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BANK/FINTECH PARTNERSHIPS — SOLVING FOR A NATIONWIDE PRODUCT AND SERVICE

This article explores the regulatory landscape facing banks that partner with Fintechs to offer a wide range of credit products to consumers on a nationwide basis. In particular, this article discusses the provisions under federal law that enable banks to offer products and services on a nationwide basis, the impacts of federalism on these partnerships, including navigating disparate laws and regulations, and how they are enforced by government actors under their respective authorities.

By Jedd Bellman and Daniel Bellovin *

I. INTRODUCTION

As longtime industry actors and new entrants have moved to disrupt classic financial services through the development of financial technology solutions, questions around legal and regulatory obligations have also become more acute over the past decade. These solutions have had immense benefits to both the efficiency and effectiveness of the industry and to the consumers and businesses that have flocked to these products and services. One of the greatest challenges to this technological renaissance is the ability to navigate the ever-complex and, at times, inflexible financial regulatory environment that has been around for over a century. Today, Fintechs are experimenting with novel ways to offer their important products and services at scale, nationwide. However, today's regulatory landscape – dictated by disparate regimes across the federal and state landscape – is not well poised for Fintechs seeking to extend credit on a nationwide basis. A common resolution to this conundrum has been for banks – who benefit from legal and regulatory privileges that allow them to compete on a national scale more easily – to partner with Fintechs, who at times have far superior technological capabilities.

State and federal regulators have taken varying approaches with respect to the supervision and regulation of these partnerships. Further, while there does not appear to be a consensus view, even a few states challenging the status quo could disrupt a national lending model and have a significant impact on the power dynamics in a dual banking system. If the federal charter becomes more cost-efficient and more certain from a regulatory perspective, it begs the question as to whether the state charter becomes less effective and competitive.

* *JEDD BELLMAN is senior counsel, DANIEL BELLOVIN is counsel, and ENNY OLALEYE is summer associate at Orrick Herrington & Sutcliffe LLP. Their e-mail addresses are dbellovin@orrick.com, jbellman@orrick.com, and eolaleye@orrick.com.* *The opinions expressed are those of the author(s) and do not necessarily reflect the views of their employer, its clients, or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.*

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II. OVERVIEW OF THE DUAL BANKING SYSTEM AND INTEREST RATE EXPORTATION

From its inception, the U.S. dual banking system is one in which state banks and national banks have operated throughout the nation in tandem, allowing each cohort to offer necessary banking services to its customers and the communities in which they operate. Under this paradigm, banks are chartered by a prudential regulator and supervised at different levels of government. National banks are chartered and regulated by the Office of the Comptroller of the Currency ("OCC") in the U.S. Department of the Treasury. State banks, however, are chartered and regulated under state laws and supervised by their respective states' banking departments, along with the Federal Deposit Insurance Corporation ("FDIC") and the Federal Reserve System (as it relates to state-bank members). While national banks tend to be larger and account for a larger share of industry assets, there is a larger number of state-chartered banks, which are frequently dedicated to meeting the banking needs of a single community or narrow geographic area.

The dual banking system allows for the co-existence of two different regulatory structures for state and national banks. While this may add an additional layer of complexity for bankers and consumers, it also provides more flexibility by allowing banks to choose how they wish to be chartered, as well as permitting them to convert from a national to a state charter (or vice versa) with government approval.

National banks to some degree have a competitive advantage over state-chartered banks in that they enjoy broad preemption from state laws under the National Bank Act ("NBA").[1] In particular, national banks must comply with state laws of general application "to the extent such laws do not conflict with the letter or purposes of the [NBA]."[2] With respect to state licensing requirements, there are three bases for establishing conflict preemption under the NBA. The first is that the NBA, not state law, provides sufficient authority to the national bank to engage in any aspect of the banking business as permitted by the federal law (as interpreted by its regulator) without respect to any state laws that would otherwise preclude the bank from engaging in that business without state authority. Second, and consistent with the first, is the NBA's grant of exclusive visitorial powers over national banks to the OCC.[3] Third, the NBA's general preemption standard, codified by the Dodd-Frank Act of 2010 ("DFA") reflects the Supreme Court's landmark decision in *Barnett Bank of Marion County, N.A. v. Nelson*,[4] that a state law is preempted if it "prevents or significantly interferes with" a national bank's exercise of its powers.[5]

With regards to the extension of credit, many states have enacted unique credit provisions that impose obligations and restrictions on a lender, including, in many instances usury laws that limit the interest rate a lender can charge borrowers located in the state.[6] A non-bank lender is generally subject to the credit and usury laws of each state where it conducts business. Thus, a Fintech acting as a direct lender on a nationwide basis must ensure that it complies with state usury laws in all 50 states, the District of Columbia, and the U.S. Territories. In contrast, except for a small subset of jurisdictions, banks may generally charge the interest rate allowed under state law *where the bank is located*, regardless of where the consumer resides. This permits banks to make loans under a single, uniform standard regarding interest rates.

More specifically, Section 85 of the NBA and Section 27 of the Federal Deposit Insurance Act ("FDI Act") provide that a national bank and a state-chartered bank, respectively, may charge on any loan "an interest at the rate allowed by the laws of the State. . . where the bank

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[1] 12 U.S.C. §§ 21 et seq.

[2] *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 11 (2007).

[3] 12 U.S.C. § 484(a).

[4] 517 U.S. 25 (1996).

[5] 12 U.S.C. § 25b(b)(1)(B). For example, the OCC's preemption regulations expressly state that a national bank may make non-real estate loans without regard to a variety of state law limitations. 12 C.F.R. § 7.4008(d).

[6] *Compare* N.Y. Penal Law § 190.40 (a person commits criminal usury by charging interest at a rate exceeding 25%), *with* Utah Code Ann. § 15-1-1(1) (the parties to a lawful contract may agree to any rate of interest).

is located."[7] The OCC and FDIC have issued interpretive letters explaining that a bank is located where it is headquartered – i.e., its "home state" – and any state where it maintains a branch – i.e., a "host state."[8] When an interstate bank is "located" in multiple states, these agencies have developed the "non-ministerial functions" test to determine whether the bank's home state or host state interest rate limits would govern a given loan. The three non-ministerial functions are (1) the decision to extend credit, (2) the extension of credit itself, and (3) the disbursal of the proceeds of the loan. The test, described in more detail in OCC Interpretive Letter #822, generally operates as follows:

- Where all three non-ministerial functions occur in the home state, the home state's interest rate limits, including presumably limits on late fees, would apply.
- Where all three non-ministerial functions occur in the branch or branches of a single host state, the host state's interest rate limits, including presumably limits on late fees, would apply.
- Where the three non-ministerial functions occur in different states, or in an office that is neither the main office nor a bank branch, the home state's interest rate limits may apply, or alternatively, the limits of a host state may apply if there is a clear nexus between the host state and the loan.

The FDIC and OCC have also offered guidance on what types of fees and charges are included in the definition of "interest" for purposes of interest rate exportation. Under the OCC's regulations, which have been adopted by the FDIC for state-chartered banks:

> [I]nterest . . . includes any payment compensating a creditor or prospective creditor for an extension of credit, making available a line of credit, or any default or breach by a borrower of a condition upon which credit was extended. It includes, among other things, the following fees connected with credit extension or availability: numerical periodic rates, late fees, creditor-imposed not sufficient funds ("NSF") fees charged when a borrower tenders payment on a debt with a check drawn on insufficient funds, over limit fees, annual fees, cash advance fees, and membership fees. It does not ordinarily include appraisal fees, premiums, and commissions attributable to insurance guaranteeing repayment of any extension of credit, finders' fees, fees for document preparation or notarization, or fees incurred to obtain credit reports.[9]

Based on this definition, banks may export a wide range of fees including NSF fees, late fees, and origination fees, without regard to the state laws where the borrower is located. These structural advantages provide an ideal business solution for banks and Fintechs alike.

III. OVERVIEW OF BANK PARTNERSHIPS ENGAGED IN THE EXTENSION OF CREDIT

Partnerships between banks and Fintechs in a lending context may be structured in a number of different ways, although some similarities exist across the majority of the marketplace. In particular, the following characteristics are relatively common practices for structuring bank partnerships:

- The Fintech is responsible for marketing the credit product and soliciting borrowers on behalf of the bank partner, although often times the bank partner will retain approval authority over the content of any marketing materials;
- The Fintech accepts the loan application, processes and underwrites the loan application (including performing steps such as obtaining consumer reports and implementing Bank Secrecy Act/anti-money laundering requirements), and makes a credit decision based on the bank partner's credit criteria; and
- The bank partner originates and funds the credit product in its own name (i.e., the bank partner is named as the creditor on the credit agreement).

However, there are a number of differences across the industry:

- The Fintech may be compensated in a number of different ways, such as accepting compensation directly from the borrower in return for arranging the loan product, compensation paid by the bank partner, receiving interest income for purchasing an

[7] 12 U.S.C. §§ 85, 1831d.

[8] OCC Int. Ltr. #822 (Feb. 17, 1998); FDIC General Counsel Opinion No. 11 (May 18, 1998).

[9] 12 C.F.R. § 7.4001(a); FDIC General Counsel Opinion No. 10 (April 17, 1998).

interest in and/or servicing the loan, or some combination thereof;

- After origination, the credit risk may be retained by the bank partner, transferred to the Fintech, or sold to the secondary market. Further, there are various ways to transfer the economic interest in these loans including by way of selling the underlying loan in a "true sale" or portion thereof, or selling a participation interest in the receivables;

- The bank partner may hold the credit risk for a certain period of time (a "seasoning period"), before transferring the loans to an assignee; and

- Some Fintechs will service the loans themselves, whereas others will retain a sub-servicer.

Notwithstanding the various permutations, the salient factor is that banks fund the loans and are named as the creditor in the original credit agreements. This lets the Fintech and bank partner scale their products and services by leveraging federal preemption regarding state usury limits.

IV. REGULATORY CONSIDERATION FOR BANK PARTNERSHIPS

The precise contours of how a bank partnership is structured have a myriad of implications for how the loans may be regulated under both state and federal law. For example, contractually allocating more risk to the Fintech may be beneficial to the bank partner from a commercial perspective. However, it can adversely impact the parties by, for example, increasing the risk of a regulator or law enforcement agency claiming the Fintech is the "true lender" and undermining the banking benefits relied upon when making the loan. Structural considerations are constantly evolving as the regulatory and legislative landscape changes and adapts to the rapid rise of bank partnerships. This section describes: (1) the applicability of state licensing requirements to both the Fintech and bank partner; (2) "true lender" lawsuits, which argue that the Fintech is the *de facto* lender – not the bank partner; (3) state usury limits that may apply to loans offered through the bank partnership; (4) the right for states to opt out of federal preemption under the Depository Institutions Deregulation and Monetary Control Act ("DIDMCA"); and (5) Consumer Financial Protection Bureau ("CFPB") Oversight.

A. State Licensing Considerations

State license requirements vary widely by state. However, the types of activities that may trigger licensure include loan soliciting, assisting, arranging, facilitating/brokering, originating, selling, purchasing, servicing, and/or collecting. Banks and other depository institutions are often[10] – but not always[11] – expressly exempt from state licensing requirements. Examples of certain licensing statutes are as following:

- Soliciting. A license is required to "solicit" a loan, or "engage in any activity intended to assist a prospective . . . borrower in obtaining a loan."[12]

- Assisting. A license is required to provide "advice or assistance" with regard to "obtaining an extension of credit."[13]

- Arranging. "Any person who holds himself out as willing or able to arrange" loans must be licensed.[14]

- Facilitating/Brokering. A license is required to act as "an agent, broker, or facilitator" for a lender.[15]

- Originating. A license is required to "transact the business of lending money."[16]

- Selling/Purchasing/Servicing. A license is required "to engage in the business of lending money," which includes "originating, selling, servicing, acquiring, or purchasing loans."[17]

- Collecting. A license is required for "any person who, in the ordinary course of business, regularly, on the person's own behalf or on behalf of others, engages in debt collection."[18]

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[10] *See,* e.g., "The following persons are exempt . . . Any bank, out-of-state bank, Connecticut credit union, federal credit union or out-of-state credit union, provided such bank or credit union is federally insured." Conn. Gen. Stat. § 36a-557(b)(1).

[11] *Maryland Commissioner of Financial Regulation v. Fortiva Financial, et. al.*, Case No.: CFR-FY2017-0033, Charge Letter (Jan. 21, 2021) (Alleging that state-chartered banks made consumer loans without a license, in violation of Maryland law).

[12] Vt. Stat. Ann. tit. 8, § 2200(7)(A).

[13] Cal. Civ. Code § 1789.12(d).

[14] 7 Pa. Cons. Stat. § 6203(B).

[15] Or. Rev. Stat. § 725.045(1)(a).

[16] Del. Code Ann. tit. 5, § 2202(a).

[17] S.D. Codified Laws, §§ 54-4-52, 54-4-36(2).

[18] Cal. Fin. Code §§ 100001(a), 100002(j).

The OCC's pre-2011 regulations preempted certain state laws as applied to national banks, but also to the bank's agents.[19] The DFA amended the NBA to expressly provide that state laws are not preempted as applied to a non-bank subsidiary, agent, or affiliate of a national bank.[20] Thus, prior to the DFA, many state licensing statutes and associated visitorial rights were preempted as applied to agents of a national bank engaged in otherwise licensable activities. While the statutory basis for this exemption was removed, it took some time for the posture of state regulators to evolve.

As evidenced by the enforcement actions listed below, third-party persons engaged in assisting, facilitating, and/or arranging loans for banks are not exempt from licensure merely because they provide services to a bank. State regulators look at who is conducting the licensable activity, without regard to whether they are acting as an agent of a bank, or other exempt entity.

Today, bank partnership models are a target for private litigation and law enforcement actions where the non-bank entity is not licensed appropriately to solicit, assist, arrange, facilitate/broker, service, and/or collect on loans. Below is a high-level summary of several recent enforcement actions, but note that this remains an active area for state and federal regulators. While the business models of the entities discussed below are not identical, there are several important similarities. First, these entities all solicit consumers, operate a web-based platform that invites consumers to apply for loans, and take loan applications from consumers. Further, in each instance a bank makes and funds the loans. Thus, these enforcement actions are a helpful metric for gauging how state regulators view bank partnership models.

- The New Hampshire Department of Banking imposed a $39,000 penalty on a person that operated an online platform through which borrowers apply for and obtain consumer loans from a third-party bank. The unlicensed person engaged in activities such as verifying the information in the consumer's application, obtaining credit reports, and acting as the loan administrator and servicer on behalf of the bank. Under New Hampshire law, a license is required, in relevant part, to act as an "intermediary, finder, or agent of a lender or borrower for the purpose of negotiating, arranging, finding, or procuring" loans. Accordingly, these activities required a license under New Hampshire law.[21]

- The Massachusetts Division of Banks imposed a $2,000,000 penalty on a marketplace lender for negotiating, arranging, aiding, or assisting a borrower or lender in procuring or making loans without a license.[22]

- The Oregon Department of Consumer and Business Services imposed a $10,000 penalty on a person acting as a service provider for state-chartered banks in the issuance of credit cards. The Fintech engaged in activities such as: (1) marketing credit card programs, (2) receiving and processing applications, (3) delivering credit card agreements, disclosures, periodic statements, and other cardholder communications to borrowers, and (4) receiving cardholder payments.[23]

- The Vermont Department of Financial Regulation imposed an $85,000 penalty on a person for soliciting loans without a license. Specifically, the Fintech operated an online lending platform and solicited loans through various targeted advertising methods designed to encourage borrowers to utilize the online marketplace. However, all loans were originated by a bank through a bank partnership. Accordingly, the Fintech was required to hold a

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[19] *SPGGC, L.L.C. v. Ayotte*, 488 F.3d 525 (1st Cir. 2007) (preempting state law that significantly interfered with the national bank's statutory power, when the bank was acting through a third-party agent); 12 U.S.C. § 24 (giving national banks the power "To exercise by its board of directors or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking"); 12 C.F.R. § 7.4009 (2010) ("A national bank may exercise all powers authorized to it under Federal law, including conducting any activity that is part of, or incidental to, the business of banking, subject to such terms, conditions, and limitations prescribed by the Comptroller of the Currency and any applicable Federal law.").

[20] 12 U.S.C. § 25b(e), (h)(2).

[21] *In re Prosper Funding LLC,* Consent Order, Case No. 16-035, New Hampshire Banking Department (Nov. 23, 2016), *available at*: https://mm.nh.gov/files/uploads/banking/orders/16-035-co-20161123.pdf.

[22] *Lendingclub Corporation and Springstone Financial, LLC*, Consent Order, Docket No. 2018-0001, Massachusetts Division of Banks (March 12, 2018), *available at*: https://www.mass.gov/consent-order/lendingclub-corporation-and-springstone-financial-llc.

[23] *In re Genesis Bankcard Services, Inc.,* Consent Order, Case No. 17-0037, Oregon Department of Consumer and Business Services (June. 19, 2017), *available at*: https://dfr.oregon.gov/AdminOrders/enf-orders-2017/CF-17-0037.pdf.

Loan Solicitation license to engage in soliciting loans in Vermont.[24]

In addition to the above examples, we note that state regulators take varying approaches with respect to persons operating without a license. For example, some states will immediately issue a cease-and-desist order, instructing the person to cease all operations in the state. Other states will let the person immediately apply for a license and continue operating while the license application is pending. Further, states will often impose a civil money penalty, depending on how long the person has been operating without a license and the volume of unlicensed activity. Additionally, the state may also require restitution of certain fees and charges collected from consumers.

There are still significant benefits to operating under a bank partnership model, despite the number of required licenses, which include among others:

- More licenses are required to engage in making loans than to engage in assisting, facilitating, and/or arranging loans. Thus, a Fintech operating as a direct lender will typically be required to obtain a greater number of licenses than if the Fintech operates under an appropriately structured bank partnership.

- The license application process for lenders is typically more burdensome than for loan assisters, facilitators, arrangers, and/or brokers. Thus, it would take longer for a Fintech to be properly licensed as a lender than as one of the others.

- Regulatory examinations for lenders are typically more in-depth and burdensome than the examinations for loan solicitors, assisters, arrangers, and/or facilitators/brokers. Thus, the ongoing compliance burden would be higher if a Fintech operated as a lender.

- Banks have interest rate-exportation privileges that allow them to operate under a single, uniform set of requirements with respect to interest rates, late fees, origination fees, and NSF fees. In contrast, non-bank lenders must arguably comply with the laws of each state where the consumer is located. Thus, if a Fintech was making loans nationally, it would be subject to interest rate and fee restrictions in 50 states, the District of Columbia, and the U.S. Territories.

B. True Lender

Arguments regarding who the "true lender" is have been around for years as a mechanism to combat perceived "renting" a bank charter to circumvent, in part, state usury and licensing laws. In other words, state and federal regulators have urged courts to look beyond the form of the transaction to the substance and conclude that the Fintech should be deemed the lender instead of the bank partner. Historically, regulatory and law enforcement focus in this space has been on closed-end, high-interest loan products that exceed a state's usury limit. While there has been some scrutiny on purported revolving credit arrangements that in structure and practice operate more like high-cost closed-end loan products, revolving credit has generally been deemed by courts outside of the true lender context.[25]

While this area of law is constantly evolving, examples of how true lender arguments have been applied include:

- The Colorado Administrator of the Uniform Consumer Credit Code alleged in a lawsuit that a Fintech should be deemed the true lender, in part, because: (1) the Fintech acquired 90% of the loans it facilitated within two business days after origination; (2) the Fintech paid all of the bank's fees and costs associated with operating the program; (3) the bank bears no credit risk related to any loans the Fintech arranges; and (4) the Fintech raised capital to fund the loans. Taken together, these facts support the argument that the bank does not bear the predominant economic interest in such loans.[26]

- Several states have statutorily enacted true lender tests. For example, a person is considered a lender under the Maine Consumer Credit Code – which limits the finance charge a lender may impose – if

[24] *In re Upstart Network, Inc.*, Docket No. 18-55-B, Vermont Department of Financial Regulation (Dec. 27, 2018), *available at*: https://dfr.vermont.gov/reg-bul-ord/upstart-network-inc.

[25] In *Krispin v. The May Department Stores Company*, the court rejected a true lender argument in the credit card space on the grounds that notwithstanding the national bank's sale of its receivables to a non-bank entity, the bank retained "substantial interests" in the credit card accounts so that application of state law to those accounts would have conflicted with the powers vested in a national bank. 218 F.3d 919 (8th Cir. 2000).

[26] *Meade v. Marlette Funding LLC*, Amended Complaint, Case No. 17CV30376 (Mar. 3, 2017).

the person "holds, acquires, or maintains, directly or indirectly, the predominant economic interest in the loan" or "the totality of the circumstances indicate that the person is the lender and the transaction is structured to evade the requirements of" Maine law.[27]

- Some states have "anti-evasion" language providing that the licensing statute applies to persons who seek to evade state law "by any device, subterfuge, or pretense."[28]

C. Usury Limits

In response to the rapid rise of bank partnerships, state regulators and legislatures have responded in varying ways. One such way is to assert that a Fintech cannot arrange or facilitate a loan that exceeds the state usury limit, even if the loan is made by a bank that benefits from interest rate exportation. While these states cannot directly regulate the interest rates charged by the lending bank – and therefore cannot declare the loans usurious – they can regulate the conduct of the Fintech. As a result, this solution is imperfect from a consumer protection standpoint because it does not limit the interest rates that banks can charge. However, by regulating Fintechs, states, and consumer advocates hope this approach will reduce the availability of loans in a state that exceed the usury limit. For example:

- Applicants for a District of Columbia Money Lender License must provide "a signed letter acknowledging its understanding of the District's usury limit of 24 percent on consumer loans."[29]

- In a Consent Order, the Massachusetts Division of Banks ordered a Fintech to reimburse Massachusetts consumers who paid any interest or fees exceeding the amounts permitted under the state usury limit.[30]

- Under the Illinois Predatory Loan Prevention Act, the definition of a "lender" for purposes of the usury limit includes any person who "arranges a loan for a third party."[31]

As such, even in circumstances where a state cannot directly regulate the conduct of a bank making loans within its jurisdiction, states retain broad authority to limit the activities of the Fintech. We have seen states take varying and creative approaches to regulate the conduct of Fintechs, which in turn, limits the types of loans being offered in the state.

D. DIDMCA Opt-Out

Another area of focus among lawmakers in response to bank partnerships is to merely opt-out of interest rate exportation for state-chartered banks. This approach both disrupts the ability for state-chartered banks to have a consistent national product and gives national banks a competitive advantage.

As described earlier, Section 27 of the FDI Act, enacted as Section 521 of DIDMCA, allows state-chartered banks to export the highest interest rate allowed by the state in which the bank is located, regardless of whether the borrower is located in a state with a lower usury cap. However, Section 525 of DIDMCA gives states the ability to "opt out" of Section 521's preemption of their respective state usury laws. Of the handful of states that historically have opted out of Section 521,[32] only Iowa and Puerto Rico's opt outs currently remain effective. In particular, the Iowa legislature enacted legislation in which it declared that "it does not want any of the provisions of [DIDMCA's Section 521] to apply with respect to loans, mortgages, credit sales, and advances made in" Iowa and that "[i]t is the intent of the general assembly of the state of Iowa in enacting this section to exercise all authority granted by Congress and to satisfy all requirements imposed by

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[27] Me. Rev. Stat. Ann. Tit. 9-A, § 2-702; *see also* N.M. Stat. Ann. § 58-15-3(D)(3).

[28] *See,* e.g., Ohio Rev. Code Ann. § 1321.63; Nev. Rev. Stat. § 675.070; N.C. Gen. Stat. § 53-166.

[29] *D.C. Money Lender License*, NMLS Company New Application Checklist, *available at*: https://mortgage.nationwidelicensingsystem.org/slr/PublishedStateDocuments/DC-Money-Lender-Company-New-App-Checklist_.pdf (June 5, 2023).

[30] *Lendingclub Corporation and Springstone Financial, LLC,* Consent Order, Mass. Division of Banks No. 2018-0001 (Mar 12, 2018).

[31] 815 ILCS 123/15-1-10.

[32] The following states previously opted out of DIDMCA preemption, but later rescinded their opt-outs: Colorado (Colo. Rev. Stat. § 5-13-104; repealed in 1994 Colo. Sess. Laws ch. 272, § 12); Massachusetts (1981 Mass. Acts ch. 231, § 2 (codified at Mass. Gen. Laws Ann. ch. 183, § 63); repealed in 1986 Mass. Acts ch. 177); Maine (Me. Rev. Stat. Ann. tit. 9A, § 1-110; repealed in 1995 Me. Laws ch. 137, §§ 1, 3); Nebraska (Neb. Rev. Stat. § 45-1,104; repealed by amendment in 1988 Neb. Laws 913); North Carolina (N.C. Gen. Stat. § 24-2.3; repealed in 1995 N.C. Sess. Laws ch. 387, § 1); Wisconsin (1981 Wis. Laws ch. 45, § 50 (not codified) (repealed in 1998 Wis. Laws ch. 142).

Congress in . . . [DIDMCA] section 525, for the purpose of rendering the provisions of [mortgage usury laws under DIDMCA] inapplicable in this state."[33] This language was inserted into a preamble to the Iowa Consumer Credit Code ("ICCC"), but was not included as part of the codified law. Initially, Iowa's opt-out was interpreted to prohibit Iowa state-chartered banks from exporting the Iowa state usury cap to other states. However, an opinion from the Iowa Attorney General clarified that Iowa's opt-out prohibits other state-chartered banks from exporting the interest rates from locations outside Iowa into Iowa.[34]

The Iowa Attorney General and Iowa Division of Banking recently reinforced this position through the issuance of an Assurance of Discontinuance ("AOD") between the State of Iowa and Transportation Alliance Bank, Inc. ("TAB"), a state bank chartered in Utah.[35] The AOD alleges that TAB "imposed finance charges on the Iowa Loans that exceeded the permitted maximum finance charge of 21% APR, in violation of [the ICCC] and in connection with Section 521 of DIDMCA."[36] In fact, TAB had made loans in excess of 21% APR on the belief that it was exporting the law of Utah, which has no state interest rate cap. The AOD states that TAB has since ceased making loans in Iowa and has agreed to a restitution plan that will provide compensation to affected Iowa borrowers, including refunds of interest charged in excess of the 21% APR ceiling.[37]

[33] 1980 Iowa Acts 1156 sec. 32.

[34] Iowa Att'y Gen. Opinion No. 39 (Sept. 23, 1986), https://www.iowaattorneygeneral.gov/media/cms/39_B85D4255F6821.pdf.

[35] *In re Transportation Alliance Bank, Inc.*, Assurance of Discontinuation with the Iowa Division of Banking, (Dec. 12, 2022).

[36] *AOD* at 1.

[37] *Id.* at 1–2.

More recently, Colorado enacted legislation to opt out of Section 521 during its most recent legislative session, except as related to "general-purpose credit card" transactions.[38] Consumer advocates are promoting this as a purported "Model for Stopping Predatory Rent-a-Bank Lending"[39] that should be replicated across the nation.

E. CFPB Oversight

While much of the regulatory focus on bank partnerships is at the state level, the CFPB has also indicated a willingness to wade into such issues. To date, the CFPB's enforcement actions have focused on tribal lending and payday lending, which included the claim that violations of state law were also unfair, deceptive, or abusive acts and practices under federal law.[40] As recently as last year, the Deputy Director of the CFPB stated that the CFPB is interested in "understanding how the small dollar credit market is evolving," and is "taking a close look at this issue."[41] Based on these remarks, the CFPB's focus appears to be on Fintechs with unusually high default rates or that generate a high volume of consumer complaints.[42] This will likely remain an area of focus for the CFPB from both a supervisory and enforcement perspective. ■

[38] HB23-1229, First Regular Session of the Seventy-fourth General Assembly, 2023.

[39] *Press Release*, National Consumer Law Center, June 6, 2023, *at* https://www.nclc.org/new-colorado-law-a-model-for-stopping-predatory-rent-a-bank-lending/ (last visited July 6, 2023).

[40] *CFPB v. CashCall, Inc.,* 35 F.4th 734, 746 (9th Cir 2022).

[41] *Deputy Director Zixta Martinez's Keynote Address at the Consumer Federation of America's 2022 Consumer Assembly*, CFPB Newsroom (Jun. 15, 2022), *available at*: https://www.consumerfinance.gov/about-us/newsroom/deputy-director-zixta-martinezs-keynote-address-at-the-consumer-federation-of-americas-2022-consumer-assembly/ (last visited July 5, 2023).

[42] *Id.*