April 27, 2021

The Honorable Maxine Waters
Chairwoman
U.S. House Committee on Financial Services
2129 Rayburn House Office Building
Washington, DC 20515

The Honorable Sherrod Brown
Chairman
U.S. Senate Committee on Banking, Housing, and Urban Affairs
534 Dirksen Senate Office Building
Washington, D.C. 20510

Re: H.J.Res. 35 and S.J.Res. 15 Disapproving the rule submitted by the OCC relating to National Banks and Savings Associations as Lenders

Dear Chairwoman Waters and Chairman Brown:

The National Association of Consumer Credit Administrators (NACCA) wishes to submit its comments related to your committee’s consideration of House Joint Resolution 35/Senate Joint Resolution 15, disapproving the Office of the Comptroller of the Currency’s (OCC) “True Lender Rule.” See 85 Fed. Reg. 68742 (October 30, 2020). NACCA supports this joint resolution and urges the committee to adopt it.

NACCA is an association of state financial regulation agencies formed in 1935. NACCA’s members include financial regulators from 49 states, the District of Columbia, Puerto Rico, and Alberta, Canada. NACCA’s members have decades of experience regulating the consumer credit marketplace, including through the enforcement of lending and usury laws. The authority and responsibility of NACCA member states to regulate consumer credit in their states derives from longstanding principles of state and federal law and reflects decisions made in state legislatures and in Congress about the
structure of the consumer financial marketplace and the central role of state regulators in overseeing that marketplace.

In carrying out these responsibilities, NACCA member states evaluate a financial institution’s ability to operate safely and soundly and to serve borrowers responsibly and effectively. Most states have enacted laws (including criminal statutes) to limit interest rates on consumer credit transactions. And NACCA member states also oversee and shape those laws. Accordingly, NACCA member states operate under a dual mandate to promote consumer protection and ensure credit availability. As state regulators, we also have an on-the-ground perspective on the need for a stable and well-regulated financial marketplace. This includes experience with the so-called “rent-a-bank” business model that the True Lender Rule would encourage.

Under the OCC’s rule, a bank is the true lender if it is named as the lender in the loan agreement or if it funds the loan. This rule would create new legal support for the “rent-a-bank” arrangements that NACCA member states have repeatedly seen lenders use to attempt to bypass state licensing and usury laws by arguing that loans are technically closed in the name of a state-chartered bank that is exempt from the applicable state usury laws. The True Lender Rule codifies this position even though consumer lenders and regulators continue to litigate the “true lender” issue. There are several ways to define the “true lender,” including focusing on the party who closes the loan, the party setting the credit terms and disbursement, or the party with predominant economic interest in the loan. Case law on the subject thus far is mixed; a number of federal and state courts have reached different conclusions by focusing on either the substance or the form of the transaction.¹

The rule disregards the evolving case law and undermines state consumer protection laws by creating a vehicle for non-bank lenders to partner with banks and circumvent state regulation, even when these non-bank lenders bear the predominant economic interest in the loan. The True Lender Rule therefore curtails the ability of NACCA member states to protect their citizens from usurious lending practices. The True Lender Rule’s preemption of state interest rate limitations could harm consumers and pose a challenge to healthy competition in these industries. The rule would thereby allow state regulated consumer lenders to unilaterally opt out of state usury regulation.

All financial services products potentially present risk of harm to borrowers and the larger financial marketplace as a whole, creating an uneven playing field that disadvantages those lenders who do not partner with bank lenders and must continue to comply with applicable state laws. State consumer protection laws like the ones NACCA member states administer seek to mitigate these risks. While states have product specific laws, including licensing requirements for offering unsecured credit, the common theme of all state supervisory regimes is the requirement for credentialing and subsequent supervision for compliance with applicable state laws. State consumer credit licensing laws require applicants to furnish credit reports, fingerprints, a business plan, financial statements, and a surety bond. Applicants may be required to provide evidence of policies, procedures, and internal controls that will facilitate compliance with state and federal laws, including disclosure, servicing, and debt collection requirements, and licensees are required to comply with federal and state law. State regulators can then supervise

¹ Compare CashCall, Inc. v. Morrissey, No. 12-1274, 2014 W. Va. LEXIS 587 (W. Va. May 30, 2014) (holding that a consumer finance company was the true lender, not the bank, where the finance company retained all credit risk from the loan and the bank did not retain any economic interest) with Sawyer v. Bill Me Later, 23 F. Supp. 3d 1359 (C.D. Utah 2014) (looking at the form over substance of a transaction and concluding that the bank was the true lender, even though the bank sold the loans after two days). See also Krispin v. May Department Stores Co., 218 F.3d 919 (8th Cir. 2000) (holding that the bank is the true lender where a department store purchased the receivables for accounts held by a national bank, and played a role in account collection).
these lenders, ensuring that they comply with state lending laws. In the interests of efficient licensing and regulation, the states have embraced cooperative efforts, interstate agreements, and model standards to provide consistent supervision, such as the Nationwide Multistate Licensing System.

By preemtping these requirements and creating workarounds, the True Lender Rule not only threatens to harm consumers, it also undermines the existing state licensing systems, the efficiencies states have created, and their cooperative efforts. State regulators are aware that some financial service providers make or service loans without regard to the applicable state laws that regulate or prohibit the activity. By violating those states’ laws, the financial service providers are depriving the consumers of the protections found in the consumer’s state laws, including protection from usurious charges. Further, it is likely that a company with a non-compliant mindset with regard to state licensing laws may be less inclined to comply with other laws or consumer protection practices. NACCA therefore urges the committee to support policies that improve the efficiency of existing licensing regimes and promote consumer protection without undermining the states’ ability to regulate entities that make or service consumer loans within their borders. The True Lender Rule fails this test. The rule also undermines the provision of the Dodd-Frank Act establishing that preemption does not affect the applicability of state law to nonbank subsidiaries, affiliates, and agents of banks. These deficiencies weigh in favor of disapproving the OCC’s rule.

Further, when promulgating the rule, the OCC did not address the substantive and procedural requirements that the OCC must observe when it seeks to preempt state consumer financial laws as mandated by the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”). Preemption is strong medicine within our federal system. As such, Congress requires it be wielded carefully in the consumer finance arena, as evidenced by Dodd-Frank’s directive that the OCC may only preempt state consumer financial laws after the OCC establishes, with compelling evidence, that the state law in question “prevents or significantly interferes with” the exercise of national bank powers and that the OCC must make case-by-case determinations about the impact of particular state consumer financial laws. The OCC’s failure to undertake the necessary analysis in this case is concerning.

NACCA reiterates its interest in working within the existing framework of complementary state and federal oversight of financial services to foster robust lending and servicing industries in a manner conducive to growth and competition, while protecting borrowers and financial institutions from harmful practices. State and federal regulators have previously partnered to reduce the risks associated with “rent-a-bank” schemes and have worked toward the shared goals of encouraging successful lending programs that both promote economic vitality and protect consumers. But this complementary oversight requires balanced standards that ensure both consumer protections and credit availability and that mitigate risks to consumers and financial institutions. Because the OCC’s True Lender Rule undermines the necessary balance and because overturning the rule would help preserve the longstanding consumer protection role of state legislatures and regulators, NACCA supports overturning the True Lender Rule by the adoption of H.J.Res. 35/S.J.Res. 15.

2 See 12 U.S.C. §25b(h)(2) (explaining that no provision of the National Bank Act “shall be construed as preempting, annulling, or affecting the applicability of State law to any subsidiary, affiliate, or agent of a national bank (other than a subsidiary, affiliate, or agent that is chartered as a national bank)").
3 See generally 12 U.S.C. §25b. Section 25b is a new section of the National Bank Act, added as part of the Dodd-Frank Wall Street Reform and Consumer Protection Act.
Finally, please note that NACCA is a non-partisan association of consumer credit administrative agencies. NACCA’s comments in this letter are intended to express support for and promotion of the state regulatory system and are not intended as a statement of support for any political party.

Sincerely,

/s/ Leslie Pettijohn

Leslie Pettijohn
President
National Association of Consumer Credit Administrators