Comments of

National Consumer Law Center (on behalf of its low-income clients)

Center for Responsible Lending

Student Borrower Protection Center

on

Request for Information on Bank-Fintech Arrangements Involving Banking Products and Services Distributed to Consumers and Businesses

to

Department of the Treasury

Office of the Comptroller of the Currency

[Docket No. OCC–2024–0014]

Federal Reserve System

[Docket No. OP–1836]

Federal Deposit Insurance Corporation

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Table of Contents

Introduction and Executive Summary

The National Consumer Law Center, on behalf of its low-income clients, the Center for Responsible Lending and the Student Borrower Protection Center submit these comments to the Department of the Treasury, Office of the Comptroller of the Currency (OCC), Federal Reserve System, and Federal Deposit Insurance Corp. (FDIC) (collectively, "bank regulators") on the Request for Information on Bank-Fintech Arrangements Involving Banking Products and Services Distributed to Consumers and Businesses.

These comments focus on bank-fintech partnerships in the lending area[1] and the significant risks to consumer protections that those partnerships often create. Experience has shown that both fintechs and their promoters pride themselves on pushing the legal and regulatory envelope. In doing so, we also note a relationship between their increased consumer-protection, risk-taking activity and a broader culture of risk that leads to other safety and soundness problems at those same banking institutions. Because our consumer protection laws are intended to be applied liberally, it is imperative that prudential regulators remind banks that they act at their own peril by enabling or aligning themselves with consumer protection evasions.

Throughout, this comment emphasizes these general areas of consumer protection risk created by bank-fintech lending partnerships:

- The risks created by partnering with fintechs on products that claim to be outside of consumer protection law, including fintech payday advance apps and income share agreements;
- The risks of helping nonbank fintechs evade consumer protection laws, especially usury laws, by exploiting the bank charter; and
- The risks of high-cost lending.

We describe three types of products offered through bank-fintech partnerships that pose concerns.

First, we discuss the role of banks in the growing area of fintech payday advance apps, sometimes misleadingly called "earned wage access" products. These advances typically deny being loans but exceed 300% APR, disguise costs, lead to a cycle of reborrowing, increase overdraft fees, and leave consumers with less liquidity, not more. Banks play various roles in these products. Evolve, and possibly other banks, is helping to disguise loans as overdrafts on fake bank accounts. Banks help to collect finance charges disguised as "tips" and inflated expedite fees. Banks are also starting to originate credit for payday advance apps, which raises the specter of a return to the usury evasions of rent-a-bank payday lending of decades ago.

Second, we highlight high-cost rent-a-bank lending by fintechs offering installment loans. A small group of rogue banks is partnering with predatory nonbank lenders by originating loans at 100% to 200% APR that the nonbanks cannot make directly. These partnerships pose a wide variety of risks, discussed below.

Third, we discuss the risks of income share agreements. These products, too, pose risks of deceptive practices, violation of the law when they claim not to be loans, and rent-a-bank evasion of usury laws.

Banks engaged in high-cost rent-a-bank schemes, regardless of the type of loan, have a high risk of being found not to be the true lender. When the bank only plays a minor supporting role

[1] The National Consumer Law Center is filing other comments that describe risks of bank-fintech partnerships that engaging in banking, deposits and payments.

in a product designed and run by a nonbank fintech, as with "banking-as-a-service," the caselaw is clear that the bank is not the true lender. When banks are not the true lender, they expose themselves to liability for facilitating violations of state usury laws and directly violating the Racketeering Influenced and Corrupt Organizations Act.

Bank-fintech partnerships may also be ignoring and risk violating state laws beyond usury laws. State-chartered banks that do not have branches in other states or do not issue products from those branches are not entitled to the same breadth of preemption that national banks and out-of-state branches of state-chartered banks receive. There is a high risk that the bank is violating state consumer protection laws other than interest rate limits.

High-cost loans issued through bank-fintech partnerships pose high credit risks and default rates that violate principles of responsible lending and prudent underwriting. Charge-offs over 50 percent would not be tolerated in traditional bank lending and should not be tolerated in bank-fintech partnerships.

Bank-fintech partnerships, especially those involving high-cost loans or deceptive products, also pose a high risk of consumer harm and violation of consumer protection and other laws. These products pose high risks of unfair, deceptive or abusive practices and of violating laws governing debt collection, credit reporting, fair lending, military lending, privacy and data security, know-your-customer, and community reinvestment requirements.

Accordingly, we believe that the bank regulators must end bank-fintech partnerships that engage in predatory lending, evade the law and pose a high risk of unfair, deceptive or abusive practices and violations of consumer protection laws. Regulators should not permit banks to help fintechs evade the law or offer products that pose significant consumer harm. Banks that do so present significant safety and soundness risks.

We also urge the bank regulators to directly examine the fintech partners of banks in high-risk areas. Only direct examination of the entities that are primarily responsible for designing and running these lending programs will enable bank regulators to fully identify and address unscrupulous practices.

1. Banks taking consumer protection risks may engage in other risky conduct that reveals broader safety and soundness concerns.

These comments focus on the consumer protection risks of bank-fintech partnerships. But in our experience, it is not unusual to see a cluster of problematic activity at the same bank. Banks that are willing to engage with fintechs in ways that take consumer protection risks may be likely to take other undue risks.

Thus, regulators should use significant consumer risks or violations as an indication of a high-risk culture that merits closer regulator attention. Bank-fintech partnerships that pose high consumer risks – such as high-cost lending – should be deemed to involve "critical activities" that are higher risk and thus require closer scrutiny, as we discussed in our earlier comments on the Proposed Interagency Guidance on Third-Party Relationships: Risk Management.[2]

For example, very few banks are willing to originate loans that exceed 100% APR, whether directly or through fintechs. Likewise, few banks partner with predatory nonbank lenders to help

[2] Comments of NCLC et al. to Board of Governors of FRB, OCC and FDIC on Proposed Interagency Guidance on Third-Party Relationships: Risk Management (Oct. 18, 2021), https://www.nclc.org/resources/group-comments-to-bank-regulators-on-third-party-risk-management-guidance-urging-an-end-to-rent-a-bank-schemes/.

them evade state interest rate limits. Both sets of activities pose significant risks, as discussed in these comments. Banks that have such a high risk tolerance are likely to be taking on other risks that could lead to other types of legal violations or other safety and soundness risks.

Similarly, most banks that offer credit, whether directly or through partners, do so directly, in compliance with the Truth in Lending Act and other laws. But as discussed below, some banks appear to be joining with fintechs to offer cash advances through manipulative approaches that deny that the advances are loans or are covered by TILA or other lending laws. While the legality of these arrangements has yet to be decided, banks that take the risk that the products are illegal, or that are willing to help offer products outside of consumer protection laws, are engaged in risky activity and deserve more intensive supervision.

We offer these examples of how consumer protection issues are a signal, or canary, of a culture of broader risky conduct at a bank.

First Bank of Delaware. In one particularly extreme example, First Bank of Delaware collapsed. For years, consumers highlighted that the bank was facilitating rent-a-bank payday loans.[3] The bank was also caught misleading subprime credit card users.[4] The bank was initially forced to close its consumer lending unit because of inadequate compliance monitoring and faulty board oversight.[5] Ultimately, the State of Delaware terminated the bank's charter and the FDIC terminated its deposit insurance, along with imposing steep monetary and other repercussions, as a result of violations of the Bank Secrecy Act (BSA) and anti-money laundering (AML) laws related to processing payments for companies engaged in defrauding consumers.[6]

Blue Ridge Bank. More recently, consumer advocates criticized Blue Ridge Bank for its partnership with MentorWorks Education Capital to offer income share agreements (ISAs).[7] Among other problems, the companies denied that ISAs are loans and entered a questionable market that poses high fair lending risks and a high risk of deceptive conduct and harm to consumers. The CFPB later clarified that ISAs are loans and took a number of enforcement actions against ISA providers.[8] Blue Ridge Bank, meanwhile, faced regulatory scrutiny and

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[3] *See* Jean Ann Fox, Consumer Federation of America, Unsafe and Unsound: Payday Lenders Hide Behind FDIC Bank Charters to Peddle Usury 17–20 (Mar. 30, 2004), https://consumerfed.org/pdfs/pdlrentabankreport.pdf.

[4] *See* Delaware Business Blog, FDIC to FIRST BANK OF DELAWARE, "Cease and Desist" (Dec. 21, 2008).

[5] *See* American Banker, Delaware Bank Ordered to Close Lending Unit (Dec. 10, 2008), https://www.americanbanker.com/news/delaware-bank-ordered-to-close-lending-unit.

[6] *See* Andy Peters, American Banker, First Bank of Delaware to Cease Operations (May 7, 2012), https://www.americanbanker.com/news/first-bank-of-delaware-to-cease-operations; Sean McLernon, Law350, First Bank Of Delaware To Pay $16M To End DOJ Fraud Claims (Nov. 19, 2012), https://www.law360.com/articles/395168/first-bank-of-delaware-to-pay-16m-to-end-doj-fraud-claims.

[7] *See* Letter from Student Borrower Protection Center et al. to Hon. Blake Paulson, Acting Comptroller, Office of the Comptroller of the Currency (Apr. 20, 2021), https://www.nclc.org/resources/group-letter-to-the-occ-regarding-the-partnership-between-blue-ridge-bank-and-mentorworks/.

[8] *See, e.g.,* CFPB, Press Release, CFPB Takes Action Against Student Lender for Misleading Borrowers about Income Share Agreements (Sept. 7, 2021), https://www.consumerfinance.gov/about-us/newsroom/cfpb-takes-action-against-student-lender-for-misleading-borrowers-about-income-share-agreements/; CFPB, Press Release, CFPB and 11 States Order Prehired to Provide Students More than $30 Million in Relief for Illegal Student Lending Practices (Nov. 20, 2023), https://www.consumerfinance.gov/about-us/newsroom/cfpb-and-11-states-order-prehired-to-provide-students-more-than-30-million-in-relief-for-illegal-student-lending-practices/.

eventually enforcement actions for its lax anti-money-laundering program and oversight of fintech partners.[9]

Evolve Bank & Trust. In the most recent example, Evolve Bank & Trust is involved in the catastrophic collapse of Synapse Financial Technologies with the resulting disappearance of millions of dollars from consumer and small business accounts and account freezes for the money that remains, causing serious consumer pain.[10] Earlier, Evolve entered into a consent order with the U.S. Department of Justice over a pattern of discriminating on the basis of race, sex, and national origin in the pricing of residential mortgage loans, in violation of the Fair Housing Act ("FHA") and the Equal Credit Opportunity Act ("ECOA").[11] Separate from the Synapse bankruptcy, Evolve Bank faced an enforcement action from the Federal Reserve Board for deficiencies in the bank's anti-money laundering, risk management, and consumer compliance programs.[12]

As discussed below, Evolve has now started to offer fake bank accounts to help the fintech Dave evade lending laws. Evolve also issued deposit accounts for the "tips"-based payday lending platform Solo Funds, which has faced several state and federal enforcement actions, and currently does so for the disguised payday advance app EarnIn.

Pathward Bank (fka MetaBank). Pathward also appears to be embarking on helping fintech cash advance apps disguise their loans as overdrafts, as discussed below. Pathward has a history of enforcement actions and consumer complaints arising out of its fintech and prepaid card partnerships involving the offering of payday loans,[13] helping payday lender prepaid cards

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[9] *See* Polo Rocha, OCC requires Blue Ridge Bank to improve monitoring of fintech partners, American Banker (Sept. 1, 2022); Catherine Leffert, Blue Ridge Bank begins offboarding at least a dozen fintech partners, American Banker (Nov. 17, 2023); Gabrielle Saulsbery, "Troubled" Blue Ridge Bank enters consent order with OCC, BankingDive (Jan. 29, 2024), https://www.bankingdive.com/news/troubled-blue-ridge-bank-enters-consent-order-occ/705871/.

[10] *See, e.g.,* Mary Ann Azevedo, TechCrunch, Fintech Synapse, backed by a16z, has collapsed, and 10M consumers could be hurt (May 25, 2024).

[11] Consent Order, United States v. Evolve Bank & Trust, No. 2:22-cv-02667-SHL-tmp (W.D. Tenn. Oct. 17, 2022), https://www.justice.gov/media/1254071/dl.

[12] Federal Reserve Board, Press Release, Federal Reserve Board issues an enforcement action against Evolve Bancorp, Inc. and Evolve Bank & Trust for deficiencies in the bank's anti-money laundering, risk management, and consumer compliance programs (June 14, 2024), https://www.federalreserve.gov/newsevents/pressreleases/enforcement20240614a.htm.

[13] NCLC, Press Release, NCLC Applauds End of 650% MetaBank Prepaid Card Payday Loan (Oct. 14, 2010), https://www.nclc.org/nclc-applauds-end-of-650-metabank-prepaid-card-payday-loan/ (describing disclosure by the bank that it would shut down its lending partnership after the Office of Thrift Supervision "determined that the Bank engaged in unfair or deceptive acts or practices" in connection with the iAdvance program); Order to Cease and Desist, In re MetaBank, Order No. CN 11-25 (Office of Thrift Supervision July 15, 2011), https://www.occ.gov/static/ots/enforcement/97744.pdf (OTS 2011 MetaBank Order).

charge overdraft fees (even after rules prohibiting them),[14] and unlawful seizure of protected funds for debt collectors.[15] Pathward was also cited for failing to develop a system of internal controls to assure ongoing compliance with Bank Secrecy Act and Anti Money Laundering regulations.[16]

We certainly believe that bank-fintech partnerships that create consumer risks bear close attention on their own merits. In addition, when regulators become aware of partnerships that are pose those risks – whether through complaints by consumer advocates or otherwise – they should consider whether they point to a broad culture of risky activity even if the activity is not clearly unlawful.

2. Banks that help fintechs evade consumer protection laws engage in risky conduct.

Regulators should prevent banks from helping fintechs to evade consumer protection laws. Fintechs are often pushing the envelope, coming up with creative arguments about why they fall outside of consumer protection laws or offering products that pose serious risks to consumers. Sometimes it takes a while for the law to address a new practice specifically through caselaw, enforcement actions, or regulatory updates. But regulators should be vigilant in enforcing consumer protection laws against evasions. The law or market developments will usually catch up eventually and force change, and those that engage in risky conduct face the risk of enforcement actions or, at a minimum, disruptions to their business models and revenue streams.

In the last several years, we have seen a new wave of financing products that claim that they are not loans or credit or are otherwise outside of federal and state lending laws. These products are invariably offered by nonbanks, but they sometimes involve partnerships with or other roles for banks.

Below we discuss fintech cash advances and income share agreements. But there are other types of "noncredit" credit, such as home equity investment financing, probate advances, and others, and it is possible that banks could become involved with them.

Regulators should pay close attention any time a bank is involved in helping a fintech offer a product that it claims is outside of the consumer protection laws that would normally apply. Constantly updated regulations are not needed in order to apply basic consumer protection laws

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[14] NCLC, Payday Lender Prepaid Cards: Overdraft and Junk Fees Hit Cash-Strapped Families Coming and Going (July 2015), https://www.nclc.org/resources/report-payday-lender-prepaid-cards/ (describing NetSpend prepaid cards, which were issued by MetaBank); NCLC, Press Release, NetSpend Plans Evasions of CFPB Prepaid Rules to Preserve $80 Million in Overdraft Fees (Oct. 28, 2016), https://www.nclc.org/netspend-plans-evasions-of-cfpb-prepaid-rules-to-preserve-80-million-in-overdraft-fees/; NCLC, Press Release, CFPB Quietly Launches Web Database of Prepaid and Payroll Card Fees and Disclosures but Some Cards with Overdraft Fees are Missing (Oct. 16, 2019), https://www.nclc.org/cfpb-quietly-launches-web-database-of-prepaid-and-payroll-card-fees-and-disclosures-but-some-cards-with-overdraft-fees-are-missing/ (The payday lender ACE Cash Express offers the 'ACE Flare Account by MetaBank' through the prepaid card company NetSpend, but the card may incur up to $100 in overdraft fees a month, which is not allowed under the CFPB's prepaid card rule.").

[15] New York Attorney General, Press Release, Attorney General James Secures More than $700,000 from Pathward Bank for Illegally Freezing Bank Accounts and Turning Over Consumer Funds to Debt Collectors (April 17, 2024), https://ag.ny.gov/press-release/2024/attorney-general-james-secures-more-700000-pathward-bank-illegally-freezing-bank.

[16] OTS 2011 MetaBank Order, *supra.*

to new products that walk and quack like a duck but claim to be a cow. Our consumer protection laws are intended to be applied liberally to protect consumers.

For example, Congress in passing the Truth in Lending Act was aware that "some creditors would attempt to characterize their transactions so as to fall one step outside whatever boundary Congress attempted to establish," and thus Congress "determined to lay the structure of the Act broadly and to entrust its construction to an agency with the necessary experience and resources to monitor its operation."[17] TILA is a remedial statute that courts have long found must be "liberally construed in favor of borrowers."[18] In assessing whether a transaction is subject to TILA and how TILA protections apply, courts can look beyond the form of the transaction as structured to determine its true nature and substance.[19] This substance-over-form approach has been applied repeatedly by courts to look through the purported form of a transaction to determine whether TILA applies.[20]

This broad construction of our consumer protection laws also applies to other statutes, including the Electronic Fund Transfer Act,[21] the Fair Debt Collection Practices Act,[22] the Fair Credit Reporting Act,[23] and the Equal Credit Opportunity Act.[24] Laws against unfair, deceptive and abusive practices also apply even if there is not a law that directly regulates conduct that poses harms to consumers.

Thus, whenever a bank-fintech partnership claims that an activity is outside of federal consumer protection laws, that should be a red flag of risk that draws closer scrutiny. Banks should not be in the business of helping fintechs evade the law, and they take on significant risks when they do so.

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[17] Mourning v. Family Publications Serv., Inc., 411 U.S. 356, 365 (1973).

[18] Curtis v. Propel Property Tax Funding, L.L.C., 915 F.3d 234, 243 (4th Cir. 2019); *accord* Cappuccio v. Prime Capital Funding L.L.C., 649 F.3d 180 (3d Cir. 2011); Rubio v. Capital One Bank, 613 F.3d 1195, 1202 (9th Cir. 2010); Hauk v. JP Morgan Chase Bank USA, 552 F.3d 1114 (9th Cir. 2009); Rand Corp. v. Moua, 559 F.3d 842 (8th Cir. 2009); Bragg v. Bill Heard Chevrolet, Inc., 374 F.3d 1060 (11th Cir. 2004). *See also* National Consumer Law Center, Truth in Lending § 1.5.2.3 n. 214, (11th ed. 2023) ("NCLC, Truth in Lending") (collecting cases).

[19] *See, e.g.,* Williams v. Chartwell Fin. Servs., Ltd., 204 F.3d 748, 753–754 (7th Cir. 2000) (courts look to economic substance of transaction, not its form, to determine whether TILA requirements apply); Adams v. Plaza Fin. Co., 168 F.3d 932 (7th Cir. 1999) (courts must penetrate the outer form to find the inner substance when determining how disclosure requirements apply).

[20] *See* NCLC, Truth in Lending § 2.1.2 (collecting cases).

[21] 15 U.S.C. § 1693(b) ("The primary objective of this subchapter, however, is the provision of individual consumer rights."); *see* Curtis v. Propel Prop. Tax Funding, L.L.C., 915 F.3d 234 (4th Cir. 2019) (citing cases on the broad, liberal construction of the EFTA).

[22] *See, e.g.*, Urbina v. Nat'l Bus. Factors Inc., 979 F.3d 758, 763 (9th Cir. 2020); Manuel v. Merchants & Pro. Bur., Inc., 956 F.3d 822, 826 (5th Cir. 2020); DiNaples v. MRS BPO, L.L.C., 934 F.3d 275, 281 (3d Cir. 2019).

[23] *See, e.g.,* Jones v. Federated Fin. Reserve Corp., 144 F.3d 961, 964 (6th Cir. 1998); Wagner v. TRW, Inc., 139 F.3d 898 (5th Cir. 1998); Guimond v. Trans Union Credit Info. Co., 45 F.3d 1329 (9th Cir. 1995); Moran v. Screening Pros, L.L.C., 943 F.3d 1175, 1186 (9th Cir. 2019).

[24] *See, e.g.,* Bros. v. First Leasing, 724 F.2d 789, 793–794 (9th Cir. 1984); Williams v. AT & T Wireless Servs., Inc., 5 F. Supp. 2d 1142, 1147 (W.D. Wash. 1998).

3. Banks that partner on payday advance apps face risks.

3.1. Some banks are helping fintechs make high-cost cash advance payday loans while claiming they are outside of lending laws.

A highly concerning development is the rise of a new category of payday loans styled as earned wage "access products" or other types of cash advance. While these loans are offered by nonbank companies, increasingly the nonbanks partner with banks, as discussed below. Banks that are involved with these companies take the risk that the products violate lending laws and result in unfair, deceptive and abusive practices, and potentially violate other laws.

Fintech payday advance apps take a variety of forms, including some offered through employer-integrated models and some directly to consumers. Interest is often disguised in a variety of forms such as so-called "tips" or "donations," inflated expedite or other transfer fees, or monthly subscriptions. The "tips" and "donations" evasion is also being used by a peer-to-peer payday lender that has been subject to state and federal enforcement actions.[25]

Most of these products deny being credit, deny that the costs are finance charges, and deny that they are covered by TILA or state credit laws, though some earned wage advances are honestly structured as credit.[26] The CFPB recently proposed to clarify that these paycheck advances are loans and their tips and expedite fees are finance charges under TILA.[27] Thirteen state attorneys general submitted a comment agreeing with the CFPB's analysis.[28] States including California,[29] Connecticut[30] and Maryland[31] are starting to clarify their laws as well. While a few states recently adopted laws declaring that earned wage advances are not credit and are exempt from credit laws, those states are not consumer protection leaders; they allow high-cost payday loans and do not have a strong record of consumer protection.[32]

Payday advance lenders claim that they are not offering credit because they insert "non-recourse" language in their agreements pledging not to use debt collectors or to sue the borrower. But whether or not a lender has "recourse" does not determine whether the product is

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[25] *See* CFPB, Press Release, CFPB Sues SoLo Funds for Deceiving Borrowers and Illegally Extracting Fees (May 17, 2024); NCLC, Press Release, CA, CT, DC Issue Orders Against Fintech Payday Loans that Solicit "Tips" (May 18, 2023) (providing links to enforcement actions); Pennsylvania Attorney General, Press Release, AG Henry Reaches Settlement with California-Based Lender over Alleged Illegal Tip and Donation Scheme, Saving Pennsylvanians Hundreds of Thousands of Dollars (July 2, 2024).

[26] *See* https://getclair.com/ (last visited Oct. 30, 2024); https://www.chime.com/mypay/ (last visited Oct. 30, 2024).

[27] *See* CFPB, Press Release, CFPB Proposes Interpretive Rule to Ensure Workers Know the Costs and Fees of Paycheck Advance Products (July 18, 2024).

[28] *See* Comments of Office of the Attorney General of the Commonwealth of Massachusetts et al. to CFPB re Truth in Lending (Regulation Z); Consumer Credit Offered to Borrowers in Advance of Expected Receipt of Compensation for Work" 12 CFR Part 1026 [Docket No. CFPB-2024-0032] (Aug. 30., 2024).

[29] *Id.*

[30] Connecticut S.B. 1011 (effective Oct. 1, 2023), https://www.cga.ct.gov/2023/ACT/PA/PDF/2023PA-00126-R00SB-01033-PA.PDF.

[31] Maryland Commissioner of Financial Regulation, Industry Advisory Regulatory Guidance on Earned Wage Access Products (August 1, 2023), https://www.labor.maryland.gov/finance/advisories/advisory-ind-earnedwageaccess.pdf.

[32] Candice Wang et al., Center for Responsible Lending, A Loan Shark in Your Pocket: The Perils of Earned Wage Advance at 6 (Oct. 2024).

a loan – for example, reverse mortgages are nonrecourse loans. Moreover, these lenders have recourse via the borrowers payroll or bank account and collect 97% of the time.[33]

Lenders also claim that their "tips," "donations" and other charges are not finance charges because they are voluntary and it is possible to borrow money for free. But free options are slow and inconvenient, and most consumers pay fees.[34] The California Department of Financial Protection and Innovation (DFPI) studied nearly 6 million transactions, and found that companies use:

> "Multiple strategies … to make tips almost as certain as required fees and these charges can be quite costly. These approaches include:
>
> 1) Disabling a service if a borrower does not tip;
> 2) Setting default tips and using other user interface elements to making tipping hard to avoid;
> 3) Making it difficult to set a $0 tip or not advertising that a particular payment is optional; and
> 4) Claiming that tips are used to help other vulnerable consumers or for charitable contributions."[35]

Lenders push "instant" or "fast" advances, but charge borrowers inflated expedite fees up to $8.99 even though instant payment rails cost the lender only about 4.5 cents.[36] Because the market for these payday advances is consumers who want fast cash and do not want to wait until payday, the vast majority pay instant access fees.[37] The fees may increase as the size of the advance increases, just as interest does, the fees for instant payments do not.

Payday advance lenders may also artificially limit advances to $100 per transaction despite the amount of earned wages. Thus, a consumer who wants a $500 advance would have to take out five loans – potentially in the same day -- paying a separate expedite fee each advance.[38]

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[33] *See* Financial Health Network, Earned Wage Access and Direct-to-Consumer Advance Usage Trends at p. 2 (April 2021).

[34] CFPB, Data Spotlight: Developments in the Paycheck Advance Market (July 2024) ("When employers do not cover the cost, nearly all workers paid a fee for expedited access to their funds."); Center for Responsible Lending, Survey Summary of Earned Wage Advance and Cash Advance Apps (Aug. 2023*)* ("CRL EWA Survey") ("Nearly 8 in 10 surveyed EWA users (79%) said they typically pay a fee to receive funds faster, with 72% who reported paying a fee doing so 1 – 2 times a week.").

[35] CA DFPI, Initial Statement of Reasons for the Proposed Adoption of Regulations Under the California Consumer Financial Protection Law and the California Financing Law, California Deferred Deposit Transaction Law, and California Student Loan Servicing Act. PRO 01-21 at 61-62 (Mar. 17, 2023) ("CA DFPI Statement of Reasons").

[36] *See* Comments of NCLC, CRL et al. to the CFPB Regarding Junk Fees Imposed by Providers of Consumer Financial Products or Services (May 2, 2022), https://www.nclc.org/resources/consumer-comments-cfpb-junk-fees-imposed-by-providers-of-consumer-financial-products-or-services/.

[37] CFPB, Data Spotlight: Developments in the Paycheck Advance Market (July 2024) ("When employers do not cover the cost, nearly all workers paid a fee for expedited access to their funds."); Calif. DFPI, 2021 Earned Wage Access Data Findings at 1 (Analysis completed Q1 2023) ("CA DFPI EWA Data") *(*73% of transactions from tip-based companies included a tip); CRL EWA Survey, *supra* ("Nearly 8 in 10 surveyed EWA users (79%) said they typically pay a fee to receive funds faster, with 72% who reported paying a fee doing so 1 – 2 times a week. Tipping was also common with 70% of respondents using MoneyLion, Earnin or Dave leaving tips. Of those who do leave tips, 62% of those surveyed do so most of the time or every time.").

[38] *See* Comments of NCLC and Center for Responsible Lending to CFPB on Truth in Lending (Regulation Z); Consumer Credit Offered to Borrowers in Advance of Expected Receipt of Compensation for Work [Docket No. CFPB-2024-0032] at 23-25 (Aug. 30, 2024) ("NCLC/CRL CFPB EWA Comments") (describing how EarnIn advertises

Apps use dark patterns[39] to make it difficult not to tip. The apps include tips as the default option and require the consumer to take several steps to undo the tip. The apps also send psychological messages that tipping is expected, that the consumer may suffer repercussions if they do not tip, and that the consumer is being stingy and hurting the community if they do not tip.[40] For example, when a consumer tried to take out an advance without tipping, one app required the consumer to suffer repeatedly through **17 messages about why tipping was important and to make 13 additional clicks** to get the advance.[41]

These payday advance apps harm consumers. The apps:

- Are **costly and deceptive**, often averaging **over 300% APR** while disclosing disclose 0% APR or no APR at all.[42] **Most consumers pay fees**, despite claims that the fees are voluntary.[43]

- Lead to a **cycle of debt** even worse than traditional payday loans. Using next week's paycheck to pay this week's expenses creates a shortfall in the next paycheck promoting reborrowing. Data indicate that borrowers frequently take **24 to 36 advances a year and as many as 100** – i.e., once or more every pay period.[44] The advances merely repay the previous advance, adding multiplying fees without supplying new liquidity.

- **Increase overdraft fees**. A recent study found that after consumers started using cash advance apps, overdraft fees increased by an average of 56%.[45] Half of users had zero

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the ability to "Access up to $750/pay period" but obscures the $100/day limit, and how MoneyLion advertises "Get Up To $500. Fast," "in minutes for a fee," put has a $100 max disbursement at time); Reddit, justagirlnamedDee (2023) (review of MoneyLion) ("They charge a fee to get funds right away, and will tell you they'll give a certain amount (say, $250), but you can only take up to $100 at a time. So if you actually need that full 250, your fees triple since you have to take 3 separate advances.").

[39] *See* Federal Trade Commission, Press Release, FTC Report Shows Rise in Sophisticated Dark Patterns Designed to Trick and Trap Consumers (Sept. 15, 2022).

[40] *See* NCLC/CRL CFPB EWA Comments.

[41] Screenshots on file with NCLC.

[42] *See* Lucia Constantine et al., Center for Responsible Lending, Not Free: The Large Hidden Costs of Small-Dollar Loans Made Through Cash Advance Apps at 1 (Apr. 3, 2024) ("CRL, Not Free") (367% average APR); NCLC, Data on Earned Wage Advances and Fintech Payday Loan "Tips" Show High Costs for Low-Wage Workers (Apr. 10, 2023), https://www.nclc.org/resources/data-on-earned-wage-advances-and-fintech-payday-loan-tips-show-high-costs-for-low-wage-workers/; CA DFPI EWA Data, *supra* (334% average APR for tip-based companies and 331% for non-tip companies); CFPB, Data Spotlight: Developments in the Paycheck Advance Market (July 2024) (typical transaction for employer-based program had 109.5% APR).

[43] CFPB, Data Spotlight: Developments in the Paycheck Advance Market (July 2024) (roughly 90% of workers using an employer-based service paid at least one fee); CA DFPI EWA Data, *supra*, at 1 *(*73% of transactions from tip-based companies included a tip); Center for Responsible Lending, Survey Summary of Earned Wage Advance and Cash Advance Apps (Aug. 2023*)* (73% paid an expedite fee; 70% left tips).

[44] CA DFPI EWA Data at 11 (the average number of times a consumer used advances per quarter was nine and ranged from 1 to 25 times per quarter); CFPB, Data Spotlight: Developments in the Paycheck Advance Market (July 2024) (average worker who used employer-based advances had 27 transactions a year); Government Accountability Office, "Products Have Benefits and Risks to Underserved Consumers, and Regulatory Clarity is needed" (March 2023) (on average 26-33 times a year at one direct to consumer provider; 10-24 times a year by users of one employer-sponsored program). *See also* Candice Wang et al, Center for Responsible Lending, A Loan Shark in Your Pocket: The Perils of Earned Wage Advance at 8 (October 2024) ("A Loan Shark In Your Pocket") (one in three users reborrowed within two weeks at least 80% of the time).

[45] CRL, Not Free at 6.

overdrafts in the previous three months, and newly started to overdraft on average 2.3 times, and as many as 35 times, in the next three months.[46]

Banks are involved in these payday advance apps and related products in a number of ways. Banks may, in partnership with the fintech:

- Disguise the advance as an overdraft on a fake deposit account offered principally for the purpose of overdrafting and offering credit, not for holding funds.
- Originate the credit for the nonbank, and potentially help the nonbank evade state interest and fee caps.
- Issue a debit card for receipt of the advances. Fees to transfer the funds from those debit cards to other accounts could in some cases be a form of disguised interest.
- Issue bank accounts designed, offered and serviced by the nonbank, with overdraft fees collected in the form of "tips."[47]
- Hold funds used in connection with payday advance apps.[48]
- Process payments for payday advances.
- Use the bank's mobile app as a way of distributing the advances.
- Offer the fintech's product to the bank's corporate client for that client's employees, *i.e.,* by integrating the advance product into the bank's payroll card.

Two types of arrangements bear particular note.

First, we are very concerned about the use of fake bank accounts to disguise loans. Evolve Bank's role in disguising loans as overdrafts on fake bank accounts, and Pathward bank's potential move in that direction, are discussed in the Section 3.2 below.

Second, the use of banks to originate credit for payday advance apps raises the possibility of a return to rent-a-bank payday loans. Rent-a-bank payday lending first appeared two decades ago, with banks helping to disguise nonbank payday loans so they could evade state rate caps. The arrangements were eventually stopped through a combination of actions by federal bank regulators, state authorities and private litigation.[49]

We are now starting to see banks originate balloon-payment payday advances. Chime is using Bancorp and Stride to originate the MyPay line of credit.[50] Pathward bank is originating employer-based earned wage advances for Clair.[51] In their favor, both products acknowledge

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[46] *Id. See also* A Loan Shark in Your Pocket at 7 (Out of EWA users who experienced overdrafts, 67% saw their overdrafts increase after initial advance use.).

[47] NCLC, Comments to CFPB on Overdraft Lending at Very Large Financial Institutions Comments to the Consumer Financial Protection Bureau regarding 12 CFR 1005 and 12 CFR 1026 Docket No. CFPB-2024-0002 at 59-61 (Apr. 1, 2024).

[48] Evolve Bank holds funds for EarnIn's Tip Yourself Accounts and Tip Jars. *See* https://www.earnin.com/ (footnote 7) (last visited Oct. 11, 2024).

[49] *See* Testimony of Lauren Saunders, National Consumer Law Center on behalf of its low income clients, Before the House Financial Services Committee on Rent-A-Bank Schemes and New Debt Traps: Assessing Efforts to Evade State Consumer Protections and Interest Rate Caps at 5-6 (Feb. 5, 2020).

[50] https://www.chime.com/mypay/ (last visited Oct, 30. 2024).

[51] https://getclair.com/ (last visit Oct. 30. 2024).

that the advances are credit and neither solicits "tips," at least not for these products.[52] It is not clear if these two programs are currently charging fees that would violate state usury laws but for the bank involvement.[53] But as these types of partnerships expand and change, the potential for rent-a-bank payday lending in the form of earned wage advances is clear. A longer discussion of rent-a-bank lending focused on installment loans is in Sections 6 to 11 below.

Other arrangements are risky and warrant close and ongoing scrutiny.

First Evolve Bank,[54] and now Bangor Bank,[55] have issued deposit accounts for the unlicensed and usurious payday loan platform SoLo Funds. Borrowers and peer-to-peer lenders are required to have those accounts in order to borrow or lend. SoLo Funds disguises payday loans up to 500% APR with tips that are virtually required, paid by up to 100% of borrowers who get loans on the platform.[56] SoLo has entered into consent decrees with California, Connecticut, DC and Pennsylvania, [57] and received a cease-and-desist order in Maryland,[58] causing it to stop lending at usurious rates.

Evolve also currently provides accounts for EarnIn,[59] one of the most controversial of the fintech payday advance apps discussed above.

The ways that banks are involved with new forms of payday loans continues to evolve. Even when the banks are not directly facilitating evasions, their relationships with payday advance companies poses risks to banks that align themselves with third parties that may be found to be violating the law, engaging in unfair, deceptive or abusive practices, or engaging in predatory lending. Many of these risks are discussed in Section 10 below.

3.2. Banks are helping fintechs disguise payday loans as overdraft fees on fake bank accounts.

One of the most recent ways in which banks are starting to help nonbank fintechs evade the law involves the use of fake bank accounts to disguise fintech payday loans. These bank accounts are not designed to hold money, and in fact they may never hold a penny. Instead, they are

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[52] Chime solicits tips for its overdraft product. *See* Chime, What are SpotMe® tips? (last visited Oct. 7, 2024).

[53] Chime's MyPay is currently not offered in several states that prohibit high-cost payday loans. *See* Chime, https://www.chime.com/mypay/ ("Is MyPay available only in certain states?") (last visited Oct. 7, 2024) (providing links to terms and conditions that list eligible states, excluding Colorado, Connecticut, Georgia, Hawaii, Illinois, Maine, Maryland, Massachusetts, Minnesota, Montana, Nevada, New Jersey, New Mexico, South Dakota, Vermont, Washington, Wisconsin and Wyoming). Clair is free in some situations and charges an expedite fee in others. That fee might exceed state usury limits in some cases.

[54] *See* https://solofunds.com/wp-content/uploads/2023/11/TOS-11_30_2023.pdf.

[55] *See* https://solofunds.com/ (last visited Oct. 7, 2024) ("Banking services provided by Bangor Savings Bank, Member FDIC.").

[56] *See* NCLC, Press Release, CA, CT, DC Issue Orders Against Fintech Payday Loans that Solicit "Tips" (May 18, 2023), https://www.nclc.org/ca-ct-dc-issue-orders-against-fintech-payday-loans-that-solicit-tips/.

[57] Press Release, CA, CT, DC Issue Orders Against Fintech Payday Loans that Solicit "Tips" (May 18, 2023); Pennsylvania Attorney General, Press Release, AG Henry Reaches Settlement with California-Based Lender over Alleged Illegal Tip and Donation Scheme, Saving Pennsylvanians Hundreds of Thousands of Dollars (July 2, 2024).

[58] Summary Order to Cease and Desist, In re SoloFunds, Inc., Case No. CFR-FY2023-13 (Md. Office of Fin'l Reg. Oct. 24, 2023).

[59] https://www.earnin.com/evolve-bank-and-trust (last visited 10/11/2024).

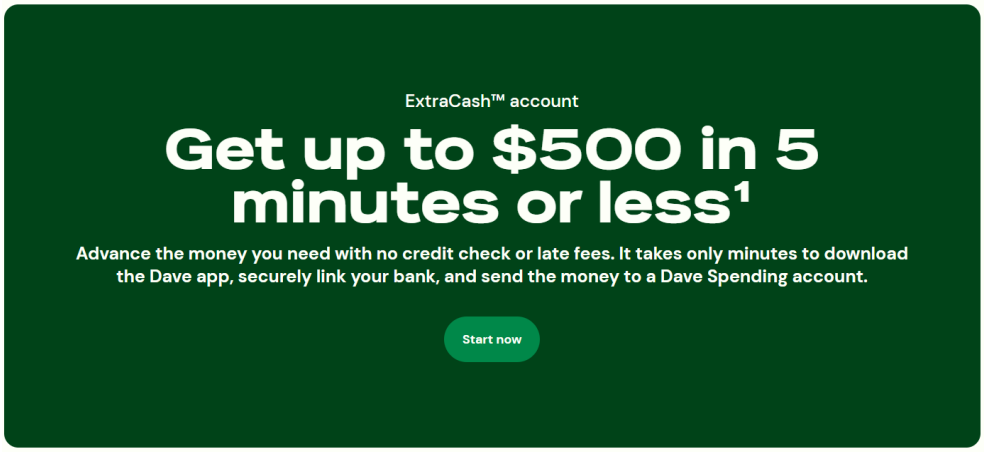
designed to conceal a loan as an overdraft on a deposit account in order to evade the TILA and state usury laws.[60]

Evolve Bank is currently working with the Dave app on this evasion. It appears that MoneyLion may be working with Pathward bank on the same approach.

As noted above, the CFPB recently proposed to clarify that fintech payday advances are credit and their tips and expedite fees are finance charges under the TILA. The next day, Dave put out a statement: "Dave's ExtraCash product is structured as a bank-originated overdraft …. As a result, we believe ExtraCash and our optional fees sit within the overdraft regulatory framework that is distinguished from EWA and paycheck advance products."[61] Pathward Bank appears to be working towards the same evasion. In a filing with the Securities and Exchange Commission on August 6, 2024, MoneyLion stated that it has amended its agreement with Pathward bank "in order to enable the Company to offer overdraft protection in connection with the Program Services [RoarMoney demand deposit accounts and debit cards with Pathward]."[62]

Dave's ExtraCash product is far different, however, from overdraft coverage offered on a real deposit account.

Dave's website advertises "advances," not deposit accounts with overdraft protection:[63]



Dave offers an "interest-free advance between paychecks," with screens showing "You're approved."[64] People are not "approved" in advance for overdraft services.

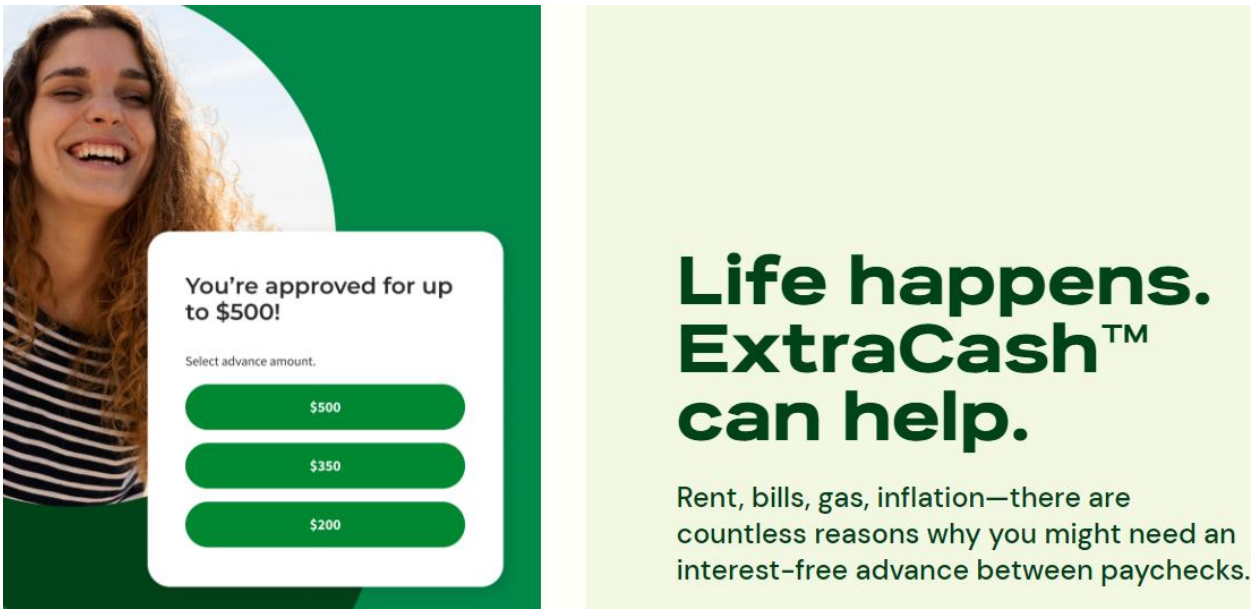
[60] For a longer discussion of how the evasion works, see NCLC/CRL CFPB EWA Comments at 18-23.

[61] Dave, Press Release, Dave Issues Statement Regarding CFPB Proposal (July 18, 2024).

[62] MoneyLion Inc., SEC Form 8-K at 1 (Aug. 6, 2024).

[63] https://dave.com/extra-cash-advances (last visited Oct. 30, 2024).

[64] *Id.*



But the fine print in a footnote states that the advances "are provided as an overdraft, which causes the ExtraCash account to have a negative balance."[65] The ExtraCash account is offered by Evolve Bank.

The footnote links to an agreement for the "Dave ExtraCash Account Deposit Agreement and Disclosures."[66] Previously, the terms stated that "we will also establish a deposit account or omnibus custody account ('Sub-Deposit Account') opened in Evolve's name for your benefit, " and that the two accounts "are considered a single account" and "[t]he existence of the Sub-Deposit Account is *only for internal purposes and to accommodate our business needs,* and will not affect the manner in which you use your ExtraCash Account."[67] However, after that language was pointed out in a public filing,[68] it was removed.

"Overdrafts" are referred to in the agreement as "Advances." Consumers are also given an "Advance Limit" that is "clearly communicated to you via the Mobile App" when consumers request a transfer.

The deposit account is limited to "a maximum balance of up to $500" and need not contain any balance at all.[69] Consumers who actually want to hold deposits through Dave get the separate Dave Checking Account,[70] and consumers are invited to "send the money to a Dave Checking

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[65] *Id.*

[66] Dave ExtraCash Account Deposit Agreement and Disclosures Last Updated October 28, 2024, https://dave.com/extra-cash (last visited Oct. 30, 2024) [October 2024 ExtraCash Agreement]. The previous agreement was Dave ExtraCash Account Deposit Agreement and Disclosures Last Updated August 9, 2024, https://dave.com/extra-cash (last visited Aug. 19, 2024) ("August 2024 ExtraCash Deposit Agreement").

[67] August 2024 ExtraCash Deposit Agreement (under "B. Sub-Deposit Accounts) (emphasis added);

[68] *See* NCLC, CRL & CFA Comments in Support of CFPB's Proposed Interpretive Rule on Earned Wage Advances at 20 (Aug. 30, 2024), https://www.nclc.org/wp-content/uploads/2024/09/CRL.NCLC_.CFA-Joint-Comment-Payday-Advances-Docket-No.-CFPB-2024-0032Appendix-Corrected-9-16-24.pdf [NCLC/CRL CFPB EWA Comments].

[69] October 2024 ExtraCash Agreement.

[70] https://dave.com/checking-account (last visited October 18, 2024).

Account."[71] The ExtraCash Account does not appear to come with any debit card, checks, bill pay, or other mechanism to spend money that might trigger an overdraft, or even to access to overdraft credit. The consumer must have a separately linked account in order to actually access and use the funds.[72]

Transfers of the "overdrafts" carry an optional express fee if the consumer wants the funds transferred instantly to an external bank account rather than waiting for an ACH transfer.[73] The idea of express fees in an overdraft situation is bizarre. True overdrafts instantly cover a pending transaction. They are not loans that are delivered on a faster or slower schedule.

The ExtraCash account, with its limited balance and purpose, is a disguised form of credit. The true substance of these advances is a loan, not an overdraft on a deposit account.[74] The transactions may also violate the EFTA ban on compulsory use of preauthorized electronic fund transfers to repay credit.[75]

Banks that assist nonbank fintechs with this type of evasion run the risk that they are violating the law.

4. A handful of banks partners with predatory lenders to help them evade state interest rate laws.

Most banks do not engage in predatory lending, and do not help predatory lenders attempt to evade the law. We have identified only seven banks that are presently assisting nonbank lenders to make loans over 100% APR and to try to evade state interest rate laws, though there are two other banks worth looking closely at.[76]

Republic Bank and Trust (Kentucky-chartered) is enabling:

- Enova's (which operates payday and installment lender CashNetUSA) NetCredit-branded installment loans at rates up to 99.99% APR (along with Transportation Alliance Bank). Republic also facilitates Enova's rent-a-bank high-cost lines of credit.
- Elevate's Elastic-branded lines of credit at effective APRs of about 100% APR.

FinWise Bank (Utah-chartered) is enabling:

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[71] https://dave.com/extra-cash-advances (last visited Oct. 30, 2024).

[72] *See* https://dave.com/extra-cash-advances (last visited Oct. 18, 2024) ("Where is my ExtraCash™ advance? … You can choose to transfer your ExtraCash™ … to your Dave Checking: Ready in your account in seconds and ready for you to spend with your Dave debit card… To your external debit card … To your external bank account.").

[73] ExtraCash Account Fee Schedule Last Updated October 17, 2024, https://dave.com/extra-cash/fees/8 (last visited Oct. 30, 2024).

[74] For a longer discussion, see NCLC/CRL CFPB EWA Comments at 18-23.

[75] 15 U.S.C. § 1693k. It is well established that overdrafts are credit. *See* NCLC, Comments on CFPB's Proposed Rule Governing Overdraft Lending at Very Large Financial Institutions, Docket No. CFPB-2024-0002, at 34-26 (Apr. 1, 2024) ("NCLC Overdraft Fee Comments") (listing authorities). The Regulation E definition of "credit" is "the right granted by a financial institution to a consumer to defer payment of debt, incur debt and defer its payment, or purchase property or services and defer payment. Reg. E, 12 C.F.R. § 1005.2(f). A negative balance is a debt, and the deposit account agreement gives the right to set-off and collect that debt.

[76] *See* NCLC, High-Cost Rent-a-Bank Loan Watch List (updated Sept. 26, 2024). *See* Section 6.2 below for website cites and more details.

- Opportunity Financial, LLC (OppFi aka OppLoans), which makes installment loans at rates up to 160% APR. (OppFi also uses Capital Community Bank (CC Bank) and First Electronic Bank to enable these loans, as noted below).
- Elevate's Rise-branded installment loans at rates up to 99%-149% APR. (Elevate also uses CC Bank to enable Rise loans, noted below).
- American First Finance's secured and unsecured installment loans for purchases at retailers including furniture, appliances, home improvements, pets, auto and mobile home repair, jewelry and body art at rates up to about 161% APR.

CC Bank (Utah-chartered) is enabling:

- OppFi's installment loans at rates up to 160% APR. (OppFi also uses FinWise Bank and First Electronic Bank to enable these loans).
- Elevate Credit's Rise-branded installment loans at rates up to 99-149% APR.
- Enova's NetCredit-branded installment loans at rates up to 99.99% APR (along with Transportation Alliance Bank).
- Wheels Financial Group, LLC dba LoanMart (under the ChoiceCash brand), which makes auto title loans at rates up to 170% APR.
- CNG Financial, which operates the Check 'no Go payday loan stores and makes installment loans under the Xact brand at APRs of 145% to 193%.
- Integra's installment loans at 159% to 224% APR.
- Installments loans up to 225% APR offered through a variety of payday and online lenders including Lendly, Total Loan Services dba Quickcredit, Simple Fast Loans, and SunUp Financial dba Balance Credit.
- Lines of credit through Propel Holding's MoneyKey at an effective APR of about 200%.[77]

First Electronic Bank (Utah-chartered industrial loan company (ILC)) is enabling:

- Applied Data Finance, dba Personify Financial, which offers installment loans up to 179.99% APR.
- OppFi's installment loans at rates up to 160% APR (along with FinWise Bank and CC Bank).
- Propel Holding's Credit Fresh line of credit at an effective APR of over 200%[78] (also offered through CBW Bank).

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[77] The complex fee and amortization schedule makes calculating an APR difficult. *See* https://www.moneykey.com/line-of-credit-loans-online/cc-flow-rates/ (last visited Oct. 30, 2024). Calculating the APR for each of the first 12 months and then taking the average yields 209% APR. The lack of transparency is another serious problem with high-cost rent-a-bank lines of credit, as discussed below.

[78] The complex fee and amortization schedule makes calculating an APR difficult. *See* https://www.creditfresh.com/line-of-credit/cost-of-credit/ (last visited Oct. 30, 2024). Calculating the APR for each of the first 12 months and then taking the average yields 159%. The lack of transparency is another serious problem with high-cost rent-a-bank lines of credit, as discussed below.

Transportation Alliance Bank (TAB Bank) (Utah-chartered) is or has enabled:

- Duvera Billing Services dba EasyPay Finance, which makes loans at rates up to 188.99% APR through businesses across the country that sell auto repairs, furniture, home appliances, pets, wheels, and tires, among other items.
- Enova's NetCredit-branded installment loans at rates up to 99.99% APR (along with Republic Bank & Trust).
- Integra's installment loans at 149% to 224% APR.
- Snap Finance's installment loans that could reach 150% APR or higher.[79]

CBW Bank (Kansas-chartered) is enabling:

- Propel Holding's Credit Fresh line of credit at an effective APR of about 160% (also offered through First Electronic Bank).

Bank of Orrick (Missouri-Chartered) is enabling:

- Hyphen, LLC dba Helix Financial loans that likely reach 547% APR.

In addition, both Kendall Bank and Lead Bank were posing as fronts for Helix Financial, which has now moved on to Bank of Orrick. Lead Bank also had a partnership with LoanMe, but LoanMe has ceased operation. Kendall Bank and Lead Bank may still be involved in other rent-a-bank schemes we have not identified.

5. Banks that partner with providers of income share agreements face risks.

Income Share Agreements (ISAs) are financing products that require students to pledge a portion of their future income in exchange for money to pay for school. ISAs have been touted by venture capitalists and Silicon Valley as a solution to the student debt crisis, but these products pose serious risks to students and could violate a number of federal and state laws. The ISA business model depends on questionable and possibly illegal conduct. This behavior includes firms' use of deceptive business practices, reliance on disparate impacts that harm students of color, and—most importantly—insistence that ISAs do not need to comply with federal and state consumer protection laws.

Banks that partner with ISA providers engaging in these practices face substantial risks. We highlighted these risks in our 2021 letter to the OCC about Blue Ridge Bank for its partnership with MentorWorks Education Capital.[80] MentorWorks continues to partner with Blue Ridge Bank

[79] TAB Bank's lending partners are listed in Public Disclosure, Community Reinvestment Act Performance Evaluation, Transportation Alliance Bank, Inc., d/b/a TAB Bank Certificate Number: 34781 at 11 (April 13, 2022), https://crapes.fdic.gov/publish/2022/34781_220413.PDF. The interest rates on Snap Finance installment loans are not available on their website, but an email from a consumer attorney on file at NCLC describes a contract with 150% APR.

[80] *See* Letter from Student Borrower Protection Center et al. to Hon. Blake Paulson, Acting Comptroller, Office of the Comptroller of the Currency (Apr. 20, 2021), https://www.nclc.org/wp-content/uploads/2022/08/Letter_MentorWorks_OCC-1.pdf.

and continues to imply that its ISAs are not loans.[81] In addition, FinWise Bank partners with Stride Funding dba Clasp.[82] FinWise Bank is one of the banks making 160% APR or higher rent-a-bank loans in states that prohibit those rates, as discussed in Section 4 above.

ISAs can take years before payments are due and potentially many more for their problems to become apparent. It could be quite some time before regulators begin to hear complaints about problems such as large balloon payments to pay off or refinance an ISA, high payments as income increases, or less relief than anticipated when income drops or the student leaves the workforce to have a family. But these problems are inherent from the beginning and regulators must pay attention to them.

For years, ISA providers have misrepresented to consumers that their products were neither credit nor debt,[83] despite the fact that they meet these legal definitions. At the same time, however, ISA providers have represented that, as student loans, their products are presumptively non-dischargeable in bankruptcy.[84] Starting in 2021, federal and state regulators began entering consent decrees against major ISA providers for these misrepresentations.[85] These cases make clear that, as deferred payments, ISAs are credit products.

Although it should no longer be disputed whether ISAs are credit or debt, some providers continue to evade applicable state and federal laws. ISAs must comply with TILA and state-law equivalents,[86] should include FTC Holder Rule language in their contracts,[87] and—for ISAs used to finance postsecondary education— must meet the restrictions on private education loans

[81] *See* https://mentorworks.com/income-share-agreements-program/ (last visited Oct. 14, 2024) ("Unlike a loan, students do not pay until they find a job and reach the minimum income threshold.").

[82] https://www.clasp.com/nondegree (last visited Oct. 14, 2024).

[83] *See*, *e.g.*, Press Release, Consumer Fin. Prot. Bureau, *CFPB Takes Action Against Student Lender for Misleading Borrowers About Income Share Agreements* (Sept. 7, 2021), https://www.consumerfinance.gov/about-us/newsroom/cfpb-takes-action-against-student-lender-for-misleading-borrowers-about-income-share-agreements/.

[84] Press Release, Cal. Dep't of Fin. Prot. & Innovation, *Lambda School Reaches Settlement with DFPI, Agreeing to End Deceptive Educational Financing Practices* (Apr. 26, 2021), https://dfpi.ca.gov/2021/04/26/lambda-school-reaches-settlement-with-dfpi-agreeing-to-end-deceptive-educational-financing-practices/.

[85] *Id.*; Press Release, Consumer Fin. Prot. Bureau, *CFPB Takes Action Against Student Lender for Misleading Borrowers About Income Share Agreements* (Sept. 7, 2021), https://www.consumerfinance.gov/about-us/newsroom/cfpb-takes-action-against-student-lender-for-misleading-borrowers-about-income-share-agreements/.

[86] Joanna Pearl & Brian Shearer, *Credit by Any Other Name: How Federal Consumer Financial Law Concerns Income Share Agreements* (July 2020), https://protectborrowers.org/wp-content/uploads/2020/07/Pearl.Shearer_Credit-By-Any-Other-Name.pdf; Benjamin Roesch, *Applying State Consumer Finance and Protection Laws to Income Share Agreements* (Aug. 2020), https://protectborrowers.org/wp-content/uploads/2020/08/ISAs-and-State-Law.pdf.

[87] *See*, *e.g.*, Press Release, Fed. Trade Comm'n, *Sollers College to Cancel $3.4 Million in Student Debt to Resolve Charges It Used Deceptive Ads to Lure Prospective Students Into Illegal Contracts* (Oct. 18, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/10/sollers-college-cancel-34-million-student-debt-resolve-charges-it-used-deceptive-ads-lure (discussing school's failure to include required Holder Rule language).

imposed by the Truth in Lending Act.[88] In some jurisdictions, offering ISAs may trigger a requirement to obtain state licensure for consumer lending or servicing,[89] or may run afoul of usury restrictions.[90] Banks that partner with ISA providers face compliance risks when those arrangements attempt to evade important state consumer protections.

ISAs may also violate fair lending laws and civil rights protections. Some ISA underwriting models factor borrowers' choice of study and institution into the terms of the financial product. This has the effect of incorporating disparities on the basis of sex and race, resulting in more expensive products for protected classes.[91] Banking regulators and potential bank partners should carefully scrutinize any ISA provider's underwriting models.

6. Banks engaged in high-cost rent-a-bank schemes have a high risk of being found not to be the true lender.

6.1. The true lender doctrine is widely recognized, posing a significant risk to rent-a-bank schemes.

High-cost lenders use rent-a-bank schemes in an attempt to evade state usury laws. These schemes are premised on the belief that the bank's identification in the loan documents as the originator of the loan, together with nominal approval of credit decisions and underwriting criteria by the bank, and other superficial aspects of the bank's control over the loan program, will enable the lending program to benefit from the bank's ability to export its home state interest rate. However, the ability to export rates vanishes if the bank is found not to be the true lender.

The true lender doctrine is an application of the centuries-old rule that, in an effort to prevent evasions of usury laws, courts will look beyond of the form of the transaction to the substance.[92] At least 49 states and the District of Columbia – in hundreds of cases – have recognized the ability of courts to apply this substance-over-form principle to evasions of usury laws.[93] Courts

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[88] Memorandum from Student Borrower Protection Center to Consumer Financial Protection Bureau et al., *Income Share Agreements and TILA's Ban on Prepayment Penalties* (Mar. 30, 2020), https://protectborrowers.org/wp-content/uploads/2021/03/ISA-Prepayment-Memo.pdf.

[89] *See*, *e.g.*, Press Release, Cal. Dep't of Fin. Prot. & Innovation, *California DFPI Enters Groundbreaking Consent Order with NY-Based Income Share Agreements Servicer* (Aug. 5, 2021), https://dfpi.ca.gov/2021/08/05/california-dfpi-enters-groundbreaking-consent-order-with-ny-based-income-share-agreements-servicer/.

[90] *See* Jen Mishory & Anthony Walsh, *ISA Industry Relies on Age-Old Strategy to Ignore Existing Regulations*, The Century Foundation (Aug. 7, 2020), https://tcf.org/content/commentary/isa-industry-relies-age-old-strategy-ignore-existing-regulations/.

[91] Stephen Hayes & Alexa Milton, *Solving Student Debt or Compounding the Crisis?: Income Share Agreements and Fair Lending Risks* (July 2020), https://protectborrowers.org/wp-content/uploads/2020/07/SBPC_Hayes_Milton_Relman_ISA.pdf.

[92] *See* CashCall, Inc. v. Morrisey, 2014 WL 2404300 (W. Va. May 30, 2014) (quoting *Carper v. Kanawha Banking & Trust Co.*, 207 S.E.2d 897 (W. Va. 1974) (citing *Crim v. Post*, 41 W. Va. 397, 23 S.E. 613 (1895)); BankWest v. Oxendine, 598 S.E.2d 343, 348 (Ga. Ct. App. 2004) (quoting *Pope v. Marshall*, 78 Ga. 635, 640, 4 S.E. 116 (1887)); Scott v. Lloyd, 34 U.S. (9 Pet.) 418 (1835) (The ingenuity of lenders has devised many contrivances by which, under forms sanctioned by law, the [usury] statute may be evaded. . . . [I]f giving this form to the contract will afford a cover which conceals it from judicial investigation, the [usury] statute would become a dead letter. Courts, therefore, perceived the necessity of disregarding the form, and examining into the real nature of the transaction.").

[93] *See* NCLC, Consumer Credit Regulation § 3.9. Wyoming undoubtedly recognizes the substance-over-form doctrine as well as the other 49 states, but a case discussing it has not yet been identified.

have also applied substance-over-form doctrine to prevent evasions of federal usury and lending laws.[94]

For centuries, the U.S. Supreme Court has held that, to prevent usury laws from becoming "a dead letter," courts "perceived the necessity of disregarding the form, and examining into the real nature of the transaction.").[95] More recently, the Court has recognized "courts' standard practice … of ignoring artifice when identifying the parties to a transaction."[96]

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[94] *See, e.g.,* Williams v. Chartwell Fin. Servs., Ltd., 204 F.3d 748, 753–754 (7th Cir. 2000) (courts look to economic substance of transaction, not its form, to determine whether TILA requirements for disclosure of security interests apply); Adams v. Plaza Fin. Co., 168 F.3d 932 (7th Cir. 1999) (courts must penetrate the outer form to find the inner substance when determining how nonfiling insurance must be disclosed under TILA); Edwards v. Your Credit, Inc., 148 F.3d 427, 436 (5th Cir. 1998) (same); Burnett v. Ala Moana Pawn Shop, 3 F.3d 1261, 1262 (9th Cir. 1993) (lower court was permitted to look "past the form of the transactions to their economic substance in deciding whether [TILA] applied"); Hickman v. Cliff Peck Chevrolet, Inc., 566 F.2d 44, 46 (8th Cir. 1977) ("the substance rather than the form of credit transactions should be examined in cases arising under [TILA]"); Daniel *et al.* v. First National Bank of Birmingham, 227 F.2d 353, 355, 357 (5th Cir. 1956) ("'No disguise of language can avail for covering up usury, or glossing over an usurious contract. The theory that a contract will be usurious or not, according to the kind of paper bag it is put up in, or according to the more or less ingenious phrases made use of in negotiating it, is altogether erroneous. The law intends that a search for usury shall penetrate to the substances.'" (quoting *Pope v. Marshall*, 4 S.E. 116, 118 (Ga. 1887)) (finding that National Bank Act usury provision applied to bank assignee of sales contract, as "the real transaction was a sale at a cash price accompanied by a loan or extension of credit to which the Bank was privy throughout."); Fed. Deposit Ins. Corp. v. Lattimore Land Corp., 656 F.2d 139, 147 n.15 (5th Cir. 1981) (noting that "the statute [the National Bank Act] does apply to usurious discounting of a note by a national bank or to usurious loans disguised as purchases of notes from an intermediary," but unlike in *Daniel*, where "the transaction was usurious from the start and the bank was the actual lender," in the instant case "the obligors have never claimed that Hamilton National Bank was the lender in fact."). *See also* CFPB v. CashCall, 35 F.4th 734 (9th Cir. 2022) (applying substance over form to reject tribal choice of law provision in rent-a-tribe case).

[95] Scott v. Lloyd, 34 U.S. (9 Pet.) 418 (1835). *See also* Fowler v. Equitable Trust Co., 141 U.S. 411, 414, 12 S. Ct. 8, 35 L. Ed. 794 (1891) ("The [usury] law will not tolerate any shift or device to evade its provisions." (quoting Barton v. Farmers' & Merchants' Nat. Bank, 122 Ill. 352, 355, 13 N.E. 503 (1887)); Hotel Co. v. Wade, 97 U.S. 13, 24 L. Ed. 917 (1877) ("Usury, certainly, is not to be favored; but the rule is well settled, that, when the contract on its face is for legal interest only, then it must be proved that there was some corrupt agreement, device, or shift to cover usury, and that it was in full contemplation of the parties."); Junction R. Co. v. Bank of Ashland, 79 U.S. 226, 20 L. Ed. 385 (1870) ("If a bond be not usurious by the law of the place where payable, a plea of usury cannot be sustained in an action thereon, unless it alleges that the place of payment was inserted as a shift or device to evade the law of the place where the bond was made."); Miller v. Tiffany, 68 U.S. 298, 307–310, 17 L. Ed. 540 (1863) (while contractual choice of law provisions for usury are enforceable, when done with intent to evade the law, the law of the contract location applies); De Wolf v. Johnson, 23 U.S. 367, 385, 6 L. Ed. 343 (1825) ("Usury is a mortal taint wherever it exists, and no subterfuge shall be permitted to conceal it from the eye of the law; this is the substance of all the cases, and they only vary as they follow the detours through which they have had to pursue the money lender.").

[96] Abramski v. United States, 57 U.S. 169, 184 (2014) ("In United States v. One 1936 Model Ford V–8 De Luxe Coach, Commercial Credit Co., 307 U.S. 219, 59 S.Ct. 861, 83 L.Ed. 1249 (1939), the company could not have relied on the formalities of the sale to the "'straw' purchaser" when it knew that the "real owner and purchaser" of the car was someone different. Id., at 223–224, 59 S.Ct. 861. We have similarly emphasized the need in other contexts, involving both criminal and civil penalties, to look through a transaction's nominal parties to its true participants. *See, e.g.*, American Needle, Inc. v. National Football League, 560 U.S. 183, 193, 130 S.Ct. 2201, 176 L.Ed.2d 947 (2010) (focusing on "substance rather than form" in assessing when entities are distinct enough to be capable of conspiring to violate the antitrust laws); Gregory v. Helvering, 293 U.S. 465, 470, 55 S.Ct. 266, 79 L.Ed. 596 (1935) (disregarding an intermediary shell corporation created to avoid taxes because doing otherwise would "exalt artifice above reality"). We do no more than that here in holding, consistent with § 922's text, structure, and purpose, that using a straw does not enable evasion of the firearms law.").

When courts have been asked to assess whether the lender named on the loan agreement is the true lender, they have overwhelmingly recognized the substance-over-form doctrine. The true lender doctrine has been recognized in a variety of contexts in at least seven federal court of appeals decisions[97] and dozens of state or lower federal court rulings.[98] Several administrative actions have also recognized the true lender doctrine.[99] Twenty-four state attorneys generals have endorsed the doctrine.[100]

A growing number of states have also codified the true lender doctrine in their installment or payday loans statutes, including four that did so within the past few years.[101]

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[97] *See* United States v. Grote, 961 F.3d 105, 122 (2d Cir. 2020) (finding sufficient evidence of wire fraud consisting of misrepresenting the true lender where "the Tribes had no meaningful influence or control over the lending business, but rather served merely as a cover"); Community State Bank v. Knox, 523 Fed. Appx. 925 (4th Cir. 2013) (affirming decision that determined that state-law usury claims were not completely preempted by the FDIA merely because a state-chartered bank was the named lender; plaintiff pleaded alternative theories that payday lender was the true lender or that it engaged in other unlawful activities as a loan broker); Community State Bank v. Strong, 651 F.3d 1241 (11th Cir. 2011) (finding federal jurisdiction because plaintiff could "plead facts demonstrating that the Bank was not the actual lender" and thus could be held liable under RICO for aiding or abetting a usury violation; agreeing with *BankWest* that "Section 27(a) [of the FDIA] does not provide immunity to a state bank for usury-related offenses if it is not the true lender of the loan under federal law"); Discover Bank v. Vaden, 489 F.3d 594, 604 n.9 (4th Cir. 2007) ("In finding Discover Bank to be the real party in interest here, we emphasize the heavily fact-dependent nature of our analysis and its consequent parameters. Clearly, a state-chartered, federally insured bank will not always be the real party in interest for purposes of invoking the FDIA."), *rev'd on other grounds,* 556 U.S. 49, 129 S. Ct. 1262, 173 L. Ed. 2d 206 (2009) (holding that complete preemption cannot be based on counterclaim to state law claim); BankWest, Inc. v. Baker, 411 F.3d 1289 (11th Cir. 2005) (upholding Georgia statute deeming a purported agent of a bank to be the de facto lender if it has the predominant economic interest), *reh'g granted, op. vacated*, 433 F.3d 1344 (11th Cir. 2005), *op. vacated due to mootness*, 446 F.3d 1358 (11th Cir. 2006); Easter v. American West Fin., 381 F.3d 948 (9th Cir. 2004) (under Washington law, courts apply substance over form to determine whether broker, whose name was on the loan, was the true lender); Fed. Deposit Ins. Corp. v. Lattimore Land Corp., 656 F.2d 139, 147, n.15 (5th Cir. 1981) (describing *Daniel et al. v. First National Bank of Birmingham*, 227 F.2d 353, 355, 357 (5th Cir. 1956), as a case where "the transaction was usurious from the start and the bank was the actual lender," unlike in the instant case where "the obligors have never claimed that Hamilton National Bank was the lender in fact."). *See also* Williams v. Martorello, 59 F.4th 68 (4th Cir. 2023) (affirming class certification and finding that individual defendant received most of the lenders' gross revenue "such that he was functionally in charge of Red Rock's lending operations—are supported by the record"); CFPB v. CashCall, 35 F.4th 734, 745 (9th Cir. 2022) (without addressing who was the true lender, finding choice-of-law clause invalid because examining "the economic reality of these loans … reveals that the Tribe had no substantial relationship to the transactions"). *See also Krispin v. May Department Stores*, 218 F.3d 919 (8th Cir. 2000) (finding complete preemption of usury claims against a store only after analyzing the facts and concluding that the store's national bank subsidiary was the real party in interest).

[98] *California*: Consumer Financial Protection Bureau v. CashCall, Inc., 2016 WL 4820635 (C.D. Cal. Aug. 31, 2016) (considering whether a tribe is the true lender); Ubaldi v. SLM Corp., 852 F. Supp. 2d 1190 (N.D. Cal. 2012); Sawyer v. Bill Me Later, 2011 WL 13217239 (C.D. Cal. 2011) (granting motion to compel and agreeing with plaintiff that the determination of who is a true lender is heavily fact-dependent); Opportunity Financial, LLC v. Hewlett, No. 22STCV08163 (Sup. Ct. Cal. Sept. 30, 2022) (https://library.nclc.org/companion-material/opportunity-financial-llc-v-clothilde-no-22stcv08163-cal-super-ct-sept-30-2022 ("OppFi v. Hewlett") (denying demurrer after extensive review of caselaw, and finding: "In enforcing the usury protections, California courts have examined the substance of a transaction to determine its true nature. … As alleged, the substance is that OppFi is the lender.").

Colorado: *In re* Rent-Rite Superkegs West Ltd., 623 B.R. 335 (D. Colo. 2020) ("If the true lender is a non-bank assignee, then DIDA § 1831d cannot attach."); Meade v. Avant of Colorado, 307 F. Supp. 3d 1134, 1138–1139 (D. Colo. 2018); Meade v. Marlette Funding L.L.C., 2018 WL 1417706 (D. Colo. Mar. 21, 2018); Colorado *ex rel.* Salazar v. Ace Cash Express, 188 F. Supp. 2d 1282 (D. Colo. 2002) (rejecting complete preemption of claim that payday lender, which argued it was only an agent for loans made by the bank, was acting as an unlicensed lender); Fulford v. Marlette Funding, L.L.C., et al., No. 17CV30376 (Colo. Dist. Ct., Denver Cnty. June 9, 2020), *available at* www.nclc.org/unreported ("Further, the Valid When Made doctrine implies that the first transaction was valid. . . . [S]uffice it to say, if [non-bank lender] Marlette were the 'true lender,' then the interest rates associated with loans in question were invalid in the first instance under Colorado usury law.").

District of Columbia: Dist. Of Columbia v. Elevate, 554 F. Supp. 3d 125, 137-140 (D.D.C. 2021).

Florida: Inetianbor v. CashCall, Inc., 2015 WL 11438192 (S.D. Fla. Dec. 8, 2015) ("because Inetianbor has raised a genuine issue of material fact as to Western Sky's status as the actual lender, enforcement of the choice-of-law provision in the Loan Agreement would be unjust and unreasonable on a motion to dismiss").

Georgia: Georgia Cash America v. Greene, 734 S.E.2d 67 (Ga. Ct. App. 2012) (triable issues existed as to whether, prior to adoption of statute, payday lender was de facto lender); BankWest Inc. v. Oxendine, 598 S.E.2d 343 (Ga. Ct. App. 2004) ("[w]e do not find *Hudson [v. Ace Cash Express, Inc.*, 2002 WL 1205060 (S.D. Ind. May 30, 2002)] persuasive because Georgia courts apply a different analysis to the examination of an allegedly usurious transaction. To determine if a contract is usurious, we critically examine the substance of the transaction, regardless of the name given it").

Illinois: Eul v. Transworld Sys., 2017 WL 1178537 (N.D. Ill. Mar. 30, 2017).

Michigan: Dep't of Ins. & Fin. Servs. v. Comdata Network, Inc., 2019 WL 3857904 (Mich. Dep't of Ins. & Fin. Servs. Aug. 7, 2019), ***aff'd in part, rev'd in part by*** Comdata Network, Inc. v. Michigan Dep't of Ins. & Fin. Servs., No. 19-747-AV (Mich. Cir. Ct., Inghan Cnty. May 19, 2020) (available online as companion material to this treatise) (affirming order prior to change in statute but rescinding it after effective date of new law).

Mississippi: Richardson v. Cortner, 100 So. 2d 854, 857 (Miss. 1958) (evidence showed company "was not in fact a broker, but the lender. The application, 'brokerage' contract, and the arrangement between Southern Loan Service and the firm of Cortner and Ragland were devices to circumvent the laws against usury.").

New Mexico: Dandy v. Wilmington Finance, Inc., 2010 WL 11493721 (D.N.M. May 3, 2010) (remanding case and noting: "Thus, the question raised by the Complaint is essentially a factual one–which entity actually made the loan–rather than a legal one that calls for the interpretation of federal statutes.").

New York: Spitzer v. Cnty. Bank of Rehoboth Beach, 846 N.Y.S.2d 436 (N.Y. App. Div. 2007).

North Carolina: State *ex rel.* Cooper v. Western Sky Fin., L.L.C., 2015 WL 5091229 (N.C. Sup. Ct. Aug. 27, 2015) (plaintiffs alleged facts that lenders, not tribal members, were the de facto lender); Order Sustaining the Objection to Proof of Claim (Claim #10) Filed by Scolopax, L.L.C., *In re* Twiddy, No. 19-05790-5-JNC (Bankr. E.D.N.C. Oct. 16, 2020), *available at* www.nclc.org/unreported (sustaining objection to claim for, and finding void, usurious loans made by internet lender, where debtor alleged the lender used "a 'straw lender' to nominally make loans through First Electronic Bank to claim federal preemption of state consumer protection laws but because Applied Data Finance retains the economic benefits of the loans processed through its internet platform, it is, in form and substance, the 'true lender and thus is not entitled to claim federal preemption of North Carolina's consumer protection laws"); Goleta Nat'l Bank v. Lingerfelt, 211 F. Supp. 2d 711 (E.D.N.C. 2002).

Ohio: Goleta National Bank v. O'Donnell, 239 F. Supp. 2d 745 (S.D. Ohio 2002).

Oklahoma: Flowers v. EZPawn Oklahoma, Inc., 307 F. Supp. 2d 1191 (N.D. Okla. 2004).

Pennsylvania: Commonwealth v. Think Fin., Inc., 2016 WL 183289 (E.D. Pa. Jan. 14, 2016).

Virginia: Solomon v. American Web Loan, 2019 WL 1320790 (E.D. Va. Mar. 22, 2019) (finding that plaintiffs alleged sufficient facts to support their claim that defendants, not tribe, are the lenders in fact and the tribal entity was only a nominal lender).

West Virginia: West Virginia v. CashCall, 605 F. Supp. 2d 781 (S.D. W. Va. 2009) (no complete preemption where there is a factual question whether the bank was the true lender); CashCall, Inc. v. Morrisey, 2014 WL 2404300 (W. Va. May 30, 2014).

Washington: Sanh v. Rise Credit Service, No. C20-0310RSL, 2022 WL 16854329 (Nov. 10, W.D. Wash. 2022) ("Plaintiff has now alleged facts to support her true-lender theory, however, and if RISE played a role in the rent-a-bank scheme as described, it can arguably be held liable for plaintiff's losses under the Consumer Protection Act."); Sanh v. Opportunity Fin., L.L.C., 2021 WL 2530783 (W.D. Wash. June 21, 2021) (granting leave to amend as court found true lender theory "viable," noting: "Where a non-bank entity has extended a loan, there is no state-chartered bank, there is no issue of federal insurance, state regulation of such loans would not adversely impact a banking entity's ability to lend, and DIDA preemption would not apply," and quoting FDIC's recognition of "real party in interest" argument).

[99] *In re* Financial Servs. Enterprises, d.b.a. Pioneer Capital, 2016 WL 7840137 (Cal. Dep't of Corp. Nov. 29, 2016) (finding that funding of loans was not dispositive of whether person was engaged in business of "making" loans where "respondent consistently held itself out as a lender and regularly conducted many activities of a lender, including performing 'due diligence' (i.e., collecting and evaluating information relevant to the decision to lend money and the terms on which to lend it), assessing the risk of lending to a particular client, proposing loan terms and conditions—

which included providing for itself to take a security interest in clients' assets and for the subordination of clients' other debt—and sharing in or making the ultimate decision whether to lend"); Dep't of Ins. & Fin. Servs. v. Comdata Network, Inc., 2019 WL 3857904 (Mich. Dep't of Ins. & Fin. Servs. Aug. 7, 2019), *aff'd in part, rev'd in part by* Comdata Network, Inc. v. Michigan Dep't of Ins. & Fin. Servs., No. 19-747-AV (Mich. Cir. Ct., Inghan Cnty. May 19, 2020) (available online as companion material to this treatise) (affirming order prior to change in statute but rescinding it after effective date of new law); Assurance of Voluntary Discontinuance, *In re* Avant, Inc., WVRE 408 Settlement Offer, at 3 (W. Va. Att'y Gen. June 2, 2016), *available at* www.nclc.org/unreported ("The Attorney General alleges that under the 'bank partnership' model, a company such as Avant does everything that a bank would do to make a loan to a customer. . . . Avant then turns the customer over to a Bank with which it has 'partnered' for the bank to make a final decision on whether to lend the money. Because the bank and the company have agreed on, and the bank has previously approved, the underwriting criteria in advance, the bank always loans the money.").

[100] *See* Letter from twenty-four state attorneys general to Brian Brooks, Office of the Comptroller of the Currency re: National Banks and Federal Savings Associations as Lenders, Docket No. OCC-2020-0026, at 3 (Sept. 3, 2020), *available at* https://oag.ca.gov (opposing proposed rule that would overturn the true lender doctrine and endorsing totality of the circumstances and predominant economic interest approach).

[101] Cal. Fin. Code §23037 (West) (in context of arrangers of payday loans); Ga. Code Ann. § 16-17-2(b)(4); 815 Ill. Comp. Stat. Ann. 123/15-5-15(b) (effective Mar. 23, 2021); Me. Stat. tit. 9-A, § 2-702 (effective Oct. 18, 2021); Minn. HF 290 (adding Minn. Stat. Ann. § 47.60(8) (effective Aug. 1, 2023); Nev. Rev. Stat. §§ 604A.5064(2)(b) (high-interest loans over 40% APR), 604A.5089(2)(b) (title loans), 604A.200 (statute governing deferred deposit, high-interest, and title loans and check cashing service); N.H. Rev. Stat. Ann. § 399-A:2(III)(c) (consumer loans under $10,000); N.M.S.A. 58-15-3(D)(3) (additional anti-evasion language in (D)(1) and (2)) (effective Jan. 1, 2023).

In the context of bank preemption challenges to true lender claims, only two decisions have refused to look beyond the face of documents specifying that the bank is the lender.[102] In contrast, nearly two dozen, including three federal court of appeals decisions, have acknowledged the relevance of true lender analysis in considering substantive preemption,[103] complete preemption,[104] or bank exemptions in usury and lending statutes.[105]

Congress and President Biden have strongly endorsed the true lender doctrine by repealing the OCC's fake lender rule that would have repealed the true lender doctrine. As President Biden said when signing the resolution overturning the rule:

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[102] Sawyer v. Bill Me Later, Inc., 23 F. Supp. 3d 1359 (D. Utah 2014) (finding usury claims preempted even accepting that bank is not the true lender and "this is a lending program of a non-bank attempting to circumvent California's usury law") (relying on *Hudson*); Hudson v. Ace Cash Express, Inc., 2002 WL 1205060 (S.D. Ind. May 30, 2002) (refusing to look beyond the form of the transaction to the substance to consider allegation that payday lender was the actual lender and arrangement with bank was for purpose of evading state usury law).

[103] BankWest, Inc. v. Baker, 411 F.3d 1289, 1304 (11th Cir. 2005) (upholding against a preemption challenge Georgia statute deeming a purported agent of a bank to be the de facto lender if it has the predominant economic interest), *reh'g granted, op. vacated,* 433 F.3d 1344 (11th Cir. 2005), *op. vacated due to mootness,* 446 F.3d 1358 (11th Cir. 2006); Sanh v. Opportunity Fin., L.L.C., 2021 WL 2530783 (W.D. Wash. June 21, 2021) (granting leave to amend as court found true lender theory "viable," noting: "Where a non-bank entity has extended a loan, there is no state-chartered bank, there is no issue of federal insurance, state regulation of such loans would not adversely impact a banking entity's ability to lend, and DIDA preemption would not apply," and quoting FDIC's recognition of "real party in interest" argument); Order Sustaining the Objection to Proof of Claim (Claim #10) Filed by Scolopax, L.L.C., *In re* Twiddy, No. 19-05790-5-JNC (Bankr. E.D.N.C. Oct. 16, 2020) (sustaining objection to claim for, and finding void, usurious loans made by internet lender, where debtor alleged the lender used "a 'straw lender' to nominally make loans through First Electronic Bank to claim federal preemption of state consumer protection laws but because Applied Data Finance retains the economic benefits of the loans processed through its internet platform, it is, in form and substance, the 'true lender and thus is not entitled to claim federal preemption of North Carolina's consumer protection laws"); *In re* Rent-Rite Superkegs West Ltd., 623 B.R. 335 (D. Colo. Aug. 12, 2020) ("If the true lender is a non-bank assignee, then DIDA § 1831d cannot attach."); Fulford v. Marlette Funding, L.L.C., et al., No. 17CV30376 (Colo. Dist. Ct., Denver Cnty. June 9, 2020), *available at* www.nclc.org/unreported (agreeing with plaintiff that preemption does not apply to non-bank lenders, and "if Marlette were the 'true lender,' then the interest rates associate with loans in question were invalid in the first instance under Colorado usury law"); Eul v. Transworld Sys., 2017 WL 1178537 (N.D. Ill. Mar. 30, 2017) ("preemption does not apply … [because] plaintiffs have alleged that Chase was not in fact the true originator"); Commonwealth v. Think Fin., Inc., 2016 WL 183289 (E.D. Pa. Jan. 14, 2016) (denying motion to dismiss on preemption grounds as the complaint "alleges the Defendants, not the bank, are the real parties in interest and the Defendants are not closely tied to the [bank]"); Ubaldi v. SLM Corp., 852 F. Supp. 2d 1190 (N.D. Cal. 2012) (denying motion to dismiss on preemption grounds allegation that Sallie Mae, not a national bank, was the true lender); Sawyer v. Bill Me Later, 2011 WL 13217239 (C.D. Cal. Apr. 11, 2011) (granting motion to compel discovery since facts are relevant to the determination of who is a true lender and thus whether the usury claim is preempted); Goleta Nat'l Bank v. Lingerfelt, 211 F. Supp. 2d 711 (E.D.N.C. 2002) (dismissing on standing and abstention grounds bank's and payday lender's action to enjoin state enforcement action against rent-a-bank lending; noting that preemption contention was not readily apparent as there was factual dispute as to whether national bank was actual lender).; People *ex rel.* Spitzer v. Cnty. Bank of Rehoboth Beach, 846 N.Y.S.2d 436 (N.Y. App. Div. 2007) (disagreeing with bank that loan documents alone establish who is the true lender, but reversing grant of summary judgment for state, finding disputed issues of act as to whether, under the totality of the circumstances, the bank was the true lender); CashCall, Inc. v. Morrisey, 2014 WL 2404300 (W. Va. May 30, 2014) (upholding predominant economic interest test to determine whether bank was the true lender). *See also* Goleta National Bank v. O'Donnell, 239 F. Supp. 2d 745 (S.D. Ohio 2002) (finding that bank had no standing to seek declaratory judgment on preemption grounds of state action alleging that payday lender is the true lender).

[104] *See* Community State Bank v. Knox, 523 Fed. Appx. 925 (4th Cir. 2013) (affirming decision that determined that state law usury claims were not completely preempted by the FDIA merely because a state-chartered bank was the named lender; plaintiff pleaded alternative theories that payday lender was the true lender or that it engaged in other unlawful activities as a loan broker); Community State Bank v. Strong, 651 F.3d 1241 (11th Cir. 2011) (finding federal jurisdiction over potential racketeering claim because federal law does not preempt usury laws if the bank is not the true lender); Dist. of Columbia v. Elevate, 554 F. Supp. 3d 125 (D.D.C. 2021); Meade v. Avant of Colorado, 307 F. Supp. 3d 1134, 1138–1139 (D. Colo. 2018); Meade v. Marlette Funding L.L.C., 2018 WL 1417706 (D. Colo. Mar. 21,

> The … bill will protect borrowers against predatory lenders. In many states, these lenders are kept in check by caps on how much interest they can charge, but some loan sharks and online lenders have figured out how to get around these limits and—by using a partnership with a bank to avoid the state cap and charging outrageous interest. And I'm—you all have pointed out—some as high as 100 percent interest, which is astounding. And I must admit to you, I didn't know that. I was unaware they could pull that off.
>
> These are so called "rent-a-bank" schemes. And they allow lenders to prey on veterans, seniors, and other unsuspecting borrowers tapping in the—trapping them into a cycle of debt. And the last administration let it happened, but we won't.[106]

The FDIC has also acknowledged the true lender doctrine and has provided assurance that its rule regarding the rates on assigned loans does not impact that doctrine.[107]

6.2. Numerous factors in high-cost rent-a-bank schemes lead to a high risk that the bank will not be found to be the true lender.

High-cost rent-a-bank schemes are highly susceptible to challenge through the true lender doctrine. Several factors often present in these arrangements lend strong support to a finding that the bank is not the true lender and that the loan program is thus unlawful.

First and foremost, the core *raison d'être* for rent-a-bank schemes – the gross disparity between the rate charged and the legal rate allowed for a nonbank lender – strongly supports a true lender challenge. Because the true lender doctrine is focused on preventing evasions of usury laws, the greater the disparity between a loan's interest rate and the legal state rate for the nonbank lender, the greater the likelihood that it will be viewed not as

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2018); Dandy v. Wilmington Fin., Inc., 2010 WL 11493721 (D.N.M. May 3, 2010); West Virginia v. CashCall, 605 F. Supp. 2d 781 (S.D. W. Va. 2009) (no complete preemption where there is a factual question whether the bank was the true lender); Flowers v. EZPawn Oklahoma, Inc., 307 F. Supp. 2d 1191 (N.D. Okla. 2004); Colorado *ex rel.* Salazar v. Ace Cash Express, 188 F. Supp. 2d 1282 (D. Colo. 2002) (rejecting complete preemption of claim that payday lender, which argued it was only an agent for loans made by the bank, was acting as an unlicensed lender); *See also* Discover Bank v. Vaden, 489 F.3d 594, 604 n.9 (4th Cir. 2007) ("In finding Discover Bank to be the real party in interest here, we emphasize the heavily fact-dependent nature of our analysis and its consequent parameters. Clearly, a state-chartered, federally insured bank will not always be the real party in interest for purposes of invoking the FDIA."), *rev'd* 556 U.S. 49, 129 S. Ct. 1262, 173 L. Ed. 2d 206 (2009) (holding that complete preemption cannot be based on counterclaim to state law claim).

While complete preemption is technically about federal court jurisdiction and not about substantive preemption, the factors that courts have cited in denying complete preemption often are relevant to substantive preemption as well.

[105] BankWest Inc. v. Oxendine, 598 S.E.2d 343 (Ga. Ct. App. 2004) ("We do not find *Hudson [v. Ace Cash Express, Inc.*, 2002 WL 1205060 (S.D. Ind. May 30, 2002)] persuasive because Georgia courts apply a different analysis to the examination of an allegedly usurious transaction. To determine if a contract is usurious, we critically examine the substance of the transaction, regardless of the name given it").

[106] Remarks by President Biden Signing Three Congressional Review Act Bills Into Law: S.J.RES.13; S.J.RES.14; and S.J.RES.15, 2021 WL 2679694 (June 30, 2021).

[107] "[T]he text of the proposed regulation cannot be reasonably interpreted to foreclose true lender claims. The rule…is premised upon a State bank having made the loan." FDIC, Federal Interest Rate Authority, Final Rule, 85 Fed. Reg. 44,146, 44,155 (July 22, 2020).

a bank lending program but as a non-bank lending program and an unlawful evasion of state usury laws.[108]

In the rent-a-bank lending schemes facilitated by the banks highlighted above, there is an enormous difference between the rates charged by the lending programs and the legal rate allowed for the nonbank partner. The median state interest rate cap among states that cap interest rates is:

- 39.5% for a six-month, $500 installment loan;
- 32.5% for a $2,000, two-year installment loan; and
- 27% for a $10,000, five-year loan.[109]

A loan over 100% APR is prohibited by almost every state that imposes any interest rate limit: by 38 states plus DC if the loan is $500, 43 states plus DC if the loan is $2,000, and 41 states and DC if the loan is $10,000.[110] Not a single state with an interest rate limit allows a 100% APR rate on a $2,000, two-year loan; the highest is 59%.

Yet FDIC-supervised banks are helping these nonbank lenders charge rates between 100% to 225% APR that are illegal ***in almost every state***.[111] For example:

- **American First Finance,**[112] using FinWise Bank, makes secured and unsecured installment loans for purchases at retailers including furniture, appliances, home improvements, pets, auto and mobile home repair, jewelry and body art at rates up 155% APR or higher.[113]
- **Applied Data Finance**, dba **Personify Financial**, using First Electronic Bank, makes loans up to 179.99% APR.[114]
- **CNG Financial,** which operates the Check 'no Go payday loan stores, uses CC Bank to make installment loans under the **Xact** brand at APRs of 145% to 193%.[115]

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[108] While this analysis focuses on loans over 100% APR, we are also concerned about banks that facilitate evasive and dangerous loans at rates below 36% APR. Several states prohibit large loans over 25% APR or even lower. For example, Florida has a tiered rate structure allowing 30% on the first $3,000, 24% on the next $1,000, and 18% on the remainder, resulting in a blended 20.51% APR rate for a $25,000 loan. That loan would cost $14,076 more if the rate were 36% APR. Anyone who is forced to pay 36% APR on a $25,000 loan is likely credit impaired and struggling and would have difficult repaying that rate.

[109] *See* National Consumer Law Center, State Rate Caps for $500 and $2,000 Loans (Nov. 15, 2023), https://www.nclc.org/resources/state-rate-caps-for-500-2000-loans/.

[110] At the time state interest rate laws were passed, decades and up to a century ago, some states felt that loans that large would only be taken out by wealthy and sophisticated parties that did not need state rate caps to protect them. But a $10,000 loan is not nearly as large or unusual today.

[111] For maps and a spreadsheet showing in which states rent-a-bank lenders are evading state interest rate limits, see NCLC, High-Cost Rent-a-Bank Loan Watch List, https://www.nclc.org/resources/high-cost-rent-a-bank-loan-watch-list/.

[112] https://americanfirstfinance.com/ (last visited Oct. 30, 2024).

[113] American First Finance does not disclose its rates on its website, but contracts on file with NCLC along with complaints in the CFPB's complaints database reveal its high rates.

[114] https://www.personifyfinancial.com/rates-terms-and-licensing-information (last visited Oct. 30, 2024).

[115] https://www.xact.com/ (last visited Oct. 30, 2024) (see footnote 1 and notice to consumers in certain states at the bottom of the page).

- **Duvera Billing Services dba EasyPay Finance** uses TAB Bank to make loans at rates up to 189% APR through businesses across the country that sell auto repairs, furniture, home appliances, pets, wheels, and tires, among other items.[116]
- **Elevate** makes Elastic-branded lines of credit, using Republic Bank, at effective APRs of about 100% APR;[117] Elevate also uses FinWise Bank and CC Bank to make Rise-branded installment loans at rates up to 99%-149% APR.[118]
- **Enova**, which operates payday and installment lender **CashNetUSA**, uses Republic Bank and TAB Bank to make **NetCredit**-branded installment loans at rates up to 99.99% APR.[119]
- **Hyphen, LLC** dba **Helix Financial,** has switched from using Lead Bank, to Kendall Bank and now Bank of Orrick to make loans that likely reach 547% APR.[120]
- **Integra** uses TAB Bank to make installment loans at rates of 159% to 224% APR.[121]
- **Opportunity Financial, LLC (OppFi aka OppLoans)** uses FinWise Bank, First Electronic Bank and CC Bank to make installment loans at rates up to 160% APR.[122]
- **Propel Holdings** operates the **Credit Fresh** and **MoneyKey** lines of credit. Credit Fresh uses CBW Bank and First Electronic Bank, and possibly others, and offers lines of credit with an effective APR of about 160% though no APR is disclosed.[123] MoneyKey operates through CC Bank and similarly does not disclose an APR but the sample loan shown has an effective APR of over 200%.[124]
- **Wheels Financial Group**, LLC dba **LoanMart** (under the **ChoiceCash** brand) uses Capital Community Bank to make auto title loans at rates up to 170% APR.[125]

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[116] *See* Stop the Debt Trap, Predatory Puppy Loans by TAB Banka and EasyPay Finance (Feb. 2022), https://www.nclc.org/wp-content/uploads/2022/09/IB_Easypay_Puppy_Loans_Feb22.pdf; Stop the Debt Trap, Predatory Auto Repair Loans by TAB Bank and EasyPay Finance (May 2022), https://www.nclc.org/wp-content/uploads/2022/09/Rpt-TAB_Auto_Repair-5.11.22.pdf.

[117] *See* Elevate Credit, Inc., SEC Form 10-Q for the period ending Sept. 20, 2022 at 48, https://www.sec.gov/ix?doc=/Archives/edgar/data/1651094/000165109422000057/elvt-20220930.htm (describing the effective APR on a $2,500 draw on the Elastic line of credit if all minimum payments are made as 107% APR).

[118] https://www.risecredit.com/how-online-loans-work#WhatItCosts (last visited Oct. 30, 2024).

[119] https://www.netcredit.com/rates-and-terms (last visited Oct. 30, 2024).

[120] The Helix website, HelixFi.com, notes that it offers installment loans and lines of credit but does not disclose the rates. However, a recent lawsuit accuses Helix of charging 547% for a $700 loan purportedly from Lead Bank, and states that "since 2019, Defendant has jumped around from bank to bank, using at least three different state-chartered, FDIC-backed banks—Lead Bank, Kendall Bank, and Bank of Orrick—as cover for its scheme." Class Action Complaint at 13, Childs v Hyphen, LLC dba Helix Financial, and Lead Bank, No. 1:23-cv-00197-LAG (M.D. Ga. filed Nov. 11, 2023). The complaint describes the similarities in the website, contact information and other items as Helix changed from being a "brand" of Lead Bank to a "brand of Kendall Bank" to a "brand of Bank of Orrick." *Id.* at 14-15.

[121] https://www.integracredit.com/rates-and-terms (last visited Oct. 30, 2024).

[122] https://www.opploans.com/rates-and-terms/ (last visited Oct. 30, 2024).

[123] *See supra* note 78.

[124] *See supra* note 77.

[125] https://www.choicecash.com/ (last visited Oct. 30, 2024). Rates are not on the website, but a sample loan formerly on the website was a 3-year, $3,000 loan at 170% APR.

- A variety of smaller payday and online lenders including **Balance Credit, Lendly, Quickcredit, and Simple Fast Loans** offer installment loans up to 225% APR through CC Bank.[126]

These rates are far in excess of the rates allowed in the states where these rent-a-bank schemes are lending.

Second, courts often find that the bank is not the true lender when the nonbank entity that is actively involved[127] in the loan program (or a related entity) has the predominant economic interest in the loans.[128] An entity may have the predominant economic interest in the loans even if it holds only an indirect interest in the loans, interest, or receivables.

Litigation to date indicates that the nonbank entities in high-cost rent-a-bank schemes often have the overwhelming economic interest in the loan program. For example, the District of Columbia Attorney General's Office (DC AG) alleged, based on its investigation, that "Elevate receives revenue through two Cayman Islands special purpose vehicles—EE SPV and ESPV—that purchase a 96% interest in the receivables for the Rise loans and a 90% interest in the receivables for the Elastic loans, respectively."[129] Similarly, the DC AG found that OppFi purchases "nearly all" of the receivables on its rent-a-bank loans, and that for each customer who provides $1,657 in revenue, almost all of that revenue goes to OppFi as profit or to cover its costs; the bank realizes only a portion of the $138 in servicing costs.[130] The California Department of Financial Protection and Innovation also found that OppFi purchases between 95 to 98 percent of the receivables for each rent-a-bank loan.[131]

But a nonbank might have the overall predominant economic interest even if the transaction is structured to keep its revenue share below 50%.[132] An entity's economic interest in a loan program is not only the reward (i.e., direct or indirect interest in the revenues or profits) but also by the risk (expenses, risk of defaults, and other liabilities).[133] With excess profits to spare,

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

[127] The predominant economic interest test focuses on entities that have enough of a role in the loan program to consider them the true lender. Passive investors who have no role in the loan program and no connection to an entity with such a role do not become the true lender even if a bank that actively designed and is actively running a loan program is ultimately funded by passive investors, or through passive securitization trusts that play only a ministerial role. *Cf*. Chase v. Capital One Funding, 489 F. Supp. 3d 33 (E.D.N.Y. 2020) (describing process of securitizing national bank's credit card receivables through passive shell-company intermediaries with no employees, and finding that it would significantly interfere with the power of the national bank that controlled the credit card program to subject the credit cards to the interest rate limits of the states of its customers if the bank wished to engage in the "commonplace banking practice of securitizing its receivables").

[128] *See* NCLC, Consumer Credit Regulation § 3.5.4.3.2 (citing cases).

[129] Dist. of Columbia v. Elevate, 554 F. Supp. 3d 125, 138 (D.D.C. 2021).

[130] Complaint for Violations of the Consumer Protection Procedures Act at 3, 4, No. 2021 CA 001072B (Sup. Ct. DC filed Apr. 5, 2021), https://oag.dc.gov/sites/default/files/2021-04/OppLoans-Complaint-final.pdf.

[131] OppFi v. Hewlett, *supra*, at 2.

[132] *Cf.* Georgia Cash America v. Greene, 734 S.E.2d 67, 73 (Ga. Ct. App. 2012) (after Georgia passed true lender statute, payday lender restructured arranged to ensure it received only a 49% economic interest in loan, but the remaining aspects of the relationship with the bank remained the same, and the payday lender might be the true lender if it "by contrivance, device, or scheme, attempted to avoid the provisions" of Georgia law).

[133] *See, e.g.,* Dist. of Columbia v. Elevate, 554 F. Supp. 3d 125 (D.D.C. 2021) ("Elevate provides credit protection to [the Cayman Islands special purpose vehicles] against [Rise and Elastic] loan losses. This credit protection places

lenders may give the bank more than half the profits, but carry the bulk of the risk. Indeed, the fact that the nonbank shoulders the lion's share of the risk, and thus likely has effective control over the core of the lending program that impacts that risk, is a particularly salient factor in finding that it is the true lender.

Third, numerous other factors can show that the nonbank is the true lender, as the true lender test is a "totality of the circumstances" substance-over-form test that looks at whether the effect of the transaction has been structured to attempt to evade usury law.[134] Predominant economic interest is not the sole or a required factor, and a nonbank entity may be the true lender even if holds less than a predominant economic interest.[135] In addition to predominant economic interest, other factors that point to the nonbank as the true lender include when the nonbank (or a related entity):

- Lends directly under its own name in some states and lends through a bank in states that prohibit high rates;
- Lends through more than one bank or has the right to change the entity that originates the credit, indicating that the bank is fungible;
- Designs, brands, or holds the intellectual property on the loan product and collateral;
- Drafts the loan documents;
- Markets and offers the loan, or runs the website or storefront;
- Takes and processes applications;
- Designs the underwriting criteria, reviews applications, or makes approval decisions or recommendations;

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the risk of losses on Elevate." (quoting complaint)); Meade v. Avant of Colorado, L.L.C., 307 F. Supp. 3d 1134, 1147 (D. Colo. 2018) (non-bank pays all of the legal fees and expenses, indemnifies the bank against claims, and bears all the risk in the event of default); Flowers v. EZPawn Oklahoma, Inc., 307 F. Supp. 2d 1191 (N.D. Okla. 2004) (payday lender "accepts the ultimate credit risk").

[134] *See, e.g.,* Eul v. Transworld Sys., 2017 WL 1178537 (N.D. Ill. Mar. 30, 2017); Consumer Financial Protection Bureau v. CashCall, Inc., 2016 WL 4820635 (C.D. Cal. Aug. 31, 2016) (considering whether a tribe is the true lender); Ubaldi v. SLM Corp., 852 F. Supp. 2d 1190 (N.D. Cal. 2012); Dep't of Ins. & Fin. Servs. v. Comdata Network, Inc., 2019 WL 3857904 (Mich. Dep't of Ins. & Fin. Servs. Aug. 7, 2019), *aff'd in part, rev'd in part by* Comdata Network, Inc. v. Michigan Dep't of Ins. & Fin. Servs., No. 19-747-AV (Mich. Inghan Cnty., 30th Jud'l Cir. Ct. May 19, 2020) (available online as companion material to this treatise) (affirming order prior to change in statute but rescinding it after effective date of new law); People *ex rel.* Spitzer v. Cnty. Bank of Rehoboth Beach, 846 N.Y.S.2d 436 (N.Y. App. Div. 2007). *See also* Letter from 24 State Attorneys General to Brian Brooks, Office of the Comptroller of the Currency re: National Banks and Federal Savings Associations as Lenders, Docket No. OCC-2020-0026, at 3 (Sept. 3, 2020), *available at* https://oag.ca.gov (opposing proposed rule that would overturn the true lender doctrine and endorsing totality of the circumstances and predominant economic interest approach); Kaur v. World Business Lenders, L.L.C., 440 F. Supp. 3d 111 (D. Mass. 2020) (recognizing totality of circumstances approach and Massachusetts cases involving rent-a-bank or rent-a-tribe issues but declining to weigh in on true lender doctrine).

A number of other cases have considered a variety of factors without specifically mentioning the "totality of the circumstances." *See* Dist. of Columbia v. Elevate, 554 F. Supp. 3d 125, (D.D.C. 2021); Meade v. Avant of Colorado, 307 F. Supp. 3d 1134, 1138–1139 (D. Colo. 2018); Meade v. Marlette Funding L.L.C., 2018 WL 1417706 (D. Colo. Mar. 21, 2018); Georgia Cash America v. Greene, 734 S.E.2d 67 (Ga. Ct. App. 2012).

[135] *See* Georgia Cash America v. Greene, 734 S.E.2d 67, 73 (Ga. Ct. App. 2012) (even if facts show that payday lender received only a 49% economic interest in loan purportedly originated by bank, under Georgia codification of true lender doctrine, the payday lender may be the true lender if it "by contrivance, device, or scheme, attempted to avoid the provisions" of Georgia law).

- Has a high level of control over the loans as shown by conditions on a term sheet or otherwise;
- Provides the ultimate funding;
- Maintains a cash collateral account at the bank to secure payment for the loans or receivables purchased;
- Services the loan, handles customer service and manages collections;
- Trains, supervises, or monitors the employees who deal with borrowers and service the loans;
- Bears, directly or indirectly, the primary risk of significant loss or expenses from the borrower's default;
- Pays expenses;
- Indemnifies or otherwise protects the bank from risks; and/or
- Directly or indirectly is expected to purchase, has first right of refusal to purchase, or ultimately holds the bulk of the loans, receivables, or participation interests.[136]

Many of the factors listed above are common in the rent-a-bank schemes discussed in this paper,[137] making clear that the banks involved in these schemes are not the true lenders. As discussed in Section 3 below, if the bank is not the true lender, the bank faces significant potential liability and other safety and soundness risks.

6.3. Rent-a-banks face a safety and soundness Catch-22: The more they protect themselves from the risks of predatory partnerships, the more likely it is that they are not the true lender and the loans are illegal.

Banks use a number of mechanisms to attempt to protect themselves from the compliance, credit, operational and other risks of predatory loans with high default rates. But they face a Catch-22, because the more they protect themselves from those risks, the more likely that the bank is not the true lender, making the loans usurious and illegal and placing the bank at risk, as explained in Section 3 below.

Rent-a-bank schemes attempt to protect banks from these risks in a number of ways:

- The bank sells most of the receivables to the nonbank, in an attempt to offload default risk.
- The nonbank may provide credit protection against defaults.
- The nonbank may keep funds on deposit with the bank to fulfill its purchase obligations.
- The nonbank may bear the bulk of the expenses.
- The nonbank may indemnify the bank from some or all risks of liability and other risks.

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[136] *See* NCLC, Consumer Credit Regulation §3.5.4.3.2.

[137] *See, e.g.,* District of Columbia v. Elevate Credit, Inc. 554 F.Supp.3d 125 (D.D.C. 2021); Complaint for Violations of the Consumer Protection Procedures Act, District of Columbia v. Opportunity Financial, LLC (Sup. Ct. D.C. filed Apr. 6, 2021), https://oag.dc.gov/sites/default/files/2021-04/OppLoans-Complaint-final.pdf.

Yet, the more that a bank attempts to protect itself from the risks of third-party high-cost lending arrangements, the more likely it is that the nonbank will be viewed as the true lender. Factors that shield the bank from risk have been cited by courts to find that the bank is not the true lender.[138] And, as discussed above, if the nonbank shoulders the predominant risk of default, it has the predominant economic interest.

Thus, the risk of predatory rent-a-bank loans cannot be avoided.

6.4. Recent developments show the increasing risk of true lender challenges.

With increasing frequency in recent years, rent-a-bank schemes have been subject to litigation or regulatory challenges on the basis that the bank is not the true lender. States have also been tightening their lending statutes to strengthen their ability to attack rent-a-bank schemes. When challenges succeed, banks can themselves be liable in a number of ways, both for directly participating in and facilitating a usurious lending scheme, and for deceptive practices or debt collection violations for giving the false impression that a loan is legal and attempting to collect unlawful interest or a void loan.[139] In addition, as the noose tightens on rent-a-bank schemes and lenders pull out of more and more states, the business model of these lending programs becomes increasingly less viable.

While the result of any individual litigation is not certain, the likelihood that rent-a-bank schemes will result in litigation is hardly hypothetical. Every one of the five banks discussed in this paper is involved with at least one program that has faced a government enforcement action in the last few years. In addition to usury claims, many of these cases also assert other legal violations, in particular unfair and deceptive practices. While these actions have primarily been against the non-bank partner, the attacks on these schemes still pose risks to the bank for the reasons explained in Section 3 below. (The bank regulators must also ensure that these enforcement actions against the non-bank lenders are being reported to the bank,[140] and the bank in turn should be reporting them to their regulator.)

Recent enforcement actions and lawsuits against rent-a-bank schemes include:

- In June 2020, the Attorney General of the District of Columbia (DC) sued Elevate for violating its interest rate cap. The suit alleges that Elevate charged up to 42 times the DC's permissible rate limits, "unlawfully burden[ing] over 2,500 financially vulnerable District residents with millions of dollars of debt."[141] In remanding the case from federal to DC court, a federal court found that the AG's allegations are similar enough to older rent-a-bank schemes for the court to conclude that "the District has sufficiently alleged

[138] *See, e.g.,* Dist. of Columbia v. Elevate, 554 F. Supp. 3d 125, 130 (D.D.C. 2021) (noting that the bank's interests are protected by a requirement that a special purpose vehicle maintain cash collateral to secure its obligations to purchase the loans); *id.* at 139 ("Elevate provides credit protection to [the Cayman Islands special purpose vehicles] against [Rise and Elastic] loan losses. This credit protection places the risk of losses on Elevate." (quoting complaint)); Meade v. Avant of Colorado, L.L.C., 307 F. Supp. 3d 1134, 1147 (D. Colo. 2018) (non-bank "bears all the risk on the loans in the event of default, … pays all the legal fees and expenses related to the lending program … and indemnifies [the bank] against all claims arising from [the bank's] involvement in the loan program"); Flowers v. EZPawn Oklahoma, Inc., 307 F. Supp. 2d 1191 (N.D. Okla. 2004) (payday lender "accepts the ultimate credit risk").

[139] *See* CFPB v. CashCall, 35 F.4th 734, 739 (9th Cir. 2022); NCLC, Consumer Credit Regulation § 2.4.1.3.5 (deception and nondisclosure).

[140] Third-Party Relationships, 88 Fed. Reg. at 37932.

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

that Elevate is the true lender of the Rise and Elastic loans."[142] In February 2021, Elevate, which had earlier stopped lending in DC in response to the investigation, agreed to a nearly $4 million settlement with DC.[143]

- In April 2021, the DC AG sued OppFi, stating that "OppFi lures vulnerable borrowers in with false promises, and then forces them to pay interest rates that far exceed what is allowed in the District."[144] In December 2021, the DC AG won a $2 million settlement against OppFi for making illegal loans to over 4,000 DC residents.[145] The case also alleged that the company misrepresented that its loans would help consumers build credit when its own underwriting model anticipated that up to one third of its borrowers would be unable to repay and default.
- In June 2021, a federal court in Washington State granted leave to file an amended complaint against Elevate Credit, finding the true lender theory of liability "viable."[146]
- In December 2021, the California Department of Financial Protection and Innovation (DFPI) announced a consent order to resolve its investigation into whether Wheels Financial Group, LLC (dba LoanMart), was evading California's newly-enacted interest rate cap. LoanMart agreed to stop making loans above 36% in California for 21 months, until September 2023.[147]
- In April 2022, the California DFPI filed a cross complaint against OppFi after OppFi sued for declaratory relief to attempt to stop DFPI's enforcement investigation. On September 30, 2022, the trial court overruled OppFi's demurrer, finding that California law recognizes the "true lender" doctrine.
- In November 2022, a federal court in Washington State rejected Elevate's motion to dismiss a rent-a-bank claim, finding that the plaintiffs had "adequately pled that FinWise [Bank] has essentially rented its charter to Elevate for the purpose of charging usurious interest rates to Washington consumers," and if true, preemption would not apply.[148]

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[142] 554 F.Supp.3d 125, 139 (D.D.C. 2021).

[143] *See* Office of the Attorney General of the District of Columbia, Press Release, AG Racine Announces Nearly $4 Million Settlement with Predatory Online Lender That Will Compensate Thousands of District Consumers (Feb. 8, 2021), https://oag.dc.gov/release/ag-racine-announces-nearly-4-million-settlement#:~:text=Racine%20today%20announced%20that%20Elevate,pay%20%24450%2C000%20to%20the%20District.

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

[145] *See* Office of the Attorney General of the District of Columbia, Press Release, AG Racine Announces Over $2 Million Settlement with Predatory Online Lender Will Compensate Thousands of District Consumers (Nov. 30, 2021), https://oag.dc.gov/release/ag-racine-announces-over-2-million-settlement.

[146] Sanh v. Opportunity Fin'l, LLC, 2021 WL 2530783 (W.D. Wash. June 21, 2021). Although the title of the court's opinion mentions Opportunity Financial, the plaintiff settled as to OppFi and the amended complaint was against Elevate Credit and its Rise Credit brand. *See* Amended Class Action Complaint, Sanh v. Rise Credit Service of Texas, LLC dba Rise and Elevate Credit, Inc. No. 2:20-cv-00310-RSL (W.D. Wash. Filed June 22, 2021).

[147] *See* Calif. Dept. of Fin'l Prot'n & Innov., Press Release, DFPI Reaches Agreement to End High-Interest Rate Loans Marketed by LoanMart for 21 Months (Dec. 14, 2021), https://dfpi.ca.gov/2021/12/14/dfpi-reaches-agreement-to-end-high-interest-rate-loans-marketed-by-loanmart-for-21-months/.

[148] Sanh v. Rise Credit Service, 2022 WL 16854329 at *2 (Nov. 10, W.D. Wash. 2022).

- In December 2022, the Iowa Attorney General entered into an Assurance of Discontinuance with TAB Bank that requires the bank to stop issuing loans for EasyPay Finance and to refund money to consumers who were charged illegal interest rates, which are limited to 21% in Iowa.[149] Iowa law makes it easier to attack the bank directly, because the state has opted out of rate exportation by state-chartered banks.
- In April 2023, the Colorado Attorney General's office entered into a consent decree with EasyPay Finance over its rent-a-bank loans, prohibiting EasyPay from lending in Colorado and requiring it to pay $275,000 in restitution to Colorado borrowers.[150]
- In July 2023, the District of Columbia Attorney General also entered into a settlement with EasyPay, including $216,548.83 in restitution and an agreement to stop lending above the District's interest rate cap.[151]
- Several private rent-a-bank cases have been filed against OppFI.[152]
- In November 2023, a rent-a-bank class action was filed against Lead Bank and Helix Financial (which is now using Bank of Orrick). The complaint included both federal and state RICO claims against the bank.[153]

  In September 2024, Wheels Financial which offers LoanMart and ChoiceCash auto title lending, revealed that the Oregon Department of Business and Consumer Services has been threatening an enforcement action for its rent-a-bank lending. Wheels is seeking declaratory and injunctive relief to stop the enforcement action.[154]

Moreover, since 2021, six states have adopted legislation to codify the true lender doctrine and to enact strong anti-evasion rules: Illinois,[155] Maine,[156] New Mexico,[157] and most recently

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[149] *See* Clark Kauffman, Iowa Capital Dispatch, Iowa consumers to collect refunds for 'predatory' pet loans, auto-repair loans (Dec. 21, 2022), https://www.3newsnow.com/news/local-news/iowa-consumers-to-collect-refunds-for-predatory-pet-loans-auto-repair-loans.

[150] Colorado Attorney General's Office, Press Release, Colorado Attorney General's Office settles with lender for exceeding state interest rate limits on consumer loans, secures $275K in restitution (Apr. 24, 2023), https://coag.gov/press-releases/4-24-23/#:~:text=Under%20the%20settlement%2C%20EasyPay%20agreed,stop%20collecting%20on%20defaulted%20loans.

[151] Office of the District of Columbia Attorney General, Press Release, Ag Schwalb Secures Comprehensive Financial Relief for Consumers Deceived By Predatory Lender (July 12, 2023), https://oag.dc.gov/release/ag-schwalb-secures-comprehensive-financial-relief#:~:text=Schwalb%20today%20announced%20that%20EasyPay,DC's%20legally%20allowed%20maximum%20rate.

[152] *See, e.g.,* Michael v. Opportunity Financial, No. 1:22cv529 (W.D. Tex. filed June 1, 2022); Johnson v. Opportunity Financial, No. 3:22-cv-190 (E.D. Va. Filed April 6, 2022); Carpenter v. Opportunity Financial, No. 2:21-cv-09875 (C.D. Cal. Filed Dec. 22, 2021); Sanh v. Opportunity Financial, No. 20-00002-02268-3 SEA (King Co., Wash. Sup. Ct filed Jan. 27, 2020), removed as No. C20-0310RSL (W.D. Wash. Feb. 26, 2020).

[153] *See* Class Action Complaint, Childs v Hyphen, LLC dba Helix Financial, and Lead Bank, *supra.* The case has been settled and dismissed.

[154] Complaint, Wheels Financial Group, LLC v. Stolfi, No. 3:24-cv-1543 (D. Ore. filed Sept. 12, 2024).

[155] 815 Ill. Comp. Stat. Ann. 123/15-5-15(b) (effective Mar. 23, 2021).

[156] Me. Stat. tit 9-A, § 2-702 (effective Oct. 18, 2021).

[157] N.M.S.A. 58-15-3(D)(3) (additional anti-evasion language in (D)(1) and (2) (effective Jan. 1, 2023).

Connecticut,[158] Minnesota[159] and Washington.[160] They join Georgia and other states that have older true lender statutes.[161] A statutory true lender doctrine is not necessary to assert the true lender doctrine, which is simply an application of the centuries' old rule that courts may look beyond the form of a transaction to the substances to prevent evasions of usury laws. But having the doctrine codified in statute increases the risks to the lender.

Triple-digit rate rent-a-bank lenders generally stay out of states that have codified the true lender doctrine, that have been active in bringing enforcement actions and enforcing their usury laws, or that have strong caselaw endorsing the true lender doctrine. There is now little triple-digit rent-a-bank lending in Colorado, DC, Georgia, Illinois, Iowa, Maine, Maryland, Massachusetts, New Hampshire, New Mexico, New York, Pennsylvania, South Dakota, Vermont and West Virginia. [162] As the number of those states grow – and are joined by large states like California that have stepped up enforcement – the risks to lending programs that depend on the fiction that the bank is the lender only increase. The footprint for these loans will become smaller and smaller, making the lending scheme less and less viable and more vulnerable to collapse.

In addition to true lender challenges, states are beginning to address these abuses by revisiting the interest rate exportation that rent-a-bank schemes depend on. In June 2023, the State of Colorado enacted a law opting Colorado out of the Depository Institutions Deregulation and Monetary Control Act of 1980 (DIDMCA).[163] Predatory rent-a-bank lending drove the effort to opt out, which is being considered by other states.[164]

7. Banks face serious risks if they are not the true lender.

7.1. Banks face safety and soundness risks if their lending programs are unlawful.

The legality of rent-a-bank lending programs hinges on the false claim that the bank is the lender. If the bank is not the true lender, then the interest rates are illegal, posing several

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[158] Connecticut S.B. 1011 (effective Oct. 1, 2023), https://www.cga.ct.gov/2023/ACT/PA/PDF/2023PA-00126-R00SB-01033-PA.PDF.

[159] Minn. HF 290 (adding Minn. Stat. Ann. § 47.60(8) (effective Aug. 1, 2023), Minnesota's statute governs loans up to $1,300. But Minnesota's substance-over-form usury caselaw can be used for other loans.

[160] Wash. SB 6025 (2023-24), *codified at* RCW 31.04.025(2), (3), RCW 31.040.027(1)(o).

[161] Ga. Code Ann. § 16-17-2(b)(4) ("A purported agent shall be considered a de facto lender if the entire circumstances of the transaction show that the purported agent holds, acquires or maintains a predominant economic interest in the revenues generated by the loan."); Cal. Fin. Code § 23037 (West) (exempting arrangers for, agents of or assistants to banks from payday loan statute as long as several criteria are satisfied, including that the bank does not sell "a preponderant economic interest" in the loan to the agent unless selling the preponderant economic interest is expressly permitted by the bank's primary regulator); Nev. Rev. Stat. §§ 604A.5064(2)(b) (high-interest loans over 40% APR), 604A.5089(2)(b) (title loans), 604A.200 (applying provisions of statute governing deferred deposit, high-interest, and title loans and check cashing services to any person who seeks to evade it, including by "making a loan while purporting to be the agent of such an exempt entity where the purported agent holds, acquires or maintains a preponderant economic interest in the revenues generated by the loan"); N.H. Rev. Stat. Ann. § 399-A:2(III)(c) (same) (consumer loans under $10,000).

[162] *See* NCLC, Consumer Rent-a-Bank Watch List (50-state spreadsheet), https://docs.google.com/spreadsheets/d/1XJxKzS6e9hgkRFYAr3idNkLVUcHZmuAm/edit#gid=1917677263.

[163] Colo. HB23-1229 (2023 regular session), to be codified at Colo. Rev. Stat. § 5-13-106.

[164] *See* Polo Rocha, American Banker, Colorado's new law on high-cost lending may be a model for other states (June 7, 2023), https://www.americanbanker.com/news/colorados-new-law-on-high-cost-lending-may-be-a-model-for-other-states.

potential consequences to banks. These consequences for not being the true lender are described in the subsequent subsections, and include the risk that:

- The bank could be subject to significant liability, even criminal liability, for facilitating unlawful loans and the collection of unlawful debt. That liability could significantly exceed any profit that the bank earns from the illegal program.
- The bank could suffer credit losses if the receivables kept on its books are not repaid.
- The nonbank partner could fail to fulfill its commitment to purchase loans or receivables that the bank expected to sell, enhancing the risk of nonpayment.
- Reliance on revenues from high-cost, usurious loan programs is increasingly unsustainable as more and more states put a stop to these abuses.
- Enforcement actions could lead fintechs to refrain from partnerships with the bank.

These are not the only risks that rent-a-banks face. They face other risks even if they are the true lender, and they face the risks of failing to comply with a number of consumer protection and other laws beyond interest rate limits, as discussed in Sections 5 and 7.

7.2. Banks could be liable for significant damages and RICO liability for rent-a-bank schemes, and even criminal liability, if they are not the true lender.

If the bank is not the true lender, then the loan is likely usurious. The bank then faces risks for facilitating that usurious lending. As the FDIC has noted in the Small Dollar Loan section of its Consumer Compliance Examination Manual:

> "Third parties involved in small dollar-lending may also be subject to federal and state laws, including requirements regarding licensure and/or the *pricing* and terms of loans offered through the third party, notwithstanding whether the financial institution is designated as the lender in the transaction. If a third party offering loans as part of a business relationship with an FDIC-supervised institution is found by a court of competent jurisdiction or a federal or state regulatory authority to have engaged in practices that are not compliant with applicable federal or state law, the institution may face risks for facilitating or participating in the third party's unlawful activity."[165]

The FDIC emphasized that "Under Section 3(v) of the [Federal Deposit Insurance] Act, a bank may be found to have violated a law or regulation if it caused, brought about, participated in, or otherwise aided or abetted a third party in violating such a law or regulation."[166]

A bank that facilitates a usurious loan could face serious liability and other consequences, far beyond relinquishing its profits from the scheme.

To the extent that agreements between banks and rent-a-bank lenders attempt to limit the bank's potential liability, they must take into account the full range of that liability. Banks must consider whether indemnification provisions and limits on liability "are in proportion to the amount of the loss the banking organization might experience as a result of third-party failures …."[167] But, as discussed in Section 2.3 above, any such liability protection poses a Catch-22:

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[165] FDIC, Consumer Compliance Examination Manual (April 2023) at V-17.2; *accord id.* at V-17.4. (emphasis added)

[166] *Id*. at V-17.2, n.3.

[167] Third-Party Relationships, 88 Fed. Reg. at 37933 (banks must consider whether indemnification provisions and limits on liability "are in proportion to the amount of the loss the banking organization might experience as a result of third-party failures …."

the more the agreement protects the bank from liability, the more likely the bank is not the true lender, and thus the greater potentially liability.

The bank may be directly liable for all of the excess interest collected and more, even if most of the interest in the loans is ultimately passed on to the nonbank entity. The Ninth Circuit recently reaffirmed that restitution "may be measured by the 'full amount lost by consumers rather than limiting damages to a defendant's profits.'"[168] On remand from that decision, the district court awarded $134 million in restitution and $33 million in penalties against a "rent-a-tribe" scheme.[169] Although the CFPB did not seek damages or restitution from the tribe (analogous to the bank in a rent-a-bank scheme), the Ninth Circuit's reasoning could make banks liable for significant damages far above their profits. Damages could include double or triple the excess interest and even include repayment of principal, as some states have laws deeming the entire loan to be void if it is usurious.[170]

A bank that facilitates and profits from a usurious lending scheme could also be liable under either the Racketeer Influenced and Corruption Organizations Act (RICO)[171] or state RICO statutes.[172] RICO provides powerful remedies, including treble damages, criminal sanctions, and forfeiture of any property or derived directly or indirectly from the unlawful activity.[173]

As noted above, federal state RICO claims were recently brought against Lead Bank for its rent-a-bank scheme operated by Helix Financial (which now uses Bank of Orrick).

RICO prohibits the use of an "enterprise" to engage in "collection of unlawful debt," including usurious debt.[174] Any agreement to facilitate such activity is also prohibited, under the separate RICO conspiracy provision.[175]

The United States Supreme Court has established that criminal liability for a RICO conspiracy may attach to one who "knowingly agree[d] to facilitate a scheme which includes the operation or management of a RICO enterprise."[176] Thus, individuals and companies who promote or service a usury scheme are potentially criminally liable under RICO even if they themselves are not involved in managing or directing the illegal lending enterprise.[177]

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[168] CFPB v. CashCall, 35 F.4th 734, 751 (9th Cir. 2022) (quoting CFPB v. Gordon, 819 F.3d 1179, 1195 (9th Cir. 2016)), on remand, 2023 WL 2009938 (C.D. Cal. Feb. 10, 2023) (awarding $134 million in restitution, $33 million in penalties).

[169] CFPB v. CashCall, 2023 WL 2009938 (C.D. Cal. Feb. 10, 2023).

[170] *See* National Consumer Law Center, Consumer Credit Regulation Appx. B.2 (summary of state usury statutes).

[171] 18 U.S.C. § 1961 et seq.; see National Consumer Law Center, Consumer Credit Regulation § 7.8.6.2.6.

[172] See National Consumer Law Center, Consumer Credit Regulation § 7.8.6.2 (state RICO statutes).

[173] 18 U.S.C. §§ 1963, 1964.

[174] 18 U.S.C. § 1962(c).

[175] 18 U.S.C. § 1962(d).

[176] Salinas v. United States, 522 U.S. 52, 65 (1997) ("A conspirator must intend to further an endeavor which, if completed, would satisfy all of the elements of a substantive criminal offense, but it suffices that he adopt the goal of furthering or facilitating the criminal endeavor."); *see* U.S. v. Fernandez, 388 F.3d 1199, 1230 (9th Cir. 2004), modified, 425 F.3d 1248 (9th Cir. 2005) (quoting Smith v. Berg, 247 F.3d 532, 538 (3d Cir. 2001)).

[177] *See, e.g.*, United States v. Zemlyansky, 908 F.3d 1, 12, n.6 (2d Cir. 2018) ("Persons outside the enterprise may be found liable under RICO if they 'agreed to facilitate a scheme by providing tools, equipment, cover or space,' so long as the facilitation was knowing because the defendant was aware of the broader scheme.").

Federal courts, including the Eleventh Circuit, have recognized the applicability of RICO to usurious rent-a-bank schemes.[178] Just last year, a federal district court held that a consumer could assert a RICO claim involving a rent-a-bank loan,[179] and another court recently denied a motion to compel arbitration in a rent-a-bank case asserting RICO among other claims.[180] While these cases are against the non-bank entity, they show the risks banks are taking in engaging in an enterprise with these lenders to collect unlawful debt.

RICO has also been applied in other settings analogous to rent-a-bank lending. Courts have upheld criminal liability for attorneys and others who facilitated usurious rent-a-tribe lending, notwithstanding claims that the defendants had a good faith belief that the loans were lawful, and their conduct was not willful, due to the tribes' involvement.[181] The Fourth Circuit recently upheld class certification of RICO claims against another rent-a-tribe lender.[182]

The litigation risk that RICO violations pose can lead to significant liability. For example, in one rent-a-tribe case where the plaintiffs' alleged RICO violations, the lender agreed to a $500 million settlement.[183]

7.3. The questionable legality of rent-a-bank schemes leads to safety and soundness risks even if the bank is not directly targeted.

Even if the bank is not directly sued or liable, legal challenges can result in safety and soundness impacts on the bank. A variety of circumstances could jeopardize the viability of the lending program or leave the bank exposed to unexpected default and legal risks. The result could be a significant decrease in planned revenue or a spike in expenses and losses.

The Third-Party Relationships guidance notes banks must engage in more comprehensive and rigorous oversight of higher-risk activities. One characteristic of a critical activity is one that could "[c]ause a banking organization to face significant risk if the third party fails to meet

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[178] *See, e.g.,* Community State Bank v. Strong, 651 F.3d 1241 (11th Cir. 2011) (finding federal jurisdiction because plaintiff could "plead facts demonstrating that the Bank was not the actual lender" and thus could be held liable under RICO for aiding or abetting a usury violation); Dillon v. BMO Harris Bank, 16 F. Supp. 3d 605 (M.D.N.C. 2014) (denying motion to dismiss RICO claims against banks that enabled payday lenders to collect loans from North Carolina residents that would be illegal under state law and against state-chartered bank for aiding and abetting unlicensed lending in violation of anti-evasion provision of the state lending law).

[179] Michael v. Opportunity Financial, No. 1:22-cv-00529-LY, 2022 WL 14049645 (W.D. Tex. Oct. 24, 2022) (magistrate's recommendation finding that plaintiff could assert a RICO claim, notwithstanding the Utah choice-of-law clause in the contract, and thus the arbitration clause did not prohibit plaintiff from asserting a federal statutory claim), *adopted by district court* 2023 WL 3035394 (W.D. Tex. Jan. 11, 2023).

[180] Carpenter v. Opportunity Financial, 2023 WL 2960327 (Mar. 29, 2023).

[181] *See* United States v. Grote, 961 F.3d 105, 113 (2d Cir. 2020), cert. denied sub nom. Tucker v. United States, 209 L. Ed. 2d 160, 141 S. Ct. 1445 (2021), *cert. denied sub nom.* Muir v. United States, 211 L. Ed. 2d 97, 142 S. Ct. 222 (2021); United States v. Neff, 787 Fed.Appx. 81 (3d Cir. 2019) (a conviction for conspiring to collect unlawful debt in violation of RICO does not require willfulness to distinguish innocent from guilty, and thus, Government needs only prove that a defendant knew that the debt collected had the characteristics that brought it within the statutory definition of an unlawful debt); cf. CFPB v. Cashcall, 35 F.4th 734 (9th Cir. 2022) (district court erred by determining lender did not act "recklessly," as was required for imposition of tier-two civil penalty under Consumer Financial Protection Act, when its counsel recommended termination of program).

[182] Williams v. Martorello, ___ F.4th ___, 2023 WL 364903 (4th Cir. Jan. 24, 2023). *See* Ali Sullivan, Law360, Borrowers Can Bring RICO Suit Against Tribe-Linked Lender (Jan. 25, 2023), https://www.law360.com/articles/1568967/borrowers-can-bring-rico-suit-against-tribe-linked-lender.

[183] Katryna Perera, Law360, Consumers Reach $500M Deal With Tribal Lending Cos. (Apr. 27, 2022), https://www.law360.com/articles/1487910.

expectations."[184] As rent-a-banks schemes are challenged, the nonbank could cease to purchase loan interests, causing the lending program may collapse.[185] Legal challenges or other factors may also lead the nonbank partner to be unable to fulfill its obligations to purchase loans or receivables.[186]

The lending programs may also be curtailed significantly as lenders withdraw from states that challenge these schemes. For example, some rent-a-bank lenders have pulled out of California since the state began a more active enforcement posture, and out of Illinois after the state passed a 36% rate cap with rent-a-bank anti-evasion language. When large markets like those disappear, the viability of the lending program becomes more questionable. Banks that have significant business lines dependent on these partnerships are at risk.

7.4. Banks face special risks when they continue rent-a-bank schemes that have been exposed through enforcement actions.

All of the rent-a-bank schemes discussed in this paper are unlawful and should be ended because the bank is not the true lender. But in particular, several of these schemes have been subject to state enforcement actions that have revealed details confirming their illegality and have resulted in consent decrees forcing the lenders out of the jurisdictions at issue. These consent decrees, detailed above, include DC's actions against OppFi and Elevate; California's against LoanMart, as well as its pending litigation against OppFi; and those of Colorado, DC and Massachusetts against EasyPay Finance. Those loan programs are unlawful not only in the states where they have been sued, but in all of the other states where they are evading state rate caps.

The fact that banks (all supervised by the FDIC) have been participants in these unlawful schemes and that their partners have been subject to enforcement actions poses particular risks to the banks that continue these schemes in other states. The FDIC should shut down these partnerships. If it does not, these schemes will continue to fact state enforcements actions and private litigation.

8. Banks that partner with fintechs may be subject to, and could be violating, state laws other than usury laws.

The right of state-chartered banks to export their home state laws under Section 27 of the Federal Deposit Insurance Act (FDIA) (adopted through the Depository Institutions Deregulation and Monetary Control Act of 1980)[187] applies only to interest rates. It does not preempt other state consumer protection laws.

The only possible basis for preemption of state laws regarding matters other than interest is the Riegle-Neal Act, which gives the branches of out-of-state, state-chartered banks many of the same preemption rights that national banks have. It amended the FDIA to provide: "The laws of a host State, including laws regarding community reinvestment, consumer protection, fair

[184] Third-Party Relationships, 88 Fed. Reg. at 37927.

[185] *See, e.g.,* CFPB v. CashCall, 35 F.4th 734, 739 (9th Cir. 2022) ("In September 2013, CashCall discontinued its purchase of Western Sky loans; without CashCall, Western Sky ceased its operations.").

[186] As discussed above, if banks try to insulate themselves from this risk, it is more likely that the nonbank will be found to be the true lender.

[187] 12 U.S.C. §1831d.

lending, and establishment of intrastate branches, shall apply to any branch in the host State of an out-of-State State bank to the same extent as such State laws apply to a branch in the host State of an out-of-State national bank."[188]

However, Riegle-Neal preemption only applies to "*any branch* in the host state." It does not apply if a bank does not have branches in other states, or to activities conducted out of the home state.

The term "branch" is strictly defined in the FDIA to mean a physical location: "any branch bank, branch office, branch agency, additional office, or any branch place of business located in" any state or dependency "at which deposits are received or checks paid or money lent," and "does not include an automated teller machine or a remote service unit."[189] Thus the FDIC has stated:

> the preemption provided by section [12 U.S.C. § 1831a(j)] only operates with respect to a branch in the host state of an out-of-state, state bank. By its terms section [12 U.S.C. § 1831a(j)(1)] … would not apply if the out-of-state, state bank does not have a branch in the host state.[190]

Thus, state-chartered banks have no preemption rights beyond the right to export interest rates when they extend credit from their state of charter over the internet to borrowers in a host state.[191]

Many banks that partner with fintechs do not have branch networks, and they primarily conduct their activities through the internet. Even for loans that are arranged through brick-and-mortar retail outlets, the loan itself is taken out on a mobile device or otherwise through a computer, not in a bank branch in the consumer's state. As a result, these banks are potentially subject to state laws including licensing laws and other laws that are not directly related to interest rate limits.

For example, TAB Bank was sued by a consumer in Wisconsin over its EasyPay Finance loan through a furniture store. Wisconsin does not have interest rate limits. But the consumer alleged numerous violations of state law based on these and several other provisions of the bank's contract:

- a clause selecting Utah as the choice of law
- a provision declaring that the loan was in default if any payment was not made in 10 days
- a provision giving the bank attorneys' fees
- a waiver of class action and jury trial.[192]

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[188] 12 U.S.C. § 1831a(j)(1); 12 C.F.R. § 331.3 (effective Aug. 21, 2020).

[189] 12 U.S.C. § 1813(o). Cf. 12 U.S.C. § 3101(3) ("'branch' means any office or any place of business of a foreign bank located in any State of the United States at which deposits are received").

[190] Federal Deposit Ins. Corp., Proposed Rules, Interstate Banking; Federal Interest Rate Authority, 70 Fed. Reg. 60,019, 60,025 (Oct. 14, 2005).

[191] *See* Lauren Saunders, NCLC, New Angles in Challenging Rent-a-Bank Schemes (Feb. 7, 2023), https://library.nclc.org/article/new-angles-challenging-rent-bank-schemes.

[192] Complaint and Demand for Jury Trial, Ermilio v. TAB Bank, removed to federal court as No. 3:21-CV-00652 (W.D. Wisc. Oct. 15, 2021), https://library.nclc.org/sites/default/files/field_media_file/2023-02/Ermilio%20v.%20TAB%20complaint.pdf.

The bank (which was represented by Ballard Spahr) immediately submitted a confession of judgment offering to pay $2,000, cancel the debt, and pay attorneys' fees.[193]

Similarly, the Maryland Commissioner of Financial Regulation filed a charge letter against the Bank of Missouri in connection with its origination of loans for Fortiva Services LLC, and Atlanticus Services Corp. Maryland alleged that the bank violated Maryland law by, among other things, making installment loans and engaging in collection agency activities without being licensed in Maryland, which made the loans void and unenforceable.[194] The bank and other defendants removed the administrative action to federal court, which granted Maryland's motion to remand and rejected the argument that the action was preempted. The court found that the federal interest in the case does not outweigh the state's "substantial interest in regulating lending within its jurisdiction and in providing a forum for enforcement" of state law and that Maryland's allegations of unlicensed lending "does not implicate Section 27 [of the FDIA]."[195]

The interagency Third-Party Relationships guidance also emphasizes that banks must ensure that the third parties with which they engage have "the necessary legal authority to perform the activity, such as any necessary licenses …."[196] Even if fintechs claim to be agents of the bank, they may still be subject to licensing.

Banks that engage in rent-a-bank operations or other bank-fintech partnerships across the country may not be paying attention to the many state laws that could apply. This increases the risk to those banks even aside from the risk of violating state usury laws.

9. High-cost lending poses high credit risks and default rates that violate requirements for prudent credit underwriting.

9.1. Banks are required to engage in prudent underwriting.

The Treasury Department recently emphasized that banks "have existing obligations to make certain assessments related to a borrower's ability to repay, including when participating in a bank-fintech relationship."[197] Prudent credit underwriting is an obligation of every bank, regardless of the interest rate it charges or its business model. The FDIC's Standards for Safety and Soundness require institutions to "assess the ability of the borrower to repay the indebtedness in a timely manner" and "establish and maintain prudent credit underwriting practices."[198] Among other elements, the bank's underwriting practices must provide for:

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[193] Rule 68 Offer of Judgment, Ermilio v. TAB Bank, No. 3:21-cv-00652 (W.D. Wisc. Oct. 29, 2021).

[194] Charge Letter, Maryland Comm'r of Fin'l Reg. v. Fortiva Financial, et al., Case No. CFR-FY2017-003 (Jan. 21, 2021), https://library.nclc.org/companion-material/charge-letter-md-commr-finl-reg-v-fortiva-financial-et-al-case-no-cfr-fy2017-003.

[195] Salazar v. Fortiva Financial, LLC, 2022 WL 1267995 (D.D. Md. Apr. 28, 2022).

[196] 88 Fed. Reg. at 37929.

[197] Treasury Non-Bank Competition Report at 141 & n.451 (citing the Interagency Guidelines Establishing Standards for Safety and Soundness adopted under Section 39 of the Federal Deposit Insurance Act, 12 C.F.R. Appendix A to Part 364, Section 2 (C) & (D), https://www.ecfr.gov/current/title-12/part-364/appendix-Appendix%20A%20to%20Part%20364 (Interagency Safety & Soundness Guidelines).

[198] Interagency Safety & Soundness Guidelines, Appx. A at 4.

> "consideration, prior to credit commitment, of the borrower's overall financial condition and resources, the financial responsibility of any guarantor, the nature and value of any underlying collateral, and the borrower's character and willingness to repay as agreed."[199]

Similarly, the Interagency Guidance for Responsible Small-Dollar Loans includes guidance principles to clarify regulatory expectations for responsible small-dollar loans. These principles include:

- A high percentage of customers successfully repaying their small dollar loans in accordance with original loan terms, which is a key indicator of affordability, eligibility, and appropriate underwriting;
- Repayment terms, pricing, and safeguards that minimize adverse customer outcomes, including cycles of debt due to rollovers or reborrowing; and
- Repayment outcomes and program structures that enhance a borrower's financial capabilities.[200]

The Small Dollar guidance also emphasizes:

- "Loan products are underwritten based on prudent policies and practices governing the amounts borrowed, frequency of borrowing, and repayment requirements…"
- "Loan underwriting: Analysis that uses internal and/or external data sources, such as deposit account activity, to assess a customer's creditworthiness and to effectively manage credit risk. Such analysis may facilitate sound underwriting for credit offered to non-mainstream customers or customers temporarily impacted by natural disasters, national emergencies, or economic downturns. Underwriting can also use effectively managed new processes, technologies, and automation to lower the cost of providing responsible small-dollar loans."

The FDIC's updated Small-Dollar Lending section of the FDIC Consumer Compliance Examination Manual also emphasizes the "compliance risks associated with small-dollar loan products" including that "performance analysis by the FDIC or by the institution finding high charge-off or default rates, or high rates of refinancing or reborrowing associated with a particular loan program, may suggest an elevated risk of consumer harm."[201]

Many other guidances on responsible underwriting also emphasize the critical importance of ensuring that borrowers have the capacity to repay their loans on their terms.[202]

The Treasury Department's recent report on competition by nonbank firms emphasizes that insured depository institutions (IDIs) "have existing obligations to make certain assessments related to a borrower's ability to repay, including when participating in a bank-fintech relationship," and "bank-fintech relationships should be supervised for consistency with

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[199] *Id.*

[200] Board of Governors of the Federal Reserve System, FDIC, National Credit Union Administration, Office of the Comptroller of the Currency, Interagency Lending Principles for Offering Responsible Small-Dollar Loans (May 2020), https://www.fdic.gov/news/press-releases/2020/pr20061a.pdf.

[201] FDIC, Consumer Compliance Examination Manual (April 2023) at V-17.1.

[202] *See* NCLC, Federal ability-to-repay requirements for small dollar loans and other forms of non-mortgage lending (Nov. 2021), https://www.nclc.org/resources/federal-ability-to-repay-requirements-for-small-dollar-loans/.

principles for responsible and prudent consumer lending."[203] Regulators should consistently apply the supervisory framework for financial institutions, including small dollar loan guidance: "Treasury recommends that federal banking regulators implement a clear and consistently applied supervisory framework for an IDI's role in bank-fintech relationships to address competition, consumer protection, and safety and soundness concerns" and "that the agencies increase consistency in supervisory practices related to small-dollar lending programs."[204]

In particular, the report stated that "high-cost, high-default loan programs that do not sufficiently consider a borrower's financial capabilities may warrant review for unsafe or unsound practices and violations of law, including consumer protection statutes, and inconsistency with supervisory principles for responsible consumer lending."[205]

9.2. High-cost rent-a-bank lenders do not ensure prudent underwriting.

Bank lending conducted through a third party must adhere to the bank's lending policies.[206] The banks involved in rent-a-bank lending do not appear to engage in high-cost predatory lending directly through their own name, website and branches. Yet they are facilitating predatory lending with high default rates that likely deviates from the bank's policies for its own lending activities.

Most banks exercise self-restraint in the consumer lending space and rarely engage in lending above 36%. In large part, that is because borrowers who cannot qualify for credit at 36% are likely struggling to pay their existing expenses and debts and do not have the ability to repay additional credit.[207]

High-cost rent-a-bank lenders care less about ability to repay. They often target struggling consumers with marketing aimed at those with bad credit. Indeed, as described in Section 7.2 below, high-cost lenders may even prefer borrowers who will make payments for a period of time and then default over those who have the capacity to repay and may repay early.[208]

The Treasury non-bank competition report noted that bank-fintech relationships "can provide an opening for so-called 'rent-a-charter' schemes that market themselves as innovative fintech lending platforms, but operate with essentially the same harmful business model as a traditional payday lender."[209] These "high-cost, high-default businesses often primarily derive profits from consumers who do not have the ability to repay."[210]

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[203] Treasury Non-Bank Competition Report at 113, 114.

[204] *Id.*, 114-115.

[205] *Id.* at 113-114.

[206] *See* Third-Party Relationships, 88 Fed. Reg. at 37929; *id.* at 37936 (bank must conduct periodic independent reviews to assess whether the third-party relationship aligns with the bank's internal policies, procedures and standards).

[207] As discussed above, even rates below 36% can be unaffordable on larger loans.

[208] *See* NCLC, *Misaligned Incentives: Why High-Rate Installment Lenders Want Borrowers Who Will Default* (July 2016), https://www.nclc.org/resources/misaligned-incentives-why-high-rate-installment-lenders-want-borrowers-who-will-default/; Proposed Statement of Decision After Court Trial ,De La Torre v. CashCall, No. 19CIV01235 (Sup. Ct. Cal. Nov. 17, 2022).

[209] Treasury Non-Bank Competition Report at 113.

[210] Id. at 113 n.449.

High interest charges exacerbate the problems from inadequate underwriting. Consumers who would be deemed an inadequate credit risk at 36% or less cannot be expected to have the ability to repay loans with exorbitantly higher interest charges. Payments for much of the loan term go heavily to interest, leading consumers to despair of making progress, and leading many to give up.

As a result, high-cost rent-a-bank lenders tend to have very high default rates. Recent public filings show shockingly high annualized net charge-off rates for several publicly-traded lenders:[211] 56% for Enova,[212] 52% for Elevate,[213] and 58% for OppFi.[214] Of course, defaults are only the tip of the iceberg of consumers who do not have the ability to repay their loans, as automatic payments may trigger overdrafts or take money needed for other expenses.

Banks undoubtedly specify target or maximum default rates in their rent-a-bank programs (and if they do not, that would indicate a failure to monitor a highly critical indicator of risk). But the Third-Party Relationships guidance states that it is important to for banks to negotiate with their third parties for "performance measures that do not incentive imprudent performance or behavior, such as … adverse effects on … customers."[215] If rent-a-bank programs have performance measures that permit high default rates, they are incentivizing such behavior.

Prudent underwriting must be judged by assessing not only front-end underwriting processes but also by their results. The default rates common in the lending programs facilitated by rent-a-bank schemes have no place in the banking system and are indicative of banks that are not ensuring prudent underwriting. Default rates at these levels would never be tolerated at other banks, and should not be tolerated at rent-a-banks. These default rates pose risks to the banks, not only credit risk but also litigation risk and the risk of violating laws against unfair, deceptive and abusive practices.

The fact that these banks pass the bulk of the risks of these loans on to third parties does not change their obligation to ensure prudent credit underwriting. Taking the loan losses off their books does not relieve banks of the requirement to lend responsibly.[216]

10. Banks engaged in fintech partnerships face significant compliance risk of violating consumer protection and other laws.

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[211] *See* Alex Horowitz & Chase Hatchett, Pew Charitable Trusts, Rent-a-Bank Payday Lenders' New Filings Show 55% Average Loss Rates (Jan 9, 2023), https://www.pewtrusts.org/en/research-and-analysis/articles/2023/01/09/rent-a-bank-payday-lenders-new-filings-show-55-average-loss-rates; Cross-Complaint [of Calif. Dept. of Fin'l Prot'n & Innov.] For (1) Violation of the California Financing Law, (2) Violation of the California Consumer Financial Protection Law, Opportunity Fin'l v. Hewlett, No. 22STCV08163 (Sup. Ct. Calif. Apr. 8, 2022) ("Although OppFi entices borrowers with promises of building a credit history, it expects that a vast number of its loans will default. In fact, OppFi's public filings reflect that, in 2021, OppFi had a default rate over 37 percent. OppFi's business model is premised on the assumption that although a significant number of borrowers will default on their loans, the high interest rates charged will ensure that a profit is generated so long as a minimum number of borrowers scrape together enough money to make payments. Not only are these lending practices predatory, they violate the consumer protection laws that the California legislature enacted to prevent this exact activity.").

[212] Enova International Inc. Form 10-Q (Oct. 28, 2022) and Form 10-K (Feb. 28, 2022).

[213] Elevate Credit Inc., SEC Form 10-Q (Nov. 9, 2022); Elevate Credit Inc., SEC Form 10-K (Feb. 25, 2022).

[214] Opportunity Financial LLC Form 10-Q (Nov. 9, 2022).

[215] 88 Fed. Reg. at 37932.

[216] Final Joint Guidance on Leveraged Lending, FIL-13-2013 (Mar. 27, 2013), https://www.fdic.gov/news/financial-institution-letters/2013/fil13013.html.

10.1. Compliance risks are enhanced in high-cost lending programs, especially when a third party handles significant lending activities

Under longstanding guidance, a banking organization that uses third parties has a responsibility to operate in a safe and sound manner and in compliance with applicable laws and regulations "to the same extent as if the activities were performed by the banking organization in-house."[217] Yet "the use of third parties can reduce a banking organization's direct control over activities and may introduce new risks or increase existing risks, such as operation, compliance, and strategic risks."[218] In particular, rent-a-bank schemes increase compliance risk—the risk arising from violations of laws, rules or regulations.

Banks are more exposed in modern rent-a-bank schemes than in older ones, where whole loans were generally sold, removing the bank from the relationship. Today, the nonbank lender is more likely to claim to be a service provider to the bank, such as the servicer of accounts nominally still held by the bank. Thus, the bank is more directly responsible for the nonbank's activities throughout the life of the loan.

As noted above, the interagency Third-Party Relationships guidance requires rigorous oversight over critical activities. One type of critical activity is where there are "significant customer impacts."[219] The extensive complaints against rent-a-bank lenders detailed in this analysis show the significant detrimental impact on consumers. The continuation of these problems make it unlikely that rent-a-banks are sufficiently assessing and addressing the "potential for consumer harm, and handling of customer complaints and inquiries."[220] Banks must also consider whether third parties have "identified, and articulated a process to mitigate, areas of consumer harm."[221]

Two aspects of high-cost rent-a-bank schemes exacerbate consumer impacts and compliance risks for banks.

First, high-cost lending, which generally targets subprime borrowers, imposes high costs and other harms on consumers who are already struggling and poses a high risk of violating a panoply of laws, including those regarding unfair, deceptive, abusive or unconscionable practices, fair lending, credit reporting, debt collection, electronic fund transfers, the Military Lending Act, the Servicemembers Civil Relief Act and other laws. As the Treasury non-bank competition report noted: "In addition to exorbitantly priced credit, 'rent-a-charter' lenders deploy products using other practices that are both unsafe and unsound for the lender and unfair to consumers."[222]

Because of these risks, the FDIC's small-dollar loan examination guidelines appropriately require examiners to review loan pricing and expected rates of default or refinancing, along with other elements of the loan program.[223] The manual requires examiners to consider transaction

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[217] Interagency Guidance on Third-Party Relationships, 88 Fed. Reg. 37920, 37927 (June 9, 2023) (replacing, i.e., Federal Deposit Insurance Corporation, *Guidance for Managing Third-Party Risk*. FIL-44-2008 (June 6, 2008)) ; *see also id.* at 37932.

[218] *Id.*

[219] 88 Fed. Reg. at 37927.

[220] 88 Fed. Reg. at 37929; *see id.* at 37934 (the third party must "provide the banking organization with sufficient, timely, and usable information to analyze customer complaint and inquiry activity and associated trend").

[221] 88 Fed. Reg. at 37930.

[222] Treasury Non-Bank Competition Report at 113.

[223] FDIC, Consumer Compliance Examination Manual (April 2023) at V-17.3.

testing when warranted, including, among other factors, due to the presence of consumer complaints, high default, charge-off or refinancing rates, marketing claims about "building credit" or "working with customers to help them meet their financial goals," loan terms that are likely to be unaffordable, and when other risks of unfair, deceptive or abusive practices are elevated.[224] The manual reaffirms longstanding FDIC policy that "Signs of predatory lending include … loan pricing that reaches beyond the risk that a borrower represents."[225]

Second, the involvement of a third party that handles significant aspects of the lending operation increases the risk of legal violations more generally. The small dollar examination guidance emphasizes that third-party arrangements can increase an institution's risks.[226] Banks must ensure that these arrangements with more attenuated parties do not "create or transfer risks to the banking organization or its customers."[227]

These third-party risks are especially significant in high-cost rent-a-bank schemes, as the nonbank lender typically handles nearly every aspect of the loan program and interaction with the consumer, and does so in the high-risk setting of high-cost, predatory lending to struggling borrowers.[228] The FDIC noted that transaction testing can be warranted when the institution "does not effectively oversee the practices of one or more third parties involved in a small-dollar lending program related to marketing, underwriting, servicing, collection, or other aspects of the program."[229]

Extensive consumer complaints against the lenders that offer high-cost rent-a-bank schemes provide evidence that these compliance risks are not just theoretical. We have provided examples of these complaints, many of which indicate potential legal violations, in our comments in connection with the Community Reinvestment Act examinations of CC Bank,[230] FinWise Bank,[231] First Electronic Bank,[232] Republic Bank & Trust,[233] and Transportation Alliance Bank.[234]

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[224] *Id.* at V-17.3 to V-17.4.

[225] *Id.* at V.17-.6 (citing FDIC's Supervisory Policy on Predatory Lending, FIL6-2007 (Jan. 22, 2007)).

[226] *Id.* at V-17.2.

[227] Third-Party Relationships, 88 Fed. Reg. at 37931.

[228] Risks are especially extreme when that third party itself employs other third parties, such as the retail outlets that EasyPay Finance and American First Financial operate through, which are not even supervised by the nonbank lenders.

[229] *Id.* at V-17.4.

[230] *See* Coalition Comments to FDIC Regarding Community Reinvestment Act examination of Capital Community Bank of Provo, Utah (Mar. 30, 2023), https://www.nclc.org/fdic-should-downgrade-three-banks-engaged-in-predatory-rent-a-bank-lending/ (CC Bank CRA Examination Comments).

[231] *See* Coalition Comments to FDIC Regarding Community Reinvestment Act Examination of Rent-a-Bank FinWise Bank (Mar. 14, 2023), https://www.nclc.org/resources/coalition-comments-to-fdic-rent-a-bank-finwise-bank/ (FinWise Bank CRA Examination Comments)

[232] *See* Coalition Comments to FDIC Regarding Community Reinvestment Act examination of First Electronic Bank (Mar. 21, 2023), https://www.nclc.org/fdic-should-downgrade-three-banks-engaged-in-predatory-rent-a-bank-lending/ (First Electronic Bank CRA Examination Comments).

[233] *See* Coalition Comments to FDIC Regarding Community Reinvestment Act exam of Republic Bank & Trust of Kentucky (Mar. 30, 2023), https://www.nclc.org/fdic-should-downgrade-three-banks-engaged-in-predatory-rent-a-bank-lending/. (Republic Bank CRA Examination Comments).

[234] *See* Coalition Comments to FDIC Regarding Community Reinvestment Act examination of Transportation Alliance Bank (June 30, 2022), https://www.nclc.org/resources/joint-letter-to-the-fdic-regarding-the-community-reinvestment-act-examination-of-tab/ (TAB Bank CRA Examination Comments).

10.2. Laws against unfair, deceptive, abusive or unconscionable practices

10.2.1. Banks engaged in fintech partnerships may violate UDAAP or unconscionability laws

The federal laws against unfair, deceptive or abusive practices (UDAAP) of course apply to banks. The CFPB recently issued a Statement of Policy Regarding Prohibition on Abusive Acts or Practices Policy (Abusiveness Policy Statement) emphasizing the various elements of abusive conduct.[235] There are many ways in which the predatory lending that rent-a-banks engage in can be abusive.[236]

State UDAAP laws and laws against unconscionability also generally apply to state-chartered banks. UDAAP laws are not generally preempted by banking laws,[237] and unconscionability is incorporated into the Uniform Commercial Code and is part of the background law with which banks must comply.[238] The OCC has stated that state UDAP laws are not generally preempted as to national banks and federal savings associations. And any preemptive effect of the National Bank Act would not extend to state-chartered banks that do not make their loans or issue their products from branches in the consumer's home state.[239]

High interest rates lead to misaligned incentives between the lender and the borrower, which ultimately expose the bank to the risk that aspects of the loan program could be found unfair, deceptive, abusive, unconscionable or otherwise unlawful.[240] The fact that the lender has the incentive to make loans that do not benefit borrowers creates business pressure to conceal or downplay the dangers of the loans when dealing with borrowers. High-cost lending turns incentives on their head, so that lenders succeed when borrowers fail. With higher rate loans, the consumer injury is higher, but the lender's incentive to make affordable loans and avoid

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[235] CFPB, Policy Statement on Abusive Acts or Practices, 88 Fed. Reg. 21883 (Apr. 3, 2023), https://files.consumerfinance.gov/f/documents/cfpb_policy-statement-of-abusiveness_2023-03.pdf (CFPB Abusiveness Policy Statement).

[236] *See* Comments of NCLC et al. to CFPB re Statement of Policy Regarding Prohibition on Abusive Acts or Practices (July 3, 2023), https://www.nclc.org/resources/abusive-acts-and-practices-comments-to-cfpb/.

[237] *See* Office of the Comptroller of the Currency, Exploring Special Purpose National Bank Charters for Fintech Companies at 5 (Dec. 2016), https://www.occ.gov/publications-and-resources/publications/banker-education/files/exploring-special-purpose-nat-bank-charters-fintech-companies.html. ("the OCC has taken the position that state laws aimed at unfair or deceptive treatment of customers apply to national banks.").

[238] *See* Davis v. Chase Bank U.S.A., 650 F. Supp. 2d 1073, 1086 (C.D. Cal. 2009) (claims of unconscionability and breach of covenant of good faith and fair dealing not preempted because these are part of general contract law and have only incidental effect on lending practices); NCLC, Mortgage Lending § 5.8.4.2 (3d ed. 2019), updated at library.nclc.org.

[239] *See* Section 5 above. The cases that have found unconscionability laws preempted in particular contexts as to national banks generally have involved state laws governing matters other than the interest rate, which would not be preempted as applied to state-chartered banks without a branch in the consumer's state. *See, e.g.,* Gutierrez v. Wells Fargo Bank, 704 F.3d 712 (9th Cir. 2012) (12 C.F.R. § 7.4007(b)(3) regarding banks' deposit-taking powers preempts application of unfairness claim to prohibit bank's use of high-to-low posting order as means of maximizing fees for dishonored checks).

[240] *See generally*, NCLC, *Misaligned Incentives: Why High-Rate Installment Lenders Want Borrowers Who Will Default* (July 2016), https://www.nclc.org/resources/misaligned-incentives-why-high-rate-installment-lenders-want-borrowers-who-will-default/.

unfair, deceptive or abusive practices is lower. High-cost lenders take advantage of vulnerable consumers, which can be an element of unfairness, unconscionability and abusiveness.[241]

10.2.2. Predatory lending can be deceptive and take unreasonable advantage of consumers' lack of understanding.

10.2.2.1. In General

Deception about the cost of a loan, about implied promises that the loan will build credit, or any other deception certainly can be a UDAAP violation. Acts and practices that materially interfere with consumers' ability to understand a term or conduct of a loan or that take unreasonable advantage of consumers' lack of understanding can also be abusive.[242]

For example, our analysis of the complaints against EasyPay Finance, a rent-a-bank lender enabled by Transportation Alliance Bank, have revealed numerous instances of consumers complaining about being misled, both about the interest rate and about the ability to exercise the 90-day full interest rebate.[243] The FDIC appropriately downgraded TAB Bank's CRA rating based on a violation of Section 5 of the Federal Trade Commission Act, Unfair or Deceptive Acts or Practices affecting "a large number of consumers over an extended period of time"[244] most likely through the EasyPay rent-a-bank scheme.[245] But a more severe sanction and termination of the partnership is warranted.

American First Finance, enabled by FinWise Bank, also has a business model nearly identical to that of EasyPay Finance and has provoked numerous complaints about deception and other problems – nearly twice as many as EasyPay.[246] For example, as with EasyPay, consumers frequently complained that agreements executed in stores on tablets and mobile phones prevented them from seeing or understanding critical terms, and that the three-month "no interest" option was deceptive and difficult to exercise.[247]

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[241] *See* NCLC, Unfair and Deceptive Acts and Practices § 4.3.8 (unfairness), § 4.4.4 (unconscionability); NCLC, Federal Deception Law § 3.2.4 (2d ed. 2016), updated at www.nclc.org/library; 12 U.S.C. § 5531(a) (abusive conduct).

[242] 12 U.S.C. §5531(d),

[243] TAB Bank CRA Examination Comments at 4-8.

[244] *See* FDIC, Public Disclosure, Community Reinvestment Act Performance Evaluation, Transportation Alliance Bank, Inc., d/b/a TAB Bank at 11 (Apr. 13, 2022), https://crapes.fdic.gov/publish/2022/34781_220413.PDF.

[245] The FDIC downgraded TAB Bank's rating on the heels of several reports and comments highlighting the high level of deception and potential law violations in the EasyPay-TAB Bank relationship. *See* TAB Bank CRA Examination Comments, *supra*; Stop the Debt Trap, Predatory Puppy Loans by TAB Banka and EasyPay Finance (Feb. 2022), https://www.nclc.org/resources/predatory-puppy-loans-by-tab-bank-and-easypay-finance/; Stop the Debt Trap, Predatory Auto Repair Loans by TAB Bank and EasyPay Finance (May 2022), https://www.nclc.org/resources/predatory-auto-repair-loans-by-tab-bank-and-easypay-finance/; Stop the Debt Trap, Predatory Lenders TAB Bank and EasyPay Finance Harm Veterans and Military Servicemembers with Loans up to 189% APR (May 2022), https://www.nclc.org/resources/report-predatory-lenders-tab-bank-easypay-finance-harm-veterans-military-servicemembers/.

[246] *See* FinWise Bank CRA Examination Comments at 9-10.

[247] *See id.* at 11-14.

Aside from these rent-a-bank loans through brick-and-mortar stores, online rent-a-bank lenders might also be susceptible to charges of deception or abusiveness. Several consumer complaints about deceptive conduct are described in our CRA comments.[248]

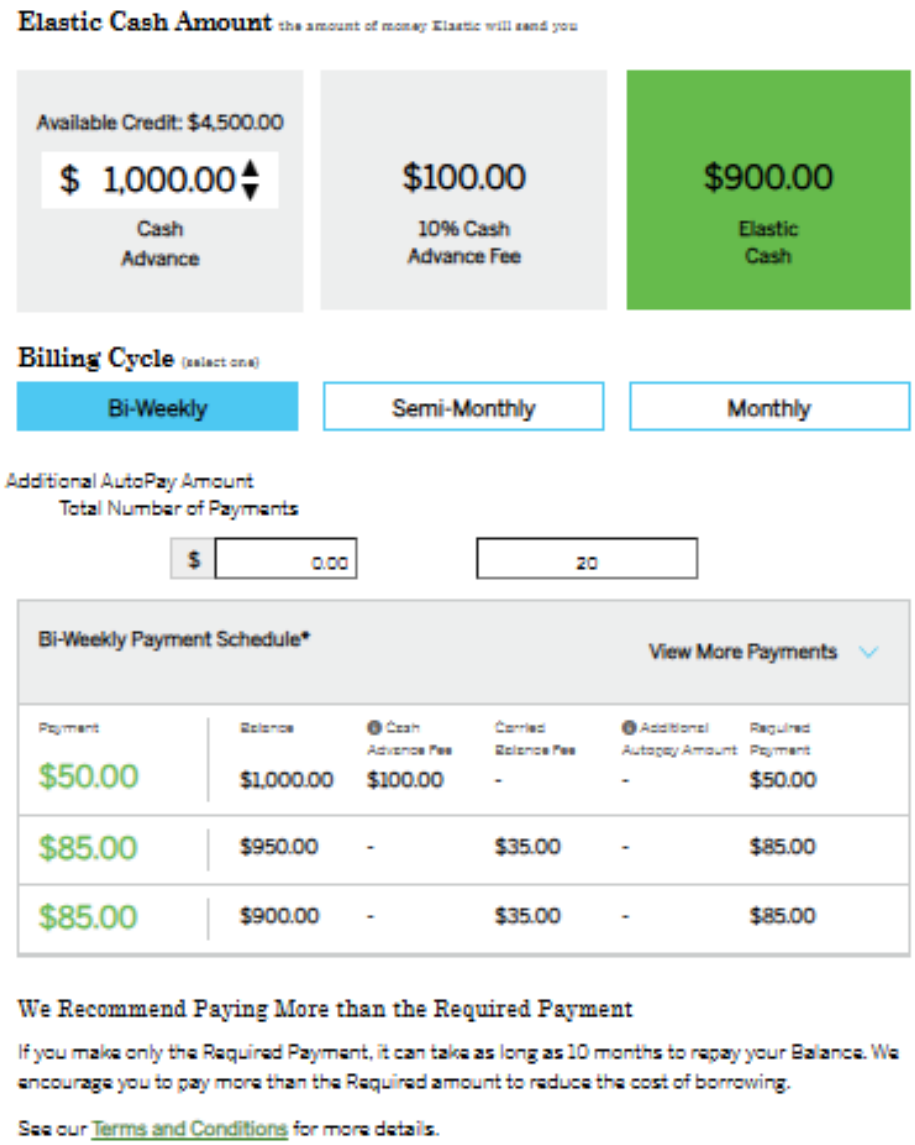
10.2.2.2. The pricing of high-cost lines of credit is especially deceptive and designed to inhibit consumer understanding.

The high-cost lines of credit facilitated by Republic Bank & Trust, CC Bank and CBW Bank are especially vulnerable to claims of deception or abusiveness. The pricing using fees rather than periodic interest, lack of a disclosed APR, and indecipherable disclosures of cost and payments obscure the cost of the loans, the length of time to repay, and the high effective interest rates.

For example, with a $1,000 loan selected, the website for the Elastic line of credit (enabled by Republic Bank) emphasizes the $100 cost of the "10% cash advance fee," and below that shows three payments of $50, $85 and $85, showing two additional $35 "carried balance fees."[249]

[248] *See* CC Bank CRA Examination Comments, *supra*; First Electronic Bank CRA Examination Comments, *supra*: Republic Bank & Trust Examination Comments, *supra*; TAB Bank Examination Comments, *supra*.

[249] https://www.elastic.com/what-it-costs/ (last visited Oct. 30, 20204).



It is not obvious that there are 20 payments with "carried balance fees" every two weeks (on a biweekly payment schedule) or that the total cost is $465 – an effective APR of over 100%.[250] Only by clicking on the faint caret to the right of "View More Payments" can the consumer see the full payment schedule if the consumer makes the minimum payment-- the payment amount that most of the financially struggling consumers who take out these loans are likely to make.

Enova's NetCredit line of credit, facilitated by Republic Bank or TAB Bank, has similarly opaque cost disclosures based on a 10% cash advance fee along with a statement balance fee.

[250] The APR calculation is complicated. It appears that the consumer actually only receives a $900 loan due to the $100 cash advance fee. The equivalent of a $900 installment loan at the same cost with 20 equal biweekly payments would be about 115% APR. Elevate previously disclosed that the effective APR on a $2,500 draw is 107%. Elevate Credit, Inc., SEC Form 10-Q for the period ending Sept. 20, 2022 at 48, https://www.sec.gov/ix?doc=/Archives/edgar/data/1651094/000165109422000057/elvt-20220930.htm.

Information About Fees & Charges

Cash Advance Fee:

10% of each Cash Advance, which will be deducted from the amount you request and the remaining Advance Proceeds are delivered to you.

Statement Balance Fee:

The Statement Balance Fee assessed each Billing Cycle will vary based on your Billing Cycle (determined by your income frequency), your Cash Advance Balance at the end of your Billing Cycle and any Fee Saver reductions earned by making on-time payments. If your Cash Advance balance at the end of your Billing Cycle is $25 or less, you will not incur a Statement Balance Fee.

See below for further payment examples and **click here to view the Fee Table**.[251]

Clicking on the fee table yields a pop-up box in fine print that initially shows only part of a lengthy table and has to be clicked further to expand and cannot be printed. The way that box is formulated could also lead to the impression that the cost is only 10% of the cash advance, though the details disclose that the fee is charged each billing cycle.

Similarly, Propel's MoneyKey (through CC Bank)[252] and Propel's Credit Fresh (through CBW Bank and First Electronic Bank)[253] promise a "fully transparent process" but the pricing is completely incomprehensible. For example, Credit Fresh promises "clear repayment terms and no hidden charges."[254] But clicking on that link leads to the following two sample loans which, as with Elastic, display no total cost or APR and only show examples of making three minimum payments, though far more payments would be required to repay the loan.

[251] NetCredit, *Kentucky Personal Loans & Lines of Credit Rates and Terms,* https://www.netcredit.com/rates-and-terms/kentucky.

[252] https://www.moneykey.com/line-of-credit-loans-online/cc-flow-rates/

[253] https://www.creditfresh.com/line-of-credit/cost-of-credit/.

[254] https://www.creditfresh.com/.

Cost of Credit Example

To demonstrate what is included in each Minimum Payment on a Line of Credit through CreditFresh, let's look at the following examples for monthly and non-monthly income frequencies. We assume in these examples that there is an outstanding principal of $1,500 for three billing cycles.

Monthly Income Frequency (each Minimum Payment is about 30 days apart):

Billing Cycle Example	Average Daily Principal Balance	Mandatory Principal Contribution (A)	Billing Cycle Charge – Table 1 (B)	Minimum Payment Due (A+B)	Remaining Principal Balance
1	$1,500.00	$30.00	$184.00	$214.00	$1,470.00
2	$1,470.00	$29.40	$184.00	$213.40	$1,440.60
3	$1,440.60	$28.81	$184.00	$212.81	$1,411.79

Non-Monthly Income Frequency (each Minimum Payment is about 14 days apart):

Billing Cycle Example	Average Daily Principal Balance	Mandatory Principal Contribution (A)	Billing Cycle Charge – Table 1 (B)	Minimum Payment Due (A+B)	Remaining Principal Balance
1	$1,500.00	$15.00	$85.00	$100.00	$1,485.00
2	$1,485.00	$14.85	$85.00	$99.85	$1,470.15
3	$1,470.15	$14.70	$85.00	$99.70	$1,455.45

Disclaimer: These examples assume a draw is made at the start of a billing cycle, only Minimum Payments are made and no additional draws are requested on the Line of Credit. This example is for illustrative and informational purposes only. The actual Minimum Payment(s) due on your Line of Credit through CreditFresh will depend on your individual account activity.

In the monthly income example, those three payments on a $1,500 loan cost $640.21 but reduce the loan by only $88.21.

These high-cost lines of credit are deceptive and also abusive because they materially interfere with consumers' understanding and take advantage of consumers' lack of understanding of the full cost of the credit and full length of time that it will likely take to repay the loan.

10.2.3. Lending without regard to ability to repay can be a UDAAP violation or unconscionable

Making loans without a reasonable expectation that the consumer will be able to repay the loan on its original terms, without reborrowing and while meeting other expenses, may be found to be unfair, deceptive, abusive or unconscionable.[255]

The CFPB's Abusiveness Policy Statement emphasizes that such practices are abusive.[256] The CFPB noted that when Congress passed the Consumer Financial Protection Act, "one of its main concerns was financial products and services that may be 'set up to fail.'… Congress prohibited certain abusive business models and other acts or practices that … misalign

[255] *See* NCLC, Unfair and Deceptive Acts and Practices § 6.3; NCLC, Consumer Credit Regulation § 2.4.8.5 (improvident lending as unconscionable), § 2.4.8.6 (terms other than interest rate as unconscionable).

[256] CFPB, Policy Statement on Abusive Acts or Practices, 88 Fed. Reg. 21883 (Apr. 3, 2023), https://files.consumerfinance.gov/f/documents/cfpb_policy-statement-of-abusiveness_2023-03.pdf.

incentives and generate benefit for a company when people are harmed."[257]
For example, lending without regard to ability to repay may be abusive because it takes unreasonable advantage of consumers' inability to protect their interests.[258]

Such lending may also be unconscionable. A court recently proposed to award $235 million to a class of CashCall borrowers, finding the loans to be unconscionable, in part because the lender expected a 35% to 40% default rate, set the term at 36 to 42 months even though a 22-month term would result in fewer defaults, and had a business model that enabled the lender to profit even if borrowers could not afford to repay the loans through the full term.[259] As discussed above, the high default rates on high-cost rent-a-bank loans lend support a similar claim of unconscionable lending.

Similarly, marketing aimed at consumers with bad credit or who have been turned down by more responsible lenders can also support a claim of lending without regard to ability to pay. For example, we understand that one rent-a-bank lender has a business model of offering loans to borrowers who have been turned down by other lenders that charge 36% or less. But if the consumer is not considered to be an acceptable risk on loans at that rate, the consumer's ability to repay the loan with even higher interest charges of 160% APR or more is in serious doubt.

Rent-a-bank lenders tend to portray themselves as better alternatives to traditional payday loans. In reality, rent-a-bank lenders' longer-term loans still have a business model that can profit despite high borrower defaults. While APRs are lower than the typical 300% to 400% APR for payday loans, the larger loan size and longer term make interest costs far higher, and the loans even less affordable.

Making matters worse, because lenders use automatic electronic repayment and often arrange for payments to be due on or near the borrower's payday, the lenders are often able to collect even if the borrower cannot afford to make the payment while covering other essential expenses, or if the payment triggers an overdraft (and overdraft fee). Borrowers may manage to make payments for a while, but they often cannot sustain those payments for the life of the loan, or do so at the cost of being unable to pay for other expenses. For these reasons, even high-rate loans with low charge-offs can lead to significant consumer harm and can reflect unfair, deceptive or abusive practices.

For car title lenders (which are expanding into rent-a-bank operations via LoanMart's scheme with Community Capital Bank), the unfairness, abusiveness and unconscionability of lending without regard to ability to repay is especially harsh. Lenders take title to unencumbered cars borrowers previously owned outright. An astounding one in five auto-title loan borrowers have their cars repossessed.[260] The consequences of losing one's vehicle are dire – resulting in both the loss of a valuable asset and the serious disruption of a borrower's ability to get to work, earn

[257] *Id.* at 9.

[258] *Id.* at 15 & n. 66, 67 (citing cases).

[259] *See* Final Statement of Decision After Court Trial at 25-26, De La Torre v. CashCall, No. 19CIV 01235 (Cal. Sup. Ct. Aug. 21, 2023).

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

income, and manage their life.[261] More than a third of auto title borrowers have reported pledging the only working car in their household as security for their auto title loan.[262]

Many consumer complaints about the lenders involved in rent-a-bank schemes are about the unaffordability of the loans. We provided some examples of these complaints in our CRA comments for the examinations of CC Bank,[263] FinWise Bank,[264] First Electronic Bank,[265] Republic Bank & Trust[266] and TAB Bank.[267] Other complaints revealing the predatory nature of OppFi loans are provided in an issue brief.[268]

10.2.4. Refinancing and reborrowing practices can violate UDAAP or unconscionability laws.

Refinancing practices that simply prolong unaffordable loans or increase loan costs may also violate UDAAP or unconscionability laws.[269] Once even small portions of principal are paid down, high-cost lenders typically aggressively push refinances to borrowers to keep them on a high-cost debt treadmill.[270] Refinancing to give the consumer a small amount of additional cash in exchange for prolonging the term can also hide distress and defaults. In this way, high-cost lending is also a mechanism that relentlessly siphons resources from the poorest communities, often communities of color, pushing consumers into longer-term and larger loans that can result in an even deeper debt trap and more consumer harm than short-term payday loans.[271]

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

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

[263] *See* CC Bank CRA Examination Comments at 8-9 (LoanMart), 11-13 (CNG Financial Corp. dba Check 'n Go and Xact), 14-15 (Elevate), 16-18 (OppFi).

[264] *See* FinWise Bank CRA Examination Comments at 10-14 (American First Finance), 17-19 (Elevate), 21-22 (OppFi).

[265] *See* First Electronic Bank CRA Examination Comments at 8-9 (OppFi), 13-14, 16 (Personify).

[266] *See* Republic Bank & Trust CRA Examination Comments at 9-11 (Net Credit), 12-14 (Elevate's Elastic).

[267] *See* TAB Bank CRA Examination Comments at 3, 5-8 (EasyPay Finance).

[268] *See* Center for Responsible Lending, Burned Borrowers: A Look at the Experiences of OppFi Customers (April 2023), https://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/crl-burned-borrowers-oppfi-7apr2023.pdf;

[269] NCLC, Consumer Credit Regulation § 2.4.8.6 (terms other than interest rate as unconscionable).

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

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

Two CFPB actions illustrate the way in which refinancing or reborrowing practices can violate the ban on abusive conduct. In an administrative consent order, the CFPB concluded that ACE Cash Express collectors created and leveraged an artificial sense of urgency to induce delinquent borrowers with a demonstrated inability to repay their existing loans to take out a new ACE loan with accompanying fees.[272] The CFPB found that ACE Cash Express took unreasonable advantage of the consumers' inability to protect their interests and thus engaged in abusive practices.

A federal court agreed with the CFPB that ITT, a for-profit school, engaged in such abusive conduct by taking unreasonable advantage of students by giving the students little choice after enrollment but to take out new high-priced private loans with ITT. ITT's initial loans to those students (with much lower interest rates) had to be repaid before the course was completed even though ITT knew this would be impossible. The students were therefore left with the choice of taking out a new loan from the school or not completing the course, in which case the partial course credits would not be transferable to another school.[273]

10.2.5. Unconscionability or abusiveness can act as an outer limit on the price of credit.

Even if no interest rate cap applies to a bank loan, the high price and payment structure that results in payments going almost entirely to interest could be unconscionable or a UDAAP violation.[274]

For example, after a bench trial, a court awarded $235 million to a class, finding that CashCall's loans over $2500 of 96% to 135% were both procedurally and substantively unconscionable, even though at the time California had no interest rate caps on those loans.[275]

High interest rates on installment loans and lines of credit can also be abusive because they take unreasonable advantage of consumers' lack of understanding of how payments make little progress repaying principal and thus of how difficult it will be to repay the loan. The loans offered by rent-a-bank lenders frequently leave consumers shocked and in distress when they realize that hundreds or even thousands of dollars of payments have done almost nothing to reduce the principal. We have detailed many such complaints that the CFPB and complaint websites have received against high-cost lenders including EasyPay Finance,[276] American First

[272] Consent Order, In re ACE Cash Express, CFPB No. 2014-CFPB-0008 (July 8, 2014), *available at* www.nclc.org/unreported.

[273] Consumer Fin. Prot. Bureau v. ITT Educ. Servs., Inc., 219 F. Supp. 3d 878 (S.D. Ind. 2015). *See also* Illinois v. Alta Colleges, 2014 WL 4377579 (N.D. Ill Sept. 4, 2014) (state attorney general action brought under CFPB's standard of abuse can proceed); Complaint, Consumer Fin. Prot. Bureau v. ITT Educ. Servs., Inc., No. 1:14-cv-00292 (S.D. Ind. Feb. 26, 2014), *available at* www.nclc.org/unreported.

[274] *See* NCLC, Consumer Credit Regulation § 2.4.8.4; NCLC, Unfair and Deceptive Acts and Practices § 6.5.

[275] *See* Proposed Statement of Decision After Court Trial, De La Torre v. CashCall, No. 19CIV01235 (Sup. Ct. Cal. Nov. 17, 2022). The judge has not yet issued a final decision.

[276] *See* Letter from NCLC et al. to FDIC Acting Chairman Martin Gruenberg re: Community Reinvestment Act examination of Transportation Alliance Bank (June 30, 2022); Stop the Debt Trap, Predatory Auto Repair Loans By TAB Bank and EasyPay Finance (May 2022); Stop the Debt Trap, Predatory Puppy Loans by TAB Bank and EasyPay Finance (Feb. 2022).

Finance,[277] Elevate Credit's Rise installment loan,[278] Opportunity Financial,[279] Personify,[280] LoanMart,[281] Check 'no Go's Xact,[282] Elevate's Elastic line of credit,[283] Enova's Net Credit[284] and others. These lenders take unreasonable advantage of consumers' lack of understanding of how they will be trapped in high-cost loans.

10.2.6. Taking unreasonable advantage of consumers' lack of understanding of how state interest rates apply to the true lender can be abusive.

Rent-a-bank lending is abusive because it takes unreasonable advantage of borrowers' lack of understanding of how state interest rate laws apply to the true lender. For example, a federal court found that the CFPB adequately pled the abusive standard where it alleged that borrowers lacked an understanding of the law applicable to the loans in question and how those laws affected repayment obligations.[285]

Lenders also take unreasonable advantage of borrowers' lack of understanding of how forced arbitration clauses and class action bans prevent them from challenging illegal interest rates and their inability to protect their interests. These clauses prevent consumers from banding together, block them from access to the courts, and make it near impossible to find counsel as the value of an individual case is insufficient to justify hiring a lawyer.

10.3. Unlawful Debt Collection Practices

Due to their imprudent underwriting standards and targeting of struggling borrowers, high-cost loans have high default rates, as described in Section 6.2 above. As a result, these loans lead to significant collection activity.

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[277] *See* Letter from NCLC et al. to FDIC Chairman Martin Gruenberg re Community Reinvestment Act examination of FinWise Bank (Mar. 14, 2023) (describing complaints against American First Finance, Elevate's Rise, and Opportunity Financial).

[278] *Id.*

[279] *Id.*

[280] *See* Letter from NCLC et al. to FDIC Chairman Martin Gruenberg re Community Reinvestment Act examination of First Electronic Bank (Mar. 21, 2023) (describing complaints against Opportunity Financial and Personify).

[281] *See* Letter from NCLC et al. to FDIC Chairman Martin Gruenberg re Community Reinvestment Act examination of Capital Community Bank (Mar. 30, 2023) (describing complaints against Wheels Financial dba LoanMart and Choice Cash, CNG Financial's Xact, and others).

[282] *Id.*

[283] Republic Bank CRA Letter, *supra*, at 12-14.

[284] Republic Bank CRA Letter, supra, at 9-12.

[285] *See* Consumer Fin. Prot. Bureau v. Think Fin., L.L.C., 2018 WL 3707911 (D. Mont. Aug. 3, 2018). *See also* Proposed Stipulated Final Judgment & Order, Consumer Fin. Prot. Bureau v. NDG Fin. Corp., No. 1:15-cv-05211-CM (S.D.N.Y. Feb. 1, 2019), *available at* https://files.consumerfinance.gov; Complaint, Consumer Fin. Prot. Bureau v. Golden Valley Lending, Inc., No. 1:17-cv-03155 (N.D. Ill. Apr. 27, 2017), *available at* https://files.consumerfinance.gov; Complaint, Consumer Fin. Prot. Bureau v. NDG Fin. Corp., No. 1:15-cv-05211-CM (S.D.N.Y. July 31, 2015), *available at* www.nclc.org/unreported; Consent Order, Consumer Protection Bureau v. Colfax Capital Corp., CFPB No. 2014-CFPB-0009 (July 29, 2014), *available at* https://files.consumerfinance.gov; Complaint, Consumer Fin. Prot. Bureau v. CashCall, Inc., No. 1:13-cv-13167-GAO (D. Mass. Mar. 21, 2014), *available at* www.nclc.org/unreported. *Cf.* Consumer Fin. Prot. Bureau v. NDG Fin. Corp., 2016 WL 7188792 (S.D.N.Y. Dec. 2, 2016) (finding that practice could be abusive because it materially interferes with consumers' ability to understand; court did not reach question of whether it takes unreasonable advantage of a consumer's ability to understand); Consumer Fin. Prot. Bureau v. CashCall, Inc., 2016 WL 4820635 (C.D. Cal. Aug. 31, 2016) (finding practice deceptive, so not having to reach whether practice was also unfair or abusive).

The FDCPA prohibits a range of false, deceptive, abusive, unfair and threatening conduct. Such conduct also generally constitutes a federal UDAAP violation, and potentially a state one, even if engaged in by first-party creditors that are not subject to the FDCPA.[286] Moreover, some state debt collection laws cover creditors,[287] and debt collection laws are not generally preempted by federal banking regulations.[288] Creditors can also be liable under state agency law for the actions of their collectors and servicers.[289] Nonbank rent-a-bank lenders typically claim to be servicers of banks, and thus agency should be easy to establish. Banks are also at risk if they sell loans to debt buyers that are inaccurate or not owed.[290]

Some third-party non-bank lenders outsource their own debt collection services (despite asserting their role as servicers to attempt to evade state usury limits) to other third parties, distancing the bank even further from its ability to oversee debt collection practices. For example, Elevate outsources its collections and customer service to a third party.[291]

Debt collection is an inherently risky business that frequently crosses the line into unlawful abuse and harassment. Consequently, high-rate lending often leads to violations of the Fair Debt Collection Practices Act or of the prohibition on unfair, deceptive and abusive practices.

Not surprisingly then, many of the complaints about rent-a-bank lenders in the CFPB's complaints database are about debt collection problems that might violate the FDCPA or UDAAP laws. We provided some examples of these debt collection complaints in our CRA comments for the examinations of CC Bank,[292] FinWise Bank,[293] First Electronic Bank,[294] Republic Bank & Trust[295] and TAB Bank.[296]

10.4. Credit Reporting Laws

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[286] *See* Consumer Fin. Prot. Bureau, CFPB Bulletin 2013-07, Prohibition of Unfair, Deceptive, or Abusive Acts or Practices in the Collection of Consumer Debts (July 13, 2013), https://files.consumerfinance.gov; NCLC, Unfair and Deceptive Acts and Practices § 6.10 (10th Ed. 2021), updated at library.nclc.org; NCLC, Fair Debt Collection § 16.3 (10th Ed. 2022), updated at library.nclc.org.

[287] *See* NCLC, Fair Debt Collection § 16.2.3.3.1 (10th Ed. 2022), updated at library.nclc.org.

[288] *See* NCLC. Mortgage Lending § 5.8.4.6 (3d ed. 2019), updated at library.nclc.org; NCLC, Fair Debt Collection §§ 11.6.1, 16.1.2 (10th ed. 2022), updated at library.nclc.org.

[289] *See generally id.* § 11.4.4.5.

[290] *See* Press Release, Consumer Fin. Prot. Bureau, 47 States and D.C. Take Action Against JPMorgan Chase for Selling Bad Credit Card Debt and Robo-Signing Court Documents (July 8, 2015), *available at* http://www.consumerfinance.gov/about-us/newsroom/cfpb-47-states-and-d-c-take-action-against-jpmorgan-chase-for-selling-bad-credit-card-debt-and-robo-signing-court-documents/ (finding that bank sold accounts that had already been settled by agreement, paid in full, discharged in bankruptcy, identified as fraudulent and not owed by the debtor, subject to an agreed-upon payment plan, no longer owned by the bank, or that were otherwise no longer enforceable; ordering the bank to cease collecting on these debts and to pay $50 million in consumer refunds, and $166 million in penalties).

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

[292] *See* CC Bank CRA Examination Comments at 8-10 (LoanMart), 11-12 (CNG Financial Corp. dba Check 'n Go and Xact), 14 (Elevate), 16-18 (OppFi).

[293] *See* FinWise Bank CRA Examination Comments at 10-12, 14-15 (American First Finance), 17-19 (Elevate), 21-22 (OppFi).

[294] *See* First Electronic Bank CRA Examination Comments at 8-11 (OppFi), 13-14, 16 (Personify).

[295] *See* Republic Bank & Trust CRA Examination Comments at 10.

[296] *See* TAB Bank CRA Examination Comments at 9-10.

The high default rate of high-cost loans mean that they are often the subject of negative reports to credit reporting agencies. When late or defaulted loans are reported to credit reporting agencies, the obligations of the Fair Credit Reporting Act apply. The FCRA requires that furnishers provide accurate information to credit bureaus, that they correct and update information, and that they respond to consumer disputes. Here again, many complaints about rent-a-bank loans are about credit reporting problems that may reflect FCRA violations. We provided some examples of these debt collection complaints in our CRA comments for the examinations of CC Bank,[297] FinWise Bank,[298] First Electronic Bank,[299] Republic Bank & Trust[300] and TAB Bank.[301] Banks are fully subject to the FCRA and liable for their violations of that Act.

10.5. Fair Lending Laws

High-cost lending increases the risk of violating the Equal Credit Opportunity Act. Online rent-a-bank lenders often falsely promote their models, in which borrowers of color are often overrepresented among their target borrowers, as expanding economic inclusion. Yet this is a false notion given high-cost lending's association with financial destruction and lost bank accounts.[302] Storefront high-cost lenders have long targeted borrowers of color and are more likely to locate stores even in more affluent communities of color than in less affluent white communities.[303] Online high-cost lenders may focus more on subprime credit score than geography (although we understand that some lenders use zip codes to target online marketing), but historical discrimination against communities of color is also reflected in credit scores.[304] Payday and auto title loan storefronts can also be used to direct people to online high-cost installment loans.[305]

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[297] *See* CC Bank CRA Examination Comments at 8-9 (LoanMart), 11-12 (CNG Financial Corp. dba Check 'n Go and Xact), 14-16 (Elevate), 16-17 (OppFi).

[298] *See* FinWise Bank CRA Examination Comments at 10-12, 16 (American First Finance), 17-18, 20 (Elevate), 21, 23 (OppFi).

[299] *See* First Electronic Bank CRA Examination Comments at 8-9. 12 (OppFi), 13-14, 17 (Personify).

[300] *See* Republic Bank & Trust CRA Examination Comments at 10-11 (Enova dba NetCredit).

[301] *See* TAB Bank CRA Examination Comments at 10-11.

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

[303] Li, et al., *Predatory Profiling: The Role of Race and Ethnicity in the Location of Payday Lenders in California,* Center for Responsible Lending (2009), http://www.responsiblelending.org/payday-lending/research-analysis/predatory-profiling.pdf; Brandon Coleman and Delvin Davis, *Perfect Storm: Payday Lenders Harm Florida Consumers Despite State Law*, Center for Responsible Lending at 7, Chart 2 (March 2016); Delvin Davis and Lisa Stifler, *Power Steering: Payday Lenders Targeting Vulnerable Michigan Communities*, Center for Responsible Lending (Aug. 2018), https://www.responsiblelending.org/research-publication/power-steering-payday-lenders-targeting-vulnerable-michigan-communities; Delvin Davis, *Mile High Money: Payday Stores Target Colorado Communities of Color*, Center for Responsible Lending (Aug. 2017; amended Feb. 2018), https://www.responsiblelending.org/research-publication/mile-high-money-payday-stores-target-colorado-communities-color.

[304] *See* Chi Chi Wu, *Past Imperfect: How Credit Scores and Other Analytics "Bake In" and Perpetuate Past Discrimination*, National Consumer Law Center (May 2016), https://www.nclc.org/resources/past-imperfect-how-credit-scores-and-other-analyticsbake-in-and-perpetuate-past-discrimination/.

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

Banks engaged in rent-a-bank schemes likely typically have little direct involvement in the marketing of loans and likely do not oversee it closely to monitor targeting of financially vulnerable consumers and communities of color. The algorithms and big data that "fintech" lenders use may also result in disparate impacts on these communities.[306] It seems unlikely the banks involved in high-cost rent-a-bank lending are engaging in rigorous fair lending testing of complex, proprietary programs employed by the third-party lenders. Consequently, loans at high rates tend to go disproportionately to borrowers of color and may pose fair lending issues related to marketing of the loans and underwriting using "big data." This risk was highlighted by the FDIC's recent fair lending enforcement action against Cross River Bank.[307]

10.6. Electronic Fund Transfer Act and Other Payment Requirements

Rent-a-bank loans invariably depend on preauthorized electronic payments. Indeed, as noted above, they use the security of access to the borrower's bank account as a substitute for meaningful underwriting for ability to repay.

The Electronic Fund Transfer Act (EFTA) has rules governing the authorization for those payments. The EFTA also prohibits creditors from requiring borrowers to repay by electronic fund transfer. Related NACHA rules govern ACH payments and require that consumers be given a right to revoke authorization for payments.

Violations of the EFTA are common, even by banks in the business of handling payments.[308] The risks of violations increase when payment authorizations are handled by a predatory lender depending on electronic payments and by lenders that are purchasing consumer names and account information from lead generators.

Indeed, the Consumer Financial Protection Bureau recently fined rent-a-bank lender Enova International $15 Million for withdrawing funds from consumer accounts without consent, including repeat violations involving unauthorized changes to payment authorizations purchased from lead generators.[309]

10.7. E-Sign Act and Statues Requiring Written Disclosures and Records

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

[307] ABA Banking Journal, Cross River Bank enters consent order with FDIC over fair lending compliance practice (May 19, 2023), https://bankingjournal.aba.com/2023/05/cross-river-bank-enters-consent-order-with-fdic-over-fair-lending-compliance-practices/.

[308] *See, e.g.,* FDIC, Consumer Compliance Supervisory Highlights at 5 (March 2022) (listing EFTA among most frequently cited violations); Scott Sonbuchner, Federal Reserve Bank of Minneapolis, Error Resolution and Liability Limitations Under Regulations E and Z: Regulatory Requirements, Common Violations, and Sound Practices, Consumer Compliance Outlook (2d Issue 2021).

[309] CFPB, Press Release, CFPB Fines Repeat Offender Enova $15 Million for Violating Order, Deceiving Customers, and Withdrawing Funds Without Consent (Nov. 15, 2023), https://www.consumerfinance.gov/about-us/newsroom/cfpb-fines-repeat-offender-enova-15-million-for-violating-order-deceiving-customers-and-withdrawing-funds-without-consent/.

Many federal laws require certain disclosures and records, and require those disclosures and records to be provided to the consumer in writing – that is, on paper. Electronic disclosures and records may substitute for paper ones only if the consumer has agreed in accordance with the procedures of the federal E-Sign Act.

For example, the regulations issued pursuant to the Truth in Lending Act require creditors to make a number of disclosures in writing, such as the amount financed, the finance charge, and the annual percentage rate (APR) before the consumer is asked to sign a loan contract. The EFTA requires a written authorization before a consumer's account may be debited by preauthorized electronic fund transfers.

When the transaction is entered into electronically, the lender must follow the requirements of the E-Sign Act). If a law requires disclosures or records to be provided in writing to a consumer, E-Sign requires the lender first to obtain the consumer's consent to conduct that transaction electronically in a manner that demonstrates that the consumer is actually able to receive and access that information electronically.[310]

E-Sign and similar state laws on electronic transactions known as the Uniform Electronic Transaction Act (UETA)[311] also allow an electronic sound, symbol or process to be considered a valid signature and have the same binding effect as aa "wet" signature, if the parties have agreed to conduct business electronically. E-Sign[312] and UETA's[313] definition for an electronic signature both require that the party whose signature is applied electronically must have intended for their electronic mark to be a binding signature, and is attached to or logically connected to the document purported to be signed.[314]

Most, indeed probably all, of the lenders discussed in this paper make their disclosures, obtain authorizations and signatures, and provide records electronically. If the procedures of the E-Sign Act and UETA have not been properly followed, then the disclosures, records and authorizations are not valid, and there is a violation of the underlying laws requiring those disclosures, records and authorizations.

This risk applies to all lenders that use electronic disclosures and records, but the risk of violations is especially acute for those that do so in a physical environment where the consumer is not actually transacting online. For example, EasyPay Finance (Transportation Alliance Bank) and American First Finance (FinWise Bank) offer loans through pet stores, auto repair shops, furniture stores, and other brick and mortar locations. Consumers obtain the loans after the disclosures are supposedly provided to them electronically through tablets or kiosks offered to them at the stores, or on the consumers' smartphone, yet they have not initiated an electronic transaction; they have gone in person to a store.

Similarly, LoanMart offers auto title loans, and relies on physical locations to inspect the vehicle and potentially to obtain the consumer's electronic signature. Some brick-and-mortar payday lenders also serve as the entry point for consumers to take out "online" installment loans that are illegal in the state where the store is located.

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[310] *See* 15 U.S.C. § 7001(c)(1)(C)(ii).

[311] https://www.uniformlaws.org/committees/community-home?CommunityKey=2c04b76c-2b7d-4399-977e-d5876ba7e034

[312] 15 U.S.C. § 7005(6).

[313] Unif. Elec. Transactions Act § 2(8).

[314] *See* NCLC, Consumer Banking & Payments Law § 11.6 (6th Ed. 2018), updated at library.nclc.org.

In some cases, the consumer may not have electronically signed an agreement or authorization, or even seen electronic disclosures before the transaction was signed, or–in some cases—at all. It may be that a store clerk forged the consumer's signature – clicking all the "I agree" boxes for the consumer. The clerk may have taken an application on the phone and inputted it into an electronic form. The clerk may also have obscured or scrolled through the required disclosures and allowed the consumer only to see the page on which they are to sign

We provided some examples of potential E-Sign Act and UETA problems in our CRA comments for the examinations of FinWise Bank[315]and TAB Bank.[316] In addition, some of the know-your-customer/identity theft complaints discussed below may reflect electronic signature problems.

10.8. The Military Lending Act and Servicemembers Civil Relief Act

Banks and their third-party partners are subject to the Military Lending Act's (MLA) 36% rate cap when they lend to servicemembers and their dependents. The possibility that a consumer could be covered by the MLA results in greater compliance risks when loans are routinely far above MLA limits. This risk is especially acute when the bank uses a third party to handle the bulk of the loan program, including the consumer application, screening, and preliminary approval process. The Servicemembers Civil Relief Act also applies to rent-a-bank loans taken out before military service, requiring the lender to reduce the interest rate to 6% during service. Numerous banks and non-bank lenders have faced public and private enforcement actions for violating the MLA or SCRA for their own loan programs. Here again, the use of a third party to handle servicing increases the risk of violations.

We provided some examples of potential MLA or SCRA problems in our CRA comments for the examinations of CC Bank,[317] FinWise Bank,[318] First Electronic Bank,[319] Republic Bank & Trust[320] and TAB Bank.[321]

10.9. Laws Governing Privacy and Data Security

Federal laws and safety and soundness regulations and guidances require that banks hold sensitive information securely.[322] For example, the Gramm-Leach-Bliley Act and its implementing regulations, among other things, prohibit a financial institution from disclosing nonpublic personal information about a consumer to non-affiliated third parties, unless certain conditions are met.[323] Loan applications involve collecting social security numbers, names, addresses, birthdays and a host of sensitive personally identifiable information that could lead to identity theft and fraud if not protected. Yet in rent-a-bank schemes, this information is typically collected and stored by the non-bank partner, not the bank.

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[315] *See* FinWise Bank CRA Examination Comments at 8, 14, 20 (American First Finance), 23 (OppFi).

[316] *See* TAB Bank CRA Examination Comments at 11-12.

[317] *See* CC Bank CRA Examination Comments at 7.

[318] *See* FinWise Bank CRA Examination Comments at 16 (American First Finance), 20-21 (Elevate), 23 (OppFi).

[319] *See* First Electronic Bank CRA Examination Comments at 12 (OppFi).

[320] *See* Republic Bank & Trust CRA Examination Comments at 9-11 (Enova dba NetCredit).

[321] *See* TAB Bank CRA Examination Comments at 14.

[322] *See, e.g.,* Third-Party Relationships, 88 Fed. Reg. at 37930.

[323] *See* FDIC, Consumer Compliance Examination Manual at V-17.6.

These nonbank lenders are unlikely to have the same level of data security protections that insured and supervised financial institutions have. Indeed, these nonbank are unlikely to be significantly examined at all, and no one is looking at their data security procedures. Like other companies, some of these nonbanks have undoubtedly suffered data breaches. Yet no one is ensuring that they took appropriate steps in response to such breaches. Data breaches also pose a significant risk of litigation.

These risks fall on the bank. When a third party collects and stores this information on behalf of a bank, the bank is responsible just as if it were performing those activities directly.

10.10. Know-Your-Customer Laws

When banks open an account, including a credit account, they must follow customer identification protocols and know-your-customer (KYC) laws.[324] As the Wells Fargo case fake account scandal and similar cases demonstrate, banks can face enforcement actions as well as private litigation risk if they improperly open accounts in the name of customers whose identity has not been appropriately verified.

The use of third parties to perform this identity verification leads to the risk of KYC violations. This risk is especially acute when the rent-a-bank lender itself relies on additional third parties to obtain the consumer's application.

For example, many consumers complain about identity theft and loans that the consumer did not take out, indicating that there was likely a failure to appropriately verify the applicant's identity. We provided some examples of potential know-your-customer problems in our CRA comments for the examinations of FinWise Bank,[325] First Electronic Bank,[326] Republic Bank & Trust[327] and TAB Bank.[328]

10.11. Community Reinvestment Act

Banks that engage in predatory lending risk a downgrade in their Community Reinvestment Act (CRA) rating. A less than satisfactory CRA rating may affect a bank's ability to participate in mergers and acquisitions or to open new branches. A low CRA rating can lead to more frequent examinations, which increases the risk of findings of legal violations. Additionally, CRA ratings are publicly available, which can impact a financial institution's reputation.

A CRA downgrade is warranted when a bank engages in illegal or discriminatory credit practices. Indeed, the FDIC recently lowered TAB Bank's CRA rating to "needs to improve" – a very low rating that few banks receive – based on a finding that the bank committed unfair or deceptive acts or practices in connection with one of its strategic partners, likely the rent-a-bank

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[324] Section 3261 of the USA PATRIOT Act and regulations thereunder require banks to have a Customer Identification Program ("CIP") to verify the identity of each customer who opens an account. 31 C.F.R. § 1020.220(a)(2). "Account" includes "a credit account, or other extension of credit." 31 C.F.R. § 1020.100(a)(1).

[325] *See* FinWise Bank CRA Examination Comments at 12, 15-16 (American First Finance), 17, 19-20 (Elevate), 21, 23 (OppFi).

[326] *See* First Electronic Bank CRA Examination Comments at 1 (Genesis FS Card), 9, 11 (OppFi), 14, 16-17 (Personify).

[327] *See* Republic Bank & Trust CRA Examination Comments at 10 (Enova dba NetCredit).

[328] *See* TAB Bank CRA Examination Comments at 11-12.

lender EasyPay Finance.[329] The downgrade was well deserved, as shown by the extensive complaints about the EasyPay Finance loans that TAB Bank facilitates.[330]

Other banks engaged in rent-a-bank lending also have likely committed illegal or discriminatory credit practices. For example, FinWise Bank has a partnership with American First Finance, which has a very similar loan program to EasyPay Finance's, with high-cost loans offered through tablets at pet stores, furniture stores, and other retail locations. American First Finance also has generated the same types of complaints that EasyPay has on Better Business Bureau, CFPB, and other websites.

But problems are not limited to lenders that operate through retail outlets. The predatory online loans that other rent-a-bank lenders have also generated numerous complaints and have a high risk of violating the consumer protection laws outlined above.

Moreover, beyond explicit legal violations, CRA assessments should be based not just on the amount of lending in disadvantaged communities but also on the quality of that lending. Bank engagement in predatory lending is grossly inconsistent with the Community Reinvestment Act. Communities of color have historically been disproportionately left out of the traditional banking system, a disparity that persists today. High-cost lenders also target borrowers with low credit scores – who are disproportionately communities of color. Predatory lending to these communities harms borrowers rather than providing helpful access to affordable credit and sucks resources out of the communities who have long been disadvantaged.

These toxic products inflict financial, emotional, and physical turmoil that can pervade every aspect of a person's and, by extension, community's well-being. Growing research documents the links between high-cost loans and negative health impacts.[331] The interdependence between economic and physical health factors has been laid bare as economically disadvantaged consumers and communities of color (especially Black communities) have experienced far greater economic and human loss during the COVID-19 pandemic.

Consequently, the bank regulators should closely assess the appropriate CRA rating of all of the banks discussed in this paper. All of those banks face a significant risk of a lower CRA rating with attendant consequences.

11. Risky rent-a-bank lending must end.

11.1. Bank regulators must end rent-a-bank lending, take action against predatory lending, and hold banks responsible for the violations of their service providers.

The FDIC and any other regulator of a bank involved in high-cost rent-a-bank schemes must end those partnerships, as they pose untenable risks to the banks involved and to the consumers they prey on, for all of the reasons discussed above. Whether through enforcement actions, supervision or other means, regulators must take action to stop these violations of the law, reckless lending that harms consumers, and serious risks to the banks involved.

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[329] Public Disclosure, Community Reinvestment Act Performance Evaluation, Transportation Alliance Bank, Inc., d/b/a TAB Bank Certificate Number: 34781 at 11 (April 13, 2022), https://crapes.fdic.gov/publish/2022/34781_220413.PDF.

[330] See TAB Bank CRA Examination Comments.

[331] *See, e.g.,* Elizabeth Sweet, Univ. of Mass. et al., Short-term lending: Payday loans as risk factors for anxiety, inflammation and poor health, 5 SSM – Population Health 114 (Aug. 2018); Vicky Shaw, The Guardian, Payday loans are bad for your mental health (Mar. 24, 2018) (reporting on study by Royal Society for Public Health).

In the meantime, regulators should take enforcement actions against rent-a-bank lenders and must crack down on unsafe and abusive predatory lending that fails to comply with prudent underwriting standards. Regulators must be vigilant about spotting and taking enforcement actions against violations of consumer protection laws, which are likely being committed by all of the predatory rent-a-bank schemes highlighted in this paper.

While action against all of the banks and rent-a-bank schemes outlined in this paper is demanded, the immediate need for action is especially clear against Transportation Alliance Bank for the unfair or deceptive practices that led to the downgrade of its Community Reinvestment Act rating; against FinWise Bank, which has a similar unfair and deceptive lending program through American First Finance; and against FinWise Bank, Capital Community Bank, First Electronic Bank and any other bank that is partnered with lenders such as Elevate and Opportunity Financial that have faced state enforcement actions exposing the fact that the bank is not the true lender.

Bank regulators also must make good on the requirement that banks take full responsibility for the conduct of their service providers. Until rent-a-bank schemes can be ended, regulators must hold banks responsible whenever the nonbank lenders in those schemes violate the law.

For example, the Consumer Financial Protection Bureau recently fined Enova International $15 Million and required Enova to enter into a new consent decree for violating a previous order, for deceiving consumers, and for withdrawing funds from consumer accounts without consent.[332] The order included conduct involving the installment loans that Enova extends "or arranges" in 37 states through its CashNetUSA or NetCredit-branded subsidiaries.[333] In many of those 37 states, Enova operates a rent-a-bank scheme through Republic Bank & Trust or TAB Bank.[334]

Thus, the FDIC must investigate whether any of that conduct involved rent-a-bank loans, which appears likely. If it did, the FDIC must hold the banks responsible for the legal violations "to the same extent as if the activities were performed by the banking organization in-house."[335] Banks must feel the consequences when they allow predatory lenders to act in their name, otherwise the admonition that banks must strictly oversee their partners' activities is just a hollow threat.

11.2. Bank regulators must directly examine third parties that engage in high-cost, predatory lending, including through transaction testing.

Until rent-a-bank schemes can be ended, bank regulators must directly examine the non-bank partners and should engage in transaction testing of their loan programs.

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[332] CFPB, Press Release, CFPB Fines Repeat Offender Enova $15 Million for Violating Order, Deceiving Customers, and Withdrawing Funds Without Consent (Nov. 15, 2023), https://www.consumerfinance.gov/about-us/newsroom/cfpb-fines-repeat-offender-enova-15-million-for-violating-order-deceiving-customers-and-withdrawing-funds-without-consent/.

[333] Consent Order, In re Enova Int'l, No. 2023-CFPB-0014 at 9 (CFPB Nov. 15, 2023), https://files.consumerfinance.gov/f/documents/cfpb_enova-international_consent-order_2019-01.pdf.

[334] *See* https://www.nclc.org/resources/high-cost-rent-a-bank-loan-watch-list/.

[335] Interagency Guidance on Third-Party Relationships, 88 Fed. Reg. 37920, 37927 (June 9, 2023) (replacing, i.e., Federal Deposit Insurance Corporation, *Guidance for Managing Third-Party Risk*. FIL-44-2008 (June 6, 2008)) ; *see also id.* at 37932.

As discussed above, the FDIC recently noted the importance of transaction testing of small dollar loan programs as part of an examination when certain factors are present, as there are in high-cost rent-a-bank schemes.[336]

Direct examination of the third-party partners in rent-a-bank schemes is also well warranted. The Interagency Guidance on Third-Party Relationships states that the scope of supervisory review "depends on the degree of risk and the complexity …."[337] As explained throughout this paper, the risks of rent-a-bank schemes are high.

The Third-Party Relationships guidance makes clear that when circumstances warrant, a bank regulator "may use its legal authority to examine functions or operations that a third party performs on a banking organization's behalf."[338] Such examinations may, *inter alia,* examine the third party's ability to fulfil its obligation "to comply with applicable laws and regulations, including those designed to protect customers and to provide fair access to financial services."[339]

Similarly, the Treasury Department notes that banking regulations may "*supervise* IDI activities such as lending, deposit-taking, payments conducted directly … [T]he activities performed on behalf of the [insured depository institution (IDI)] by a fintech firm or other third-party would be subject to the laws and regulations applicable to the IDI *and subject to supervision and examination by the IDI's federal regulator*."[340]

It is not sufficient to examine just the bank in a high-cost rent-a-bank relationship. The bank has a very small role, and examining the bank alone will not give the bank regulator sufficient insight in to the activities of the company that is handling the vast majority of the lending programs and that poses the highest risk of legal violations and other risks. The banks that choose to front for predatory lenders to help them try to evade state laws cannot be counted on to supervise that predatory conduct.

The Treasury Non-Bank Competition Report points out how these non-banks "avoid the type of comprehensive supervision and regulation applicable to IDIs."[341] Thus, the "activities of these non-bank firms can largely be conducted outside the perimeter of federal prudential regulation and oversight."[342] Indeed, these non-banks avoid federal supervision altogether, including for consumer protection, as they are not examined by the Consumer Financial Protection Bureau either unless they are engaged in payday lending.

These rent-a-bank schemes attempt to obtain the privileges of depository institutions while avoiding their obligations, "including stringent oversight and examination."[343] "This difference in regulatory scrutiny can create a type of regulatory arbitrage that benefits lenders that operate

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[336] FDIC, Consumer Compliance Examination Manual at V-17.3 to V-17.4

[337] Third-Party Relationships, 88 Fed. Reg. at 37936.

[338] *Id.*

[339] *Id.*

[340] U.S. Dept. of the Treasury Report to the White House Competition Council, Assessing the Impact of New Entrant Non-bank Firms on Competition in Consumer Finance Markets at 110 (Nov. 2022), https://home.treasury.gov/system/files/136/Assessing-the-Impact-of-New-Entrant-Nonbank-Firms.pdf ("Treasury Non-Bank Competition Report") (emphasis added).

[341] Treasury Non-Bank Competition Report at 8.

[342] *Id.* at 18.

[343] *Id.* at 15.

outside the bank regulatory perimeter."[344] Rent-a-bank lenders "may seek relationships with IDIs primarily as a means for the non-bank firm to evade state consumer protections and engage in harmful lending practices. Without proper oversight, new entrant non-bank firms might not have the same incentives to engage in responsible lending to creditworthy borrowers that IDIs do by nature of their business model."[345] Treasury emphasized that "there is ostensibly an alignment of incentives if all aspects of the lending activities are regulated and supervised as if conducted by the IDI. However, there are risks that a non-bank firm may seek to use or 'rent' the charter of an IDI that is located in a state with a less restrictive interest rate cap to pursue high-cost lending schemes. Such relationships could be used to facilitate evasion of state protections that results in consumer harm."

To ensure that rent-a-bank schemes do not violate consumer protection laws, to preserve the integrity of the bank charter, and to prevent unfair competition by companies that get the benefit of a bank charter without its obligations, bank regulators should require the non-bank partners in high-risk rent-a-bank schemes to undergo direct examination.

12. Conclusion

Many bank-fintech partnerships pose high risks of evasion or violation of the law, unfair, deceptive or abusive practices, and consumer harm. The bank regulators must not allow banks to engage in these practices. Bank regulators put an end to payday loan rent-a-bank schemes in the early 2000s, and they must now take action to stop predatory lenders from laundering their loans through banks to attempt to evade the law and facilitate destructive lending.

Thank you for the opportunity to submit these comments. With any questions please contact Lauren Saunders, lsaunders@nclc.org.

Yours truly,

Center for Responsible Lending

National Consumer Law Center (on behalf of its low-income clients)

Student Borrower Protection Center

[344] *Id.* at 105.

[345] *Id.* at 80