Attorneys General of California, Colorado, Connecticut, the District of Columbia, Hawaii, Illinois, Iowa, Maine, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, North Carolina, Oregon, Pennsylvania, Virginia, and Washington

State Financial Regulators of Colorado, Hawaii, Maine, and Illinois

October 18, 2021

James P. Sheesley
Assistant Executive Secretary
Federal Deposit Insurance Corporation
550 17th St. NW
Washington, D.C. 20429

RE: FDIC RIN 3064-ZA26
Proposed Interagency Guidance on Third-Party Relationships: Risk Management

Dear Mr. Sheesley:

On behalf of the undersigned State Attorneys General and State financial regulators, we submit these comments in response to the Federal Deposit Insurance Corporation's (FDIC), the Board of Governors of the Federal Reserve System's (Board), and the Office of the Comptroller of the Currency's (OCC) recently proposed guidance, entitled "Proposed Interagency Guidance on Third-Party Relationships: Risk Management," set forth at 86 Fed. Reg. 38182 (July 19, 2021) ("Proposed Guidance").

We appreciate the FDIC's, Board's, and OCC's consideration of the issues at play with regard to banking organizations' risk management when engaging third-parties. However, based on our experiences licensing, regulating, and enforcing state laws concerning non-bank lenders, we are concerned that the Proposed Guidance fails to address rent-a-bank schemes, whereby a non-bank entity partners with a state or federally-chartered bank for the purpose of evading a lower interest rate established under the law of a non-bank entity's licensing state(s).

As the FDIC, Board, and OCC are aware, banks enjoy a special lending right under federal law referred to as interest rate exportation. Interest rate exportation permits banks to lend money to consumers across the country at interest rates permitted by the laws of the bank's home state, even if that rate exceeds the usury cap in another state. 12 U.S.C. § 1831d (state-chartered banks); 12 U.S.C. § 85 (federally-chartered banks). Non-bank entities, however, have for decades attempted to partner with state and/or federally-chartered banks in order to "rent" a bank's interest exportation rights, for the purpose of evading state usury caps that would otherwise apply to the non-bank's lending activity. *See, e.g.*, *Fulford v. Marlette Funding, LLC*, No. 17CV30376, 2020 WL 3979929 (Colo. Dist. Ct. June 9, 2020).

In the typical case, the non-bank entity seeks out a partnership with a state or federally-chartered bank, whereby the bank lends money to consumers and promptly sells those loans to the non-bank partner. Through this scheme, the non-bank partner attempts to collect interest in excess of state usury caps, which it could not do without the aid of a state or federally-chartered bank. Concerns about such schemes are set forth in greater detail in the Complaint for Declaratory and Injunctive Relief filed in *People of the State of California, et al. v. The Office of the Comptroller of the Currency*, No. 20 Civ. 5200 (N.D. Cal. July 29, 2020), and related court filings. We further note that Courts throughout the nation have looked unfavorably on schemes that are designed to evade state usury caps.[1]

Based on our experiences, we strongly recommend that the FDIC, Board, and OCC reaffirm their historical positions and explicitly disavow rent-a-bank schemes. Consistent with our request, the FDIC has spoken out against these schemes before, including through statements in its recent rulemaking that "the FDIC continues to support the position that it will view unfavorably entities that partner with a State bank with the sole goal of evading a lower interest rate established under the law of the entity's licensing State(s)." Federal Interest Rate Authority, 85 Fed. Reg. 44146–44147 (July 22, 2020). It is also consistent with the OCC's historic positions on rent-a-bank schemes,[2] such as the OCC's prior advisory opinion warning that payday lenders "should not assume that the benefits of a [national] bank charter, particularly with respect to the application of state and local law, would be available to them," OCC Advisory Letter No. 2000-10 (Nov. 27, 2000), and former Comptroller John D. Hawke's remarks that such schemes "constitute an abuse of the national charter . . . [and] are highly conducive to the creation of safety and soundness problems at the bank . . . ." *Remarks Before the Women in Housing and Finance* at 10 (Feb. 12, 2002). Further, our request is consistent with Congress' recent repeal of the OCC's true lender rule,[3] which would have permitted rampant rent-a-bank abuses. Act of June 30, 2021, Pub. L. No. 117-24, 135 Stat. 296; 86 Fed. Reg. 42686.

In conclusion, our experience teaches us that, in the absence of an explicit disavowal of rent-a-bank schemes, the Proposed Guidance invites continued abuse of banks' interest exportation rights, to the considerable detriment of state regulation, consumer protection, and banks' safety and soundness. We ask that you consider our proposal, in light of our experience regulating non-bank lenders and look forward to you contacting us in support of a productive dialogue.

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[1] *See, e.g.*, *Cmty. State Bank v. Strong*, 651 F.3d 1241, 1260 (11th Cir. 2011); *CashCall, Inc. v. Morrisey*, No. 12-1274, 2014 WL 2404300, *14–15 (W.Va. May 30, 2014); *Penn. v. Think Finance, Inc.*, No. 14-cv-7139, 2016 WL 183289, *13 (E.D. Pa. Jan. 14, 2016); *CFPB v. CashCall*, No CV 15-7522-JFW (RAOx), 2016 WL 4820635, *5 (C.D. Cal. Aug. 31, 2016); *Goleta Nat'l Bank v. Lingerfelt*, 211 F. Supp. 2d 711, 717 (E.D. N.C. 2002).

[2] *See, e.g.*, OCC News Release 2002-1 (Jan. 3, 2002) (Eagle National Bank); OCC Consent Order 2002-93 (Oct. 28, 2002) (Goleta National Bank); OCC News Release 2003-3 (Jan. 31, 2003) (First National Bank of Brookings); OCC News Release 2003-6 (Jan. 31, 2003) (Peoples National Bank); OCC News Release 2002-1; Comptroller of the Currency's Brief As Amicus Curiae In Support of Plaintiffs' Motion to Remand, *Salazar v. Ace Cash Express, Inc.*, No. 1:01-cv-1576-WYD-OES (D. Colo. Sept. 27, 2001).

[3] National Banks and Federal Savings Associations as Lenders, 85 Fed. Reg. 68742 (Oct. 30, 2020).

Respectfully submitted,

Rob Bonta
California Attorney General

Philip J. Weiser
Colorado Attorney General

Martha U. Fulford
Administrator, Colorado Uniform Consumer Credit Code

William Tong
Connecticut Attorney General

Karl A. Racine
Attorney General for the District of Columbia

Clare E. Connors
Hawaii Attorney General

Stephen H. Levins
Executive Director, State of Hawaii Office of Consumer Protection

Mario Treto, Jr.
Secretary, Illinois Department of Financial and Professional Regulation

Kwame Raoul
Illinois Attorney General

Thomas J. Miller
Iowa Attorney General

Aaron M. Frey
Maine Attorney General

William N. Lund
Superintendent, Maine Bureau of Consumer Credit Protection

Maura Healey
Massachusetts Attorney General

Dana Nessel
Michigan Attorney General

Keith Ellison
Minnesota Attorney General

Aaron D. Ford
Nevada Attorney General

Andrew J. Bruck
New Jersey Acting Attorney General

Hector Balderas
New Mexico Attorney General

Letitia James
New York Attorney General

Josh Stein
North Carolina Attorney General

Ellen F. Rosenblum
Oregon Attorney General

Josh Shapiro
Pennsylvania Attorney General

Mark R. Herring
Virginia Attorney General

Bob Ferguson
Washington State Attorney General