September 3, 2020

Legislative and Regulatory Activities Division
Office of the Comptroller of the Currency
Suite 3E-218
400 7th Street, SW
Washington, DC 20219

Re: National Banks and Federal Savings Associations as Lenders, Docket ID OCC–2020–0026

Dear Ladies and Gentlemen:

Better Markets[1] appreciates the opportunity to comment on the notice of proposed rulemaking captioned above ("Proposal" or "Release"),[2] issued by the Office of the Comptroller of the Currency ("OCC"), regarding the standard for determining when a national bank is the "true lender" of a loan transaction, ostensibly to settle a conflict among the courts for making that determination. The Proposal would resolve this conflict, treating the form of the transaction as determinative by establishing that a national bank or savings association is the "true lender" where the bank is either (1) listed as the lender on the loan documents or (2) funds the loan.[3] Alone, and in conjunction with a prior proposal to reverse the Second Circuit's decision in *Madden v. Midland Funding, LLC*, 786 F.3d 246, 247 (2d Cir. 2015), the Proposal provides a roadmap for utilization of "rent-a-bank" schemes, once disfavored by the OCC, to evade state consumer protection laws.

In making this choice, however, the OCC does not produce any evidence indicating the current legal framework has had any adverse impact on the ability of banks to lend, nor does it produce any evidence justifying its choice to consider only the form of the transaction in determining whether a bank is the true lender. Similarly, the Proposal does not account, at all,

1 Better Markets is a non-profit, non-partisan, and independent organization founded in the wake of the 2008 financial crisis to promote the public interest in the financial markets, support the financial reform of Wall Street, and make our financial system work for all Americans again. Better Markets works with allies—including many in finance—to promote pro-market, pro-business, and pro-growth policies that help build a stronger, safer financial system, one that protects and promotes Americans' jobs, savings, retirements, and more.

2 85 Fed. Reg. 44,223 (July 22, 2020).

3 Release at 44,225.

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for how its elevation of form over substance would impact consumer protection or safety and soundness concerns. Yet, the Proposal would obviously allow for evasion of state consumer protection laws by non-bank lenders by cloaking transactions, in substance made by non-banks who should be subject to state consumer protection laws (and over whom the OCC has no authority), as transactions made by national banks, giving the transactions the benefit of federal preemption.

The Proposal could also implicate systemic safety and soundness concerns by facilitating and promoting the extension of loans by non-banks under weaker underwriting standards and without supervision by the OCC or other banking regulators. While the Release professes the OCC's general commitment to consumer protection and safety and soundness issues, these are empty gestures. In fact, the Release fails entirely to consider the actual, preemptive impact of the Proposal, which will undermine consumer protection and the safety and soundness of the financial system. The OCC's failure to justify its change in policy and to consider the harmful impact of the rule on consumers and the stability of the financial system renders the Proposal arbitrary and capricious.

BACKGROUND AND SUMMARY OF THE PROPOSAL

A national bank charter confers significant advantages, largely in the form of federal preemption of state laws. For example, preemption allows national banks to "export" interest rates, i.e. to charge residents of a state higher interest rates than the law of that state allows, so long as that interest rate is permissible under federal law and the state in which the bank is located. National banks are also generally exempted from a host of other state licensing, inspection, and supervision requirements that apply to non-banks.[4] The benefits of a national bank charter, of course, come with a host of obligations—national banks are subject to extensive supervision by the OCC, and a significant body of federal regulation restricts their activities.

Over the years, banks have increasingly partnered with non-bank lenders to take advantage of federal bank preemption. In a typical arrangement, the non-bank lender pays a

[4] William E. Stern & Alexander J. Callen, *Goodwin Law, So You Want to be a Bank? Benefits of Operating Through a Bank Charter and Charter Choice Considerations* (2018) ("Operating through a bank charter also confers significant advantages on lenders, since insured depository institutions are permitted to "export" interest and fees that are components of interest from the state where the bank is located to borrowers in other states, thereby eliminating the need to comply with various state usury laws. Federally chartered depository institutions generally benefit from federal preemption of state banking laws, and are not subject to state licensing and compliance requirements that may apply to nonbank lenders or other nonbank financial services businesses, such as money transmitters.").

national bank to nominally make loans that the non-bank then purchases and services.[5] The non-bank lender's role in the loan is often the dominant one—the non-bank lender typically markets the loan, provides application materials, sets loan terms, and approves or rejects potential applicants. The role of the national bank in the process is often as minimal as having its name or logo on materials in connection with the loan (materials, again, that are prepared by the non-bank lender).[6] Moreover, even though the loan is held on the national bank's books for some short period of time, the non-bank lender is typically contractually obligated to purchase the loan, and the non-bank lender will typically fund the loan. Essentially the bank takes no real financial risk in "making" the loan—it is a foregone conclusion that all of the risk of the loan will be assumed by the non-bank (hence the non-bank's exclusive involvement in marketing the loan, setting the terms, and approving or rejecting applicants).

The OCC has previously recognized that such situations include significant potential for abuse, and it brought enforcement actions where banks failed to take appropriate care in administering these partnerships:

> We have been greatly concerned with arrangements in which national banks essentially rent out their charters to third parties who want to evade state and local consumer protection laws…The preemption privileges of national banks derive from the Constitution and are not a commodity that can be transferred for a fee to nonbank lenders. In many of these cases, we have also found that the bank failed to properly manage its relationships with the payday lenders, leading to significant safety and soundness problems and violations of federal laws and regulations…The OCC expects national banks to comply with federal consumer protection laws, and we will take appropriate enforcement actions if they do not.[7]

In these situations, when seeking to hold the nonbank lender accountable for violations of law, particularly of state law, a critical question arises: who is the "true lender"? This is a critical question because if the national bank is considered the true lender, federal preemption applies, meaning the borrower loses the protection of state usury statutes, as well as other important state

5 *Consumer Fin. Prot. Bureau v. CashCall, Inc.*, No. CV157522JFWRAOX, 2016 WL 4820635, at *1 (C.D. Cal. Aug. 31, 2016).

6 *Beechum v. Navient Sols., Inc.*, No. EDCV 15-8239-JGB-KKX, 2016 WL 5340454, at *2 (C.D. Cal. Sept. 20, 2016).

7 *See, e.g.*, Press Release, OCC, Peoples National Bank to Pay $175,000 Civil Money Penalty And End Payday Lending Relationship with Advance America (Jan. 31, 2003), https://www.occ.gov/news-issuances/news-releases/2003/nr-occ-2003-6.html, Notably, in bringing these enforcement actions, the OCC did not analyze whether the bank or the bank's partner was the "true lender," because, as explained below, it did not need to for purposes of holding the bank accountable.

consumer protections. Most courts confronting the issue, recognizing the importance of not providing a roadmap for evasion of critical state consumer protection laws through formalities, have adopted a more functional approach, looking below the surface of the formalities of the transaction to determine the reality.[8] Courts taking such a functional approach have had little trouble concluding, in fact patterns such as the one described above—in which a nonbank creates all marketing and application materials, sets loan terms, approves or rejects applicants, funds the loans, and is contractually obligated to purchase loans—that the nonbank is the true lender, rather than the national bank nominally included on the loan documents.[9]

As the Proposal notes, however, at least one court has adopted a hyperformalistic approach, holding, in an unpublished decision, that it will "look **only** to the face of a transaction when assessing" who is the true lender for purposes of determining whether a state consumer protection statute is preempted.[10] In the Proposal, the OCC comes down affirmatively on the side of the courts that have taken a hyperformalistic approach to assessing these partnerships. Specifically, the Proposal would establish that a national bank is the "true lender" if it (1) is named as the lender on the loan documents **or** (2) funds the loan.[11] The disjunctive here is critical, because it allows the bank to be considered the true lender without even the minimal pretense of actual economic involvement in the lending process, beyond renting out the use of its name. The result will be to confer the benefits of state law preemption on a wide variety of nonbank partners, which are often among the most predatory actors in the financial marketplace and the most in need of state oversight.

COMMENTS

The Proposal represents a complete and total abdication of responsibility by the OCC. The OCC abdicates its responsibility under the APA to justify its approach, failing to provide **any** evidence-based justification whatsoever for the Proposal. The OCC also abdicates its further responsibility under the APA to consider important aspects of the rule, ignoring entirely the negative impact the Proposal will have on consumer protection, as well as the impact on the safety and soundness of the financial system. All of this renders the rule arbitrary and capricious. Accordingly, the OCC should withdraw the Proposal and reissue it, if at all, only

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8 *Ubaldi v. SLM Corp.*, 852 F. Supp. 2d 1190 (N.D. Cal. 2012); *see also Consumer Fin. Prot. Bureau v. CashCall, Inc.,* No. CV157522JFWRAOX, 2016 WL 4820635, at *5 (C.D. Cal. Aug. 31, 2016) (citing cases to support the decision that the court "should look to the substance, not the form, of the transaction to identify the true lender").

9 *Consumer Fin. Prot. Bureau v. CashCall, Inc.*, No. CV157522JFWRAOX, 2016 WL 4820635, at *5 (C.D. Cal. Aug. 31, 2016).

10 *Beechum v. Navient Sols., Inc.*, No. EDCV 15-8239-JGB-KKX, 2016 WL 5340454, at *7 (C.D. Cal. Sept. 20, 2016).

11 Release at 44,228.

after it has credibly justified its approach and credibly assessed the impact it will have on consumers and the banking system.

I. THE OCC FAILS TO OFFER SUFFICIENT JUSTIFICATION FOR THE PROPOSAL

In the Release, the OCC asserts that the Proposal is intended to reduce regulatory uncertainty. It does this by (1) resolving conflicting interpretations by courts about how to determine when a national bank is the true lender and (2) providing an easy-to-apply, bright line test for determining when the bank is the true lender. The Proposal explains that under the status quo "there has been increasing uncertainty about the legal framework that applies to the loans made as part of these relationships."[12] According to the OCC, this legal uncertainty "may discourage banks and third parties from entering into relationships, limit competition, and chill the innovation that results from these partnerships—all of which may restrict access to affordable credit."[13]

These supposed justifications for the Proposal are empty on their face. While the Proposal may provide "certainty" for banks and their nonbank business partners, it is "certainty" of the worst sort. It exalts form over substance and provides predatory lenders with precisely the type of "certainty" they need to victimize consumers with impunity under state law. And the notion that vastly expanding the shield of preemption for the benefit of payday lenders and other predatory firms will promote access to "affordable credit" is equally specious. Many of the loans facilitated by rent-a-bank schemes are the very antithesis of "affordable," as they are designed to gouge consumers with sky-high interest rates and fees and often trap consumers in cycles of *unaffordable* debt.

Even more to the point, however, the OCC provides no evidence that the status quo actually **has** had any chilling or adverse impact in the credit markets, even though well-counseled banks, and their well-counseled partners, have presumably been operating under this supposedly uncertain legal regime for years. Essentially, the OCC has failed to even identify, with evidence, that there is an actual (rather than an imagined) problem to be solved.[14] And even assuming, arguendo, that resolution of conflicting court interpretations may be a valid use of the OCC's rulemaking authority, even in the absence of evidence that the conflict is harming interests the OCC wants to protect, the OCC is still obligated to provide a rational explanation for why it is resolving this conflict in favor of the hyperformalistic approach that ignores reality

[12] Release at 44,224.

[13] Release at 44,22,4.

[14] *New York Stock Exch. LLC v. Sec. & Exch. Comm'n*, 962 F.3d 541, 556–57 (D.C. Cir. 2020) ("Rules are not adopted in search of regulatory problems to solve; they are adopted to correct problems with existing regulatory requirements that an agency has delegated authority to address.")

rather than the substantive approach that examines it. As the Supreme Court has explained, the OCC is obligated to articulate "a rational connection between the facts found and the choice made."[15] Having failed to find any facts whatsoever about the impact of choosing the hyperformalistic approach to the "true lender" question, the OCC cannot possibly have articulated a rational connection between those (non-existent) facts and the choice made.

II. THE OCC DISTORTS THE EXPECTED IMPACT OF THE PROPOSAL AND FAILS TO CONSIDER ITS ACTUAL EFFECT ON CONSUMER PROTECTION AND SAFETY AND SOUNDNESS.

An agency acts in an arbitrary and capricious manner where it "entirely fail[s] to consider an important aspect of the problem. Here, the OCC has failed to consider two critical aspects of the problem: (1) how the Proposal will undermine state consumer protections, and (2) how the Proposal will undermine systemic safety and soundness. The OCC's consideration of the impact of the Proposal, such as it is, is contained in Section III of the Release, titled "Consequences of the Bank as Lender," in which the OCC purports to analyze the consequences of the Proposal. However, in reality, the discussion in this section is a red herring, raising wholly irrelevant points while ignoring the pertinent analysis. It violates the Supreme Court's direction in *State Farm* with sins of both commission and omission—it provides misleading analysis that gives the false impression that the "true lender" rule would enhance consumer protection and safety and soundness, while failing to provide any actually relevant analysis addressing the ways in which the Proposal actually undermines these goals.

A. The Proposal Fundamentally Misstates the "Consequences of Bank as Lender"

The OCC seeks to obscure the impact of the Proposal by indicating that establishing the bank as the "true lender" of a transaction will subject the transaction to more stringent federal rules, particularly in the areas of consumer protection and safety and soundness. The Proposal states that

> identifying the lender would pinpoint key elements of the statutory, regulatory, and supervisory framework applicable to the loan in question. Specifically, when a bank makes a loan, it is responsible for ensuring that the loan is made both in a safe and sound manner and in accordance with applicable laws and regulations.[16]

The OCC goes on to recite the various legal obligations applicable to national banks, specifically their obligations to follow federal consumer protection law and to operate in a safe and sound manner. This entire discussion seems designed to give the impression that the choice made by the OCC in the Proposal is necessary to ensure that critical safeguards apply to loan transactions.

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[15] *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).
[16] Release at 44,225.

Whether intentional or not, this impression is false; at the very best, the entire discussion has absolutely no relevance to the OCC's Proposal for determining whether a bank is the "true lender," because the obligations cited by the OCC would apply to national banks **regardless of whether the bank is considered to have "made" a loan consummated pursuant to a partnership with a third-party nonbank.**

The Release indicates that by designating a national bank as the "true lender" for a transaction, the transaction becomes subject to a litany of federal consumer protection laws.[17] This discussion is fundamentally misleading, because the application of the cited federal consumer protection laws does not turn on whether a national bank is considered the "true lender." For example, the Federal Trade Commission Act categorically prohibits unfair or deceptive acts and practices in interstate commerce; its coverage is not limited to national banks.[18] Similarly, the Dodd-Frank Act's prohibition against unfair, deceptive or abusive acts and practices does not turn on whether a lender is a bank or not.[19] Likewise, the Equal Credit Opportunity Act prohibits discrimination by "any creditor" without regard to whether the creditor is a bank.[20] Thus, making a national bank the "true lender" does not enlarge the federal consumer protections that would actually be applicable to the transaction.[21]

Moreover, the OCC's ability to use its enforcement and supervisory powers to ensure that national banks comply with federal consumer protection laws does not turn on whether the bank is, from a legal perspective, the "true lender" in a particular transaction. Banks must comply with all applicable law in conducting their activities—it does not matter whether that activity is defined, legally, as "making a loan," as under the Proposal, or "partnering with a third-party to facilitate that third-party's making of a loan," as it would be under a more functional approach. As the OCC's guidance on third-party relationships explains, banks must "ensure the contract addresses compliance with the specific laws, regulations, guidance, and self-regulatory standards applicable to the activities involved, including provisions that outline compliance with certain

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17 Release at 44,226.

18 Indeed, by its terms, the FTC Act prohibits the FTC from enforcing these provisions against banks. 15 U.S.C. 45(a)(2). However, the OCC explicitly applies these standards to banks. Release at 44,226 n.32.

19 *See* 12 U.S.C. 5531(a) ("The Bureau may take any action authorized under part E to prevent a covered person or service provider from committing or engaging in an unfair, deceptive, or abusive act or practice under Federal law in connection with any transaction with a consumer for a consumer financial product or service, or the offering of a consumer financial product or service."; 12 U.S.C. 5481(6) (defining "covered person," in pertinent part, as "any person that engages in offering or providing a consumer financial product or service").

20 15 U.S.C. 1691(a); 15 U.S.C. 1691a(e) ("The term "creditor" means any person who regularly extends, renews, or continues credit; any person who regularly arranges for the extension, renewal, or continuation of credit; or any assignee of an original creditor who participates in the decision to extend, renew, or continue credit.").

21 Indeed, the OCC appears to concede this point, noting in a footnote that "This proposal would not, however, affect the application of Federal consumer financial laws." Release at 44,226n.21.

provisions of the Gramm-Leach-Bliley Act (GLBA) (including privacy and safeguarding of customer information); BSA/AML; OFAC; and Fair Lending and other consumer protection laws and regulations."[22] When a bank partners with a third-party to enable that third-party to make a loan, it is not necessary that the OCC determine that the bank is the "true lender" from a legal perspective in order for the OCC to use its supervisory and enforcement powers to ensure that the bank's partnership does not result in a violation of federal law—the OCC has routinely held banks liable for activities conducted directly by their partners, in furtherance of that partnership, that violate federal consumer protection laws applicable to the bank.[23]

If a bank partners with a third-party to engage in lending activities, and those lending activities result in a violation of federal law, the OCC is fully empowered to use its supervisory and enforcement powers to hold the bank itself accountable for those violations, without regard to whether the bank is considered the "true lender." As OCC guidance explains

> The Office of the Comptroller of the Currency (OCC) expects a bank to practice effective risk management regardless of whether the bank performs the activity internally or through a third party. **A bank's use of third parties does not diminish the responsibility of its board of directors and senior management to ensure that the activity is performed in a safe and sound manner and in compliance with applicable laws.**[24]

Thus, the OCC's discussion of the applicability of federal consumer protection law is irrelevant to the Proposal, as the applicability of those laws simply does not turn on the identification of a national bank as the "true lender" in these situations.

B. Contrary to the Impression Conveyed in the Release, the Proposal Would Clearly Undermine Consumer Protection by Preempting State Laws

The actual, and intended, impact on consumer protection, however, is ignored entirely by the OCC in the Release. Specifically, the Proposal has the purpose and effect of preempting state consumer protection laws that would apply if loans were considered to be "made" by a non-bank lender. This results in direct, tangible consumer harm, the most obvious being that nonbank lenders will be able to evade state usury laws simply by "partnering" with a national

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22 OCC Bulletin 2013–29, ''Third-Party Relationships: Risk Management Guidance'' (Oct. 30, 2013).

23 *E.g.*, Press Release, OCC, Peoples National Bank to Pay $175,000 Civil Money Penalty And End Payday Lending Relationship with Advance America (Jan. 31, 2003), https://www.occ.gov/news-issuances/news-releases/2003/nr-occ-2003-6.html,.

24 OCC Bulletin 2013–29, ''Third-Party Relationships: Risk Management Guidance'' (Oct. 30, 2013) (emphasis added).

bank, i.e. paying the national bank a fee to use the bank's name on its loan documents.[25] The Proposal would also preempt a number of other state laws intended to protect consumers and adequately regulate nonbanks operating in their state.[26] And the litany of consumer harms inflicted by payday lenders and other predatory firms is long, including endless cycles of costly debt; a shortage of funds for life essentials such as food, medicine, and housing; bank overdraft fees; car repossession; negative credit scores; and bankruptcy.

The Proposal would undermine state-level consumer protections without providing consumers any benefit whatsoever. However, the OCC entirely fails to grapple with this impact of the Proposal and, indeed, as explained above, the discussion of the consumer protection impact of the Proposal conveys the distinct yet false impression that by designating the bank as the true lender, the Proposal would somehow enlarge consumer protections. This failure to accurately consider, and convey, the true impact of the Proposal on consumer protection renders it arbitrary and capricious.

C. The Proposal Does Not Promote the Safety and Soundness of National Banks, and Could Undermine Systemic Safety and Soundness

Similarly, the OCC misleads and obscures the impact of the Proposal on safety and soundness by arguing that designating the bank as the "true lender" subjects the transaction to rules and guidance intended to ensure that banks are managing risk in a safe and sound manner. As the Proposal explains

> In this regard, the OCC expects all banks to establish and maintain prudent credit underwriting practices that: (1) Are commensurate with the types of loans the bank will make and consider the terms and conditions under which they will be made; (2) consider the nature of the markets in which the loans will be made; (3) provide for 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; (4) establish a system of independent, ongoing credit review and appropriate communication to management and to the board of directors; (5) take adequate account of concentration of credit risk; and (6) are appropriate to the size of the institution and the nature and scope of its activities. Moreover, banks are also expected to have loan documentation practices that: (1) Enable the institution to make an informed lending decision and assess risk, as necessary, on an ongoing basis; (2) identify the purpose of a loan and the source

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25 Jayne Munger, *Crossing State Lines: The Trojan Horse Invasion of Rent-A-Bank and Rent-A-Tribe Schemes in Modern Usury Law*, 87 Geo. Wash. L. Rev. 468, 486 (2019).

26 *Cf. Beechum v. Navient Sols., Inc.*, No. EDCV 15-8239-JGB-KKX, 2016 WL 5340454 (C.D. Cal. Sept. 20, 2016) (dismissing several California state law claims after taking formalistic approach to determine that bank, rather than nonbank partner, was "true lender").

> of repayment, and assess the ability of the borrower to repay the indebtedness in a timely manner; (3) ensure that any claim against a borrower is legally enforceable; (4) demonstrate appropriate administration and monitoring of a loan; and (5) take account of the size and complexity of a loan.

These standards are intended to ensure that banks are adequately managing their credit risk. However, in a transaction where a bank partners with a nonbank lender, and the nonbank lender funds the loan and/or is obligated to purchase the loan after a short period of time, the bank essentially takes no credit risk. The loans in such a transaction may be poorly underwritten in numerous ways, but it is not clear at all from the Release that this would be of supervisory concern to the OCC, given that the bank is not actually directly taking on any risk. Nor does the Proposal contain any legally enforceable mechanism whatsoever that would force the bank to take into account the credit risk associated with transactions where the risk is actually assumed by its nonbank partner.[27]

The absence of any indication whatsoever that the OCC will actually evaluate the credit risk implications of loan transactions where the credit risk is assumed by a bank's non-bank partner rather than the bank itself poses a serious problem. While the risks associated with such transactions may be assumed by institutions outside the banking system, they nevertheless remain in the larger nonbank financial system, which can undoubtedly incubate systemic instability. As the OCC knows, or should know, one of the predominant causes of the financial crisis was the buildup of poorly underwritten credit risk outside of the banking system, which the Proposal could exacerbate. Indeed, the Proposal, which both undermines consumer protections for loans and pushes the risk of loans outside of the banking system, essentially recreates the primary conditions of the financial crisis.

Indeed, the Proposal may fuel the buildup of risk in the shadow banking system in an even more insidious way. By establishing that a national bank is the "true lender," the Proposal will preempt the application of state laws intended to ensure the financial safety and soundness of nonbank lenders. In other words, for safety and soundness purposes, rent-a-bank transactions executed under the Proposal would enter a regulatory "no-man's land," in which the OCC is unlikely to enforce federal safety and soundness standards as part of its supervisory process, because the transaction presents no credit risk to individual national banks, but in which states would be prevented by preemption from enforcing any safety and soundness or other financial stability rules. This would necessarily increase systemic risk. The OCC's failure to even acknowledge potential systemic safety and soundness concerns, much less to establish standards

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[27] Moreover, as with the discussion of the consumer protection implications mentioned above, the OCC is not required to determine that the bank is the "true lender" of a loan consummated pursuant to its partnership with a nonbank in order to enforce violations safety and soundness principals implicated by the partnership. If there are safety and soundness concerns implicated by the partnership, notwithstanding that the bank itself does not assume any credit risk with regard to loans made pursuant to the partnership.

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that would mitigate those concerns and ensure adequate oversight of lending risks, renders the Proposal arbitrary and capricious.

CONCLUSION

We hope you find these comments helpful.

Sincerely,

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