APPLESEED

September 3, 2020

Office of the Comptroller of the Currency
Attn: Brian Brooks, Acting Comptroller
400 7th Street, SW
Washington, DC 20219

Re: Comments on Proposal "National Banks and Federal Savings Associations as Lenders"
Docket ID: OCC-2020-0026 RIN 1557-AE97

Dear Acting Comptroller Brooks:

We are writing on behalf of Nebraska Appleseed, New Jersey Appleseed Public Interest Law Center, and Texas Appleseed, which are part of the Appleseed Network of 16 public interest justice centers across the United States and Mexico. The Appleseed centers are engines of systemic change, working independently and collaboratively to advance justice and equity, including in the area of consumer protection. We strongly oppose the Comptroller of the Currency ("OCC")'s proposed rule, 12 C.F.R. Part 7, "National Banks and Federal Savings Associations as Lenders" (Docket ID No. CC–2020–0026), as set forth in the Federal Register, Vol. 85, No. 141, p. 44223-28 ("Proposed Rule"). As explained in detail below, the Proposed Rule would exempt certain third-party entities, including those engaging in predatory lending, from liability under federal consumer protection laws, and limit the ability of states to implement their own consumer protections. For these reasons, we urge the OCC not to adopt the Proposed Rule.

Predatory Lending Practices

Predatory lending includes any unscrupulous action carried out by a lender to entice, induce, and assist a borrower in taking out a loan that they are unable to reasonably pay back. Predatory loans typically carry high fees and high-interest rates, and strip the borrower of equity. Examples of predatory lending include payday loans, car title loans, and high-cost installment loans. New and different predatory lending schemes frequently arise. These predatory loans extract a significant cost in the United States. For example, the Center for Responsible Lending estimates that payday loans and car title loans typically carry annual percentage rates (APR) of at least 300%, and drain nearly $8 billion dollars each year from borrowers, who have an average annual income of approximately $25,000.[1] The unaffordability of the loan and the lender's extreme leverage over the borrower—either through direct access to the bank account or the threat of repossessing the borrower's car—make it very difficult to escape a cycle of debt that can last for months, if not

[1] https://www.responsiblelending.org/research-publication/payday-and-car-title-lenders-drain-8-billion-fees-every-year

years.[2] The Consumer Financial Protection Bureau (CFPB) has found that the average payday consumer takes out 10 loans a year, one after another. Similarly, the Center for Responsible Lending found that the typical car title loan consumer will renew their loan eight times, paying more in fees than they originally borrow. While such loans are marketed as a quick infusion of cash to financially struggling people, research demonstrates that they frequently lead to debt that is nearly impossible to escape.

The effects of predatory lending are felt disproportionally by vulnerable populations, including African-American and Latino communities, veterans, seniors, and low-income borrowers. For example, research from several states indicates that payday lenders locate their stores disproportionately in communities of color, even when controlling for income. In California, African Americans and Latinos make up almost 44% of the state's total population, but nearly 60% of predominantly African-American or Latino communities have six or more payday loan stores, compared to 28% of predominantly white communities.[3] Even after controlling for income and other factors, payday lenders are 2.4 times more concentrated in African-American and Latino communities. In Florida, high-minority areas (over 50% black and Latino) have 8.1 payday lending stores per 100,000 people, compared to 4.0 stores per 100,000 people in neighborhoods that are mostly white (i.e., below 25% black and Latino).[4] In Michigan, payday lenders disproportionately locate their stores in rural and low-income areas, including communities of color.[5] Over two-thirds of Michigan payday stores have headquarters out of state.

Impacts of the Predatory Lending and the Proposed Rule on Selection of States with Appleseed Centers

New Jersey

New Jersey, with its substantial minority population—according to 2019 data from the U.S. Census Bureau, it was only 54.6% white[6]—has a strong interest in preventing predatory lending directed at its minority and other residents. That interest was evidenced, for example, in its passage of the New Jersey Homeowner Security Act[7], a landmark 2003 law that provides protections against predatory lending in the area of home loans and, more recently, in 2019, when Attorney General Gurbir Grewal led a coalition of 25 Attorneys General from around the country in opposing the CFPB's repeal of its own 2017 rule meant to rein in payday lending abuses.[8] In an accompanying press release, Grewal stated "Fortunately, New Jersey has strong laws on the books

[2] https://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/crl_payday_fee_savings_jun2016.pdf
[3] https://www.responsiblelending.org/media/state-research-shows-payday-lending-stores-are-heavily-concentrated-african-american-and
[4] https://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/crl_perfect_storm_florida_mar2016.pdf
[5] https://www.responsiblelending.org/research-publication/power-steering-payday-lenders-targeting-vulnerable-michigan-communities
[6] https://www.census.gov/quickfacts/NJ
[7] https://www.state.nj.us/dobi/pressreleases/pr041221.htm
[8] https://www.nj.gov/oag/newsreleases19/Dkt-No-CFPB-2019-0006_State-AGs-Comment.pdf

to shield our residents from some of the worst abuses among payday loan and vehicle-title loan companies. But repealing the federal standards would make it harder for us to protect our residents' pocketbooks—especially from bad conduct by out-of-state lenders."[9] Unfortunately, the CFPB went through with the repeal, which makes the state laws in New Jersey and elsewhere that would be further undermined by the Proposed Rule all the more essential in safeguarding against payday loan abuses.

Rate caps—a hard ceiling on the amount of interest that can be charged for a consumer loan—have been enacted in a number of states, including New Jersey, and have proven effective. According to a 2014 report from the Pew Charitable Trusts, in the 15 states that then capped interest rates at 36% or lower or banned payday lending outright, there were no payday lending stores.[10] As of February 2020, over 40 states and the District of Columbia had adopted rate caps of 36% or less.[11] The U.S. Department of Defense has also adopted a 36% rate cap to protect military personnel and their families.[12]

New Jersey's rate cap is its criminal usury law, which makes it illegal to make a loan or agree to make a loan to an individual at an annual interest rate greater than 30%.[13] The state also has a civil usury law that sets a 16% ceiling on interest rates for loan made on written contracts. Other New Jersey laws that would be undercut by the Proposed Rule include the Consumer Finance Licensing Act,[14] which imposes licensing and other requirements on consumer lenders, and the Check Cashers Regulatory Act of 1993, which generally prohibits cashing or advancing money on a postdated check.[15]

Texas

The Covid-19 pandemic has had dramatic impacts on the financial well-being of Texans, and particularly the lowest income families, raising the importance of efforts to rein in predatory lending abuses. The Federal Reserve Board Survey of Household Economics and Decision-making found, as of April 2020, that 39% of people earning less than $40,000 per year had lost a job due to the pandemic, twice the rate of job loss compared to those earning $100,000 or more. We are also seeing disproportionate health impacts from the pandemic on low-income, Black, and Latino communities in Texas. These same communities are disproportionately impacted by payday and auto title lending. According to the 2017 FDIC national survey of unbanked and underbanked

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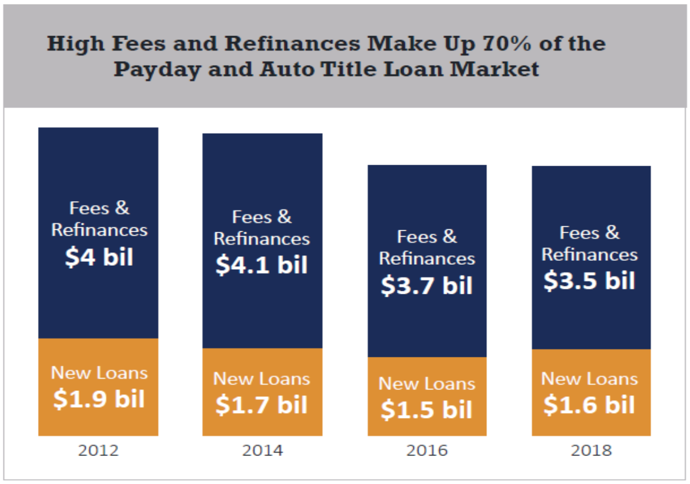
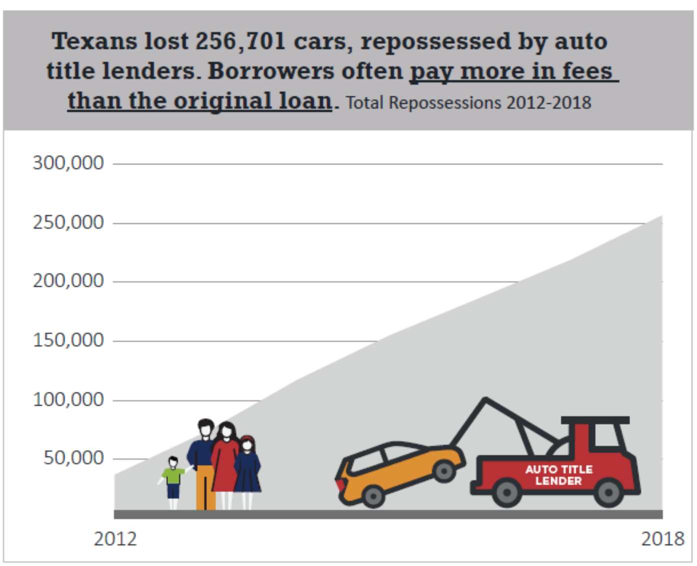
[9] https://www.nj.gov/oag/newsreleases19/pr20190516a.html
[10] https://www.pewtrusts.org/~/media/legacy/uploadedfiles/pcs/content-level_pages/fact_sheets/stateratelimitsfactsheetpdf.pdf
[11] https://www.nclc.org/images/pdf/high_cost_small_loans/payday_loans/FactSheet-StateRateCap.pdf
[12] https://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/crl_payday_fee_savings_jun2016.pdf
[13] https://codes.findlaw.com/nj/title-2c-the-new-jersey-code-of-criminal-justice/nj-st-sect-2c-21-19.html
[14] https://law.justia.com/codes/new-jersey/2009/title-17/17-11c
[15] https://codes.findlaw.com/nj/title-17-corporations-and-institutions-for-finance-and-insurance/nj-st-sect-17-15a-47.html

households, Black and Latino households made up 47% of the all Texas households, but 57% of households using auto title loans and 65% of households using payday loans.[16]

Uncapped payday and auto title loans in Texas, with average annual percentage rates that range between 200% and 500% APR, are a debt trap that offers quick relief and long-term financial hardship. An average $500 loan often costs $1,100 or more to repay and 70% of the market is dominated by refinances and high fees.



For people with auto title loans, repossessions have been on the rise. In 2019, 18% of borrowers lost their car, in many instances after paying more in fees than the original loan amount. Those repossessions amount to 42,878 cars lost, or 825 cars per week, on top of the nearly 257,000 cars that were repossessed from 2012 to 2018.[17]



[16] Federal Deposit Insurance Corporation Survey of Unbanked and Underbanked Households (2017). Data analysis available at economicinclusion.gov.
[17] Texas Office of Consumer Credit Commissioner, Credit Access Business Quarterly Data, 2012-2019.

As of the first quarter of 2020, vehicle repossessions by auto title lenders reached an all-time high—a concerning trend given the robust economy during that quarter, a period just prior to the stay-at-home orders.

Texas veterans also suffer disproportionately from the impacts of payday and auto title lending. A survey of Texas veterans conducted in partnership with the United Way of Greater Houston, Mission United, and United Way of Central Texas found that 45% of those surveyed had taken out a payday or auto title loan, compared to 7% of adult Texans overall. Three quarters of those surveyed said that they struggled to repay payday and auto title loans when they came due and 77% said that they struggled to pay other bills because of the loans. As one veteran shared, "they suck you in for a quick fix and you have to get another then another, they only make your situation worse."

Despite the proliferation of harmful consumer lending products in the Texas market, Texas has important protections that would be undermined by the proposed rule. Payday and auto title loans have no fee caps in Texas, but there are important local protections that have established basic affordability standards for the loans in 46 Texas municipalities.[18] In addition, for other consumer loans, there are state rate and fee caps as well as other important consumer protections. For example, a $2,000 loan carries a maximum APR of 35 percent. The proposed rule would undermine the protections that exist and further expand predatory high-cost loans in Texas. Texas needs more policies to rein in abuses, and not a new federal rule that would undermine the important state-based protections that exist.

Nebraska

Nebraska has a well-documented problem with payday loans that would be exacerbated if the proposed rule were to go into effect. Under current Nebraska law, payday loans are simply unaffordable to borrowers. If an average borrower (earning about $30,000 per year) takes a loan of $400, they will owe about $471 in one lump-sum payment in two weeks ($400 in principal plus about $71 in fees). In this situation, the borrower would pay more than *one-third* of their income simply to repay the loan and fees, leaving little to pay other expenses like rent, food, child care and transportation. Consequently, borrowers often take out another payday loan immediately to make ends meet. Many borrowers get trapped in a cycle of debt, frequently having to take out multiple payday loans immediately after paying off a prior loan.[19] The average contracted APR on payday loans in Nebraska is almost inconceivably high. Earlier this year, the Nebraska Department of Banking and Finance reported an annual APR of 405% on payday loans in the state.[20]

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[18] Examples of municipalities with ordinances that implement basic affordability standards for payday and auto title loans include Amarillo, Austin, Dallas, Bryan, College Station, and Midland.

[19] See Pew Charitable Trusts, "Payday Loan Facts and the CFPB's Impact," Jan. 2016.

[20] Nebraska Department of Banking and Finance, Annual Report to the Legislature 2020

Because of the significant harm payday lending inflicts upon Nebraska communities, particularly low-income communities and communities of color, a broad coalition of Nebraskans including borrowers, faith groups, consumer advocates, and others, have been engaged in a years-long effort to curb these abusive lending practices. Throughout that effort, borrowers have come forward to tell lawmakers their stories of how payday lending has impacted their lives. One borrower shared that he has had epilepsy since he was 14 years old and takes medication every day to control his seizures. Keeping his seizures under control allowed him to work at a local bank. Suddenly, the copays for his medication went up significantly and he found himself unable to afford the extra expense. He took out a $500 payday loan, but was then caught in the cycle of reborrowing that ensnares so many payday borrowers. He ended up taking out several successive loans and the interest and fees he ended up paying were higher than the original loan principal.

Another borrower who worked for the local government was suddenly laid off due to budget cuts. She had been supporting her oldest daughter through her last year of an advanced nursing program, and took out a payday loan so that her daughter could afford groceries. She had trouble finding other job opportunities, so she took out an additional payday loan to meet her own basic needs. She found herself caught in what she described as a "vicious cycle" of reborrowing and ended up paying back thousands of dollars on what originally had been two small loans. These borrowers are just a few examples of the thousands of Nebraskans who could tell a similar story of needing a small loan to help pay for a sudden expense and finding themselves trapped in a cycle of debt due to the predatory structure of payday loans.

Currently, the coalition of Nebraskans that has been working for years to curb these abusive practices, including the borrowers mentioned above, are supporting a ballot initiative to impose a 36% rate cap on payday loans in the state. Recently, the campaign turned in over 126,000 signatures of Nebraskans who supported placing that question on the November ballot, and the Secretary of State verified that the needed number of signatures was obtained, clearing the way for the question to be voted on in November. If the measure is successful, payday lenders will no longer be able to prey on vulnerable Nebraskans by locking them into a cycle of debt.

The Proposed Rule would not only undermine the existing fee limitations Nebraska imposes on payday lenders, potentially allowing products even more dangerous than the current 400% APR loans, but could allow payday lenders to sidestep the 36% rate cap that Nebraskans may choose to adopt this year. The borrowers above, and thousands more like them, would continue to be harmed by usurious loan products, and the ability of the state to implement meaningful, common sense consumer protections would be significantly weakened.

The Proposed Rule Would Undermine Efforts to Prevent Predatory Lending

The Proposed Rule would exacerbate the problems associated with predatory loans by permitting such lenders to avoid federal consumer protection laws and state interest rate caps meant to protect consumers. The Proposed Rule would limit the applicability of consumer protection laws to only entities that are 1) named as the lender in a loan agreement, or 2) fund a loan as of the date of origination. Federal Register, Vol. 85, No. 141 at 44225. The laws affected would include Section 5 of the Federal Trade Commission Act and the Dodd-Frank Wall Street Reform and Consumer Protection Act, as well as state statutes enacting interest rate caps. *Id*. at 44226. As the Proposed

Rule acknowledges, however, banks falling within this definition often work with third-party entities, "including small-dollar lending programs designed to assist with cash-flow imbalances, unexpected expenses, or income shortfalls." *Id*. at 44224. If such a third party makes a loan as part of a relationship with a bank, under the Proposed Rule "OCC is not the prudential regulator of the lending activity." *Id*. at 44225.

The Proposed Rule would serve to exclude many forms of predatory high interest loans from federal and state consumer protection laws. For example, by providing that a bank is the "true lender" if a bank's name is on the loan agreement or a bank funds the loan, the Proposed Rule would make it exceedingly easy for "rent-a-bank" schemes in which predatory lenders partner with banks to evade state interest rate caps, by asserting that the national bank is the true lender. Rent-a-bank schemes are active in most U.S. states, including New Jersey, Texas and Nebraska.[21]

The Proposed Rule, if enacted, would allow predatory lenders to escape rate cap laws, and escape liability for violations of federal and state consumer protection laws, by participating in a "rent-a-bank" scheme. This would limit states' ability to enforce interest rate caps against such predatory lenders across the country, including in New Jersey. The Proposed Rule would also limit the ability of states to enact new legislation to protect consumers within that state from predatory lending practices, as predatory lenders would have a loophole to escape liability if they were not named as the lender and did not fund the loan at the date of origination.

The Proposed Rule notes that a goal of the banking system is to provide "affordable credit" to Americans. Federal Register, Vol. 85, No. 141 at 44223. The Proposed Rule, however, would do the opposite. It would allow predatory lenders to provide loans at exorbitant and, in many cases, unaffordable rates of interest and trap vulnerable borrowers in a cycle of debt.

As described above, borrowers taking such loans typically pay extremely high interest rates, and are often forced to take on additional loans to extend the interest payments, trapping these borrowers in a predatory lending scheme many times over the life of the original loan. A 2017 report by the Center for Responsible Lending estimates that New Jerseyans save more than $193 million per year in fees that they would otherwise bear if there was no rate cap that prevented payday lenders from operating in the state.[22]

Other harms suffered by borrowers on account of predatory loans include car repossession, bank overdraft fees, lower credit scores, lack of ability to pay for food, rent, and utilities, wage garnishment, and even bankruptcy. These loans are in no way "affordable" to the vulnerable Americans who are subject to predatory lending practices. Rather, these high interest loans drain wealth from our poorest communities, put borrowers into a worse situation, and ruin their credit and ability to borrow at lower interest rates. Allowing these predatory lending practices to go unchecked will also increase the pressure on state legislatures from non-predatory banks to increase allowable interest rates so that these banks can compete, effectuating a "race to the bottom" in which further deregulation occurs at the expense of consumers.

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[21] https://www.nclc.org/issues/high-cost-small-loans/rent-a-bank-loan-watch-list.html

[22] https://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/crl_payday_fee_savings_jun2016.pdf

In summary, predatory loans cause a significant drain of wealth and indebtedness, particularly among the poorest and most vulnerable Americans. Loans made through rent-a-bank schemes are some of the most predatory on the market. Caps on allowable interest rates are among the best protections for consumers against such predatory loans. The Proposed Rule would gut these protections and eliminate the ability of each state to enact and enforce legislation to protect its citizens. For these reasons and those explained above, we respectfully request that the OCC withdraw the Proposed Rule.

Sincerely,

Benet Magnuson, Interim Executive Director for the Appleseed Foundation
on behalf of
Nebraska Appleseed
New Jersey Appleseed Public Interest Law Center
Texas Appleseed[23]

[23] Prepared with the pro bono assistance of Fish & Richardson P.C.