American Fintech Council

A Call for Clarity

Removing Regulatory Barriers to Healthy Secondary Markets in Consumer Credit

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I. Executive Summary

Consumer lending relies upon the availability of capital, which comes from a variety of secondary market sources. The providers of capital include debt facility providers, bondholders, state and private pension funds, endowments, equity investors, and many other parties. These capital providers are not involved in the details of consumer lending, but they depend upon the stability of the United States regulatory structure in order to assess and price the risk of a particular business and extending capital to that business. Unpredictable changes to the regulatory structure alter that risk calculus, and can result in significant losses for those capital providers. A loss of investment capital typically results in a tightening of the credit spectrum, which primarily impacts the availability of credit to borrowers with fewer assets and lower income. Further, the potential for entire categories of consumer loans to be voided by vague state legislation creates systemic risks to the banking system that threaten to create dramatic changes to liquidity and the ability of depository institutions to continue traditional lending activity. This white paper lays out the well settled law governing bank lending, explores the development of unpredictable regulatory challenges impacting consumer lending against the backdrop of that law, and how those regulatory hurdles create challenges to properly functioning credit markets and impose significant risks on the banking system. This white paper also makes specific policy recommendations to remedy the discussed challenges, namely the intervention Congress and the federal banking agencies to reaffirm the longstanding authority of banks to make loans and investors to rely upon the validity of those loans.

II. Black Letter Federal Law Establishing Authority to Make Loans

Banks have the ability to seek either a federal or state charter under the dual chartering system that exists in the United States. Prior to the passage of the National Bank Act ("NBA"), the banking system was predominately centered on state-chartered institutions. Prior attempts to have a strong centralized federal bank failed primarily due to citizens' concerns with the powers granted to such banks. The First Bank of the United States had its charter expire in 1811 when Congress failed to renew the bank's charter. The Second Bank of the United States was created in 1816 and it also failed when its charter was not renewed by Congress in 1836.[1] The NBA established a structure to allow for a national bank while providing significant oversight, creating a chartering process under the newly created Office of the Comptroller of the Currency ("OCC").[2] The NBA thus created a dual banking system subjecting a bank to both federal and state law, while also allowing banks to choose either a federal or state charter.

A. Federal And State Bank Lending Authority

The NBA grants national banks the right to make, sell, purchase, participate in, or otherwise deal in loans and interests in loans that are not secured by liens on, or interests in real estate, subject to such terms, conditions, and limitations prescribed by the OCC and any other applicable federal law.[3] In contrast, state-chartered banks receive their authority from the state banking charter

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[1] *See The Founding of the Fed - FEDERAL RESERVE BANK of NEW YORK*

[2] Id.

[3] The NBA grants rulemaking authority to the OCC under 12 U.S.C. § 93a. National banks accordingly are regulated under the NBA and OCC rules. Such an institution and its operating subsidiaries may exercise "all such

granted by individual state banking agencies. State-chartered banks remain subject to federal law and to the supervision of the Federal Deposit Insurance Corporation ("FDIC") (state non-member banks) and/or the Federal Reserve (state member banks).

The NBA grants rulemaking authority to the OCC under 12 U.S.C. § 93a. National banks are therefore regulated under the NBA and must adhere to OCC rules. National banks and their operating subsidiaries may exercise "all such incidental powers as shall be necessary to carry on the business of banking[,]" including "negotiating promissory notes, drafts, bills of exchange, and other evidences of debt" and "loaning money on personal security[.]"[4] The NBA provides that a national bank may "charge on any loan … [or] other evidences of debt, interest at the rate allowed by the laws of the State, Territory, or District where the bank is located," or at a rate tied to the Federal Reserve 90-day commercial paper rate.[5] As a result, a national bank may make loans in accordance with its home state's interest rate limitations and other provisions of its home state's laws that are material to the determination of interest (such as interest-related fees, payment schedule, loan maturity, and manner of repayment), without regard to the laws of the state in which the borrower resides. The NBA expressly preempts any other state consumer financial law to the extent that: (i) application of the law would have a discriminatory effect on national banks as compared to state banks; (ii) application of the law would prevent or significantly interfere with the exercise by the national bank of its powers; or (iii) the state consumer financial law is preempted by a provision of federal law other than the NBA.[6] OCC and FDIC regulations also confirm that an assignee of loans originated by a national bank may rely on the originating creditor's ability to preempt state limits on the interest rate and other terms of credit by enforcing the loans in accordance with their terms (i.e., that the validity of a loan agreement is determined at the time of origination, such that it is "valid when made").[7] These laws establish the clear authority of depository institutions to make loans, and for secondary market purchasers of those loans to rely upon the validity of the loans when deciding whether to invest capital into the consumer lending industry.

B. Bank Authority Regarding Permissible Interest Rates

A key part of secondary market certainty rests on the ability of a secondary market investor to rely upon the rates and terms that a bank agrees to with borrowers. In this regard, banks depend on rate exportation authority that allows a bank to use its home or host state interest rate authority rather than the state of the borrower.

For national banks, the concept of rate exportation "materiality" originated in the United States Supreme Court opinion *Daggs v. Phoenix Nat. Bank*, in which the Court determined that when a national bank charges its customers interest authorized by a state's law, the "intention of the

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incidental powers as shall be necessary to carry on the business of banking[,]" including "negotiating promissory notes, drafts, bills of exchange, and other evidences of debt" and "loaning money on personal security[.]" The NBA provides that a national bank may "charge on any loan … [or] other evidences of debt, interest at the rate allowed by the laws of the State, Territory, or District where the bank is located," or at a rate tied to the Federal Reserve 90-day commercial paper rate.R. § 7.4008(a).

[4] 12 U.S.C. § 24; *see also* 12 C.F.R. § 5.34(5)(iii).

[5] 12 U.S.C. § 85.

[6] 12 U.S.C. § 25b.

[7] *See* 12 C.F.R. § 7.4001; 12 C.F.R. § 160.110; 12 C.F.R. Part 331.

national law [i.e., the NBA] is to adopt the state law, and permit to national banks what the state law allows to its citizens and to the banks organized by it."[8] Accordingly, if state law permits different interest charges on specified classes of loans, a national bank making such loans is subject only to the provisions of state law relating to that class of loans that are material to the determination of the permitted interest. For example, a national bank may lawfully charge the highest rate permitted to be charged by a state-licensed small loan company, without being so licensed, but subject to state law limitations on the size of loans made by small loan companies.[9]

For these purposes, the term "interest" is defined as 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 in connection with credit extension or availability: numerical periodic rates, late fees, NSF fees, overlimit fees, annual fees, cash advance fees and membership fees. It does not ordinarily include third party or ancillary charges, such as appraisal fees, premiums and commissions attributable to insurance guaranteeing repayment of an extension of credit, finders fees, or fees incurred to obtain credit reports.[10] The OCC has also issued numerous interpretive letters analyzing the concept of materiality and repeatedly determined that state requirements with respect to loan maturity and manner of repayment are material to the determination of interest.[11]

For state chartered depository institutions, section 521 of the Depository Institutions Deregulation and Monetary Control Act (DIDMCA), codified as section 27 of the Federal Deposit Insurance Act (12 U.S.C. § 1813d) ("Section 521"), FDIC-insured state chartered banks are expressly authorized to use both the most-favored lender authority and federal exportation authority enjoyed by national banks under 12 U.S.C. § 85 by preempting state law to the contrary. The FDIC has

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[8] *Daggs v. Phoenix Nat. Bank*, 177 U.S. 549, 555, (1900); *see also* OCC Inter. Ltr. 325, 1985 WL 202589.

[9] *Id*.

[10] 12 U.S.C. § 85.

[11] OCC Inter. Ltr., 1983 WL 145788 (1983) (size, maturity and classes of borrowers); letter from Deputy Comptroller (Aug. 12, 1940) (size and maturity); letter from A. J. Mulroney, Deputy Comptroller (Jan. 10, 1941) (duration, amount, manner of repayment, and other characteristics); letter from A. J. Mulroney (May 9, 1941) (size, maturity, and manner of repayment); letter from Deputy Comptroller (May 28, 1941) (size, term, and manner of repayment); letter from Deputy Comptroller (June 21, 1941) (maturity, size, and method of repayment); letter from Deputy Comptroller (May 2, 1945) (maturity, size, and repayment); letter from R. B. McCandless, Deputy Comptroller (Dec. 14, 1945) (size and maturity); letter from R. B. McCandless, Deputy Comptroller (Nov. 27, 1946) (maturity, size, and method of repayment); letter from Deputy Comptroller (May 29, 1947) (size and maturity); letter from Deputy Comptroller (Sept. 12, 1947) (maturity, size, and method of repayment); letter from R. B. McCandless, Deputy Comptroller (Sept. 27, 1948) (maturity, size, and method of repayment); letter from W. M. Taylor, Deputy Comptroller (July 1, 1952) (maximum maturity period); letter from Deputy Comptroller (Nov. 21, 1942) (maturity, size, and method of repayment); letter from Deputy Comptroller (Apr. 12, 1953) (size, maturity, and manner of repayment); letter from Deputy Comptroller (Jan. 14, 1955) (maturity); letter from L. A. Jennings, Deputy Comptroller (Mar. 12, 1957) (amount and maturity); letter from Justin Watson, Deputy Comptroller (Oct. 14, 1964) (all limitations of substance with respect to size, maturity, and method of payment); letter from Thomas G. DeShazo, Deputy Comptroller (Oct. 18, 1968) (term); letter from Kenneth W. Leaf, Chief National Bank Examiner (June 19, 1972) (all limitations of substance with respect to size, maturity, and the like and all conditions upon which such loans may be made). Edited by Alan S. Kaplinsky, Recent Usury Law Developments, 39 Bus. Law. 1251, 1294 (1984).

also promulgated regulations clarifying that the originating banks' home or host state law will govern such transactions.[12]

Although the Daggs opinion and other authority initially discussed materiality only in the context of national banks, the FDIC has had a long-standing practice of applying national bank precedent to the rate exportation authority of state-charted banks. This practice was codified in the FDIC's Federal Interest Rate Authority Rule, which provides that:

> A State bank or insured branch of a foreign bank located in a State may charge interest at the maximum rate permitted to any State-chartered or licensed lending institution by the law of that State. If State law permits different interest charges on specified classes of loans, a State bank or insured branch of a foreign bank making such loans is subject only to the provisions of State law relating to that class of loans that are material to the determination of the permitted interest. For example, a State bank may lawfully charge the highest rate permitted to be charged by a State-licensed small loan company, without being so licensed, but subject to State law limitations on the size of loans made by small loan companies.[13]

The rule subjects state banks to provisions of the permitted interest law that are material to the determination of interest, such as the features that define a class of loans. This provision of the rule is "intended to maintain parity between State banks and national banks."[14] Therefore, when national and state banks exercise their authority to charge interest as authorized under the law where they are located, these banks must also utilize and subject themselves to all other statutory provisions in their home state that are material to the determination of interest. Because of the FDIC's intent to establish parity between state and national banks, the FDIC notes that it is appropriate to look to authority construing the rate exportation authority of national banks to determine the interest rate authority of state-chartered banks.[15]

DIDMCA allows states to opt out of such federal preemption ("Section 525").[16] This opt-out does not apply to national bank preemption, however, so a DIDMCA opt-out solely impacts state-chartered depository institutions. While the law permits states to opt-out of this provision, all states, with the exception of Iowa and Colorado, as well as Puerto Rico, have not explicitly done so by statute, constitutional amendment, or referendum as required by law, or have repealed previously enacted opt out legislation. As a result, if a state legislature has not "opted-out" of DIDMCA, then the state legislature decided that state law interest rate limitations are preempted by federal law.

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[12] 12 C.F.R. Part 331.

[13] 12 C.F.R. § 331.4(b).

[14] 85 Fed. Reg. 44146, 44154 (July 22, 2020).

[15] 85 Fed. Reg. 44146 (July 22, 2020).

[16] 12 U.S.C. § 1831d(a). Note that Section 525 only provides an opt-out in relation to state-chartered banks. The National Bank Act does not include a similar opt-out provision with respect to National Banks, meaning that states cannot opt-out of rate exportation authority for loans originated by National Banks. As a result, National Banks can export their home-state interest rate (or interest rate of a state where a branch is located) even into states that have attempted to opt-out of rate exportation pursuant to DIDMCA. See 12 U.S.C. § 85.

While DIDMCA is a longstanding law, the impact and meaning of such an opt-out is currently subject to high profile litigation. In the wake of Colorado's attempt to opt-out of DIDMCA in June 2023, a Colorado district court originally granted a preliminary injunction temporarily blocking enforcement of Colorado usury limits as applied to state bank-originated loans.[17] Interpreting the key language from Section 525, the *National Association of Industrial Bankers* court held that where a loan is "made" turns only on where the originating bank is located and performs non-ministerial functions (e.g., where the credit decision is made, where the decision to grant credit is communicated from, and where the funds are disbursed). Under the court's view, the state in which the borrower enters into the transaction is irrelevant. The Court's conclusion meant, notwithstanding the state's Section 525 opt-out legislation, Colorado was not able enforce its interest-rate caps with respect to loans to Colorado residents that were made by a bank outside of Colorado. Instead, the opt-out only impacted banks located in Colorado that "make" loans in that state, and thus its primary impact is that the opt-out eliminates the ability of Colorado based, state-chartered depository institutions to export their home state law. The Court's decision was subsequently overturned by the 10th Circuit Court of Appeals on a 2-1 decision.[18] The 10th Circuit took the position that the Colorado opt-out should apply when either the borrower *or* lender was located in Colorado, and thus applied the opt-out to any loan made to Colorado residents. The dissenting opinion agreed with the district court decision, noting that the "statutory text, context, and history confirms a consumer loan 'made in such State' under Section 525 means the place where the lending bank is chartered or performs its non-ministerial loan making functions—and not, as Colorado and the majority insist, where the borrower is located."[19] Future appeals seeking an en banc re-hearing or adjudication at the Supreme Court are certain to follow, but current precedent indicates that the opt-out impacts loans made within or from without the opt-out state. While a final decision is yet to be made and this case considered the Colorado opt-out rather than the Iowa or Puerto Rico opt-outs, the district court's preliminary injunction and a 2-1 decision at the appeals court reflects that a DIDMCA opt-out may not impact loans made by out-of-state banks relying upon rate exportation in those jurisdictions.

III. Pension Funds, University Endowments, Private Equity, and Other Secondary Market Participants Require Certainty

The secondary market plays a critical role in the consumer lending market, which is increasingly comprised of Fintech related consumer loans. Reports indicate that unsecured consumer loan securitization volume grew to a record $13.4 billion issued in 2024, roughly 4% of the entire United States broader asset-backed securities volume.[20] By selling loans, depository institutions and other lenders can relieve balance sheet pressure by offloading assets to the secondary market and obtain capital to make additional loans. The longstanding practice provides the lender with additional capital to make addition loans, and spreads default risk across many investors rather than concentrating it within the original lender.

[17] *Nat'l Ass'n of Indus. Bankers v. Weiser*, No. 1:24-CV-00812-DDD-KAS, 2024 WL 3169735 (D. Colo. June 18, 2024).
[18] *Nat'l Ass'n of Indus. Bankers v. Weiser*, 159 F.4th 694 (10th Cir. Nov. 10, 2025).
[19] *Id*. at 729.
[20] U.S. Unsecured Consumer Loan Securitizations Gain Traction | Morningstar DBRS (last viewed August 31, 2025)

The Fintech industry is also a significant and growing part of the consumer lending industry, and one serving critical needs. In November of 2023, the Federal Reserve Bank of New York (FRBNY) published a paper discussing the role Fintech plays in lending to low-moderate income individuals.[21] The FRBNY noted that loan originations involving Fintech companies comprised 38% of the unsecured lending market in the second quarter of 2023.[22] Consumer loan origination models facilitated by Fintech companies often rely on innovative and inclusive lending models utilizing alternative underwriting models. These innovative models provide a market for sub-prime borrowers; particularly those that have thin credit files. While acknowledging risks in alternative underwriting and increased access to credit, the FRBNY stated that "Fintech models for lending offer an important alternative to higher-cost traditional credit that is often inaccessible to low and moderate-income borrowers and less secured small-dollar loan options."[23] Accordingly, the Fintech industry appears to be driving significant credit access to low and moderate-income borrowers that are not served by existing channels.

Secondary markets always face performance and economic risks related to the decline in the value of assets already held. For example, the 2008 mortgage crisis yielded repeated ratings downgrades on investments in mortgage backed securities that forced pension funds and other secondary market investors to write down significant investments, taking losses that impacted their ability to provide pensions to American citizens with hard-earned pensions.[24] Private investment in those assets also plummeted, resulting in a circumstance in which mortgage lenders were unable to sell the loans they held given little appetite for new investments.[25] More recently, the failure of Silicon Valley Bank and Signature Bank led to millions of dollars in losses to numerous state and local pension funds. Reports addressing the fallout from the Silicon Valley Bank and Signature Bank failures indicated that at least two dozen state and local pension funds had direct exposure to the banks' collapses.[26] One report indicated that the California Public Employees Retirement Fund had the highest investment in Silicon Valley Bank, closely followed by the Ohio State Teachers' Retirement System and the New York State Common Fund.[27]

The interconnected nature of investments into financial services companies exposes regular Americans to negative impacts from performance declines and disruptions in the consumer lending industry, even when those individuals are entirely disconnected from consumer lending or financial services. As a result, policymakers should be thoughtful regarding when and how new regulatory positions are articulated and applied. In the ensuing section, we will explore recent

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[21] https://www.newyorkfed.org/outreach-and-education/household-financial-stability/the-role-of-fintech-in-unsecured-consumer-lending-to-low-and-moderate-income-individuals
[22] Id.
[23] Id.
[24] Crisis and Response: An FDIC History, 2008-–2013, Federal Deposit Insurance Corporation, at 19 (November 2017), available at https://www.fdic.gov/media/18636 (last accessed September 5, 2025).
[25] *Id*. at 20.
[26] Public Pension Funds and the Silicon Valley Bank Collapse, Anthony Randazzo, Equable (Mar. 15, 2023), available at https://equable.org/pension-funds-silicon-valley-bank/ (last accessed September 5, 2025); Public Pension Funds Have Taken a Hit From the Banking Sector's Turmoil, but re Better Prepared than During the 2008 *Crisis*, Geoff Mulvihill, Fortune (Mar. 21, 2023), available at https://fortune.com/2023/03/21/public-pension-funds-svb-bank-collapse-investment-returns/ (last accessed September 5, 2025).
[27] *Id*.

developments that undermine secondary markets and add new and unpredictable risks to investments in the consumer lending industry.

IV. Certain State Legislation and Enforcement Actions Undermine Secondary Market Investment into the Consumer Lending Industry

State legislatures and in some cases enforcement agencies have begun to introduce legislation and enforcement theories that create significant risks to the consumer lending industry in a manner that is difficult for secondary market investors to calculate. These developments range from more modest impacts through attempts to impose state licensing requirements onto passive investment vehicles that have no employees or operations, to legislation seeking to separate out individual states from the federal framework of credit uniformity, to legislation attempting to regulate depository institutions indirectly through laws ostensibly focusing on parties performing services for, or contracting with, depository institutions. Each development discourages secondary market investments in the consumer lending industry, lowers the value of banking charters for depository institutions, and to varying degrees also creates significant potential risks to the banking system. The combination of these various efforts directly and indirectly impinge upon banks activities by creating a significant and growing risk to the industry that will, over time, reduce the availability of credit, decrease liquidity in the banking system, in addition to negatively impacting existing investments.

A. License Requirements for Secondary Market Investors

Several state legislatures have crafted or amended state lender licensing regimes to impose license requirements upon purchasers of loans, with the regulatory agencies generally indicating that these apply even to bank originated loans that are not subject to the licensing regime at origination.[28] These legislative actions thus subject the purchaser of a bank originated loan to licensing and regulatory requirements not imposed on the bank and which are generally inconsistent with the applicable law that governs the loan itself. These license requirements are tied to lender licensing regimes that govern the rates, terms, and conduct regarding non-depository lenders. As a result, the decision to require licensing for passive investors yields a bizarre outcome where largely inapplicable regimes are applied to investors that have no role in the origination of consumer loans, and impose ongoing regulatory burdens that decrease the amount those investors will pay for the underlying consumer loans given that those loans come with significant increased costs and regulatory requirements designed for companies that are actually engaged regulated activities where they interact with consumers. While some state legislatures have provided exemptions for such passive investors,[29] the ad hoc application of such requirements to investors holding existing portfolios creates significant disruption for no discernable benefit given that state legislatures can license and regulate the companies interacting with their residents.

B. True Lender or Predominant Economic Interest Laws

[28] *See, e.g.*, Mass. Gen. Laws ch. 140 § 96; Neb. Rev. Stat § 45-1004(1)(b) (revised and transferred in October 2025).

[29] *See, e.g.*, Conn. Gen. Stat. § 36a-557(a)(4); Wis. Stat. 138.09(1c)(a)(3), (4).

A growing number of state legislatures have enacted consumer credit laws, often known as "true lender" or predominant economic interest laws, designed to regulate Fintech companies operating through bank partnership models with traditional banks. The primary focus of these laws is to apply a subjective test to determine when the state will disregard the bank's existence, focusing on who holds the predominant economic interest in the loans or a totality of the circumstances test.[30] These true lender laws have significant enforceability issues given prior federal court decisions striking down similar laws passed decades ago. In addition to the potential lack of enforceability, these laws also seek to impose ill-fitting lending requirements on common products, such as credit cards and student loans, by tying limitations designed for vanilla installment loans to a broad range of credit products.

In general, true lender laws are structured to facially exempt banks while regulating the non-depository entities as if the non-depository entities are the lender in the credit transactions – i.e. the "true lender." However, Fintech companies often enter into bank partnerships with a desire to have the same uniform product terms that banks are able to offer to their customers. State true lender laws are intended to force a subset of bank offered products to be subject to state lending laws that would not permit the desired product, by treating the product as if it was offered directly by the non-depository entity. This statutory structure creates a problem for bank issued products due to the fact that many state laws have provisions that prohibit products such as credit cards or student loans entirely, or loan products that delay the requirement of the borrower to make payments, due to the presence of requirements that all loans under those laws have equal and amortizing payments and that the initial payments must be made within 30-45 days of loan origination.[31] These state laws force many products into bank originated loan programs, such as credit cards, home improvement loans that delay borrower obligations to pay until the home improvement project is completed, or low rate student loans that allow students to defer payments until they graduate and obtain a job. This occurs due to state legislative decisions to prohibit these categories of loans entirely through these limitations. As a result, these laws subject bank loan programs to the limitations imposed on non-depository lenders, in effect imposing illogical requirements on credit products that are common in the marketplace and yet are structurally incompatible with the non-depository lending laws.

The recent trend of true lender laws has not led to significant public litigation to date, but a similar line of legislation regarding tax refund anticipation loan laws provides context around how federal courts should approach these true lender laws. In 2005, the state of Connecticut passed legislation seeking to regulate non-depository entities involved in the origination of tax refund anticipation loans.[32] The legislation sough to regulate "facilitators", which were defined as parties that make refund anticipation loans, process, receive, or accept applications for such loans, or facilitate the making of the loans. [33] The Connecticut statutes also imposed substantive limitations on the loans that a facilitator could be involved with, such as the terms of the loans and the maximum interest

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[30] 815 Ill. Comp. Stat. § 123/15-5-15.

[31] *See, e.g.,* 815 Ill. Comp. Stat. § 670/15(e) (requiring equal, amortizing payments); Cal. Fin. Code § 22307(b) (requiring equal, amortizing payments and that loans have a first payment due within 45 days); N.C. Gen. Stat. § 53-176(e) (requiring all loans have payments due within 45 days); Va. Code Ann. § 6.2-1524(K) (requiring equal, amortizing payments and that loans have a first payment due within 45 days).

[32] *See* Conn. Gen. Stat. § 42-480 (as adopted by 2005 Conn. Leg. Serv. P.A. 05-107S. (H.B. 6830)).

[33] *Id*. at § 42-480(a)(2).

rates that could be charged on such loans. [34] As with the more recent true lender laws, the state attempted to avoid violating the black letter federal law by facially exempting depository institutions from the direct application of the Connecticut tax refund loan restrictions, while in effect eviscerating that exemption by imposing restrictions on the non-bank contractual partners of that depository institution that perform those administrative functions or "facilitate" the depository institution's loan making activities.[35] These features largely match the scope and structure of the current true lender laws. In the case of the Connecticut tax refund anticipation loans, a bank successfully filed suit against the Connecticut regulatory agency seeking a declaratory judgment that the tax refund anticipation loan law was preempted by the NBA.[36] The bank that filed the lawsuit, Pacific National Bank, N.A., successfully sought and obtained an injunction against the state prohibiting it from enforcing the tax refund anticipation loan law against any entity in connection with the offering or making of refund anticipation loans by Pacific. In response, the state of Connecticut appealed the district court's ruling. [37] Ultimately, the Second Circuit affirmed the district court's ruling, concluding that the NBA preempted Connecticut law because state law was in "irreconcilable conflict" with federal law and would frustrate the purposes of the federal scheme. The Second Circuit reasoned that, because a national bank is an instrumentality of the federal government and necessarily subject to the paramount authority of the United States, states are not able to exercise control over national banks in a way that would affect their operation, except in so far as Congress may see proper to permit. In effect, a ruling that would allow the state of Connecticut to impose interest rate limits on Pacific through its service providers would significantly restrict the ability of a national bank to conduct its activities as permitted by federal law.[38] Accordingly, the Second Circuit noted that if a state statute subjects non-bank entities to punishment for acting as agents for national banks with respect to a particular NBA-authorized activity, and thereby significantly interferes with national banks' ability to carry on that activity, the state statute does not escape preemption on the theory that, on its face, it regulates only non-bank entities.[39]

As with the preempted tax refund anticipation loan laws, the express purpose of state true lender laws are to restrict arrangements between banks and non-depository institutions.[40] The state legislatures have utilized the same logic as before, ostensibly exempting the banks themselves, but restricting their activities through entities that partner with them in a way that materially curtails the ability of banks to exercise the authority granted to them under black letter federal law. These laws seek to be viewed as not infringing upon banks' federal authority to export their home state interest rate, but the *Pacific* decision reflects federal court understanding that state laws facially excluding banks should be struck down where they significantly interfere with express federal rights afforded to such banks. The FDIC noted that DIDMCA was intended to ensure that state-chartered depository institutions have the same rights to export the same fees and charges on interstate loans that national banks can export pursuant to the NBA.[41] As a result, the *Pacific*

[34] *Id*. at § 42-480(b), (c).
[35] *Id*. at § 42-480(a)(2).
[36] *Pacific Capital Bank, N.A. v. Connecticut*, 542 F.3d 341, 346-47 (2d Cir. 2008).
[37] *Id.*
[38] *Id*. at 351-52.
[39] *Id*. at 353.
[40] *See, e.g.,* 815 Ill. Comp. Stat. § 123/15-5-5.
[41] Note 14, *supra*.

decision would apply in the same way to state and national banks with respect to matters material to the determination of the interest rate.[42]

The true lender laws thus present a similar quandary and create uncertainty regarding the treatment of loans or other credit products that may not be consistent with the laws governing non-depository lenders. The laws are particularly problematic for secondary market investors because they typically contain dramatic remedies seeking to void all impacted loans entirely for any party seeking to collect them, despite the federal regulations clarifying the ability of assignees to collect the rates contracted for and preempting state laws to the contrary.[43] The fact that these laws tie a voiding remedy to a subjective test results in significant uncertainty for secondary market investors as they cannot know if and when a regulatory agency would determine that "the totality of the circumstances" merit voiding entire loan portfolios. As a result, these laws introduce material uncertainty into secondary markets relating to consumer lending and create an uneven playing field between identical banks based upon whether they engage third parties to assist them with the administrative functions related to the bank's lending activities. While the Supreme Court's decision in *Loper Bright Enterprises v. Raimondo*[44] overturned Chevron deference in cases involving the interpretation of an ambiguous federal regulation, these true lender laws should not be enforceable under existing court authority. As a result, FDIC and OCC opinion letters or rulemaking in this regard could merely acknowledge and confirm the applicability of longstanding federal court decisions, rather than provide an agency's own interpretation.

C. DIDMCA Opt-Outs and Litigation

The Colorado litigation will likely determine the impact of a state DIDMCA opt-out, with one of two potential outcomes resulting from the litigation. The consumer lending industry position is that, consistent with legislative history from when DIDMCA was enacted, a state opt-out solely impacts the preemption afforded to depository institutions *located in the opt-out state when making loans to any borrower in the United States*. Colorado's position is that its opt-out should preclude the exercise of federal preemption by depository institutions *located outside the opt-out state when making loans to residents of the opt-out state*.[45] These two positions represent dramatically different outcomes. If the industry prevails, as it has at the district court level thus far, then out of state banks can make loans to Colorado residents without regard to Colorado usury limits. If Colorado were to prevail, on the other hand, the value of a state banking charter will be devalued as state-chartered depository institutions would need to understand and adhere to state interest rate limitations in all opt-out states. The fact that a law enacted in 1980 is facing existential litigation regarding its meaning, with potential outcomes that in both cases significantly curtail the ability

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[42] We note in this regard that while Dodd-Frank removed preemption for operating subsidiaries, it did not modify the preemption afforded to the banks themselves, which is the basis for these decisions. However, we note that some court decisions have considered the implication of Dodd-Frank's curtailment of such preemption. See *Ill. Bankers Ass'n v. Raoul*, 2024 U.S. Dist. LEXIS 230650, *4-5, 760 F. Supp. 3d 636, 2024 LX 86608; *Gordon v. Kohl's Dept. Stores, Inc*., 172 F. Supp. 3d 840, 864 (E.D. Pa. 2016), order vacated on denial of reconsideration, No. CV 15-730, 2016 WL 11552687 (E.D. Pa. Apr. 13, 2016).

[43] *See, e.g.,* Me. Rev. Stat. tit 9-A § 2-701; 2-702; 815 Ill. Comp. Stat. § 123/15-5-10.

[44] *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024).

[45] In some instances, proposed legislation has gone further by seeking to regulate any loans made to individuals physical present in the state, regardless of residency. *See* Proposed D.C. Bill 25-0609, entitled the Protecting Affordable Loans Amendment Act of 2023.

of depository institutions to have a single consistent standard for the loans that they make, presents significant challenges for secondary market investors as it can result in long lasting impacts for existing and future investments in the consumer lending industry.

In response to the most recent decision by the 10th Circuit Court of Appeals, the FDIC and OCC, various state Attorneys General, as well as multiple national and state industry associations filed amicus briefs arguing that this decision distorts competitive equality between state and federal banks, incentivizes mass conversion from state to federal charters, and materially undermines prudential supervision—particularly loan loss reserve assessment—by fragmenting loan portfolios across state regulatory regimes. Taken together, the discussed harms to the banking system propagated by Colorado's actions make federal intervention on this issue imperative.

V. Policy Recommendations

Given the harms to the banking system by state legislative and regulatory activities discussed above, Congress and the federal banking agencies should take action to reaffirm the longstanding authority of banks to make loans and investors to rely upon the validity of those loans. The federal banking agencies believed they had done this in the context of the valid when made rulemakings, which survived judicial challenge, but these rules appear to have simply caused state legislatures and enforcement agencies to shift their claims while continuing to undercut this authority. Congress and the federal banking agencies should also take action to ensure that the regulatory focus remains on companies that actually interact with consumers, rather than imposing burdensome and largely useless licensing requirements on third party investors that do not interact with consumers. While many policy options are available, secondary markets would significantly benefit from the certainty provided by the following:

- Congress should enact legislation establishing federal preemption from state licensing requirements for passive purchasers of loans when those loans are made under federal authority, particularly to counter ad hoc true lender or predominant economic interest laws promulgated by state legislatures.[46]
- The federal prudential agencies should issue regulations clarifying that state agencies may not impose requirements upon secondary market investors that are inconsistent with the laws governing the origination of the loan by the originating depository institution, in order to protect the safety and soundness of the banking industry and prevent destabilizing legislation at the state level that introduces uncertain liquidity and credit risk.
- The OCC and the FDIC should exercise their express rulemaking authority to clarify that the valid when made rules, which confirmed longstanding court precedents, protect lawfully originated loans without regard to ad hoc true lender or predominant economic interest tests enacted by state legislatures to undercut existing federal law.[47]
- The OCC should acknowledge and formally confirm it agrees with existing federal court precedent preempting state tax refund anticipation loan laws and confirm these holdings

[46] Legislation of this nature has been proposed previously, such as the Modernizing Credit Opportunities Act in 2017 (H.R.4439, 115th Congress).

[47] For example, the Federal Deposit Insurance Act provides that the FDIC is expressly empowered to craft regulations to carry out the Federal Deposit Insurance Act and define its terms. *See* FDIC Section 10; 12 C.F.R. §§ 1819; 1820.

also apply to the new state true lender legislation modeled on those previously stricken laws.[48] The FDIC should also confirm that, as it relates to matters material to the determination of the interest rates, this federal case law also applies to laws limiting state-chartered bank exportation authority.[49]

- The FDIC should issue regulations confirming that a DIDMCA opt-out solely impacts depository institutions located within the opt-out state, in support of the district court's decision, and provide clarification regarding the impact to such depository institutions.

[48] The OCC is expressly empowered to prescribe rules and regulations to carry out the responsibilities of its office. 12 U.S.C. § 93a.

[49] Note 45, *supra*.

About AFC

A standards-based organization, the American Fintech Council (AFC) is the largest and most diverse trade association representing financial technology (fintech) companies and innovative banks. On behalf of over 150 member companies and partners, AFC promotes a transparent, inclusive, and customer-centric financial system by supporting responsible innovation in financial services and encouraging sound public policy. AFC members foster competition in consumer finance and pioneer products to better serve underserved consumer segments and geographies.