WNY Law Center

37 Franklin Street, 2nd Floor, Buffalo, New York 14202
T: 716.855.0203 ext. 112 mparham@wnylc.com
F: 716.270.4005 www.wnylc.com

COMMENT ON OCC PROPOSED "TRUE LENDER" RULE

TO: Chief Counsel's Office
Attention: Comment Processing
Office of the Comptroller of the Currency
400 7th Street SW, Suite 3E-218
Washington, DC 20219
(via email to: regs.comments@occ.treas.gov)

RE: Notice of Proposed Rulemaking
Docket ID OCC-2020-0026

SUMMARY: The Western New York Law Center strongly opposes the proposed rule because it would expressly authorize predatory and abusive non-bank lenders to partner with national banks to structure sham transactions amounting to legalized money laundering to evade state usury laws and collect extremely high-interest loans that will cause severe harm to our clients and constituents.

On behalf of the Western New York Law Center ("the Law Center"), I submit the following comments on the Office of the Comptroller of the Currency's (OCC's) proposed "true lender" rule (the "Rule"), referenced above. The Law Center strongly opposes the Rule.

The Law Center is a nonprofit legal services provider located in Buffalo, New York that advocates on behalf of low-income and underserved Western New Yorkers on a variety of matters including housing, public benefits, and access to credit, guided by an overarching commitment to economic justice. Since 2012, the Law Center has administered walk-in law clinics that have helped thousands of consumers defend themselves against debt collection lawsuits and other debt collection contacts. These clinics assist consumers in nine counties throughout Western New York.

Law Center attorneys have helped numerous consumers defend themselves against creditors and debt collectors seeking to collect unlawful payday loans, and have represented plaintiffs in both individual cases and class actions against payday lenders and their debt collectors. From our experience assisting consumers in our clinics and in court we have seen the harm done by the kind of abusive high-interest loans that the Rule would authorize.

Until about six years ago, we frequently met New York consumers that had been victimized by online lenders making loans with interest of anywhere from 700% to 2500%, resulting in an inescapable debt cycle that often culminated in overdrawn bank accounts and massive overdraft fees. Because of the outstanding overdraft fees, some consumers were unable to open new bank accounts, causing them to enter the ranks of the so-called "unbanked." As a result of aggressive action by New York's Attorney General and Department of Financial Services, this unlawful online lending to New York consumers has virtually ceased, and it has been years since we met a consumer presenting such complaints.

The Rule not only threatens to revive these heretofore unlawful practices in New York, with their associated consumer suffering and loss, but it would leave consumers without any recourse because it would deem the practices lawful. The Rule would provide that for purposes of the National Bank Act's preemption of state interest rate caps, a loan is conclusively deemed to have been made by a national bank if either the bank's name appears in the loan documents as the originator or the bank funded the loan at the instant of origination—even if appearance in the loan documents was a meaningless contrivance or the funding ended the very next instant following origination.

The Rule elevates form over substance in a manner that is contrary to both common sense and the longstanding law of New York and many other jurisdictions, including the United States, as both Supreme Court precedent and longstanding OCC policy have disfavored form over substance transactions designed to evade state usury laws, such as "rent-a-charter" schemes. It provides an easy recipe for predatory lenders seeking to evade New York's or other states' rate caps. A payday lender that desires to make loans to New Yorkers in excess of the legal rate need only find a national bank that will agree to fund the loan at the moment of origination in return for an agreement by the payday lender to, say, immediately buy the loan back at 95% of face value. This is nothing more than legalized money laundering. Moreover, if the bank did not wish to assume even the minimal risk of funding the loan until the promised buyback could be completed, the Rule provides the payday lender the alternative of having the bank appear as the lender in the loan documents without providing any funding at all, for example, by assigning the loan back to the payday lender prior to funding. The rule thus authorizes straightforward "rent-a-charter" schemes that the OCC has previously condemned. Although there is no meaningful economic sense in which the bank in transactions like these is the actual lender, the Rule would conclusively deem the bank to be the maker of the loan and would thus exempt the loan from state rate caps.

The Rule unjustifiably seeks to expel state regulators from a field that is a core subject of state regulation: the activities of non-bank lenders. New York regulators have conferred great benefit on New Yorkers by protecting them from the unlawful, predatory, and abusive activities of online payday lenders. The Rule repeatedly mentions the goal of ensuring consumers' access to affordable credit, but the predictable result will be to flood the New York market with enticing offers of extremely unaffordable credit, and consumers' loss of already scarce income and assets. Where these loans are in every meaningful economic sense made by non-bank lenders, they are justly the subject of state regulation.

In short, we strongly urge the OCC to rescind or modify the proposed rule in accord with these comments. As currently proposed, we believe the Rule would cause extensive harm to New York consumers and increase the number of "unbanked" New Yorkers.

For more information, please contact Matthew Parham at 716-855-0203 x112 or mparham@wnylc.com