Ballard Spahr
LLP

1735 Market Street, 51st Floor
Philadelphia, PA 19103-7599
TEL 215.665.8500
FAX 215.864.8999
www.ballardspahr.com

Jeremy T. Rosenblum
Tel: 215-864-8505
Fax: 215-864-8999

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Email: regs.comments@occ.treas.gov

Chief Counsel's Office, Attn: Comment Processing
Office of the Comptroller of the Currency
400 7th Street, SW, Suite 3E-218
Washington, DC 20219

Re: National Banks and Federal Savings Associations as Lenders
<u>OCC Docket ID OCC-2020-0026</u>

Ladies and Gentlemen:

We write this letter in support of the OCC's Proposed Rule, National Banks and Federal Savings Associations as Lenders, 85 FR 44223 (July 22, 2020) (the "Proposed Rule").

The Proposed Rule addresses lending programs ("Bank-Agent Programs") where a bank or savings association (either, a "Bank") obtains substantial assistance from a fintech or other non-Bank company (an "Agent") to offer Bank loans to consumers or small businesses. Over more than two decades, our Firm has represented both Banks and Agents in establishing Bank-Agent Programs. We have also defended Banks and Agents in numerous class action and government enforcement proceedings arising from Bank-Agent programs, in particular challenges based on the assertion that the Agent and not the Bank is the "true lender" and, accordingly, the home-state interest exportation right provided to Banks under federal law is inapplicable.

In a typical Bank-Agent Program, the Agent may serve as marketing and servicing agent to a Bank located in a state with liberal usury laws. The Bank charges interest on its loans nationwide at the rates allowed by federal banking law and the law of the state where the Bank is located. Shortly after origination, the Bank sells the loans (or at least the "predominant economic interest" in the loans) to the Agent or an institutional investor identified by the Agent.

Many "marketplace" Bank-Agent Programs provide loans with annual percentage rates ("APRs") ranging from approximately 6% at the low end to 36% at the high end. These Bank-Agent Programs are frequently used to refinance higher-rate credit at lower rates.

Other Bank-Agent Programs are provided when a Bank offers private-label credit cards to customers of a merchant that acts as the Bank's agent and then purchases receivables generated under the credit cards. These credit cards finance purchases for cardholders who do not have or are tapped out on general-purpose credit cards.

And yet more Bank-Agent Programs provide loans to non-prime customers at much higher APRs than the rates for marketplace or private label programs. If it were not for these Bank-Agent Programs, many if not most of these non-prime borrowers might be entirely unable to access needed credit, for example to pay for car repairs, rent, utilities or medical bills, or might be forced to take loans at higher rates from payday or title lenders.

If adopted, the Proposed Rule will provide a clear and logical bright line confirming and clarifying that the Bank in a Bank-Agent Program is properly regarded as the "true lender" when, as of the date of origination, it is named as the lender in the loan agreement or funds the loan. Accordingly, OCC adoption of the Proposed Rule would eliminate confusion and uncertainty and promote uniformity and efficiency in Bank operations. Coupled with the OCC's recent action rejecting *Madden v. Midland Funding*, 786 F.3d 246 (2d Cir. 2015), *cert. denied,* 136 S. Ct. 2505 (2016) (the "OCC *Madden* Release")[1] the Proposed Rule would promote the availability of credit, a particularly urgent need in the economic crisis caused by the COVID-19 pandemic, and serve the mission Congress has laid out in the National Bank Act (the "NBA") and the Home Owners' Loan Act ("HOLA") for the OCC and the Banks it regulates.

BACKGROUND OF FEDERAL INTEREST STATUTES

Three virtually identical federal statutes (the "Federal Interest Statutes")—and not state laws—govern the interest that may be charged by Banks. Section 85 of the NBA, 12 U.S.C. § 85 ("Section 85"), governs the interest charges of national banks, and Section 4(g) of HOLA, 12 U.S.C. § 1463(g) ("Section 4(g)"), governs the interest charges of federal and state savings associations. The OCC has adopted rules under Section 85 for national banks, *see* 12 C.F.R. § 7.4001, and Section 4(g) for savings associations. *See* 12 C.F.R. § 160.110.

Additionally, Section 27(a) of the Federal Deposit Insurance Act (the "FDI Act"), 12 U.S.C. § 1831d(a) ("Section 27(a)"), governs the interest charges of state-chartered FDIC-insured

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1 Permissible Interest on Loans That Are Sold, Assigned, or Otherwise Transferred, 85 FR 33530 (June 2, 2020) (adding a new paragraph (e) to 12 C.F.R. § 7.4001: "Interest on a loan that is permissible under 12 U.S.C. 85 shall not be affected by the sale, assignment, or other transfer of the loan.").

banks. The FDIC recently adopted a regulation under Section 27(a), in part in response to *Madden*. *See* 12 C.F.R. Part 331.

The Federal Interest Statutes all provide in substantially identical terms that a Bank may take, receive, reserve, and charge on any loan interest at the rate allowed by the laws of the state where the Bank is located. This rate authority applies regardless of any conflicting law of the state where the borrower resides or the credit transaction is consummated. *See Marquette Nat'l Bank of Minneapolis v. First of Omaha Service Corp.*, 439 U.S. 299, 313-14 (1978) (holding that, under Section 85, a national bank may "export" nationwide the interest charges allowed by the laws of its home state, without regard to any more restrictive usury laws of the borrower's state); *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 744 (1996) (same as to charges defined as "interest" under 12 C.F.R. § 7.4001(a)).[2]

Whereas Banks and their Agents rely upon the applicable Federal Interest Statute and its incorporation of the usury law of the state where the Bank is located, parties attacking the lawfulness of the interest charges under Bank-Agent Programs have asserted that the loans under Bank-Agent Programs ("Loans") are subject to state law where borrowers reside because: (1) the Agent and not the Bank is supposedly the "true lender"; and (2) even if the Bank is the "true lender," *Madden* allegedly establishes that a non-Bank purchaser of Bank debt does not have the right to charge the interest previously charged by the Bank seller.[3] In June and July 2020, the OCC and FDIC unequivocally rejected *Madden* and its application to Bank-Agent Programs. *See* the OCC *Madden* Release; Federal Interest Rate Authority, 85 FR 44146 (July 22, 2020) (FDIC). If adopted, the Proposed Rule will do the same for "true lender" challenges to these Programs.

"TRUE LENDER" CHALLENGES TO BANK-AGENT PROGRAMS

Whether the "true lender" in a Bank-Agent Program is the Bank or its Agent has been addressed in a small but growing number of cases. The better reasoned cases have refused to

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2 As used for purposes of the Federal Interest Statutes, "interest" encompasses any payment compensating a creditor or prospective creditor for an extension of credit, making available a line of credit, or any default or breach, including numerical periodic rates, cash advance fees, annual fees, late fees and creditor-imposed not sufficient funds (NSF) fees charged when a borrower tenders payment on a debt with a check drawn on insufficient funds. 12 C.F.R. § 7.4001(a); 12 C.F.R. § 160.110(a); 12 C.F.R. § 331.2.

3 *Madden* did not address a Bank-Agent Program but rather the purchase of charged-off credit card debt by a non-Bank that did not act as the Bank's Agent.

disregard the Bank's status as the party named as lender on the Loan agreements and have accordingly declined to recharacterize the Agent as the "true lender."

The first and leading case is *Krispin v. May Dep't Stores Co.,* 218 F.3d 919 (8th Cir. 2000). In *Krispin,* the Eighth Circuit U.S. Court of Appeals held that Sections 85 and 86 of the NBA applied to state-law usury claims asserted against the Agent defendant.

May Department Stores originally issued Krispin's credit card. However, the store sent a notice to Krispin stating that credit would henceforth be extended by a national bank formed and wholly owned by the store. Krispin subsequently sued the store, alleging that its late charges (a form of "interest" under Section 85) violated Missouri law, which allegedly applied because the store remained substantially involved in the extension of credit by directing borrowers to the bank and purchasing on a daily basis 100% of the bank's credit card receivables. The Eighth Circuit rejected this argument and found that the extensions of credit were not store transactions but rather bank loans governed by Section 85. Even the store's daily purchase and retention of 100% of the bank's credit card receivables did not alter the court's view that the credit transactions were made and controlled by the bank:

> The store characterizes its continuing role in account collection as that of an assignee, and argues that its purchase of the bank's receivables does not alter the fact that appellants' accounts are now controlled by the bank. We agree with the store.
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> * * *
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> [T]he store's purchase of the bank's receivables does not diminish the fact that it is now the bank, and not the store, that issues credit, processes and services customer accounts, and sets such terms as interest and late fees. Thus, although we recognize that the NBA governs only national banks, *cf., e.g.*, *Green v. H&R Block, Inc.*, 981 F. Supp. 951, 955 (D. Md. 1997), in these circumstances we agree with the district court that it makes sense to look to the originating entity (the bank), and not the ongoing assignee (the store), in determining whether the NBA applies. *Cf. FDIC v. Lattimore Land Corp.*, 656 F.2d 139, 147-49 (5th Cir. Unit B Sept. 1981) (stating, in context of determining whether the NBA governs a loan assigned by the originating entity to entity in another state, that "the non-usurious character of a note should not change when the note changes hands"). Accordingly, for purposes of deciding the legality of the late fees charged to appellants' credit accounts, we find that the real party in interest is the bank, not the store.

Id. at 923-24.[4]

Subsequently, in *Hudson v. ACE Cash Express, Inc.*, No. IP 01-1336-C H/S, 2002 WL 1205060, 2002 U.S. Dist. LEXIS 11226 (S.D. Ind. May 30, 2002) (unpublished opinion), a case litigated by our Firm, the court held that the form of the Loans should govern and that Goleta National Bank, the putative lender, and not ACE Cash Express, its nonbank Agent, should be treated as the "true lender." The court reached this conclusion notwithstanding: (1) ACE's extensive marketing and servicing role and Goleta's "insignificant" role in the Program; (2) the parties' alleged intention to evade Indiana usury laws; and (3) ACE's daily acquisition of a 95% participation interest in all the Loans.[5]

The *Hudson* court relied heavily on *Krispin, Marquette* and the federal policies recognized in *Marquette.* Addressing the plaintiff's argument that the arrangement was substantively tantamount to a loan by ACE, the court stated:

> These arguments might appeal to those who believe substance should always trump form in the law, and they may provide a reasonable foundation for closer federal regulation of national banks that engage in such transactions. These arguments do not, however, offer a basis for giving Hudson any relief.

2002 WL 1205060 at *10-11.

The court explained that, in *Marquette:*

> [T]he Supreme Court recognized that § 85 "will significantly impair the ability of States to enact effective usury laws." [439 U.S. at 318.] ***However, the Court added that "the protection of state usury laws is an issue of legislative policy, and any plea to alter § 85 to [protect state usury laws] is better addressed to the wisdom of Congress than to the judgment of this Court.*** " *Id.* at 319.

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4 In *Madden,* the Second Circuit treated *Krispin* as good law but distinguished the case based on the *Krispin* bank's continuing ownership and involvement with the subject credit card accounts after its daily sale of the receivables arising under the accounts.

5 In *Hudson,* there was a conflict between the plaintiff's allegation that ACE acquired a 95% participation interest and the terms of the participation agreement ACE provided the court. The court held that the defendants would have been entitled to dismissal even if the participation interest had been a 100% interest. *Id.* at *5-6, *16.

Hudson at *11 (emphasis added).

The *Hudson* court acknowledged that the plaintiff's position "has some superficial appeal." However, it rejected the request for recharacterization, once again relying upon *Marquette:*

> Hudson invites the courts to draw boundaries between federal and state bank regulation depending upon the subjective purpose of those engaged in the transaction and/or the precise extent of financial risk accepted by the national bank. ***The court sees no basis for drawing jurisdictional boundaries in such an uncertain and unpredictable way, at least as a matter of statutory construction,*** although these arguments may well appeal to federal banking regulators concerned about the "rental" of national bank charters. See *Marquette National Bank,* 439 U.S. at 319 (concerns about protection of state usury laws present questions of legislative policy better addressed by Congress) ....

Id. at *16 (emphasis added). *See also Sawyer v. Bill Me Later, Inc.*, 23 F. Supp. 3d 1359 (D. Utah May 23, 2014) (following *Hudson* and declining to recharacterize an Agent as the "true lender" subject to state usury law despite the Bank's daily sale of all credit card receivables to the Agent after a two-day holding period); *Phipps v. FDIC,* 417 F.3d 1006, 1013 (8th Cir. 2005) ("Courts must look at 'the originating entity (the bank), and not the ongoing assignee ... in determining whether the NBA applies.' *Krispin,* 218 F.3d at 924; *see* 12 C.F.R. § 7.1004(a) ('A national bank may use the services of, and compensate persons not employed by, the bank for originating loans.')").

On the other hand, a few cases have suggested that, under certain circumstances, it might be appropriate to treat the Agent, as opposed to the Bank, as the "true lender" and accordingly deny the Bank the benefits of the Federal Interest Statutes. These cases have all hinged on the supposition, created out of whole cloth, that the Agent should be regarded as the "true lender" when it acquires the "predominant economic interest" in the Loans. *See, e.g., CashCall, Inc. v. Morrisey,* No. 12-1274, 2014 WL 2404300 (W.V. May 30, 2014) (unpublished opinion) (treating the agent as the true lender because it held the "predominant economic interest" in high-interest loans); *Spitzer v. County Bank of Rehoboth Beach,* 846 N.Y.S.2d 436, 438-39 (N.Y. App. Div. 2007) (applying a "totality of the circumstances" test to determine the identity of the "true lender" on high-rate payday loans, "with the key factor being who had the predominant economic interest in the transactions").

Decisions willing to recharacterize the identity of the "true lender" utterly fail to justify the particular line they have chosen or to tie their test to any pre-existing legal doctrines. Thus, the "predominant economic interest" goes well beyond the traditional "sham" or "subterfuge" common law doctrine that courts have occasionally used to find usury in disregard of the form or nomenclature of a transaction. *See, e.g., Home Bond Co. v. McChesney,* 239 US 568 (1916) (holding that a sale of accounts receivable was a sham to cover loans of money at usurious rates); *Handi Inv. Co. v. Mobil Oil Corp.*, 550 F.2d 543 (9th Cir. 1977) (reversing and remanding to lower court to determine whether competitive allowance in connection with a loan to gasoline retailer by supplier was a sham or subterfuge to conceal usury); *In re: Seisay,* 1986 U.S. Dist. LEXIS 28728, 1986 WL 2826 (S.D. NY 1986) (unpublished opinion) (affirming bankruptcy court's order that loan creditor made to debtors involving a "dummy" corporation was a sham to avoid usury laws applicable to personal loans).

By contrast to cases involving shams and subterfuges hiding usurious loans, and as the OCC recognizes in the preamble to the Proposed Rule, there are very significant real-world consequences when a Bank names itself as lender on Loan documents and/or funds a Loan, including the assumption of legal obligations and regulatory expectations by the Bank. For example, a national bank or federal savings association participating as the lender in a Bank-Agent Program would be subject to liability as a "creditor" under the Truth in Lending Act and would need to comply with OCC Bulletin 2013-29, Third-Party Relationships: Risk Guidance (Oct. 30, 2013). Failure to comply with applicable law or OCC risk management guidance would subject the Bank to a panoply of potential adverse consequences, including a cease and desist order and civil monetary penalties under Section 8 of the FDI Act, 12 U.S.C. § 1818, as well as an OCC directive to terminate its Bank-Agent Program.

Could it really be that a Bank-Agent Program should be treated as a sham, and the role of a Bank that funds a Loan or is named as lender in the Loan documents should be disregarded, because the Bank has sold a 51% participation interest in the Loans to its Agent (or a third party identified by its Agent) and "only" retained a 49% interest in the Loan? And if a 49% retained interest cannot be disregarded based on any pre-existing legal doctrine, then what about a 25% interest or even a 5% interest?

Not only is a "predominant economic interest" test historically unwarranted and unsustainable as a matter of policy, it is entirely unclear in practice. Questions raised by the test include (but are hardly limited to) the following:

- Is the test applied to loan balances or to loan revenues? If it is applied to balances, is it applied at or shortly after origination? Days or months after origination? On some kind of average basis?

- Instead, if the test is applied to loan revenues, is the relevant consideration gross revenues or net revenues? If the test is based on net revenues, what deductions count? Anything beyond loan losses? Overhead charges?

- Does it matter if revenues are in the form of interest, origination fees from the borrower, marketing and servicing fees from the Bank or some combination of the foregoing?

- Is the test to be applied over the anticipated lifetime of the Loan? Some other period? Must the test be applied each time the Loan or an interest therein is re-sold?

- Does the test apply when a loan purchaser plays no role in loan origination?[6] If not, what are the nature and extent of services required to trigger application of the test?

- Does the test apply if the loan purchaser and loan originator are legally distinct entities but are affiliated in some way? If the Agent identifies the Loan purchaser? What is the nature and extent of affiliation required to trigger application of the test?

- Does "predominant economic interest" mean a *majority* economic interest? A larger interest than each other party involved in the Bank-Agent Program? Which entity has "predominant economic interest" in a Loan when ownership is evenly held by or among two or more entities at the same time?

- Does the level of Bank management of the Bank-Agent Program matter? Its level of exposure for legal violations?

In short, the "predominant economic interest" test adopted by some courts is not a "standard" at all, but is rather by necessity a loose, *post hoc* evaluation of all of the "facts and circumstances." But the drawing of lines is an inherently legislative or regulatory function, and courts are particularly ill-suited and unqualified to play this role. *See FCC v. Beach Communications*, 508 U.S. 307, 315-16 (1993) ("Defining the class of persons subject to a regulatory requirement ... inevitably requires that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the line, and the fact that the line might have been drawn differently at some points ***is a matter for legislative, rather than judicial, consideration***.") (emphasis added). A statute or OCC rule can provide clarity concerning lender recharacterization. Indeed, this is precisely what the Proposed Rule would do. However, incremental case-by-case judicial decision-making on this issue would "throw into confusion the complex system of modern interstate banking," *Marquette,* 439 U.S. at 312, in direct contravention of *Marquette's* warning that "any plea to alter § 85 to [protect state usury laws] is better addressed to the wisdom of Congress than to the judgment of this Court," *id.* at 319 (much less the judgment of lower courts).

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6 Plaintiffs' class action attorneys have recently attacked the interest rates charged by the assignees of Bank credit card receivables, even though the assignees did not provide services in connection with the origination of the receivables. *See Cohen v. Chase Card Funding, LLC,* Case No. 1:19-cv-00741-LJV-JJM (W.D.N.Y., filed June 6, 2019); *Cohen v. Capital One Funding, LLC*, Case No. 1:19-cv-03479-KAM-RLM (E.D.N.Y., filed June 12, 2019).

The threat of "true lender" recharacterization deters many Banks from making credit available through Bank-Agent Programs and thereby diminishes both the opportunity for innovation in lending products and the availability of credit, especially for consumers with risker credit profiles. Adoption of the Proposed Rule, crafted by an agency with specialized expertise (and the power and willingness to tamp down any unfair, deceptive or abusive lending) would be far preferable to the existing case-by-case approach taken by the courts that have engaged in "true lender" recharacterization despite their lack of particularized expertise.

The significant and growing benefits to consumers, banks and the economy provided through Bank-Agent Programs were recently explored in a report issued by the U.S. Treasury Department. *See* U.S. Department of the Treasury, Report: A Financial System That Creates Economic Opportunities, Nonbank Financials, Fintech, and Innovation (July 2018)[7] at p. 11 ("Marketplace lenders are expanding access to credit for consumers and businesses in the United States. ***Treasury recognizes that partnerships between banks and marketplace lenders have been valuable to enhance the capabilities of mature financial firms.*** Treasury recommends eliminating constraints brought about by recent court cases that would unnecessarily limit the functioning of U.S. credit markets. Congress should codify the 'valid when made' doctrine ***and the role of the bank as the 'true lender' of loans it makes. Federal banking regulators should also use their available authorities to address both of these challenges.***") (emphasis added).

As suggested by the Treasury Report, much of the policy rationale for the OCC *Madden* Release applies equally to the Proposed Rule. This is because the ability of Banks to sell loans or economic interests in loans to their Agents serves important economic and safety and soundness goals by affording Banks access to alternative sources of liquidity, helping them manage lending concentrations and improving their financial performance ratios. As recently explained by the OCC and FDIC at page 2 of their *amicus* brief in *In re: Rent-Rite Super Kegs West Ltd,* Civ. Action No. 1:19-cv-01552-REB (appeal from Bankruptcy Adversary Proceeding No. 18-1099-TBM), the ability of banks to sell loans (and transfer enforceable rights to the buyer) is "one of the core elements of the banks' ability to engage in safe and sound banking." *See* also *id.* p. 18 n. 12 ("Loan sales and securitizations provide banks with 'a useful funding, capital, and risk management tool' by allowing banks 'to obtain lower cost funding, diversify [their] funding sources, ... and increase [their] ability to manage interest rate risk.' FDIC, Credit Card Securitization Manual, Introduction (2007), https://www.fdic.gov/regulations/examinations/credit_card_securitization/ch1.html. Loan sales also help banks maintain safe asset concentration levels. *Id.*").

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7 *Available at* https://home.treasury.gov/sites/default/files/2018-08/A-Financial-System-that-Creates-Economic-Opportunities---Nonbank-Financials-Fintech-and-Innovation_0.pdf.

Bank-Agent Programs also give banks access to cutting-edge technology to better and more efficiently serve customer needs, in order to meet ever-rising customer expectations for immediate service. *See* "Fintech Advantages Not Limited To Fintech Lenders", Alok Datta, Mortgage Bankers Association Insights, April 22, 2019, https://www.mba.org/publications/insights/archive/mba-insights-archive/2019/fintech-advantages-not-limited-to-fintech-lenders-x250356, citing the Federal Reserve Bank of New York's 2018 report, *Role of Technology in Mortgage Lending*, https://www.newyorkfed.org/medialibrary/media/research/staff_reports/sr836.pdf.

Additionally, Bank-Agent Programs promote broader access to consumer credit and financial inclusion. For example, in a 2018 Federal Reserve study, the researchers looked at LendingClub's Bank-Model Program, a "marketplace" program with APRs ranging from approximately 6%-36%. They concluded: "LendingClub's consumer lending activities have penetrated areas that could benefit from additional credit supply, especially highly concentrated banking markets and other areas that have fewer bank branches per capita."[8] An earlier Federal Reserve study recognized that consumers pay smaller spreads on loans available through LendingClub's Platform than from traditional lending channels and that the alternative data sources used by LendingClub have "allowed some borrowers who would be classified as subprime by traditional criteria to be slotted into 'better' loan grades and therefore get lower priced credit."[9] We are aware from our own work on Bank-Agent Programs that many borrowers benefit from ***lower*** interest rates available through the Bank-Agent Program, as compared to the credit card debt frequently refinanced by Bank-Agent Program loans.

OCC AUTHORITY

There can be no question of the OCC's authority to adopt the Proposed Rule. Under 12 U.S.C. § 93a, the OCC is generally "authorized to prescribe rules and regulations to carry out the responsibilities of the office." And Congress has charged the OCC "with assuring the safety and soundness of, and compliance with laws and regulations, ***fair access to financial services***, and fair treatment of customers by, the institutions and other persons subject to its

8 *Federal Reserve Bank of Philadelphia, Working Paper No.* 18-13 (Mar. 2018), *available at* https://www.philadelphiafed.org/-/media/research-and-data/publications/working-papers/2018/wp18-13.pdf.

9 *Federal Reserve Banks of Philadelphia & Chicago*, Working Paper No. 17-17, Fintech Lending: Financial Inclusion, Risk Pricing, and Alternative Information, (Jul. 6, 2017), *available at* https://www.fdic.gov/bank/analytical/cfr/bank-research-conference/annual-17th/papers/14-jagtiani.pdf; *see also Federal Reserve Bank of Philadelphia, Working Paper No.* 18-15 (April 2018), *available at* https://www.philadelphiafed.org/-/media/research-and-data/publications/working-papers/2018/wp18-15r.pdf.

jurisdiction." 12 U.S.C. § 1 (emphasis added). As the OCC correctly recognizes in its preamble to the Proposed Rule:

> While these lending relationships [Bank-Agent Programs] can be effective tools to facilitate affordable access to credit, there has been increasing uncertainty about the legal framework that applies to the loans made as part of these relationships. This uncertainty may discourage banks and third parties from entering into relationships, limit competition, and chill the innovation that results from these partnerships—all of which may restrict access to affordable credit.

Proposed Rule, 85 FR at 44224.

We would argue that the *Krispin, Hudson* and *Sawyer* conform to the plain language of the Federal Interest Statutes but the competing cases do not. The Federal Interest Statutes provide, without qualification, that a Bank may charge on ***any loan*** or upon ***any notes*** interest allowed by the laws of its home state—regardless of the Bank's utilization of Agents in making and servicing its Loans and/or the Bank's payments to such Agents. "[T]he word 'any' naturally carries 'an expansive meaning.'" *SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1354 (2018) (quoting *United States v. Gonzales*, 520 U.S. 1, 5 (1997)). And "[w]hen used (as here) with a 'singular noun in affirmative contexts,' the word 'any' ordinarily 'refer[s] to a member of a particular group or class without distinction or limitation' and in this way 'impl[ies] *every* member of the class or group.'" *Id.* (emphasis in original) (quoting Oxford English Dictionary (3d ed., Mar. 2016), www.oed.com/view/Entry/8973 (OED)).

At most, *Morrissey, Spitzer* and like cases could be read to suggest that "true lender" recharacterization is not unambiguously foreclosed by the language of the Federal Interest Statutes. However, where Congress has not directly resolved a question, the Supreme Court has long recognized that judicial deference is warranted to the informed views of agencies such as the OCC. As the Supreme Court instructed in *Smiley*:

> It is our practice to defer to the reasonable judgments of agencies with regard to the meaning of ambiguous terms in statutes that they are charged with administering. *See Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U. S. 837, 842845 (1984). As we observed only last Term, that practice extends to the judgments of the Comptroller of the Currency with regard to the meaning of the banking laws. "The Comptroller of the Currency," we said, "is charged with the enforcement of banking laws to an extent that warrants the invocation of [the rule of deference] with respect to his deliberative conclusions as to the meaning of these laws." *NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U. S. 251, 256-257 (1995) (citations and internal quotation marks omitted).

Significantly, the Supreme Court in *Smiley,* relying upon *Marquette,* accorded deference to the OCC with respect to the very statutory provision (Section 85) at issue under the Proposed

Rule. The Supreme Court explicitly rejected arguments attacking the rule. Thus, the Supreme Court stated that it did not matter that the OCC rule: (1) was adopted more than a century after Section 85 was enacted, 517 U.S. at 740-41; (2) addressed matters in ongoing litigation, *id.* at 741; (3) supposedly differed from informal positions taken by OCC staff at prior times, *id.* at 742-43; or (4) interpreted a statute with preemptive effect. *Id.* at 743-44.[10]

For at least two reasons, the special preemption rules in subsections (b) and (c) of 12 U.S.C. § 25b ("Section 25b") do not apply to the Proposed Rule:[11] *First,* the Proposed Rule serves to articulate the powers of national banks and federal savings associations. While preemption of state usury laws is a natural consequence of a determination that a Loan has been made by a federally chartered financial institution and is accordingly governed by the applicable Federal Interest Statute, no preemption determination is required and none is made in the Proposed Rule. Accordingly, the limitations and requirements of subsections 25b(b) and (c) do not apply by their clear terms. *See Smiley,* 517 U.S. at 744 (noting that "the question of the substantive (as opposed to pre-emptive) *meaning* of a statute'' is distinct from ''the question of *whether* a statute is pre-emptive") (emphasis in original).

Second, even if the OCC did make a preemption determination as to the Federal Interest Statutes under Section 25b—which it did not—subsection 25b(f) would explicitly override the special rules in subsections 25b(b) and (c) in this context. It provides:

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10 *See also Nat'l City Bank v. Turnbaugh*, 463 F.3d 325 (4th Circuit 2006) (according *Chevron* deference to OCC regulation based on "compelling" OCC reasoning: "When national banks are unable to operate under uniform, consistent, and predictable standards, their business suffers, which negatively affects their safety and soundness. The application of multiple, often unpredictable, different state or local restrictions and requirements prevents them from operating in the manner authorized under Federal law, is costly and burdensome, interferes with their ability to plan their business and manage their risks, and subjects them to uncertain liabilities and potential exposure. In some cases, this deters them from making certain products available in certain jurisdictions.") (quoting Bank Activities and Operations; Real Estate Lending and Appraisals, 69 Fed. Reg. 1904 (Jan. 13, 2004)).

11 12 U.S.C. § 1465(a) incorporates for federal savings associations the preemption rules for national banks under Section 25b. It provides:

> IN GENERAL.—Any determination by a court or by the Director or any successor officer or agency regarding the relation of State law to a provision of this Act or any regulation or order prescribed under this Act shall be made in accordance with the laws and legal standards applicable to national banks regarding the preemption of State law.

> PRESERVATION OF POWERS RELATED TO CHARGING INTEREST.—No provision of this title shall be construed as altering or otherwise affecting the authority conferred by [Section 85] for the charging of interest by a national bank at the rate allowed by the laws of the State, territory, or district where the bank is located, including with respect to the meaning of 'interest' under such provision.

POLICY CONSIDERATIONS

The OCC has proposed a bright-line standard for determining when a Bank should be regarded as the "true lender": If the Bank is named as lender on the Loan documents ***or*** provides the funds disbursed at closing, the Bank is the "true lender." For our clients participating in Bank-Agent Programs, the Bank is the "true lender" for ***both*** reasons.

The OCC's proposed creation of a simple objective test addresses concerns articulated in *Marquette*, and echoed in *Hudson* and *Sawyer*, that gradually developing judge-made fact-intensive rules would "throw into confusion the complex system of modern interstate banking." *See Marquette*, 439 U.S. at _312; *Hudson,* 2002 U.S. Dist. LEXIS 11226 at *16; *Sawyer,* 23 F. Supp. 3d at 1367. In *Marquette,* the Supreme Court expressly declined "to invite these difficulties," occasioned by unclear rules. *Id.* at 319.[12]

This is not the first time that the question of the true lender's (or creditor's) identity has arisen under federal lending laws. Confusion on this question abounded under the Truth in Lending Act, 15 U.S.C. § 1601, *et seq.* ("TILA"), prior to the adoption in 1980 of the Truth in Lending Simplification and Reform Act, Pub. L. No. 96-2-1, 94 Stat. 163 (1980) (the "TILA Simplification Act"). *See* Rohner, R.J., Truth In Lending "Simplified": Simplified?, 56 N.Y.U. Law Rev. 999, 1010-12 (describing as "[o]ne of the most persistent problems under the original [Truth in Lending] Act ... determining who was a 'creditor' subject to disclosure responsibilities"; remarking on "considerable judicial freelancing in deciding what

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[12] Courts have frequently recognized the benefits of rule-making over case-by-case adjudications. *See, e.g., SEC v. Chenery Corp.*, 332 U.S. 194, 202 (1947) (Supreme Court suggests that it is desirable in many cases for agencies to lay down new principles through rulemaking rather than adjudication and states: "The function of filling in the interstices of the Act should be performed, as much as possible, through this quasi-legislative promulgation of rules to be applied in the future"); and *Ford Motor Co. v. FTC*, 673 F.2d 1008 (9th Cir. 1981) (holding that the FTC exceeded its authority by creating new law by adjudication rather than by rulemaking and stating that an agency should proceed by rulemaking if it seeks to establish rules of widespread application); *National Petroleum Refiners Assoc. v. FTC*, 482 F.2d 672, 681 D.C. Cir. 1973 ("Increasingly, courts are recognizing that use of rule-making to make innovations in agency policy may actually be fairer to regulated parties than total reliance on case-by-case adjudication").

responsibilities rested on whom"; and explaining the TILA Simplification Act's correction by "redefining 'creditor' so that in virtually all transactions there will be only *one* creditor" who generally "must regularly extend consumer credit *and* be the one 'to whom the obligation is initially payable ... on the face of the note.'") (emphasis in original). Just as Congress corrected TILA's creditor classification issue by crafting an objective standard, the Proposed Rule would do the same when a "true lender" challenge is raised in an attempt to defeat the applicability of the Federal Interest Statutes.[13]

Not only is the OCC test easy to apply, and hence supportive of the certainty needed by the national banking system, it is also liberal and easy to meet. Thus, it allows Banks readily to offer credit nationwide on the interest terms allowed by the laws of their home states. National banks are "instrumentalit[ies] of the federal government, created for a public purpose, and ... subject to the paramount authority of the United States." *Marquette*, 439 U.S. at 308. This public purpose is best served when Banks make credit as widely and inexpensively available as possible. 12 U.S.C. § 1.

Section 85 was originally enacted to ensure that national banks are treated as "National Favorites" in their lending operations—that is, no less favorably than any competing lender under state law. *Marquette*, 439 U.S. at 314, *quoting Tiffany v. National Bank of Missouri*, 18 Wall. 409, 413 (1874). This "most favored lender" rule is embedded in all the Federal Interest Statutes and recognized by both the OCC and FDIC. *See* 12 C.F.R. § 7.4001(b) (OCC), 85 FR at 44147 (FDIC).

The value of nationwide uniformity (resulting substantially from *Marquette* and its broad preemption of state usury laws) has long been recognized by the federal banking agencies. *See, e.g.,* former 12 C.F.R. § 560.2 (repealed rule of former Office of Thrift Supervision (the "OTS")) ("To enhance safety and soundness and to enable federal savings associations to conduct their operations in accordance with best practices (by efficiently delivering low-cost credit to the public free from undue regulatory duplication and burden), OTS hereby occupies the entire field of lending regulation for federal savings associations. OTS intends to give federal savings associations maximum flexibility to exercise their lending powers in accordance with a uniform federal scheme of regulation.").

And the OCC is clearly correct that Bank-Agent Programs "can be effective tools to facilitate affordable access to credit." Proposed Rule, 85 FR at 44224. These Programs extend the geographical reach of Banks seeking to provide credit and lower costs associated with the delivery of credit. The purchase of Loans or Loan interests by the Agent or a third party

[13] We note that credit laws in a number of states likewise adopt this objective standard for determining the identity of the creditor. *See, e.g.,* Ind. Code Ann. § 24-4.5-1-301.5(11); K.S.A. § 16a-1-301(20) (Kansas); 9-A M.R.S. § 1-301(17) (Maine); MGL ch. 140D, § 1 (Massachusetts); Utah Code Ann. § 70C-1-302 (3).

identified by the Agent frees up Bank capital, thereby supporting lending operations and Bank safety and soundness.[14]

We know that self-styled consumer advocates will object to the Proposed Rule. Indeed, the Attorneys General of California, Illinois and New York recently brought suit challenging the OCC's "*Madden* fix." *See People of the State of California, et al. v. OCC,* Complaint for Declaratory and Injunctive Relief, Case No. 20-cv-5200 (N.D. Cal. July 29, 2020). These and other Attorneys General will undoubtedly be equally as hostile to the Proposed Rule. However, we submit that the real objection of states in this philosophical camp is to *Marquette* itself and its recognition of the broad preemption of state usury laws. However, as *Marquette* instructed, "the protection of state usury laws is an issue of ***legislative policy***, and any plea to alter § 85 to [protect state usury laws] is better addressed to the wisdom of Congress than to the judgment of this Court." *Id.* at 319 (emphasis added). Unless and until Congress determines to change its approach and scale back *Marquette*, the Proposed Rule properly effectuates the policies underlying the Federal Interest Statutes.[15]

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14 Sales of loan participations represent a widespread, essential, longstanding and universal banking practice. Thus, the OCC and its sister agencies have long recognized that banks use loan participations—***including sales of 100% loan participations***—"as an integral part of their lending operations." *See Interagency Statement on Sales of 100% Loan Participations* (April 10, 1997). Sales of loan participations "enhance an institution's liquidity, interest rate risk management, capital, and earnings; diversify its loan portfolio; and serve the credit needs of its borrowers." *Id.*

15 It bears noting that the lending program at issue in *Marquette* involved extensive services provided to the bank by agents present in Minnesota, the state whose usury laws were preempted. Thus, the Supreme Court observed that: (1) the bank "systematically sought to enroll in its BankAmericard program the residents, merchants, and banks of the nearby State of Minnesota through the solicitation of Minnesota merchants and banks ... by respondent First of Omaha Service Corp.," a non-banking entity affiliated with the Nebraska national bank, 439 U.S. at 302; (2) participating Minnesota banks "advertise[d] BankAmericard plans and solicit[ed] applications for BankAmericard from Minnesota residents which [were] then forwarded to [the Nebraska national bank] for acceptance or rejection," *id.* at 312; and (3) "First of Omaha Service Corporation accept[ed] assignments of delinquent accounts ... and as an incident to collecting these accounts, collect[ed] interest. *Id.* None of these services, of course, disqualified the bank in *Marquette* from exercising its rights under Section 85.

UDAAP CONSIDERATIONS

In the preamble to the Proposed Rule, the OCC warned that it will be vigilant in addressing unfair, deceptive and abusive acts and practices ("UDAAP"). It warned that that improper "practices include those that target prospective borrowers who cannot afford credit on the terms being offered, provide inadequate disclosures of the true costs and risks of transactions, involve loans with high fees and frequent renewals, or constitute loan "flipping" (frequent re-financings that result in little or no economic benefit to the borrower that are undertaken with the primary or sole objective of generating additional fees)." Proposed Rule, 85 FR at 44226.

Our clients generally support the OCC's commitment to prevent UDAAP violations of this type through its supervisory and enforcement powers. However, we have some concern that the language of one factor the OCC proposes to evaluate could be mistakenly read to impose a limitation on aggregate interest charges in Bank-Agent Programs (or Bank lending more generally). Thus, the preamble to the Proposed Rule advises:

> [T]he OCC evaluates the following as part of its routine supervision of a bank's lending relationships with third parties:
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> * * *
>
> Are the bank's overall returns on the loans reasonably related to the bank's risks and costs of the loans (e.g., the total credit costs on short term loans, such as 12- to 36-month loans, are not substantial in relation to, or do not exceed, the principal amount of the loan)?

Id. at 44227.

We submit that any rule-based OCC cap on interest charges would transgress the roles of the CFPB and Congress, and would also be misguided from a policy perspective.

Under the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the "Dodd-Frank Act"), Congress gave the CFPB express authority to adopt rules defining UDAAP. *See id.*, § 1031(b), 12 U.S.C. § 5531(b). It accorded no similar rule-making authority to the OCC. And even the CFPB was explicitly denied the right to establish usury limits. *Id.*, § 1027(o), 12 U.S.C. § 5517(o).

After years of intensive research and evaluation of payday loans and certain high-cost installment loans,[16] the CFPB initially adopted a UDAAP rule establishing mandatory underwriting provisions for short-term consumer loans, payable in 45 days or less, and longer-term balloon payment loans. *See* Final Rule, Payday, Vehicle Title, and Certain High-Cost Installment Loans, 82 FR 54472 (Nov. 17, 2017) (the "2017 CFPB Rule"). It did not find justification for applying underwriting or other substantive restrictions to non-balloon longer-term loans.

Recently, the CFPB rescinded the mandatory underwriting provisions of the 2017 CFPB Rule. *See* Final Rule, Payday, Vehicle Title, and Certain High-Cost Installment Loans, 85 FR 41905 (July 13, 2020) (the "2020 CFPB Rule"). Thus, the CFPB found no basis to conclude that high-rate installment loans, with or without elaborate underwriting protections, cause more unavoidable consumer injury than benefit on a net basis. *See* Dodd-Frank, § 1031(c)(1), 12 U.S.C. § 5531(c)(1) (definition of "unfairness"). Given the CFPB's conclusion that the high-rate lending it researched did not meet the statutory definition of "unfair," we do not see how the OCC can credibly conclude that interest charges over the life of a loan that exceed the original principal balance are by definition a UDAAP problem. The rates on the loans made or facilitated by our clients are commensurate with the credit risks of the borrower population, and even borrowers charged high rates of interest benefit from credit necessary to fulfill essential needs.

Not only is there no substantive basis to conclude that interest charges in excess of original principal balances evidence UDAAP problems, an OCC rule to such effect would usurp the exclusive authority of the CFPB to adopt UDAAP rules and simultaneously conflict with the Federal Interest Statutes. These statutes uniformly provide that Banks may charge and collect interest at the rates authorized by the law of the Banks' home states. The OCC has no power or authority to impose its own limits on interest charges. Accordingly, we hope that, in its preamble to the final rule it adopts, the OCC will clarify that the interest on Loans is not limited to the original principal amount of the Loan.

We thank the OCC for taking on this very important task to clarify when the Bank participating in a Bank-Agent Program should properly be regarded as the "true lender." The standard the OCC has proposed is clear and succinct. Despite our concern about a single aspect of the preamble to the Proposed Rule, we believe that adoption of the Proposed Rule would greatly

[16] Many of our clients engaged in Bank-Agent Programs offer installment Loans with annual APRs ranging from single digits to 36%. Other clients offer Loans with higher APRs. None of them provide Loans with rates comparable to payday loans.

advance the availability of credit and efficient Bank operations. Accordingly, we strongly support adoption of the Proposed Rule, with a single clarification in the preamble accompanying the final rule to ensure that the OCC is not mistakenly viewed to be limiting Bank interest charges through the rule-making process.

Thank you for your attention to our views.

Very truly yours,

Jeremy T. Rosenblum