



January 21, 2020

VIA ELECTRONIC SUBMISSION

Joseph M. Otting
Comptroller
Office of the Comptroller of the Currency
Department of Treasury
400 7th Street S.W.
Washington, D.C. 20219

**Re: Permissible Interest on Loans That Are Sold, Assigned, or
Otherwise Transferred (Docket No. OCC-2019-0027)**

Dear Comptroller Otting:

On behalf of the 22 undersigned State Attorneys General and the Hawaii Office of Consumer Protection (the “States”), we write to express our strong and bipartisan objections to a rule proposed by the Office of the Comptroller of the Currency (the “OCC”) that would sanction one of the myriad schemes the financial services industry has devised to repackage usury and evasion of state usury laws as “innovations” deserving of special federal protection.¹ At stake are so-called “rent-a-bank” schemes, in which heavily regulated state-chartered banks and national banking and savings associations (“National Banks”) enter into relationships with largely unregulated non-bank entities for the sole purpose of allowing non-banks to evade state usury laws. The Proposed Rule would facilitate these arrangements by extending a particular privilege – the right of National Banks to preempt state usury laws – to non-bank entities, notwithstanding the fact that National Banks are afforded this privilege only because they submit to extensive federal oversight and supervision. The OCC would do so despite previously having

¹ See O.C.C., *Permissible Interest on Loans That Are Sold, Assigned, or Otherwise Transferred*, 84 Fed. Reg. 64,229 (proposed November 21, 2019) (to be codified at 12 C.F.R. § 7.40001 and 12 C.F.R. § 160.110) (the “Proposed Rule”). The Federal Deposit Insurance Corporation (the “FDIC”) issued a similar proposal on December 6, 2019. See F.D.I.C., *Federal Interest Rate Authority*, 84 Fed. Reg. 66,845 (proposed Dec. 6, 2019) (to be codified at 12 C.F.R. § 331) (the “FDIC Proposed Rule”). The States intend to submit a comment to the FDIC in due course.

condemned these arrangements as “abus[iv]e” and “highly conducive to the creation of safety and soundness problems,”² a stark reversal of position the Proposed Rule fails to acknowledge.

As explained in detail below, the OCC has no authority to unilaterally rewrite federal and constitutional law to suit its policy preferences. Unfortunately, that is precisely what the Proposed Rule does.

At a time when Americans of all political backgrounds are demanding that loans with triple digit interest rates be subject to more, not less, regulation,³ it is disappointing that the OCC instead seeks to expand the availability of exploitative loans that trap borrowers in a never-ending cycle of debt. For the reasons discussed herein, we urge the OCC to withdraw the Proposed Rule in its entirety.

I. Summary of the OCC’s Preemption Proposal

The Proposed Rule is purportedly designed to address “uncertainty” created by the 2015 decision of the U.S. Court of Appeals for the Second Circuit in *Madden v. Midland Funding, LLC*.⁴ The Proposed Rule would effectively overturn *Madden* and significantly expand National Bank Act, 12 U.S.C. §§ 1 *et seq.* (“NBA”) preemption under the pretense of codifying a contract-based principle – the OCC calls it “valid-when-made” – that has nothing to do with NBA preemption and was never mentioned in *Madden*.

Madden concerned a credit card debt originated by a National Bank and subsequently sold to an unaffiliated third-party debt collector. The debt collector sent the plaintiff, a New York resident, a collection notice seeking to recover the debt at an interest rate of 27%, which violates New York’s usury cap. The plaintiff sued the debt collector, arguing that its attempt to collect interest that is usurious in New York violated federal and state debt collection statutes. The debt collector argued that, even though it itself was not a National Bank, the plaintiff’s claims were preempted by the National Bank Act, 12 U.S.C. §§ 1 *et seq.* (“NBA”), because the debt at issue was originated by a National Bank.⁵

Under the NBA and Supreme Court precedent, National Banks are permitted to charge the maximum interest rate permissible in the state in which they are located, and to “export” that interest rate to borrowers in other states, even if the rate would violate those states’ usury laws.⁶ As to such loans originated by National Banks, state usury laws are preempted.⁷ As the Second

² John D. Hawke, Jr., Comptroller of the Currency, *Remarks Before the Women in Housing and Finance* at 10 (Feb. 12, 2002), available at <https://www.occ.gov/news-issuances/speeches/2002/pub-speech-2002-10.pdf>. All websites cited in this letter were last visited on January 21, 2020.

³ For example, when South Dakota voted on an interest rate cap in 2016, the payday loan industry spent over a million dollars lobbying against the measure, which was ultimately approved by 76% of voters in what one opponent of the cap conceded was a “landslide.” See Bart Pfankuch, *Payday Loans Gone, But Need for Quick Cash Remains*, Capital Journal (Pierre, S.D.), Mar. 23, 2018.

⁴ *Madden v. Midland Funding, LLC*, 786 F.3d 246 (2d Cir. 2015), *cert. denied*, 136 S. Ct. 2505 (2016).

⁵ See *id.* at 249.

⁶ See *Beneficial Nat’l Bank v. Anderson*, 539 U.S. 1, 10-11 (2003).

⁷ The interplay between NBA provisions regarding interest rates and state usury laws is variously described as interest rate exportation or NBA preemption, both of which refer to the same legal issues.

Circuit in *Madden* explained, National Banks are only afforded this privilege because they have submitted to comprehensive regulatory oversight by federal banking regulators.⁸ Put differently, the right to export interest rates is conferred upon National Banks *qua* National Banks.

In *Madden*, the Second Circuit acknowledged the limited circumstances under which a National Bank's ability to export its interest rate could be extended to non-bank entities, and set forth the standard to apply in such an inquiry: "To apply NBA preemption to an action taken by a non-national bank entity, application of state law to that action must significantly interfere with a national bank's ability to exercise its power under the NBA."⁹ The Second Circuit found that standard unmet because application of usury laws to debts originated by National Banks would not prevent banks from selling debts. At most, it could reduce the price National Banks could charge for such debts,¹⁰ and would in no way impact sales to other National Banks. Moreover, the Court held that extending NBA privileges to unaffiliated assignees of National Banks "would be an overly broad application of the NBA" and would "create an end-run around usury laws for non-national bank entities that are not acting on behalf of a national bank."¹¹

The financial services industry's response to *Madden* was dire. The defendants in *Madden* predicted "catastrophic consequences for secondary markets that are essential to the operations of national banks and the availability of consumer credit,"¹² and a trade group warned that *Madden* "threatens to cause significant harm to [credit] markets, the banking industry, and the millions of families and businesses they serve."¹³ Contrary to these predictions, the sky has not fallen in the nearly five years since *Madden* was decided. The OCC testified to Congress in December 2019 that the U.S.'s current economic expansion is "the longest in U.S. history, which has benefited banks' overall financial performance and banks have helped maintain that momentum. *Capital and liquidity remain near historic highs.*"¹⁴ The FDIC has similarly stated that it is "not aware of *any* widespread or significant negative effects on credit availability or

⁸ See *Madden*, 786 F.3d at 251 (noting that entities other than National Banks are "neither protected under federal law nor subject to the OCC's exclusive oversight") (internal citation and quotation marks omitted).

⁹ See *id.* at 250 (citing *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25, 33 (1996)).

¹⁰ See *id.* at 251 ("Here, however, state usury laws would not prevent consumer debt sales by national banks to third parties. Although it is possible that usury laws might decrease the amount a national bank could charge for its consumer debt in certain states (i.e., those with firm usury limits, like New York), such an effect would not 'significantly interfere' with the exercise of a national bank power.") (quoting *Barnett Bank*).

¹¹ See *Madden*, 786 F.3d at 251-52.

¹² See Petition for Panel Rehearing and Rehearing En Banc by Defendants-Appellees at 1, *Madden v. Midland Funding, LLC*, 786 F.3d 246 (2d Cir. 2015) (14-CV-2131).

¹³ See Brief of the Clearing House Association LLC as Amici Curia in Support of Rehearing and Rehearing En Banc at 1, *Madden v. Midland Funding, LLC*, 786 F.3d 246 (2d Cir. 2015) (14-CV-2131).

¹⁴ See *Oversight of Prudential Regulators: Ensuring the Safety, Soundness, Diversity, and Accountability of Depository Institutions: Hearing Before the H. Comm. on Fin. Servs.*, 116 Cong. 3 (2019) (statement of Joseph M. Otting, Comptroller of the Currency) (emphasis added), available at <https://financialservices.house.gov/uploadedfiles/hhrg-116-ba00-wstate-otting-20191204.pdf>.

securitization markets having occurred to this point as a result of the *Madden* decision.”¹⁵ And *Madden* certainly does not appear to be affecting the profitability of credit card lending by National Banks which, according to a recent headline in the *Washington Post*, “reported blockbuster 2019 profit with the help of consumers’ credit card debt.”¹⁶

The OCC apparently disagrees with *Madden*, but one would be hard-pressed to understand why from the Proposed Rule, which engages the merits of the decision only obliquely. Instead, the Proposed Rule focuses on what the OCC describes as “valid-when-made,” a general “principle” about the assignability of contracts.¹⁷ The Proposed Rule’s reliance on this “principle” is misplaced. The Proposed Rule proceeds from the flawed assumption that NBA preemption is a property interest that can be assigned. It is not. The right to interest rate exportation is a status conferred under federal law upon a National Bank that is personal to the National Bank. Indeed, the OCC has previously embraced this position: “Preemption is not like excess space in a bank-owned office building. It is an inalienable right of the bank itself.”¹⁸

¹⁵ See FDIC Proposed Rule, 84 Fed. Reg. at 66,850 (emphasis added). The only evidence that *Madden* has in any way impacted lending in the Second Circuit comes from a single academic study, involving only three non-bank lenders, that purported to find a marginal impact on lending. The study was conducted based on a proprietary data set and therefore has never been subjected to any form of review. See Colleen Honigsberg, Robert J. Jackson, Jr., & Richard Squire, *What Happens When Loans Become Legally Void? Evidence from a Natural Experiment*, (Dec. 2, 2016), at 4, available at <https://www-cdn.law.stanford.edu/wp-content/uploads/2016/12/Honigsberg-et-al-2016-What-Happens-when-Loans-Become-Legally-Void.pdf> (noting that the study is based on a “private dataset . . . which contains additional loans, as well as additional detail on loans and borrowers, not included in public databases”); *id.* at p. 15 (stating that the three non-bank lenders provided data to the authors under a non-disclosure agreement).

¹⁶ See Renae Merle, *Banks Reported Blockbuster 2019 Profit With the Help of Consumers’ Credit Card Debt*, Wash. Post, Jan. 15, 2020, available at <https://www.washingtonpost.com/business/2020/01/15/banks-reported-blockbuster-2019-profit-with-help-consumers-credit-card-debt/>. The article notes that interest rates on credit cards are at near record highs despite several interest-rate cuts by the Federal Reserve.

¹⁷ While the OCC characterizes valid-when-made as a “longstanding common law principle,” there is reason to doubt its historical pedigree. See Brief of Professor Adam J. Levitin as Amicus Curiae in Support of Plaintiff at 26, *Rent-Rite Super Kegs W., Ltd. v. World Business Lenders, LLC* (D. Colo.) (19-CV-01552-REB) (“If the ‘valid-when-made’ doctrine were a ‘cardinal rule’ of banking law, founded on Supreme Court opinions, one would expect it to regularly appear in 19th and 20th century usury and banking law treatises. Yet the doctrine is entirely unknown to historical treatise writers. Nothing even approaching the ‘valid-when-made’ doctrine in which the assignment of a loan from an originator to an assignee subject to a different state usury law appears in any 19th or 20th century usury treatise. No prior reference to ‘valid-when-made’ can be found in *any* banking or usury treatise.”). Indeed, the Second Circuit did not mention “valid-when-made” in *Madden*, perhaps because none of the parties’ briefs did. As of the date of this letter, no reported federal cases use the phrase “valid-when-made principle.” The first federal court opinions to use the terms “valid-when-made doctrine” or “valid-when-made rule” post-date *Madden* by more than two years and arise from just two cases, both in the District of Colorado. *Meade v. Avant of Colorado, LLC*, 307 F. Supp. 3d 1134, 1152 (D. Colo. 2018); *In re Rent-Rite Superkegs W., Ltd.*, 603 B.R. 41, 66 (Bankr. D. Colo. 2019).

¹⁸ John D. Hawke, Jr., Comptroller of the Currency, *Remarks Before the Women in Housing and Finance* at 10 (Feb. 12, 2002), available at <https://www.occ.gov/news-issuances/speeches/2002/pub-speech-2002-10.pdf>.

Because this preemptive status is not conferred *under a contract* – but rather under federal law – valid-when-made or any doctrine concerning the assignability of rights under contract are irrelevant. Nowhere in the Proposed Rule does the OCC explain this reversal, cite any case holding that a personal status conferred by federal law is assignable, or explain how a principle of contract law could override federal law.

Most concerning from the States’ perspective, the Proposed Rule does not address the Second Circuit’s policy-based concern that extending the NBA to entities other than National Banks would place them outside the reach of any regulator. Consumer protection has historically been among the police powers exercised by the States, and the vast majority of States – including most of the signatories to this letter – rely on usury caps to prevent consumer harm from the abuses endemic to unaffordable, high-cost loans.¹⁹ And while the OCC claims the Proposed Rule is not intended to “address” rent-a-bank schemes,²⁰ the Proposed Rule purports to preempt state law and exempt from state usury limits *any* entity that happens to acquire debt originated by a National Bank. This is the essence of all rent-a-bank schemes.²¹

Notably, the Proposed Rule conspicuously avoids the word “preemption” to describe its intended effect, but preemption – the displacement by federal law of otherwise applicable state laws or regulations – is transparently what the OCC seeks to accomplish.²² Any doubt as to whether preemption is the ultimate goal of the Proposed Rule is conclusively answered by titles the agency has given to the regulations it plans to amend: One amendment is titled “Preemption” and the other is titled “Most favored lender usury preemption for all savings associations.”²³ Despite the Proposed Rule’s emphasis on the valid-when-made doctrine and silence on preemption, as the Supreme Court has held in a related context, if an OCC regulation entitled, “Preemption” “is not pre-emption, nothing is.”²⁴

¹⁹ Those states without usury caps have an interest in retaining the ability to impose caps in the future should the need arise.

²⁰ See Proposed Rule at 64,232 (“This rule would not address which entity is the true lender when a bank makes a loan and assigns it to a third party. The true lender issue, which has been considered by courts recently, is outside the scope of this rulemaking.”).

²¹ Indeed, at least three California non-bank lenders have publicly announced their plans to evade that state’s interest rate caps through rent-a-bank schemes. See Hannah Wiley, *California Made Triple-Digit Interest Illegal on These Loans. Lenders Have Found a Loophole*, The Sacramento Bee, Dec. 18, 2019, available at <https://www.sacbee.com/news/politics-government/capitol-alert/article238501288.html#storylink=cpy>. Following California’s passage of stricter lending rules, Elevate Credit, Enova International, and Curo Group Holdings all told investors that they were working to evade the new law through partnerships with out-of-state banks – precisely the behavior the OCC’s Proposed Rule would facilitate. See *id.*

²² Although the Supreme Court has “used different labels to describe the different ways in which federal statutes may displace state law,” all describe varieties of “preemption.” *Va. Uranium, Inc. v. Warren*, 139 S. Ct. 1894, 1901 (2019); accord *Murphy v. Nat’l Collegiate Athletic Ass’n*, 138 S. Ct. 1461, 1480 (2018); see also PREEMPTION, Black’s Law Dictionary (11th ed. 2019) (“5. . . . The principle (derived from the Supremacy Clause) that a federal law can supersede or supplant any inconsistent state law or regulation”).

²³ See Proposed Rule at 64,232.

²⁴ *Cuomo v. Clearing House Ass’n, L.L.C.*, 557 U.S. 519, 535 (2009).

II. The OCC’s Proposed Rule Is Contrary to Law and Does Not Conform to Requirements Imposed by the Dodd-Frank Act

The Proposed Rule’s attempt to exempt from state laws assignees that the OCC does not license or regulate, conflicts with the statutory scheme Congress enacted in the NBA, flouts procedural and substantive requirements imposed by the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, 124 Stat. 1376 (2010) (the “Dodd-Frank Act”) and, ultimately, is beyond the agency’s authority to grant.

A. The Proposed Rule Exceeds the OCC’s Authority and Is Contrary to the Statutory Scheme Set Forth by Congress

Courts have consistently held the rulemaking authority of federal agencies is constrained by the statutory language Congress chose to enact. “An agency’s ‘power to promulgate legislative regulations is limited to the authority delegated’ to it by Congress.”²⁵ When “Congress has explicitly left a gap for the agency to fill, . . . the agency [may] elucidate a specific provision of the statute by regulation.”²⁶

By contrast, an agency has no authority to alter the regulatory landscape if “Congress has supplied a clear and unambiguous answer to the interpretive question at hand.”²⁷ “If the intent of Congress is clear, that is the end of the matter; for [any reviewing] court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”²⁸ As the Supreme Court has affirmed, it is a “core administrative-law principle that an agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate.”²⁹ This is especially true for the OCC, whose preemption determinations are entitled only to *Skidmore* deference.³⁰

1. The Proposed Rule Conflicts with the Plain Text of NBA Sections 85 and 1463(g)

The primary statutory provisions in the NBA the OCC purports to interpret – 12 U.S.C. sections 85 and 1463(g)(1) – are clear and unambiguous. Section 85 provides, “Any association [*i.e.*, any National 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[.]” Section 1463(g)(1) similarly states, “Notwithstanding any State law, a savings association may charge interest on any extension of credit . . . at the rate allowed by the laws of the State in which such savings association is located[.]” Thus, sections 85 and 1463 permit National Banks to charge interest in excess of rates permitted by states where they do business if those states impose usury caps

²⁵ *Amalgamated Transit Union v. Skinner*, 894 F.2d 1362, 1368 (D.C. Cir. 1990) (quoting *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988)).

²⁶ *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984).

²⁷ *Pereira v. Sessions*, 138 S. Ct. 2105, 2113 (2018).

²⁸ *Id.* (quoting *Chevron*, 467 U.S. at 842-43).

²⁹ *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 328 (2014).

³⁰ *See Lusnak v. Bank of Am., N.A.*, 883 F.3d 1185, 1191–92 (9th Cir.), *cert. denied*, 139 S. Ct. 567 (2018) (“[The Dodd-Frank Act] clarified that the OCC’s preemption determinations are entitled only to *Skidmore* deference... [under which] an agency’s views are ‘entitled to respect’ only to the extent that they have the ‘power to persuade.’”) (citing 12 U.S.C. § 25b(b)(5)(A) and quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

lower than what state law provides where the National Bank is “located.” These statutes grant explicit rights to National Banks – and no one else. Sections 85 and 1463(g)(1) say nothing about interest chargeable by assignees, transferees, or purchasers of bank loans. These provisions on their face preempt state law *only* with respect to National Banks.³¹ The OCC’s Proposed Rule would alter these statutory provisions, even though the OCC nowhere points out any “ambiguity” or “statutory gap” in this straightforward text.³²

Nevertheless, the OCC’s Proposed Rule would cloak non-banks in section 85’s preemptive power. The proposed regulations would provide, “Interest on a loan that is permissible under 12 U.S.C. 85 [*sic*] shall not be affected by the sale, assignment, or other transfer of the loan.”³³ The OCC’s language with respect to § 1463(g)(1) is of a piece: “Interest on a loan that is permissible under 12 U.S.C. 1463(g)(1) [*sic*] shall not be affected by the sale, assignment, or other transfer of the loan.”³⁴

The agency’s use of passive voice obscures what the Proposed Rule would do – expand sections 85 & 1463(g)(1)’s preemptive effect to cover non-bank purchasers of loans and effectively amend the federal code to read “Any association [*or the buyer, assignee, or transferee of any loan made by any association*] may take receive, reserve, and charge on any loan . . . interest at the rate allowed by the laws of the States, Territory, or District where the bank is located[.]”³⁵ But this is beyond the agency’s power. The OCC simply “may not rewrite clear statutory terms to suit its own sense of how the statute should operate.”³⁶

2. The Proposed Rule Conflicts with the OCC’s Own Longstanding Interpretation and the Intent of Congress

Until now, the OCC has held that the preemptive power of sections 85 and 1463(g) accrue only to National Banks, and that extending such power to non-banks would raise safety and soundness concerns. As the OCC explained in 2002,

The benefit that national banks enjoy by reason of [state-law preemption] cannot be treated as a piece of disposable property that a bank may rent out to a third party that is not a national bank. Preemption is not like excess space in a bank-owned office building. It is an inalienable right of the bank itself.

We have recently seen several instances in which nonbank lenders who would otherwise have been fully subject to various state regulatory laws have sought to rent out the preemption privileges of a national bank to evade such laws. Indeed, the payday lending

³¹ Similarly, not-for-profit credit unions are exempt from federal income taxation by 26 U.S.C. § 501(c)(14)(A), but that does not mean interest income from loans originated by credit unions remains non-taxable if those loans are sold to a for-profit business. Put differently, credit unions are tax exempt, but when they sell loans, there is no reason to believe that tax-exempt status travels with the loans.

³² See *Chevron*, 467 U.S. at 843-44.

³³ See Proposed Rule at 64,232 (proposed language for 12 C.F.R. § 7.4001(e)).

³⁴ See *id.* (proposed language for 12 C.F.R. § 160.110)(d)).

³⁵ 12 U.S.C. § 85 (text in italics supplied); *accord* 12 U.S.C. § 1463(g)(1).

³⁶ *Util. Air Regulatory Grp.*, 573 U.S. at 328.

industry has expressly promoted such a “national bank strategy” as a way of evading state and local laws. Typically, these arrangements are originated by the payday lender, which attempt to clothe itself with the status of an “agent” of the national bank. Yet the predominant economic interest in the typical arrangement belongs to the payday lender, not the bank.

Not only do these arrangements constitute an abuse of the national charter, but they are highly conducive to the creation of safety and soundness problems at the bank, which may not have the capacity to manage effectively a multistate loan origination operation that is in reality the business of the payday lender.³⁷

More recently, the OCC confirmed in a May 23, 2018 Bulletin that it “views unfavorably an entity that partners with a bank with the sole goal of evading a lower interest rate established under the law of the entity’s licensing state(s).”³⁸

Recent legislative (in)activity confirms the straightforward reading that sections 85 and 1463(g) apply to National Banks only. Had Congress meant to exempt non-bank debt buyers from state usury law to the same extent as National Banks, it could have done so. But as recently as 2018, it *declined to do just that*. The Protecting Consumers’ Access to Credit Act of 2017 would have exempted loan assignees from state usury laws to the same extent as the National Banks that originated the loans, using language very similar to that contained in the OCC’s Proposed Rule.³⁹ Following the House’s passage of the proposed legislation, the Senate took no action, allowing it to expire at the close of the 115th Congress.⁴⁰ Congress’s consideration and rejection of the policy the OCC now proposes indicates that neither current law nor the will of Congress support the proposal.

³⁷ John D. Hawke, Jr., Comptroller of the Currency, *Remarks Before the Women in Housing and Finance* at 10 (Feb. 12, 2002), available at <https://www.occ.gov/news-issuances/speeches/2002/pub-speech-2002-10.pdf>. Courts have also rejected arrangements between National Banks and non-banks – like those criticized by the OCC – because National Banks that do not bear the predominant economic interest in their loans are not the lender of the loans for preemption purposes. *See, e.g., Cmty. State Bank v. Strong*, 651 F.3d 1241, 1259-60 (11th Cir. 2011) (holding that preemption under the Depository Institution Deregulation and Monetary Control Act – which contains the same language as Section 85 of the NBA – does not apply to a National Bank “if it is not the true lender of the loan”); *Pennsylvania v. Think Fin., Inc.*, No. 14-CV-7139, 2016 WL 183289, at *13 (E.D. Pa. Jan. 14, 2016) (same).

³⁸ OCC Bulletin 2018-14, *Installment Lending: Core Lending Principles for Short-Term, Small-Dollar Installment Lending* (May 23, 2018), available at <https://www.occ.gov/news-issuances/bulletins/2018/bulletin-2018-14.html>.

³⁹ *See* H.R. 3299, 115th Cong. (2017-2018), available at <https://www.congress.gov/bill/115th-congress/house-bill/3299/text> (proposing to amend 12 U.S.C. §§ 85 and 1463(g) to provide that loans made by National Banks at interest rates in excess of state usury caps applicable to assignees of those loans “shall remain valid with respect to such rate regardless of whether the loan is subsequently sold, assigned, or otherwise transferred to a third party, and may be enforced by such third party notwithstanding any State law to the contrary”)

⁴⁰ *See* S. 1642, 115th Cong. (2017-2018), available at <https://www.congress.gov/bill/115th-congress/senate-bill/1642/actions?q=%7B%22search%22%3A%5B%22S1642%22%5D%7D&r=2&s=1> (only recorded Senate action on bill is introduction on July 27, 2017).

3. The Proposed Rule Conflicts with Other Elements of the Statutory Scheme Governing National Banks

In construing the statutes it administers, the OCC may not cherry pick the provisions it likes and discard the others. An agency's "reasonable statutory interpretation must account for both 'the specific context in which . . . language is used' and 'the broader context of the statute as a whole.'"⁴¹ The OCC's attempt to extend preemption to entities other than National Banks directly conflicts with the Dodd-Frank Act.

At several points in the Dodd-Frank Act, Congress made clear that the benefits of federal preemption provided by the NBA accrue *only* to National Banks.⁴² In provisions codified at 12 U.S.C. § 25b Congress stated – in three separate subsections – that the NBA, which includes section 85, does “not preempt, annul, or affect the applicability of any State law to any subsidiary or affiliate of a national bank (other than a subsidiary or affiliate that is chartered as a national bank).”⁴³ Thus, by Congress's explicit command, subsidiaries and affiliates of National Banks cannot benefit from section 85's preemption of state usury caps. The Proposed Rule entirely fails to consider or account for this important limitation.

Another provision of section 25b further shows the Proposed Rule is at odds with the NBA as a whole. Section 25b(f) provides that certain NBA amendments in the Dodd-Frank Act do not alter “the authority conferred by section 85 of this title 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[.]”⁴⁴ While subsection 25b(f) clarifies that Dodd-Frank did not revoke National Banks' exemption from state usury laws, its language reiterates section 85's scope: It applies only to “the charging of interest by a national bank,” not third-party assignees.

4. Additional Statutory Provisions Cited by the OCC Lend No Support

The OCC cites several other statutory provisions to buttress the Proposed Rule, but none overcome Congress's clear and unambiguous statements limiting the benefits of sections 85 and 1463(g) to National Banks. “Invoking some brooding federal interest or appealing to a judicial policy preference” is not enough to displace state law; rather, one “must point specifically to ‘a constitutional text or a federal statute’ that does the displacing or conflicts with state law.”⁴⁵ But the Proposed Rule does little more than gesture toward National Banks'

⁴¹ *Util. Air Regulatory Grp.*, 573 U.S. at 321 (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)).

⁴² See Dodd-Frank Act (amending 12 U.S.C. §§ 25b (b)(2), (e), & (h)(2)). Subsequent references to the Dodd-Frank Act in this letter cite to the amended U.S. Code sections directly.

⁴³ See, e.g., 12 U.S.C. § 25b(b)(2); *accord id.* § 12b(e) & (h)(2). Congress also provided for equal treatment of preemptive privileges enjoyed by savings associations. See 12 U.S.C. § 1465(a) (“Any determination . . . regarding the relation of State law to a provision of this chapter or any regulation or order prescribed under this chapter shall be made in accordance with the laws and legal standards applicable to national banks regarding the preemption of State law.”)

⁴⁴ 12 U.S.C. § 25b(f) (emphasis added).

⁴⁵ *Va. Uranium*, 139 S. Ct. at 1901 (quoting *P.R. Dep't of Consumer Affairs v. ISLA Petroleum Corp.*, 485 U. S. 495, 503 (1988)).

authority to “enter into and assign contracts.”⁴⁶ That is not enough to justify extending National Banks’ preemption privilege to non-National Banks.

For instance, the OCC emphasizes National Banks’ power “[t]o make contracts” and “loan[] money” granted in 12 U.S.C. § 24.⁴⁷ But the mere ability of National Banks to lend and contract sheds no light on whether the OCC may exempt new classes of entities from compliance with state law.

Similarly, that *National Banks* hold “all such incidental powers as shall be necessary to carry on the business of banking,” per section 24(Seventh), does not imply *non-banks* may escape state laws of general applicability.⁴⁸ The OCC likewise invokes section 371,⁴⁹ which provides that “[a]ny national banking association may make, arrange, purchase or sell” real estate loans,⁵⁰ but the agency’s proposal extends to all loans, not just those financing real estate transactions. And section 371’s authorization for banks never suggests non-bank loan purchasers may evade state law, nor does it indicate the OCC has authority to grant any such a state-law exemption.⁵¹

The Proposed Rules states that third-party assignees of National Bank loans must be exempt from state usury laws because “among the essential rights normally associated with the power to contract is the ability to subsequently assign some or all of the benefits of a contract to a third party.”⁵² But, as discussed above, preemption of state law is not a “piece of disposable property” that a bank may contract away – it is a privilege specifically granted to National Banks by sections 85 & 1463(g).⁵³ Moreover, National Banks’ power to assign contractual rights is not impaired by the ordinary principle that their counterparties must comply with state law. As the Second Circuit explained, “[a]lthough it is possible that usury laws might decrease the amount a national bank could charge for its consumer debt in certain states,” such laws do not significantly interfere with banks’ powers.⁵⁴ The Proposed Rule also fails to account for the fact that state usury laws have absolutely no impact on a National Bank’s ability to sell debts to other National Banks.

⁴⁶ Proposed Rule at 64,229.

⁴⁷ *See id.* at 64,229, 64,230; *see also* 12 U.S.C. § 1464 (conferring analogous powers on savings associations).

⁴⁸ *See* Proposed Rule at 64,230 (quoting 12 U.S.C. § 24(Seventh)).

⁴⁹ *See id.*

⁵⁰ 12 U.S.C. § 371.

⁵¹ Analogous powers granted to savings associations in 12 U.S.C. § 1464 likewise fail to support the OCC’s claim of authority to exempt from state law entities it does not regulate.

⁵² Proposed Rule at 64,230.

⁵³ OCC News Release 2002-10, *Comptroller Calls Preemption a Major Advantage of National Bank Charter* (Feb. 12, 2002), available at <https://www.occ.gov/news-issuances/news-releases/2002/nr-occ-2002-10.html>.

⁵⁴ *Madden*, 786 F.3d at 251.

5. The OCC's Proposal Conflicts with Principles of Federalism

Finally, even if the Proposed Rule were a plausible interpretation of the statutory scheme, the proposal would fail for lack of sufficient indication that Congress intended to preempt state law. The Supreme Court has held that, unless Congress has chosen to “occupy the legislative field,” agencies must begin with “the assumption that the historic police powers of the States are not to be superseded by [federal law] unless that was the clear and manifest purpose of Congress.”⁵⁵ The presumption against preemption “applies with particular force when Congress has legislated in a field traditionally occupied by the States. . . . Thus, when the text of a preemption clause is susceptible of more than one plausible reading, courts ordinarily accept the reading that disfavors preemption.”⁵⁶

Congress has specifically affirmed that the powers granted to National Banks “do[] *not* occupy the field in any area of State law.”⁵⁷ And there is no question that consumer protection laws, like usury caps, are among those historic police powers held by the States.⁵⁸ Accordingly, the strong presumption against preemption applies to the Proposed Rule. Even if the agency’s interpretation of sections 85 & 1463(g) were among several reasonable readings, that interpretation must yield to the reasonable non-preemptive interpretation the OCC has previously embraced.⁵⁹

B. The OCC Has Failed to Comply with Procedural and Substantive Requirements Imposed by the Dodd-Frank Act

In the Dodd-Frank Act, Congress imposed new substantive and procedural requirements that the OCC must observe when it seeks to preempt any “State consumer financial law,”⁶⁰ like a state usury cap.⁶¹ The Proposed Rule does not even mention these requirements, let alone how the OCC plans to fulfill them.

⁵⁵ *Altria Grp., Inc. v. Good*, 555 U.S. 70, 76-77 (2008) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

⁵⁶ *Id.* (internal citations and quotation marks omitted).

⁵⁷ 12 U.S.C. § 25b(b)(4) (emphasis added); *accord* 12 U.S.C. § 1465(b).

⁵⁸ *Cf. Altria Grp.*, 555 U.S. at 76–77 (holding that federal tobacco regulations did not preempt state consumer protection law).

⁵⁹ *Id.*

⁶⁰ *See* 12 U.S.C. § 25b(b) (imposing procedural and substantive requirements on OCC’s preemption of state consumer financial law); *see also id.* § 1465(a) (requiring the OCC to make any preemption determination relating to savings associations “in accordance with the laws and legal standards applicable to national banks regarding the preemption of State law,” *i.e.*, those imposed by section 25b).

⁶¹ “The term ‘State consumer financial law’ means a State law that does not directly or indirectly discriminate against national banks and that directly and specifically regulates the manner, content, or terms and conditions of any financial transaction (as may be authorized for national banks to engage in), or any account related thereto, with respect to a consumer.” 12 U.S.C. § 25b(a)(2). State usury caps regulate the terms and conditions of financial transactions with respect to consumers by limiting the rates of interest that may be charged, *see, e.g.*, Cal. Fin. Code §§ 22303, 22304.5 (regulated maximum rates chargeable in California for certain consumer loans), and thus fit squarely in § 25b’s definition of “State consumer financial law.”

In section 25b, Congress imposed the following limitations on OCC preemption determinations:

- Before making a preemption determination, the OCC “shall first consult with the Bureau of Consumer Financial Protection and shall take the views of the Bureau into account”⁶²;
- The OCC shall make such determinations on a “case-by-case basis” in which the Comptroller must determine “the impact of a particular State consumer financial law on [a] national bank that is subject to that law”⁶³;
- The NBA preempts State consumer financial laws *only* when the state law “prevents or significantly interferes with the exercise by the national bank of its powers” as described by the Supreme Court in *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25 (1996)⁶⁴; and
- “[T]he OCC may not deem preempted a provision of a state consumer financial law ‘unless substantial evidence, made on the record of the proceeding, supports the specific finding regarding the preemption of such provision in accordance with [*Barnett Bank*].’”⁶⁵

The agency has failed to abide by these procedural and substantive requirements.⁶⁶

Procedurally, the Proposed Rule ignores the consultation requirement, never mentioning whether the agency has completed or plans to complete the required consultation with the Consumer Financial Protection Bureau.

The Proposed Rule likewise shows no signs of the required “case-by-case” consideration of a state law’s impact on a National Bank.⁶⁷ It never describes the OCC’s consideration of the impact a particular state’s usury cap may have on a National Bank. The closest it comes is to describe the OCC’s hypothetical concern that “a bank’s . . . authority to assign a loan may be unduly curtailed” if state usury laws bind the intended assignee.⁶⁸ Notably, the Proposed Rule

⁶² *Id.* § 25b(b)(3)(B).

⁶³ *Id.* § 25b(b)(1)(B) & (3)(A).

⁶⁴ *Id.* § 25b(b)(1)(B); *see also Lusnak*, 883 F.3d at 1191-92.

⁶⁵ *Lusnak*, 883 F.3d at 1194 (quoting 12 U.S.C. § 25b(c)).

⁶⁶ Section 25b(f) provides that “[n]o provision of title 62 of the Revised Statutes 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 . . . where the bank is located[.]” This carve-out does not apply to the present rulemaking. As discussed above, the OCC’s proposal is not a product of “authority conferred by section 85.” Section 85 permits only National Banks to charge interest in excess of state-law caps otherwise applicable in states where they do business, and section 25b(f)’s preservation of authority drives home that key point: It too notes *only* “the charging of interest by a national bank.” Moreover, the OCC’s proposal relies on a number of authorities *not* granted by section 85. *See, e.g.*, Proposed Rule at 64,230 (citing 12 U.S.C. §§ 24, 371, 1464). Accordingly, section 25b(f)’s limited exemption for “authority conferred by section 85” is inapplicable.

⁶⁷ 12 U.S.C. § 25b(3).

⁶⁸ Proposed Rule at 64,231.

does not explain the provenance or relevance of this “unduly curtailed” standard, or address the fact that National Banks can sell debts to other National Banks.

Even if the “authority to assign a loan” could be “unduly curtailed” by usury laws applicable to the assignee, whether the OCC’s hypothetical⁶⁹ is borne out would necessarily depend on the specifics of the state usury cap at issue—*e.g.*, what rates are permissible? which entities are subject to the cap? The answers to these questions will change whether and how a state usury cap will affect the assignees of loans issued by National Banks. That is why § 25b calls for a “case-by-case” consideration of “the impact of a particular State consumer financial law.”⁷⁰ But the Proposed Rule fails to specify a *single* state usury regime the agency considered, and the OCC has neglected this important procedural requirement.

Substantively, the OCC may not preempt state law without a finding that “the State consumer financial law prevents or significantly interferes with the exercise by the national bank of its powers,” and that finding must be supported “by substantial evidence, made on the record[.]”⁷¹ The OCC has not met these substantive bars either, and its Proposed Rule indicates no intention to do so.

Rather than ground its proposal in identifiable and significant interference with National Bank powers, the OCC speculates that the *Madden* decision has caused “uncertainty” in some secondary credit markets.⁷² That is not enough to sustain the agency’s proposal.⁷³ “As Congress provided in Dodd–Frank, the operative question is whether [state consumer protection law] *prevents* [a bank] from exercising its national bank powers or *significantly interferes* with [its] ability to do so. Minor interference with federal objectives is not enough.”⁷⁴ The OCC appears to take the position that a state law that impacts or inconveniences a National Bank in any way is preempted, but that is not the standard set forth by the Dodd-Frank Act.

Moreover, the OCC has indicated no plan to adduce and evaluate the “substantial evidence, made on the record” that is required to preempt state law.⁷⁵ In fact, it has not identified *any* evidence that a particular state usury law as applied to non-banks prevents or

⁶⁹ As noted above, this conjecture itself is dubious because state “usury laws might decrease the amount a national bank could charge for its consumer debt in certain states,” but a mere discount on the sale of debt would not amount to significant interference with the power to assign. *Madden*, 786 F.3d at 251.

⁷⁰ 12 U.S.C. § 25b(b)(3).

⁷¹ *Id.* § 25b(b)(1)(B) & (c).

⁷² Proposed Rule at 64,231 (“[A] recent decision from the United States Court of Appeals for the Second Circuit has created uncertainty regarding the ongoing validity of the interest term determined under section 85 after a national bank assigns a loan.”).

⁷³ In fact, the Court in *Madden* left *no ambiguity* as to its understanding of NBA preemption and its proper application: “No other mechanism appears on these facts by which applying state usury laws to the third-party debt buyers would significantly interfere with either national bank’s ability to exercise its powers under the NBA. Rather, such application would limit [] only activities of the third party which are otherwise subject to state control, and which are not protected by federal banking law or subject to OCC oversight.” *Madden*, 786 F.3d at 251 (internal citations and quotation marks omitted).

⁷⁴ *Lusnak*, 883 F.3d at 1194 (emphasis in original) (internal citation omitted).

⁷⁵ 12 U.S.C. § 25b(c).

significantly interferes with a National Bank’s exercise of its powers. And tellingly, the FDIC’s parallel proposal notes there is no such evidence: “The FDIC is not aware of any widespread or significant negative effects on credit availability or securitization markets having occurred to this point as a result of the *Madden* decision.”⁷⁶

Like all federal agencies, the OCC is bound to act in accordance with the procedural and substantive requirements Congress has set forth. It has not done so.

III. The Proposed Rule Violates the Administrative Procedure Act

The Proposed Rule is not only contrary to Congress’ statutory scheme set forth in the NBA and the Dodd-Frank Act, it also violates the Administrative Procedure Act, 5 U.S.C. §§ 550 *et seq.* (the “APA”), in multiple ways. The APA requires “reasoned decision making,” wherein the grounds for agency action must be “logical and rational.”⁷⁷ The APA embodies a “basic presumption of judicial review,” through which reviewing courts set aside agency action that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”⁷⁸ The OCC’s attempt to regulate non-National Bank entities is in excess of its statutory authority, and its proposal to allow non-National Bank entities to charge interest in excess of state usury laws is arbitrary and capricious, all in violation of the APA.

A. The Lack of Statutory Authority for the Proposed Rule Renders It Unlawful Under the APA

The APA provides that an agency action is unlawful when it is undertaken “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right” or “without observance of procedure required by law.”⁷⁹ As discussed above, the OCC lacks the authority to issue the Proposed Rule under any provision of the NBA, and the OCC has not even attempted to comply with the requirements of the Dodd-Frank Act. The Proposed Rule thus violates Section 706(2)(C) of the APA.⁸⁰

B. The Proposed Rule Is Arbitrary and Capricious

In addition to being unlawful for lacking statutory authority, the OCC’s Proposed Rule is arbitrary and capricious because the OCC (1) relies on factors which Congress has not intended it to consider, (2) fails to consider rent-a-bank schemes that the Proposed Rule would facilitate,

⁷⁶ FDIC Proposed Rule, 84 Fed. Reg. at 66,850.

⁷⁷ *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 374 (1998).

⁷⁸ *Dep’t of Commerce v. New York*, 139 S. Ct. 2551, 2567 (2019) (citing 5 U.S.C. § 706(2)(A)).

⁷⁹ 5 U.S.C. § 706(2)(C).

⁸⁰ *See Haitian Ctrs. Council, Inc. v. Sale*, 823 F. Supp. 1028, 1047-48 (E.D.N.Y. 1993) (Court held that Sections 207 and 208 of the Refugee Act of 1980 established exclusive mechanisms for determining the definition of “refugee” and restricted the Attorney General’s authority to circumvent this system. Haitian refugees were detained and subject to “extra-statutory” screening not contemplated in Section 207 and 208. The Court found that Sections 207 and 208 did not grant the Attorney General authority to conduct these “extra-statutory” screenings, and thus the Government’s action violated Section 706(2)(C) of the APA); *see also FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125, (2000) (“Regardless of how serious the problem an administrative agency seeks to address, however, it may not exercise its authority ‘in a manner that is inconsistent with the administrative structure that Congress enacted into law.’”)

and (3) fails to support its proposal with any factual findings, and its conclusion runs *counter* to the evidence before similar agencies, such as the FDIC.⁸¹

1. **Congress Did Not Intend for the OCC to Consider Non-Banks In Any Proposed Rulemaking**

The best evidence that Congress did not intend for the OCC to extend NBA preemption to non-National Bank entities is that Congress itself weighed this possibility and declined to allow this conduct, reasonably so. As discussed above, in 2018 Congress declined to enact a law that would accomplish legislatively what the OCC seeks to accomplish administratively. Therefore, Congress has already “directly spoken to the precise question at issue” and rejected attempts to extend NBA preemption to entities other than National Banks.⁸² The OCC’s disregard of Congress renders the Proposed Rule arbitrary and capricious.⁸³

2. **The OCC Failed to Consider that Its Proposed Rule Would Facilitate Predatory Rent-A-Bank Schemes**

In attempting to justify the need for promulgating the Proposed Rule, the OCC only considers the hypothetical inability of National Banks to *assign* their loans to third parties if said third parties are subject to state usury laws.⁸⁴ The OCC posits, without support, that the U.S. credit markets depend on the expansion of NBA preemption to non-banks, but the OCC fails to consider that the primary benefit of this proposed regime will inure to those non-National Bank entities which seek to “rent” (or, in this case, “buy”) National Bank status in order to engage in the business of lending in excess of state usury laws.⁸⁵ The OCC has not addressed, even summarily, how the Proposed Rule, if adopted, will serve to incentivize and sanction predatory rent-a-bank schemes. This failure to consider the substantial negative consequences this rule would have on consumer financial protection across the country renders the OCC’s Proposed Rule arbitrary and capricious.

First, the OCC suggests that “a bank’s well-established authority to assign a loan may be unduly curtailed if the bank cannot be certain that interest permissible prior to the assignment will remain permissible afterwards.”⁸⁶ This proposition is not supported by any consideration of whether loan assignments have *in fact* been curtailed, and if so, to what extent. The OCC’s “conclusory statements do not suffice to explain its decision.”⁸⁷

⁸¹ *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

⁸² *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2124-25 (2016).

⁸³ See *Grace v. Whitaker*, 344 F. Supp. 3d 96, 125 (D.C. Cir. 2018) (INS new rule concerning “credible fear” determinations was arbitrary and capricious because there was no “legal basis for an effective categorical ban on domestic violence and gang-related claims.”)

⁸⁴ See Proposed Rule at 64,230.

⁸⁵ “[A]gency action is lawful only if it rests on a consideration of the relevant factors and must be invalidated if the agency entirely failed to consider an important aspect of the problem.” *Motor Vehicle Mfrs.*, 463 U.S. at 43 (internal citations omitted).

⁸⁶ Proposed Rule at 64,231.

⁸⁷ *Encino Motorcars*, 136 S. Ct. at 2127.

Second, the OCC's failure to consider how the Proposed Rule invites rent-a-bank schemes is arbitrary and capricious considering that the OCC explicitly admits that it is *aware* of the problem. The final sentence of the Summary of the Proposed Rule recognizes the "true lender" issue but inexplicably dismisses the matter as irrelevant to the OCC's current rulemaking.⁸⁸ The OCC's tacit admission that the Proposed Rule implicates "true lender" issues indicates a materially critical factor that the OCC must consider. The OCC ignores the consumer harm that is all but sure to ensue if rent-a-bank schemes are allowed and encouraged, and proceeds arbitrarily and capriciously from a one-sided and partial perspective.⁸⁹

3. The OCC Fails to Offer Any Evidence to Support the Dramatic Expansion of NBA Preemption

Finally, the Proposed Rule is arbitrary and capricious because the OCC fails to set forth *any* factual findings or any reasoned analysis supporting its decision to extend NBA preemption to *all* non-bank entities that purchase loans from National Banks. Under the APA, the OCC "must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made."⁹⁰ That requirement is satisfied when the agency's explanation is clear enough that its "path may reasonably be discerned."⁹¹ But where an agency fails to provide a sufficiently minimal level of analysis, its action is arbitrary and capricious and cannot carry the force of law.⁹²

The Proposed Rule contains no factual findings. Instead, the OCC presents a doomsday scenario faced by the banking industry presumably caused by the *Madden* decision. The OCC speculates that a National Bank's ability to assign a loan "may be curtailed" if a subsequent purchaser cannot charge the same interest as the National Bank.⁹³ The OCC also concludes, without support, that a non-National Bank assignee's inability to escape the application of state usury laws somehow would "limit the bank's authority" to assign loans.⁹⁴ Then, the OCC further concludes that maintaining permissible interest rates following assignment, regardless of the buyer, is necessary to facilitate a National Bank's ability to operate across state lines.⁹⁵ The OCC suggests, without support, that the entire interstate banking industry hinges on non-banks' ability to avoid state usury laws. All of these assertions are both unsupported and *unsubmittable*. As discussed above, the OCC testified to Congress last month that credit markets are functioning smoothly; the FDIC acknowledges in its similar proposal that it is "not aware of any widespread

⁸⁸ See Proposed Rule at 64,232.

⁸⁹ See *Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1198 (9th Cir. 2008) (agency cannot "put a thumb on the scale" by undervaluing key effects and overvaluing others); *Water Quality Ins. Syndicate v. United States*, 225 F. Supp. 3d 41, 69 (D.D.C. 2016) (invalidating agency decision based on "cherry-pick[ed] evidence"); *accord Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015) (agency must weigh "the advantages and the disadvantages" of its regulatory decisions).

⁹⁰ *Motor Vehicle Mfrs.*, 463 U.S. at 43.

⁹¹ *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 286 (1974).

⁹² See 5 U.S.C. § 706(2)(A); *Motor Vehicle Mfrs.*, 463 U.S. at 42-43; *Encino Motorcars*, 136 S. Ct. at 2125.

⁹³ See Proposed Rule at 64,231.

⁹⁴ *Id.*

⁹⁵ *Id.*

or significant negative effects on credit availability or securitization markets having occurred to this point as a result of the *Madden* decision”;⁹⁶ and National Banks are reaping record profits from credit card lending. As the Supreme Court has repeatedly affirmed, an agency’s failure to include a rational connection between the data and the agency decision is arbitrary and capricious.⁹⁷ Here, the OCC has presented no data to support its conjecture and speculation, let alone a *connection* between data and its decision.

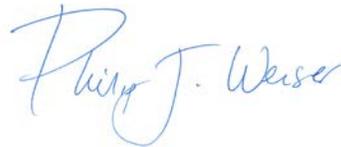
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As the very first Comptroller advised in an 1863 letter: “Splendid financiering is not legitimate banking, and splendid financiers in banking are generally either humbugs or rascals.”⁹⁸ The Proposed Rule would sanction precisely the type of “splendid financiering” condemned by the OCC over one hundred years ago. The OCC should withdraw the Proposed Rule in its entirety.

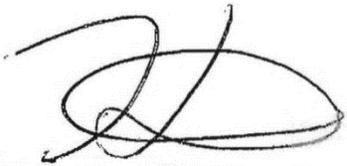
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⁹⁶ See FDIC Proposed Rule at 66,850.

⁹⁷ *Dep't of Commerce*, 139 S. Ct. at 2569.

⁹⁸ Hugh McCulloch, Comptroller of the Currency, *Advice to Bankers of 1863* (Dec. 1863) available at <https://www.occ.treas.gov/about/who-we-are/history/hugh-mcculloch-first-comptroller/comptroller-mccullochs-advice.pdf>.



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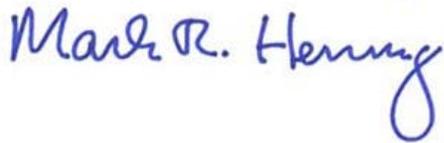
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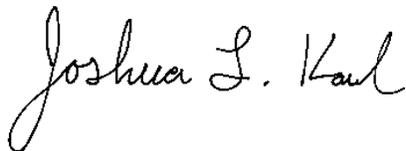
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