to enable predatory lending through rent-a-bank schemes. Instead, this guidance should unequivocally declare that it is inappropriate for a bank to rent out its charter to enable attempted avoidance of state consumer protection laws, in particular interest rate and fee caps, or state oversight through licensing regimes. Back in the early 2000s, the OCC was explicit that rent-a-bank payday lending is "an abuse of the national charter," noting: "It is a matter of great concern to [the OCC] when a national bank essentially rents out its charter to a third-party vendor who originates loans in the bank's name ….We are particularly concerned where an underlying purpose of the relationship is to afford the vendor an escape from state and local laws that would otherwise apply to it."[4] This guidance should do no less today.

We recognize that third-party relationships take many different forms. The expertise, technology and other capacities provided by third parties may enable banks to enhance their lending services and lower costs, thereby benefiting both banks and consumers. In some of these relationships, the partnerships do not avoid the laws that protect consumers or result in dangerous loans. But some third-party partnerships are being used in an attempt to enable the third party to avoid state licensing, interest rate caps or other state consumer protection laws and make loans that are illegal, often in the vast majority of states. There are many legitimate purposes of bank partnerships with third parties, but assisting a

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Proposed Interagency Guidance on Third-Party Relationships: Risk Management, 86 Fed. Reg. 38182 (July 19, 2021).

[2] 86 Fed. Reg. at 38184.

[3] Comments of Center for Responsible Lending (CRL), National Consumer Law Center (NCLC) (on behalf of its low income clients) and additional civil rights and consumer organizations, to OCC on Notice of Proposed Rulemaking, National Banks and Federal Savings Associations as Lenders, 1557-AE97, at Appendix, pp. 64-78 (Sept. 3, 2020), https://www.nclc.org/images/pdf/high_cost_small_loans/payday_loans/OCC-True-Lender-Comments.pdf.

[4] News Release, Comptroller of the Currency, OCC Concludes Case Against First National Bank in Brookings Involving Payday Lending, Unsafe Merchant Processing, and Deceptive Marketing of Credit Cards (Jan. 21, 2003), *available at* https://www.occ.gov/static/news-issuances/news-releases/2003/nr-occ-2003-3.pdf.

third party in the violation or evasion of state laws is not one of them. Banks expose both consumers and themselves to risks when they permit themselves to be used as pawns by predatory lenders.

The core of our concerns with rent-a-bank schemes is that they facilitate predatory, unaffordable credit. Rent-a-bank relationships are especially risky to banks and harmful to consumers when they enable lending above the Military Lending Act's (MLA) fee-inclusive 36% interest rate cap (MLA 36% APR). Lending above those rates violates the laws of a significant number of states and poses a number of other risks, including greater risk of (i) violating the MLA itself; (ii) predatory lending, consequent harms, and violation of other prohibitions against unfair, deceptive or abusive practices, including debt collection abuses associated with unaffordable loans; (iii) fair lending issues; (iv) litigation risk and risk that the scheme may be found unlawful, with the bank potentially responsible for conspiring to assist an attempted evasion of usury laws, given the greater disparity between permissible state interest rate limits and the loans made through the scheme; and (v) reputation risk when a bank attempts to enable a third party to offer a product it would not offer directly to its own customers and that is illegal across the country, often using underwriting guidelines it would not approve for its own customers.

Indeed, there is no way for banks to engage in partnerships involving loans exceeding MLA 36% APR that does not pose high risks. The more the bank insulates itself from the risks and shifts those risks to the non-bank lender, the more likely the arrangement will be found to be a sham. In that case, the bank could itself be exposed to litigation risk; lost revenue if the sham is shut down; and the reputation risk involved with any high-cost lending. On the other hand, if the bank takes on more economic risk in the loans, or more involvement in underwriting, the bank itself is taking on the plethora of risks involved with patently predatory lending. And certainly a bank being the actual lender of exorbitantly priced, unaffordable, extremely high default-rate loans cannot be a desirable outcome. These high-cost partnerships are lose-lose endeavors, for consumers and the banking system alike.

Our comments emphasize the following points:

- **A handful of FDIC-supervised banks are engaged in high-cost rent-a-bank schemes, which the FDIC should immediately prohibit. This proposed guidance, by its silence, could encourage more schemes.**
- **Other OCC- and FDIC-supervised banks are enabling high-cost credit features on non-bank deposit accounts that potentially involve violations or evasion of state lending laws or the CFPB's prepaid accounts rule.**
- **The guidance should explicitly provide that banks should not engage in partnerships that enable non-banks to claim they are not subject to state licensing or consumer protection laws;**
- **At a minimum, the guidance should explicitly:**
    - **deem bank involvement in lending that exceeds state interest rate limits that apply to non-banks a "critical activity";**
    - **declare that loans exceeding a fee-inclusive 36% APR pose especially high risks;**
    - **provide that when loans exceed MLA 36% APR, the federal banking supervisor will directly examine the third-party partner and charge the bank for the cost of those examinations.**
- **Guidance addressing information security should be generally applicable not only to data aggregators but to all companies with which a bank shares data, including consumer reporting agencies (CRAs) and other data gathering entities (*e.g.*, data brokers such as Acxiom).**

II. A Handful of FDIC-Supervised Banks Are Engaged in High-Cost, Predatory Rent-a-Bank Schemes, which the FDIC Should End.

We are aware of **six FDIC-supervised banks**[5] enabling at least 15 high-cost consumer lenders[6] to attempt to evade state interest rate limits with loans that are illegal for the non-bank lender to make. As a whole, many of the loans offered through these schemes are **illegal in up to 42 states and DC**.[7] These schemes are as follows:[8]

- **Republic Bank and Trust** (Kentucky-chartered) is enabling:
  - **Enova**, which operates payday and installment lender **CashNetUSA**, to make **NetCredit**-branded installment loans at rates up to 99.99% APR;
  - **Elevate** to make **Elastic**-branded installment loans at effective rates up to 109% APR;

- **FinWise Bank** (Utah-chartered) is enabling:
  - **Opportunity Financial, LLC (OppFi)** to make installment loans at rates up to 160% APR;
  - **Elevate** to make **Rise**-branded installment loans at rates up to 99%-149% APR (Elevate uses two additional banks to enable Rise loans as well, noted below);
  - **American First Finance** to make secured and unsecured installment loans for purchases at retailers including furniture, appliances, home improvements, pets, veterinarian services auto and mobile home repair, jewelry and body art at rates up to about 161% APR;

- **Capital Community Bank** (Utah-chartered) is enabling:
  - **Elevate Credit** to make **Rise**-branded installment loans at rates up to 99-149% APR.
  - **Wheels Financial Group**, LLC dba **LoanMart** (under the **ChoiceCash** brand) to make illegal auto title loans at rates up to 170% APR.
  - **Check Into Cash**, **Axcess Financial** (under the **Xact** brand), **EZ$Money Check Cashing**, **LoanMe**, **Lendly LLC**, **MoneyKey**, **Quickcredit.com**, and **SunUp Financial** to make high-cost loans.[9]

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[5] Capital Community Bank, FinWise Bank, First Electronic Bank, Lead Bank, Republic Bank & Trust (Kentucky), and TAB Bank

[6] American First Finance, Axcess Financial (Xact brand), EasyPay, Elevate, Enova, EZ$Money Check Cashing, Wheels Financial (LoanMart brand)**,** LoanMe, Lendly, LLC, MoneyKey, OppFi, Personify Financial, Quickcredit.com, and SunUp Financial, LLC, d/b/a/ BalanceCredit.com.

[7] Most of the loans through these schemes are well into the triple digits. Forty-two states and DC cap the interest rate on a $2,000, two-year loan at 59% or less. *See* NCLC, State Rate Caps for $500 and $2,000 Loans (July 2021), http://bit.ly/state-rate-caps; N.D. Cent. Code § 13-04.1-09.3(1) (effective Aug. 1, 2021).

[8] *See* NCLC, High-Cost Rent-a-Bank Loan Watch List, updated periodically, at https://www.nclc.org/issues/high-cost-small-loans/rent-a-bank-loan-watch-list.html.

[9] The Center for Economic Integrity, an Arizona-based community and advocacy organization, recently documented Capital Community Bank's rent-a-bank schemes in detail as part of a complaint the organization filed with the FDIC about the high-cost lending the bank is enabling in Arizona. See these details and the organization's complaint at https://economicintegrity.org/?p=2875.

- **First Electronic Bank** (Utah-chartered industrial loan company (ILC)), like FinWise bank, is enabling **Elevate** to make **Rise**-branded installment loans at rates up to 99%-149% APR, and **Applied Data Finance**, dba **Personify Financial**, to make loans up to 179.99% APR.

- **TAB Bank** (Utah-chartered) is enabling Duvera Billing Services dba **EasyPay Finance** to make loans at rates up to 188.99% APR through businesses across the country that sell auto repairs, furniture, home appliances, pets, wheels, and tires, among other items.

- **Lead Bank** (Missouri-chartered), like Capital Community Bank, is enabling **LoanMe** to make loans in certain states.[10] LoanMe's rates reach at least 85% APR.[11]

Most of the above schemes are addressed in further detail in CRL and NCLC's comments to the FDIC[12] and OCC[13] on their proposed so-called "Madden fix" rules, and to the OCC on its proposed so-called "true lender" rule,[14] which was finalized before being overturned by Congress in June 2021.

As with all typical rent-a-bank schemes, these programs are predominantly designed by, operated by, and run for the profit of non-bank companies that are and should be subject to state law. Typically the non-bank is the dominant force behind the program both on the front end – designing all features of the loan program, setting the underwriting criteria, marketing the loans to consumers or small businesses, taking and processing applications – and on the back end, servicing and collecting the loans and owning or benefiting from the assigned loans or receivables.[15] The bank nominally approves these aspects of the program and makes underwriting decisions, but often using criteria, software, or analysis primarily designed or provided by the nonbank company. Thus, key decisions are led and, in practice, effectively made by the non-bank.[16] In more recent incarnations, the bank may claim to retain ownership of the

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[10] https://www.loanme.com/

[11] *Id.*

[12] Comments of CRL, NCLC (on behalf of its low income clients) and additional civil rights and consumer organizations, to FDIC on Notice of Proposed Rulemaking, Federal Interest Rate Authority, RIN 3064-AF21 at 32-34 (Feb. 4, 2020), https://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/groups-crl-comment-fdic-madden-feb2020.pdf.

[13] Comments of CRL, NCLC (on behalf of its low income clients) and additional civil rights and consumer organizations, to OCC on Notice of Proposed Rulemaking, Permissible Interest on Loans That Are Sold, Assigned, or Otherwise Transferred, RIN 1557-AE73 at 21-23 (Jan. 21, 2020), https://www.nclc.org/images/pdf/rulemaking/comments-occ-interest-rates-and-apps.pdf.

[14] Comments of CRL, NCLC (on behalf of its low income clients) and additional civil rights and consumer organizations, to OCC on Notice of Proposed Rulemaking, National Banks and Federal Savings Associations as Lenders, 1557-AE97 at 44-49 (Sept. 3, 2020), https://www.nclc.org/images/pdf/high_cost_small_loans/payday_loans/OCC-True-Lender-Comments.pdf.

[15] As the National Community Reinvestment Coalition points out in its comments to this docket, no complaints in the CFPB consumer complaints database about Enova mention Republic Bank & Trust, even though Enova uses a rent-a-bank scheme through Republic in about 20 states. And no Personify Financial complaints mention First Electronic Bank.

[16] As but one indication of the lender's control over the business, note Elevate's discussion of its control over their products' APRs: "We aim to manage our business to achieve a long-term operating margin of 20% . . . . and do not

empty shell of a "loan" or "account" and only to sell receivables or participation interests. The bank may retain a share of the receivables, but the non-bank company typically has a far larger share of the economic interest – both risk and reward – in the program.

As discussed further in Section V below, bank involvement in high-cost loans like those above pose severe risks to consumers and banks alike. The FDIC is overdue in putting an end to these schemes, and it should do so immediately.

III. Other OCC- and FDIC-Supervised Banks are Enabling High-Cost Credit Features on Non-Bank Deposit Accounts.

A different form of rent-a-bank lending is starting to emerge in the deposit space. The Consumer Financial Protection Bureau's prepaid accounts rule, effective April 2019, limits overdraft and credit features on prepaid accounts. The rule eliminates the overdraft exception from the Truth in Lending Act (TILA) and effectively prohibits overdraft fees and credit features that are immediately offset from incoming deposits.[17] But two different forms of evasion of those rules have begun.

First, prepaid card companies have started offering so-called "bank accounts" with an opt-in overdraft fee feature that violates the prepaid accounts rule. Though styled as individual bank accounts, the accounts are not "checking accounts" entitled to the exception in the prepaid accounts rule.[18] These accounts are typically sold at payday loan stores. For example, these fake bank accounts are offered by the prepaid card company NetSpend, through OCC-supervised MetaBank, through payday lenders including ACE Cash Express. Similarly, the payday lender CURO (SpeedyCash, Rapid Cash) offers these fake bank accounts with overdraft credit and fees through its Revolve Finance brand using FDIC-supervised Republic Bank of Chicago. As with other rent-a-bank schemes, these accounts and credit features are predominantly designed and run by, and operate for the benefit, of non-bank companies.

Second, a newer evasive high-cost credit feature with interest hidden in purportedly voluntary "tips" is being offered by non-bank companies (often deceptively called "challenger banks" or "neo banks") that offer other forms of non-bank deposit accounts, with a bank behind the scenes facilitating the evasion.

For example, the "fintech" company Chime offers "banking" through a "spending account" and associated debit card issued by OCC- supervised Stride Bank or FDIC-supervised Bancorp Bank. (Chime

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expect our operating margin to increase beyond that level over the long-term, as we intend to pass on any improvements over our targeted margins to our customers in the form of lower APRs. We believe this is a critical component of our responsible lending platform and over time will also help us continue to attract new customers and retain existing customers." Elevate Form 10K, 2020, at 66.

[17] *See* CFPB, Prepaid Rule, Small entity compliance guide (April 2019), https://files.consumerfinance.gov/f/documents/cfpb_prepaid_small-entity-compliance-guide.pdf

[18] The prepaid account rule excludes "a checking account, share draft account, or negotiable order of withdrawal account." 12 C.F.R. §1005.2(b)(3)(i)(D)(3). The accounts offered by prepaid card companies do not offer checks (or share drafts, the credit union equivalent) and thus are not checking accounts and also are not NOW accounts that require more notice before withdrawals.

was forced to stop calling itself a bank in response to state enforcement actions.[19]) Chime offers "Fee-Free Overdraft" up to $200, but collects purportedly voluntary "tips" from people.[20]

Similarly, the non-bank company MoneyLion offers "Everything you'd want from a banking account" through a "demand deposit account" provided through MetaBank.[21] The account offers "0% APR" "cash advances up to $250 with no interest" but also uses the deceptive "tips" model and also charges a $4.99 "turbo fee" if the consumer wants the funds immediately.[22] MoneyLion has faced numerous enforcement actions and lawsuits. These are just a few: It is currently under investigation by the CFPB related to its "membership model" and compliance with the Military Lending Act,[23] and the Ninth Circuit recently ruled that a consumer could pursue public injunctive relief against MoneyLion in arbitration for offering "credit-builder loans" that "lured her into debt" through its "high-tech debt trap" app.[24] The Virginia Attorney General also sued MoneyLion for offering installment loans over the internet and falsely claiming that it was licensed in Virginia.[25]

The "tips" model is being used to attempt to evade federal and state lending laws. The "tips" are unlikely to be as voluntary as claimed, and they are effectively a hidden form of interest that should trigger APR disclosures and other requirements of the Truth in Lending Act. It is highly likely that Chime and MoneyLion, like other purveyors of the deceptive tips model,[26] engage in practices that push people

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[19] *See, e.g.,* Anna Hrushka, BankingDive, California regulator orders Chime to stop calling itself a bank (May 6, 2021), https://www.bankingdive.com/news/california-regulator-orders-chime-to-stop-calling-itself-a-bank/599710/; State of Illinois, Dep't of Fin'l and Prof'l Reg., Settlement agreement and Consent Order, In re Chime Financial, Inc., No. 2021-DB-01 (March 25, 2021), https://www.idfpr.com/banks/cbt/Enforcement/2021/2021%2003%2025%20Chime%20-%20IL%20Settlement%20Agreement%20and%20Consent%20Order.pdf.

[20] https://www.chime.com/spotme/.

[21] https://www.moneylion.com/banking/.

[22] https://www.moneylion.com/instacash/.

[23] *See* Dan Ennis, BankingDive, MoneyLion discloses CFPB, SEC, state probes ahead of $2.4B merger (June 11, 2021), https://www.bankingdive.com/news/moneylion-discloses-cfpb-sec-state-probes-ahead-of-24b-merger/601676/.

[24] DiCarlo v. MoneyLion, Inc., 988 F.3d 1148 (9th Cir. 2021).

[25] *See* Commonwealth of Virginia, Office of the Attorney General, Press Release, "Virginia Consumers To Receive $2.7 Million In Relief From Settlement With Internet Lender" (Feb. 7, 2018), https://www.oag.state.va.us/media-center/news-releases/1122-february-7-2018-virginia-consumers-to-receive-2-7-million-in-relief-from-settlement-with-internet-lender.

[26] *See, e.g.,* Kevin Dugan, New York Post, Cash-advance app Earnin gets subpoenaed by NY regulator: source (Mar. 28, 2019) ("Earnin encouraged users to leave a tip of anywhere between zero and $14 on a $100 weekly loan. Users who don't leave a tip appear to have their credit restricted. Meanwhile, a $14 tip would equate to a 730-percent APR — nearly 30 times higher than New York's 25 percent cap."); Fast Company, These 2 Black founders aim to offer a fairer alternative to payday loans (Feb. 18, 2021) ("When requesting a loan, for instance, SoLo asks borrowers to choose a "donation" to the app on top of their tip to the lender, starting at 7% or $3.50 for new borrowers seeking $50 loans. Technically, the donation is optional, but the only way to avoid it is through a toggle in SoLo's settings menu, which must be reactivated for each request. There's no way to opt out of donations while making the request itself. Industry watchdogs have also raised concerns about the tipping model. While SoLo's tips

into tipping, such as by having a default tip that should be viewed as a finance charge.[27] Even if voluntary, "tips" could still be finance charges under TILA.[28] Moreover, non-checking accounts offered by non-banks like Chime and MoneyLion should be viewed as prepaid accounts just like the prepaid card company "bank accounts" discussed above, and the CPFB's prepaid accounts rule prohibits overdraft or credit features that trigger a negative balance repaid upon the next deposit, even if there are no "tips" or other charges at all.[29]

Credit and overdraft features on non-bank deposit accounts are a form of high-cost rent-a-bank lending. Under some state laws, even "voluntary" interest can violate usury laws.[30] On a short-term advance of, say, $100, with a 12 day-duration,[31] a "tip" of $5 equates to a 150% APR, while a $10 tip on $250 equates to a 120% APR. As the loan term gets shorter, these effective rates increase substantially. Credit at these rates is illegal in a number of states, and banks should not facilitate attempts by non-banks to evade state usury laws.

Notably, Stride Bank, one of Chime's partners, is the same bank that was enabling 179% APR rent-a-bank loans for the payday lender CURO until that program stopped taking applications (apparently due to OCC pressure) in the middle of the battle over the OCC fake lender rule.[32] MetaBank, the partner on NetSpend "bank accounts," previously faced an enforcement action by the Office of Thrift Supervision

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are also voluntary, and about 7% of loans funded on the platform involve no tipping at all, the app notes that loans are much more likely to be funded when users tip the maximum amount. Between tips and donations, users may end up paying a rate that's not much more favorable than payday loans, even if the model for late payments is less predatory.").

[27] Courts and the CFPB have found violations of the Electronic Fund Transfer Act's ban on compulsory use when electronic repayment is a default method, even if the consumer can undo the default. *See* de la Torre v. CashCall, Inc., 56 F. Supp. 3d 1073, 2014 WL 3752796, at *8 (N.D. Cal. July 30, 2014), vacated on other grounds, 2014 WL 7277377 (N.D. Cal. Dec. 22, 2014); Fed. Trade Comm'n v. Payday Fin., L.L.C., 989 F. Supp. 2d 799 (D.S.D. 2013); Pinkett v. First Citizens Bank, 2010 WL 1910520 (N.D. Ill. May 10, 2010); O'Donovan v. CashCall, Inc., 2009 WL 1833990 (N.D. Cal. June 24, 2009); W. Va. ex rel. McGraw v. CashCall, Inc. et al., No. 08-C-1964 (W.V. Cir. Ct. Sept. 10, 2012), available at www.nclc.org/unreported; In re Integrity Advance, L.L.C., CFPB No. 2015-CFPB-0029 (Jan. 11, 2021).

[28] *See* Federal Reserve System, Truth in Lending, Final rule, 61 Fed. Reg. 49237, 49239 (Sept. 19, 1996) ("The Board has generally taken a case-by-case approach in determining whether particular fees are 'finance charges,' and does not interpret Regulation Z to automatically exclude all 'voluntary' charges from the finance charge.") (implementing the Truth in Lending Act Amendments of 1995, which establish new creditor liability rules for closed-end loans secured by real property or dwellings and consummated on or after September 30, 1995).

[29] The rule generally prohibits any overdraft features other than a $10 free cushion.

[30] *See, e.g.,* Buck v. Dahlgren, 100 Cal.Rptr. 462 (Ct. App. 1972) ("'[V]oluntary' payments of interest do not waive the rights of the payors" to ensure usury laws) (quoting Stock v. Meek, 35 Cal.2d 809, 817, 221 P.2d 15, 20 (1950)).

[31] CFPB found that the average loan term of bank deposit advances was 12 days. CFPB, Payday Loans and Deposit Advance Products, A white paper of initial findings at 28 (April 2013), https://files.consumerfinance.gov/f/201304_cfpb_payday-dap-whitepaper.pdf.

[32] *See* https://www.vergecredit.com/ ("We are not accepting new loan applications at this time. However, we are still servicing all open loans.").

(its previous regulator) for engaging in unfair or deceptive practices in connection with payday loans offered through NetSpend prepaid cards.[33]

Here again, bank involvement in high-cost loans like those above poses severe risks to consumers and banks alike.

IV. The Guidance Should Deem Bank Involvement in Lending at Rates Exceeding Legal Rates for the Non-Bank, or Where the Non-Bank Would Otherwise Be Licensed, a "Critical Activity."

Given its failure to highlight risks involved in high-cost lending partnerships, the proposed guidance could be read as permitting them going forward. In an environment where rent-a-bank schemes have received heightened attention, in part owing to the OCC's now-overturned true lender rule, issuing third party guidance that fails to address high-cost lending risks sending the wrong message. This risk is heightened by certain aspects of the OCC's 2020 FAQs, on which the Agencies also seek comment in this proposal. For example, the FAQs include a question on partnering with "fintechs" to "offer products or services to underbanked or underserved segments of the population" – the general justification high-cost rent-a-bank schemes provide for their high-cost loans. The FAQ names "credit" as one of those products, but does not speak at all to involvement in lending that exceeds state interest rate limits.[34]

The proposal advises that banks must ensure that third parties comply with "applicable" laws,[35] but the guidance should emphasize that "applicable law" may include state law – especially given the risk that state law will be found to apply to loans even if a bank is involved. The guidance should explicitly highlight the risk of partnering with an entity related to a product that is unlawful for the nonbank to offer, and it should deem such activity a "critical activity" warranting "more comprehensive and rigorous oversight and management third-party relationships."[36]

The proposal defines critical activities as those that "[c]ould cause a banking organization to face significant risk if the third party fails to meet expectations; could have significant customer impacts; require significant investment in resources to implement the third-party relationship and manage the risk; or could have a major impact on bank operations if the banking organization has to find an alternate third party or if the outsourced activity has to be brought in-house."[37] These are all true of third-party lending relationships where loans exceed state interest rate limits.

The high-cost, predatory lending enabled through attempted evasion of state interest rate laws has particularly significant "customer impacts." Those impacts are not sufficiently mitigated through compliance with federal law. In the lending area, various federal laws and regulations require disclosures, prohibit discrimination, protect consumers from certain damaging debt collection practices

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[33] *See* NCLC, Press Release, NCLC Applauds End of 650% MetaBank Prepaid Card Payday Loan (Oct. 14, 2010), https://www.nclc.org/images/pdf/pr-reports/pr-end-650pct-prepaid-card-payday-loan.pdf.

[34] 86 Fed. Reg. 38201, Question 18.

[35] 86 Fed. Reg. 38184.

[36] 86 Fed. Reg. 38198.

[37] 86 Fed. Reg. 38187.

when conducted through third parties, and generally prohibit unfair and deceptive practices. Those laws are important, but they have generally proven not enough to sufficiently protect consumers.

Existing federal law does not cap interest rates for the general population, which is the most effective way of protecting consumers from unfair, abusive and unaffordable loans; only state laws do that. State usury laws give consumers essential protection from predatory loans that strip them of assets and essential cash, and diminish their hopes of accumulating even a modest degree of economic security and wealth. Indeed, state interest rate caps are especially critical as high-cost lenders continue to move into longer-term and larger loans that can result in an even deeper debt trap and more consumer harm than short-term payday loans long have.[38] At least 45 states and the District of Columbia (DC) impose interest rate caps on some consumer loans. Among those that cap rates, the median annual rate including all fees is 38.5% for a $500, six-month loan; 32% for a $2000, two-year loan; and 25% for a $10,000, five-year loan.[39] While payday and other high-cost lenders are pushing hard at the state level to make high-cost longer-term loans legal in more states, the large majority of state legislatures have rejected these efforts. In addition, seventeen states plus DC have interest rate caps that prevent short-term payday loans, a number that has grown by several over the last decade.

Unaffordable high-rate loans may ultimately be unfair, deceptive or abusive under federal law. But drawing clear lines between legal and illegal lending programs is much more difficult without interest rate caps, exposing both banks and consumer to risks. And some of today's more sophisticated high-cost installment lenders may purport to be in compliance with federal law and still make high-cost, unaffordable loans that cause consumer harm through their rent-a-bank relationships.

Third-party partnerships that are rent-a-bank schemes are particularly dangerous because they enable lending that most banks do not do and would not do directly. Although banks are not subject to state usury laws, they generally exercise self-restraint in the consumer lending space and rarely engage in lending above 36%.

While rent-a-bank relationships are most alarming when they involve especially high-cost lending, the agencies should not permit bank partnerships involving lending above state limits for the non-bank even if the rates are not sky-high. Although some online lenders engaged in bank partnerships generally keep their rates under 36%, 36% is nevertheless a very high rate, especially if charged on loans that can be in the thousands and even tens of thousands of dollars.[40] A large loan could balloon astronomically at

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[38] Comments of Center for Responsible Lending, National Consumer Law Center (on behalf of its low income clients) and additional civil rights and consumer organizations, on CFPB Proposed Rule on Payday, Vehicle Title, and Certain High-Cost Installment Loans at § 2.5 (pp. 31-34) and § 10.1-10.3 (pp. 165-172) (Oct. 7, 2016), https://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/crl_payday_comment_oct2016.pdf; see also CFPB Proposed Rule on Payday, Vehicle Title, and Certain High-Cost Installment Loans, discussion of longer-term high-cost loans, 81 Fed. Reg. 47864, 47885-92 (July 11, 2016).

[39] *See* NCLC, State Rate Caps for $500 and $2,000 Loans, July 2021, https://www.nclc.org/images/pdf/high_cost_small_loans/payday_loans/FS_State_Rate_Caps_2021.pdf; NCLC, *A Larger and Longer Debt Trap? Analysis Of States' APR Caps For A $10,000 5-year Installment Loan* (Oct. 2018), overview http://bit.ly/2QOp6AG and full report, http://bit.ly/instloan18.

[40] *See* U.S. Dep't of the Treasury, Opportunities and Challenges in Online Marketplace Lending 10 (May 10, 2016).

36%.[41] Most states have tiered interest rate limits that go well below 36% for larger loans. New York's usury rate, for example, is 25% up to $25,000, and 16% above that. The agencies should not permit the use of a bank charter to be rented out to a lender to enable the lender to attempt to make loans to borrowers in New York or any other state that the lender cannot legally make directly.

In addition to evading state interest rate caps, rent-a-bank arrangements also enable the lender to avoid state licensing and, often, state oversight.[42] It is inappropriate for the bank to let itself be used to prevent state oversight of a third party. While, as the guidance acknowledges, bank regulators have some authority to scrutinize the activities of banks' third-party vendors,[43] they rarely directly examine the bank's partners. The bank regulators' legal authority that is generally not being used in practice is different from the regular oversight that comes with state licensing, state examinations, and state oversight. States play an essential role in supervising nonbank entities. The proposal should, at a minimum, deem "critical activities" any activities involving non-bank lenders that do not hold a license that would be applicable to them absent the bank partner.

V. The Guidance Should Caution That Loans Exceeding Fee-Inclusive 36% APR Are Especially High-Risk.

A. Overview.

The guidance should caution that bank involvement in third-party loan programs exceeding a fee-inclusive 36% APR as provided by the Military Lending Act (MLA) and its implementing regulations are especially high-risk given heightened risk of (i) violating the MLA itself; (ii) predatory lending, consequent harms, and violation of other prohibitions against unfair, deceptive or abusive practices, including debt collection abuses associated with unaffordable loans; (iii) fair lending issues; (iv) litigation risk and risk that the scheme may be found unlawful, given the greater disparity between permissible state interest rate limits and the loans made through the scheme; and (v) reputation risk when a third party offers a product the bank would not offer directly to its own customers, often using underwriting guidelines it would not approve for its own customers. We address each of these below in turn.

B. Lending above MLA 36% APR heightens the risk of violating MLA.

Banks and their third-party partners are directly subject to MLA caps when they lend to servicemembers and their dependents. Numerous banks and non-bank lenders have faced enforcement actions for violating the MLA. The possibility that a consumer could be covered by the MLA results in greater compliance risks when a lender is making loans above MLA limits. This risk is especially acute when the third party handles the consumer application, screening and preliminary approval process.

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[41] The repayment of a $40,000 loan over ten years at a 36% rate will require a total of payments of approximately $562,000.

[42] State licenses may still be needed if the entity engages in marketing, servicing or collecting activities that require a state license. But it is not clear if the state would have examination or oversight authority over underwriting or other lending activities without a state license.

[43] 86 Fed. Reg. 38193, n.19.

C. MLA 36% APR is a widely accepted threshold above which loans are more likely to be predatory and harmful, and ripe for abusive debt collection practices.

The 36% rate reflected in the MLA is a widely accepted dividing line between high-cost, predatory loans that pose risk of consumer harm and lower-cost loans that are more likely to be affordable.[44] With higher rate loans, the consumer injury is higher, but the lender's incentive to make affordable loans and avoid unfair, deceptive or abusive practices is lower.[45] Higher rates lead to misaligned incentives between the lender and the borrower, which ultimately expose the bank to risks of predatory lending programs.

High-cost lending turns incentives on their head, so that lenders succeed when borrowers fail.[46] As shown in the following chart,[47] high rates slow down repayment of principal so much that for months, or even years, progress toward principal can be close to negligible, even after hundreds or thousands of dollars has been repaid. Litigation against CashCall – which has been shown to be the true lender in rent-a-bank schemes[48] – exposed its predatory business model. CashCall, even without breaking 100% APR, recovered far more than its original principal and started making a profit at month 19 on its 42-month loan, even while very little of those payments were applied to principal. That discrepancy only grew, with the profit point at 14 months on a 47-month loan, once CashCall increased the interest rate and lengthened the term. The chart also demonstrates how little progress the borrower has made toward principal at that point, and how long they have to go.

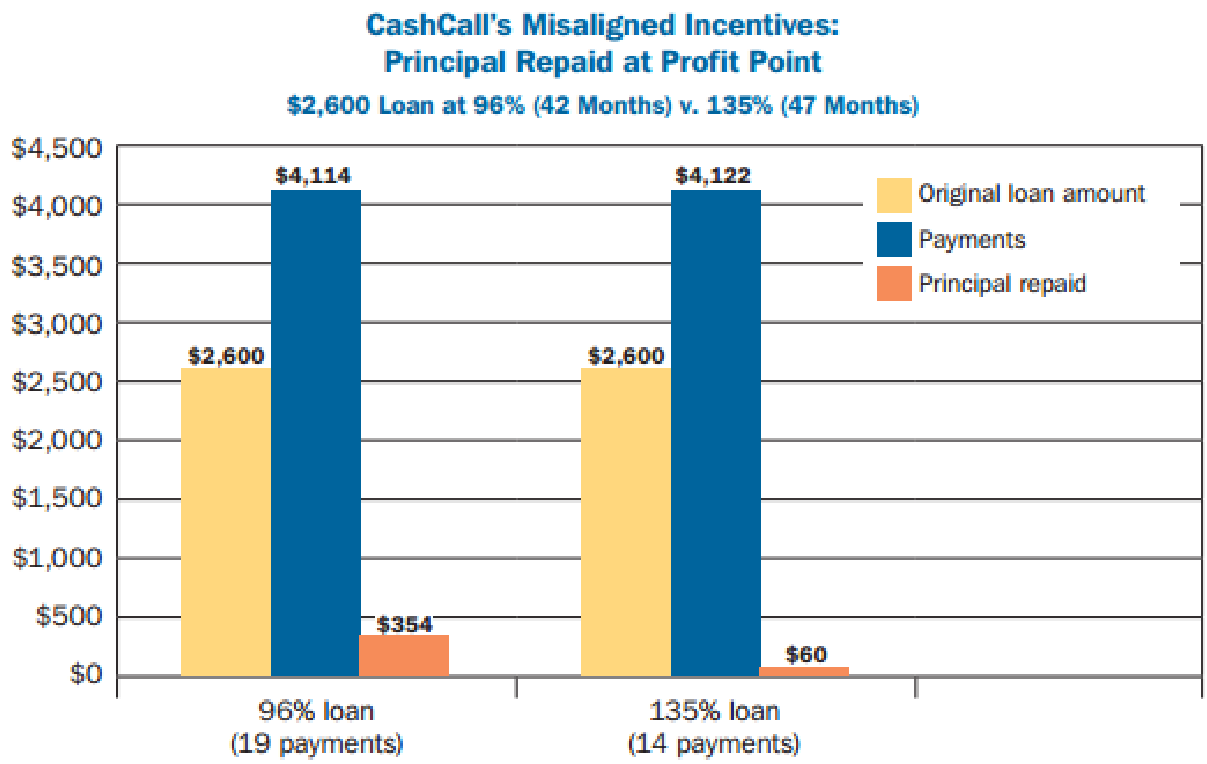
[44] NCLC, Why Cap Interest Rates at 36%? (Aug. 2021), https://bit.ly/why36.

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

[46] *Id.*

[47] This chart is drawn from NCLC, *Misaligned Incentives*, *id.*, at 15.

[48] *CashCall v. Morrisey,* 2014 WL 2404300 (W.Va. May 30, 2014); *Consumer Financial Protection Bureau v. CashCall, Inc*., 2016 WL 4820635 (C.D. Cal. Aug. 31, 2016).



Once even small portions of principal are paid down, lenders aggressively push refinances to borrowers to keep them on a high-cost debt treadmill.[49] Even with these high refinance rates, defaults on high-cost loans are extraordinarily high. Elevate, one high-cost lender using FDIC-supervised banks to make loans averaging 102% effective APR (110% for Rise and 94% for Elastic),[50] has historically had net charge-offs as a percentage of revenues of around 50%.[51] The CFPB found that Elevate's charge-off rate as a percentage of outstanding loan volume in 2014 was over 50%.[52] Elevate has stated that it does not

[49] The CFPB found that for online payday installment loans (the channel for most new "fintech" loans), refinance rates were very high. CFPB Supplemental Findings on payday, payday installment, and vehicle title loans (June 2, 2016) at 15 (35% for storefront, 22% for online). *See also* Elevate Credit, Inc., Form 10K, 2019, at 15 (noting "[a]pproximately 55% of Rise installment customers in good standing had refinanced or taken out a subsequent loan as of December 31, 2019, with 40% of the outstanding Rise installment loan balances on that date consisting of new customer loans and 60% related to returning customer loan."); Elevate Credit, Inc., Form 10K, 2020, at 8 (noting 70% of Rise installment customers in good standing had refinanced or taken out a subsequent loan as of Dec. 31, 2020). While mainstream lenders also often have substantial rates of refinancings, those lenders also charge rates that permit reasonable amortization of loan balances.

[50] Elevate Form 10K, 2020, at 84.

[51] *Id.* at 33 (showing 54% in 2018; 52% in 2019; 41% in 2020)*; see also* CFPB Supplemental Findings on payday, payday installment, and vehicle title loans (June 2, 2016) at 9 (the CFPB found that 55% of online loan sequences ended in default).

[52] As calculated by the CFPB, *CFPB Proposed Payday Rule*, 81 Fed Reg. 47886, n.246.

intend to significantly drive down its charge-off rates.[53] Similarly, OppFi, another rent-a-bank lender using an FDIC-supervised bank to make loans up to 160% APR, had charge-offs as a percentage of average net receivables of 42.2% and 35.6% in 2019 and 2020, respectively.[54] Essentially, these are high-rate, high-default business models that profit while making unaffordable loans.[55] High-rate lending supports these high default rates—indeed, the defaults are the excuse and justification for the high rates themselves, under the guise of risk-based pricing.

These charge-off rates, high as they are, actually understate borrowers' inability to repay. First, lenders use automatic electronic repayment to help ensure their ability to collect notwithstanding borrowers' problems paying other bills. Many lenders also arrange for payments to be due on the borrower's payday, when they are most likely to have funds in their account, and before they are able to pay for more essential expenses or debts. For these reasons, even low charge-offs on high-rate loans do not mean there is no consumer harm, as lenders are often first in line on payday.

With incentives misaligned as they are, the lender has a successful, profitable experience, while default causes a cascade of devastating consequences that can plague the consumer for a lifetime. Unaffordable high-cost lending is associated with a host of financial consequences that include greater delinquency on other bills,[56] high checking account fees and closed accounts,[57] and bankruptcy.[58] Growing research documents the links between high-cost loans and negative health impacts.[59]

Car title lenders, which are also expanding into rent-a-bank operations via LoanMart's scheme with an FDIC-supervised bank, inflict a special kind of pain. Lenders take title to unencumbered cars borrowers

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[53] Elevate Form 10K, 2020, at 71; Elevate Form 10K, 2019, at 81.

[54] OppFi. "OppFi Inc. IPO Investment Prospectus." S-1. Chicago, Illinois, August 11, 2021. https://sec.report/Document/0001193125-21-242313/.

[55] For a case study of Elevate, including its "soaring rhetoric," its sky-high interest rates, and the structure of its rent-a-bank schemes, see Christopher K. Odinet, *Predatory Fintech and the Politics of Banking*, Iowa L. Rev. 1739 (2021), https://ilr.law.uiowa.edu/print/volume-106-issue-4/predatory-fintech-and-the-politics-of-banking/.

[56] *See, e.g.*, B. Melzer, *The Real Costs of Credit Access: Evidence from the Payday Lending Market*, (2011), Oxford University Press, http://bit.ly/10M01tZ; Agarwal, S., Skiba, P. M., & Tobacman, J., *Payday loans and credit cards: New liquidity and credit scoring puzzles?* NBER Working Paper (2009), http://bit.ly/RtDsXx.

[57] CFPB Payday Rule, 82 Fed. Reg. 54564, 73; *see also* Dennis Campbell, Asis Martinez Jerez, & Peter Tufano, *Bouncing out of the Banking System: An Empirical Analysis of Involuntary Bank Account Closures,* Harvard Business School, 12/3/08, www.bostonfed.org/economic/cprc/conferences/2008/payment-choice/papers/campbell_jerez_tufano.pdf.

[58] Paige Marta Skiba and Jeremy Tobacman, *Do Payday Loans Cause Bankruptcy?,* Vanderbilt University and the University of Pennsylvania, 10/10/08, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1266215.

[59] *See* Comments of CRL, NCLC (on behalf of its low income clients) and additional civil rights and consumer organizations, to OCC on Notice of Proposed Rulemaking, National Banks and Federal Savings Associations as Lenders, 1557-AE97 at 39-40, n.110 and accompanying text (Sept. 3, 2020), https://www.nclc.org/images/pdf/high_cost_small_loans/payday_loans/OCC-True-Lender-Comments.pdf.

previously owned outright. An astounding one in five borrowers have their car repossessed.[60] The consequences of losing one's vehicle are dire – both the loss of a valuable asset and the serious disruption of a borrower's ability to get to work, earn income, and manage their lives.[61] More than a third of auto title borrowers have reported pledging the only working car in their household as security for their auto title loan.[62]

Thus, high-cost lending is not just credit at a higher price. It is a wrecking ball of a business model, designed by lenders to extract as much as possible, for as long as possible, from often already desperate borrowers, leaving them worse off than when they started. In this way, high-cost lending is also a mechanism that siphons resources from the poorest communities, often communities of color.

The higher default rates that tend to correlate with rates above 36% also lead to more substantial debt collection efforts and greater risk of unlawful, abusive debt collection efforts.[63] The bank can even be at risk if the loans are sold to debt buyers.[64] Moreover, some third party non-bank lenders outsource their own debt collection services to other third parties, distancing the bank even further from its ability to oversee the practices. For example, Elevate outsources its collections and customer service to a third party.[65]

D. Loans above 36% MLA APR are more likely to pose fair lending risk.

Loans at high rates tend to go disproportionately to borrowers of color and may pose fair lending issues, both related to marketing of the loans as well as underwriting using "big data." Storefront high-cost lenders have long targeted borrowers of color, more likely to locate stores even in more affluent communities of color than in less affluent white communities.[66] These storefronts may only directly

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[60] CFPB Single-Payment Vehicle Title Lending at 4 (2016). CRL estimates that approximately 340,000 auto title borrowers annually have their car repossessed, well exceeding the population of St. Louis. For calculation, *see* CRL, Public Citizen, NCLC et. al comments on CFPB's proposed repeal of the ability-to-repay provisions of the payday rule at 26, n.90 (May 15, 2019), https://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/comment-cfpb-proposed-repeal-payday-rule-may2019.pdf.

[61] *See* CFPB Payday Rule, 82 Fed. Reg. at 54573, 93.

[62] *Id.*, n. 592 (internal citations omitted).

[63] *See*, *e.g.*, Press Release, Consumer Fin. Prot. Bureau, CFPB Takes Action Against ACE Cash Express for Pushing Payday Borrowers Into Cycle of Debt (July 10, 2014), *available at* http://www.consumerfinance.gov/about-us/newsroom/cfpb-takes-action-against-ace-cash-express-for-pushing-payday-borrowers-into-cycle-of-debt/.

[64] *See* Press Release, Consumer Fin. Prot. Bureau, 47 States and D.C. Take Action Against JPMorgan Chase for Selling Bad Credit Card Debt and Robo-Signing Court Documents (July 8, 2015), *available at* http://www.consumerfinance.gov/about-us/newsroom/cfpb-47-states-and-d-c-take-action-against-jpmorgan-chase-for-selling-bad-credit-card-debt-and-robo-signing-court-documents/.

[65] Elevate Credit, Inc., Form 10-K, 2020, at 36.

[66] Li, et al., *Predatory Profiling: The Role of Race and Ethnicity in the Location of Payday Lenders in California,* Center for Responsible Lending (2009), http://www.responsiblelending.org/payday-lending/research-analysis/predatory-profiling.pdf; Brandon Coleman and Delvin Davis, *Perfect Storm: Payday Lenders Harm Florida Consumers Despite State Law*, Center for Responsible Lending at 7, Chart 2 (March 2016); Delvin Davis and Lisa Stifler, *Power Steering: Payday Lenders Targeting Vulnerable Michigan Communities*, Center for Responsible

offer short-term payday loans, but the stores also can pitch rent-a-bank loans available online.[67] Online high-cost lenders may focus more on subprime credit score than geography, although we understand that some lenders use zip codes to target online marketing. But historical discrimination against communities of color is also reflected in credit scores.[68] Lenders also pitch loans to people with "bad credit." Lenders that focus on subprime borrowers will inevitably disproportionately target borrowers of color. Moreover, online lenders often promote their models as expanding economic inclusion (a false notion given high-cost lending's association with financial destruction and lost bank accounts[69]) which will often put borrowers of color among their target borrowers.

Some high-cost lenders heavily market their loans. As the National Community Reinvestment Coalition points out in its comments to this docket, 92% of Elevate's Elastic customers responded to a pre-screened offer, the names for which Elevate purchased from credit bureaus.[70] Banks engaged in rent-a-bank schemes likely typically have little direct involvement in the marketing and likely do not oversee it closely to monitor targeting of financially vulnerable consumers and communities of color. The algorithms and big data that "fintech" lenders use may also result in disparate impacts on these communities.[71] And it seems unlikely the banks are engaging in rigorous fair lending testing of complex, proprietary programs employed by the third-party lenders.

Lending (Aug. 2018), https://www.responsiblelending.org/research-publication/power-steering-payday-lenders-targeting-vulnerable-michigan-communities; Delvin Davis, *Mile High Money: Payday Stores Target Colorado Communities of Color*, Center for Responsible Lending (Aug. 2017; amended Feb. 2018), https://www.responsiblelending.org/research-publication/mile-high-money-payday-stores-target-colorado-communities-color.

[67] *See* Lauren Saunders & Lisa Stifler, "Congress Must Overturn OCC's 'Fake Lender' Rule: Payday Lenders Benefit, Consumers Lose" (Apr. 22, 2021), https://morningconsult.com/opinions/congress-must-overturn-occs-fake-lender-rule-payday-lenders-benefit-consumers-lose/ (describing posters in Check Into Cash stores).

[68] *See* Chi Chi Wu, *Past Imperfect: How Credit Scores and Other Analytics "Bake In" and Perpetuate Past Discrimination*, National Consumer Law Center (May 2016), https://www.nclc.org/images/pdf/credit_discrimination/Past_Imperfect050616.pdf.

[69] CFPB found that about half of borrowers with online payday or other high-cost online loans paid a nonsufficient funds (NSF) or overdraft fee. These borrowers paid an average of $185 in such fees, while 10% paid at least $432. It further found that 36% of borrowers with a bounced payday payment later had their checking accounts closed involuntarily by the bank. CFPB Online Payday Loan Payments at 3-4, 22 (April 2016).

[70] NCRC, citing Elevate Credit, Inc. "2020 Annual Report," (p. 34) February 26, 2021. https://investors.elevate.com/filings-financials/sec-filings/sec-filings-details/default.aspx?FilingId=14750383.

[71] *See* Testimony of Chi Chi Wu, National Consumer Law Center, Before the U.S. House Committee on Financial Services Task Force on Financial Technology Regarding "Examining the Use of Alternative Data in Underwriting and Credit Scoring to Expand Access to Credit" (July 25, 2019); Carol A. Evans, *Keeping Fintech Fair: Thinking about Fair Lending and UDAP* Risks, Consumer Compliance Outlook (2017), https://consumercomplianceoutlook.org/2017/second-issue/keeping-fintech-fair-thinking-about-fair-lending-and-udap-risks/; *see also* Christopher K. Odinet, *Predatory Fintech and the Politics of Banking*, Iowa L. Rev. 1739 (2021), https://ilr.law.uiowa.edu/print/volume-106-issue-4/predatory-fintech-and-the-politics-of-banking/.

E. Loans above 36% MLA APR carry greater legal risk, and consequent safety and soundness risk.

The legal landscape is fluid, and banks that rent out their charters to non-bank entities run the risk that the lending programs will be deemed subject to state law and that the banks could be conspirators to usury evasions. The greater the disparity between a loan's interest rate and the legal state rate, and the greater the role of the non-bank entity in designing, operating and profiting from the loan program, the greater the likelihood that it will be viewed not as a bank lending program but as an unlawful evasion of state usury laws.

The MLA 36% APR is a useful measuring stick to assess whether a lender's rates would violate the laws in a substantial number of states. For example, a $2000, two-year loan that has an APR above 36%, including all fees,[72] would violate the law in 32 states and the District of Columbia.[73] For a smaller $500 six-month loan, a rate over 36% would violate the law in 20 states plus DC.[74] Thus, a partnership that enables loans above the MLA 36% APR rate is very clearly for the purpose of evading state laws, thus exposing the bank to heightened risks.

Four of the rent-a-bank schemes named in Section II above (involving three of the high-cost lenders) have been the subject of recent state enforcement actions or investigations. Put another way, of the six banks of which we are aware engaged in high-cost rent-a-bank schemes, *half* have had at least one of their schemes be the subject of state action in the last 18 months:

- In June 2020, the Attorney General of the District of Columbia (DC) sued **Elevate** for violating its interest rate cap as the true lender in its schemes with **FinWise Bank** and **Republic Bank & Trust**.[75] The suit alleges that Elevate charged up to 42 times over the DC's permissible rate limits, "unlawfully burden[ing] over 2,500 financially vulnerable District residents with millions of dollars of debt."[76] In remanding the case from federal to DC court, a federal court found that the AG's allegations are similar enough to older rent-a-bank schemes for the court to conclude that "the District has sufficiently alleged that Elevate is the true lender of the Rise and Elastic loans."[77]

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[72] The actual Truth in Lending Act APR might be lower with fees excluded. NCLC's methodology tracks the requirements of the Military Lending Act.

[73] *See* NCLC, State Rate Caps for $500 and $2,000 Loans, July 2021, https://www.nclc.org/images/pdf/high_cost_small_loans/payday_loans/FS_State_Rate_Caps_2021.pdf.

[74] *Id.*

[75] Press Release, Office of the Attorney General for the District of Columbia, *AG Racine Sues Predatory Online Lender for Illegal High-Interest Loans To District Consumers*, June 5, 2020, https://oag.dc.gov/release/ag-racine-sues-predatory-online-lender-illegal.

[76] *Id.*

[77] Distr. of Columbia v. Elevate, 2021 WL 2982143 at *9 (D.D.C. July 15, 2021).

- In April 2021, the DC Attorney General sued **OppFi**, “a predatory online lender,” for violating its rate cap in its scheme with **FinWise Bank**, making illegal loans to over 4,000 DC residents.[78] The case also alleges that the company misrepresented that its loans will help consumers build credit when its own underwriting model anticipates that up to one third of its borrowers will be unable to repay and default.[79]

- In September 2020, the California Department of Business Oversight announced a formal investigation into whether **Wheels Financial Group, LLC (dba LoanMart)**, was evading California’s newly-enacted interest rate cap through its partnership with **Capital Community Bank** (CCBank).[80]

These and other companies have been sued in private litigation as well.[81]

It could hardly be more apparent that these schemes pose extraordinary legal risks to the banks involved. While the third-party lender may be the most exposed if a lending arrangement is found to be a sham, banks could also be exposed to significant risks. Courts have applied the Racketeer Influenced and Corrupt Organizations (RICO) Act to banks that collude to facilitate usurious lending.[82] The banks could also be exposed to risks if their lending partners collapse or are otherwise unable to fulfill their obligations. And when loans are ultimately found to be usurious, consumers may be entitled to substantial damages, posing litigation risk to the bank. In addition, the possibility that revenue streams will be ended due to litigation pose safety and soundness risk.

Notably, the banks involved in high-cost rent-a-bank schemes tend to be smaller banks, where disruptions pose special safety and soundness risks. All of the banks noted above are relatively small banks. Small banks may have less sophisticated systems for monitoring third-party relationships or may be particularly in search of fee income. They may also be less sensitive to reputation risk if they believe they are able to fly largely under the radar in a way a large bank could not. With a smaller base of

[78] Press Release, Office of the Attorney General for the District of Columbia, *AG Racine Sues Online Lender for Making Predatory and Deceptive Loans to 4,000+ District Consumers*, April 6, 2021, https://oag.dc.gov/release/ag-racine-sues-online-lender-making-predatory-and.

[79] *Id.*

[80] Press Release, California Department of Business Oversight, *DBO Launches Investigation Into Possible Evasion of California’s New Interest Rate Caps By Prominent Auto Title Lender, LoanMart*, September 3, 2020 (“starting in 2020, rather than continuing to make loans with rates that comply with the Fair Access to Credit Act, LoanMart stopped making state-licensed auto title loans in California. Instead, using its existing lending operations and personnel, LoanMart commenced “marketing” and “servicing” auto title loans purportedly made by CCBank . . .”), https://dbo.ca.gov/2020/09/03/dbo-launches-investigation-into-possible-evasion-of-californias-new-interest-rate-caps-by-prominent-auto-title-lender-loanmart/.

[81] *See, e.g.*, Sanh v. Opportunity Fin’l, 2021 WL 2530783 at *1 n.3 (W.D. Wash. June 21, 2021) (granting leave to amend to add true lender claim).

[82] *See, e.g.,* Dillon v. BMO Harris Bank, 16 F. Supp. 3d 605 (M.D.N.C. 2014) (denying motion to dismiss RICO claims against banks that enabled payday lenders to collect loans from North Carolina residents that would be illegal under state law and against state-chartered bank for aiding and abetting unlicensed lending in violation of anti-evasion provision of the state lending law).

business, smaller banks could face serious safety and soundness problems if they suddenly find their third-party lending subject to enforcement actions or if they lose a significant part of their revenue when the arrangement ends.[83]

F. Loans above MLA 36% APR pose greater reputation risk.

Finally, the banks engaged in high-cost rent-a-bank schemes face substantial reputation risk. These banks are typically using a third party to offer a product that the bank does not, and likely would not, offer directly to its own customers. They likely also use underwriting guidelines that they would not approve for the own customers. High-cost lending is extremely unpopular,[84] and bank engagement in high-cost lending has been met with particular public outcry. When a handful of banks were engaged in direct payday lending about a decade ago, they were met by fierce opposition from virtually every sphere—the military community,[85] community organizations,[86] civil rights leaders,[87] faith leaders,[88]

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[83] See, e.g., Republic First Bankcorp Inc., Form 8-K, Securities and Exchange Commission 1 (June 27, 2003) (First Bank of Delaware was forced to abandon its rent-a-bank activities due to "materially increased regulatory requirements.")

[84] Polls show that around 70% of Americans, regardless of political affiliation, support interest rate limits addressing predatory lending. Moreover, every time an interest rate cap of 36% or lower has been put before voters at the ballot box, voters have overwhelmingly supported it, including in Nebraska (83% in 2020), Colorado (77% in 2018), South Dakota (76% in 2016), Montana (73% in 2010), Arizona (76% in 2008), and Ohio (63% in 2008). *See* NCLC, After Payday Loans: Consumers Find Better Ways to Cope with Financial Challenges (Aug. 2021), https://bit.ly/afterpayday21.

[85] *See*, *e.g.*, Testimony of Steve Abbot, former President of the Navy-Marine Corps Relief Society, Before the U.S. Committee on Banking, Housing and Urban Affairs (Nov. 3, 2011) (noting bank payday loans among the "most egregious trends"); Comments of Michael Archer, Director of Military Legal Assistance, Marine Corps Installations East, to CFPB (April 4, 2012): "Most ominously, a few large banks have gotten into the business of payday loans through the artifice of calling the loans open ended credit."

[86] Hundreds of groups urged the prudential regulators to stop banks from trapping borrowers in payday loans. Letters from approximately 250 groups to FDIC, OCC, FRB and CFPB, March 13, 2013 (http://ourfinancialsecurity.org/blogs/wp-content/ourfinancialsecurity.org/uploads/2013/03/Bank-Payday-Sign-On-Letter-3-13-13-Final.pdf) and February 22, 2012 (http://www.responsiblelending.org/payday-lending/policy-legislation/regulators/Dear-Regulators.pdf). Thousands of individuals and many community groups filed comments with the OCC urging that Wells Fargo's Community Reinvestment Act rating be negatively impacted because it was making payday loans, including CRL and NCLC (http://www.responsiblelending.org/payday-lending/policy-legislation/regulators/cra-comment_wells-nov-29-2012_final.pdf).

[87] *See*, *e.g.*, Letter from Benjamin Todd Jealous, President and Chief Executive Officer, NAACP, to FDIC, OCC, FRB, and CFPB opposing bank payday lending (Feb. 21, 2013), http://www.responsiblelending.org/payday-lending/policy-legislation/regulators/NAACP-redatory-Pay-Day-Loans-to-regulators-BTJ.pdf.

[88] *See*, *e.g.*, Elaina Ramsey, Faith Groups Take On Payday Lenders, Sojourners, https://sojo.net/magazine/stub/faith-groups-take-payday-lenders (discussing a National Day of Action among faith leaders in early 2013 to address payday lending). In connection with this National Day of Action, Rev. DeForest B. Soaries, jointly with other nationally prominent African American ministers, called for "an end to enslavement to both payday lenders and the banks now offering equally dangerous products" in *An Emancipation Proclamation from Payday Lending.* Center for Responsible Lending, *Bank Payday Lending: Overview of Media Coverage and*

socially responsible investors,[89] state legislators,[90] and members of Congress.[91] These banks' predatory lending also motivated "move-your-money" campaigns[92] and led groups managing programs aiming to bring people into the banking mainstream to establish policies that excluded banks making these loans from the program.[93] And multiple lawsuits against banks making payday loans were filed.[94]

Public Concerns, CRL Issue Brief, March 7, 2013, http://www.responsiblelending.org/payday-lending/tools-resources/BPD-media-coverage-3-7-13.pdf

[89] For proxy year 2013, investors filed shareholder resolutions with the four largest banks making payday loans expressing concern about the product and requesting data, which none of the banks agreed to provide. *See, e.g.*, resolutions filed against U.S. Bank (https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2013/dominisocial012513-14a8.pdf) and Regions Bank (https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2013/congregationsisters011413-14a8.pdf).

[90] *See*, *e.g.*, "Legislative Black Caucus slams Regions Bank over payday-style loans," Raleigh News and Observer "Under the Dome," Oct. 11, 2012 (quoting letter from N.C. Senator Floyd McKissick, Jr., chairman of the N.C. Legislative Black Caucus, to Regions Bank, which stated: "We are deeply concerned about recent reports of Regions Bank offering its 'Ready Advance' payday loans in North Carolina . . . . High-cost, short-term balloon loans like these sharply increase the financial distress of families under economic strain"); Letter from Arizona Democratic Caucus to the prudential banking regulators, February 2012 (noting that Arizona "has spent countless state resources to study and understand the effects of [payday lending], and ultimately outlaw payday lending entirely" and calling on federal regulators to "take immediate action so that meaningful reforms taking place in Arizona and throughout the country in the name of consumer protection will not be undermined.").

[91] In January 2013, several Senators wrote the FRB, OCC, and FDIC urging action to address bank payday lending (http://www.blumenthal.senate.gov/newsroom/press/release/blumenthal-calls-on-regulators-to-act-to-stop-abusive-bank-payday-lending). In April 2013, House members did the same. For further documentation of opposition to bank payday lending, *see* Center for Responsible Lending, *Bank Payday Lending: Overview of Media Coverage and Public Concerns* at 10, CRL Issue Brief, March 7, 2013, http://www.responsiblelending.org/payday-lending/tools-resources/BPD-media-coverage-3-7-13.pdf.

[92] Green America's "Break up with your mega bank" campaign (http://breakupwithyourmegabank.org/) focused on bank payday lending. In addition, a 2012 North Carolina poll found that 93 percent of respondents were less likely to use a bank that makes payday loans that violate North Carolina law. CRL and North Carolina Justice Center, Press Release, *Regions Bank Drops Payday in N.C.* (Jan. 16, 2013) (citing Public Policy Polling poll conducted on behalf of CRL, Sept. 2012), https://www.responsiblelending.org/media/regions-bank-drops-payday-n-c.

[93] In 2012, "Bank On" Savannah (Ga.) adopted as policy that participating banks may not make high-cost deposit advance products. Relatedly, Cities for Financial Empowerment, the organization that supports cities in implementing "Bank On" programs to bring people into the banking mainstream, wrote to the prudential regulators expressing serious concerns about bank deposit advance programs, https://www.fdic.gov/resources/regulations/federal-register-publications/2013/2013-deposit_advance_products-c_63.pdf.

[94] For example, the following class action lawsuits were filed against Fifth Third Bank: *Klopfenstein v. Fifth Third Bank*, S.D. Ohio (Aug. 3, 2012); *Laskaris v. Fifth Third Bank*, S.D.Ca. (Feb. 12, 2013); *Jesse McQuillen v. Fifth Third Bank*, W.D. Ky. (May 7, 2013). Another was filed against Bank of Oklahoma and its affiliates (*Leland Small v. BOKF, N.A.*, 13-cv-01125), which resulted in a $1.8 million settlement.

VI. The Agencies Should Directly Examine the Non-Bank Partners in Any Partnerships Involving Loans Exceeding MLA 36% APR and Charge the Partnering Bank for the Associated Costs.

The proposed guidance references the Agencies' "authority to examine and to regulate banking-related functions or operations performed by third parties for a banking organization to the same extent as if they were performed by the banking organization itself."[95] It further notes that "[w]hen circumstances warrant, the agencies may use their authorities to examine the functions or operations performed by a third party on the banking organization's behalf . . . [evaluating] safety and soundness risks . . . the third party's ability to fulfill its contractual obligations and comply with applicable laws and regulations, including those related to consumer protection (including with respect to fair lending and unfair or deceptive acts or practices) . . . ."[96]

For all the reasons discussed in Section V above, partnerships involving loans exceeding MLA 36% should certainly be among the "circumstances" "warrant[ing]" direct examination of the non-bank partner. Moreover, given how great the risk to banks and consumers, and the greater supervisory resources required of the Agencies in order to directly examine the non-bank, the bank should shoulder the costs associated with these examinations.

VII. Guidance about Information Security Should Be Generally Applicable to All Companies with which a Bank Shares Data.

The OCC's 2020 FAQs include a discussion of third-party risk management for data aggregators. The section raises concerns regarding, *inter alia,* information security and the safeguarding of sensitive customer data. However, these concerns should not be limited to data aggregators. Any guidance about information security should be generally applicable to all companies with which a bank shares data, including consumer reporting agencies (CRAs)[97] and other data gathering entities (*e.g.*, data brokers such as Acxiom).

After all, one of the worst data breaches in this nation's history occurred with, not a data aggregator, but a nationwide CRA - the Equifax data breach of 2017. Experian also had its own data breach in 2015 affecting 15 million consumers.[98] Banks regularly share or furnish information to the three nationwide CRAs (Equifax, Experian and TransUnion), as well to account screening CRAs such as ChexSystems and Early Warning Services.

The interagency proposed guidance itself does have a section 2.h on information security. However, that section focuses on assessing information security when conducting due diligence in evaluating whether to enter into a relationship with a third party. The section should be broadened to apply to all stages of the third party relationship, including ongoing monitoring. It should also include the specific concept

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[95] 86 Fed. Reg. 38193, n.19 (citing 12 U.S.C. 1464(d)(7)(D) and 1867(c)(1)).

[96] 86 Fed. Reg. 38195.

[97] Note that a data aggregator could also be considered a CRA if the data is shared for a purpose covered by the Fair Credit Reporting Act, such as credit, employment or insurance.

[98] Letter from Consumer Advocates to Experian and T-Mobile re: Data Breach, Oct.2, 2015, *available at* www.nclc.org/images/pdf/credit_reports/letter-experian-data-breach-oct2015.pdf.

from the OCC's 2020 FAQs of heightened scrutiny for entities to which a bank's customer data is shared or sold, *i.e.*, CRAs, data aggregators, and data brokers. It should require banks to check for compliance with applicable data security laws, most particularly the FTC's Safeguard Rule issued pursuant to the Gramm-Leach-Bliley Act, which applies to CRAs and data aggregators. The FTC is currently in the midst of a rulemaking to strengthen the requirements of the Safeguards Rule.[99]

In addition, with respect to data aggregators, the regulators should encourage the use of bilateral agreements & APIs and discourage the use of screen scraping. There should be a statement by the regulators that banks moving to bilateral agreements and use of an API is itself a positive measure for third party risk management.

VIII. Conclusion

Thank you for considering our concerns. We would welcome the opportunity to discuss our comments further. If you have any questions, please contact Rebecca Borné at rebecca.borne@responsiblelending.org, Lauren Saunders at lsaunders@nclc.org, Rachel Gittleman at rgittleman@consumerfed.org, or Michael Akinwumi at MAkinwumi@nationalfairhousing.org.

Yours very truly,

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[99] 84 Fed. Reg. 13158 (Apr. 4, 2019).