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February 12, 2021

**BY OVERNIGHT MAIL**

Hon. Charles E. Schumer  
Majority Leader  
U.S. Senate

Hon. Nancy Pelosi  
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U.S. House of Representatives

Hon. Mitch McConnell  
Minority Leader  
U.S. Senate

Hon. Kevin McCarthy  
Minority Leader  
U.S. House of Representatives

Hon. Sherrod Brown  
Chairman  
U.S. Senate Committee on Banking,  
Housing, and Urban Affairs

Hon. Maxine Waters  
Chairwoman  
U.S. House Committee on Financial Services

Hon. Pat Toomey  
Ranking Member  
U.S. Senate Committee on Banking,  
Housing, and Urban Affairs

Hon. Patrick McHenry  
Ranking Member  
U.S. House Committee on Financial Services

Re: **Use of Congressional Review Act to Disapprove of Federal  
Banking Regulation That Facilitates Predatory Lending**

Dear Congressional Leaders:

On behalf of the State of New York, the State of California, the State of Colorado, the District of Columbia, the Commonwealth of Massachusetts, the State of Minnesota, the State of New Jersey, and the State of North Carolina, we write to bring to your attention a rule recently issued by the Office of the Comptroller of the Currency ("OCC") that would radically undermine one of the states' most effective deterrents against predatory lending by preempting state usury

laws as to certain loans.<sup>1</sup> While our offices have taken legal action to challenge the OCC's unlawful and ill-advised rule, Congress can use the Congressional Review Act, 5 U.S.C. §§ 801-808 ("CRA"), to act now to protect hard-working Americans from a rule that will facilitate predatory lending.

Under the National Bank Act, 12 U.S.C. §§ 1 *et seq.*, national banks that are licensed and regulated by the OCC are permitted to charge interest on loans at the maximum rate permitted by their "home" state, even in states where that interest rate would violate state usury laws. The ability to preempt state usury laws in this way is a privilege granted to national banks – and only to national banks – because they are subject to extensive federal oversight and supervision. For years, non-bank entities – which are largely unregulated – have attempted to partner with national banks to take advantage of these banks' special privileges, and to offer ultra-high-rate loans in states where such loans are forbidden. These sham rent-a-bank schemes have been closely scrutinized by courts and regulators to determine whether the national bank is the true lender of the resulting loans. In evaluating these arrangements, courts look to the substance, rather than the form, of the relationship between the national bank and the non-bank, and examine the totality of the circumstances surrounding the loans.

Against this backdrop, the OCC has issued an unprecedented and ill-conceived rule that establishes a formalistic two-pronged standard by which to determine the true lender of a loan. Under the OCC's rule, regardless of the roles of the national bank and the non-bank lender, the national bank will be viewed as the "true lender" "when, as of the date of origination, it (1) is named as lender in the loan agreement or (2) funds the loan."

We recently filed a multistate lawsuit against the OCC under the Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.*, arguing, among other things, that the OCC has no authority to preempt state law in an area historically regulated by the states.<sup>2</sup> The lawsuit remains pending, and may take years to definitively resolve. In the meantime, unscrupulous lenders will be able to rely on the rule to issue predatory loans.

The CRA provides Congress with an expedited mechanism to review federal regulations and, as to regulations of which Congress disapproves, to invalidate them, and to prevent the

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<sup>1</sup> See OCC, *National Banks and Federal Savings Associations as Lenders*, 85 Fed. Reg. 68,742 (Oct. 30, 2020) (codified at 12 C.F.R. § 7.1031), available at <https://www.govinfo.gov/content/pkg/FR-2020-10-30/pdf/2020-24134.pdf>.

<sup>2</sup> See *New York v. OCC*, Case No. 1:21-Civ.-00057-SHS (S.D.N.Y.). The complaint is available at [https://ag.ny.gov/sites/default/files/01.05.21\\_complaint\\_doc\\_no\\_1.pdf](https://ag.ny.gov/sites/default/files/01.05.21_complaint_doc_no_1.pdf).

agency from issuing similar regulations in the future. We urge you to exercise this authority to invalidate the OCC rule and prevent the OCC from issuing a similar rule in the future.

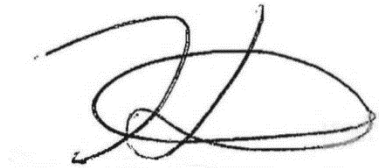
Respectfully Submitted,




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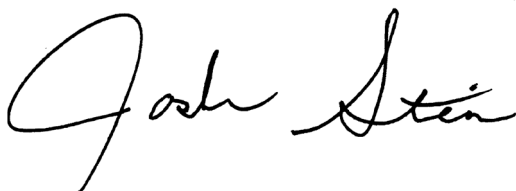
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