September 30, 2015

Department of the Treasury  
Washington, D.C.

Re: Comments to the Treasury Request for Information on  
Online Marketplace Lending RFI; TREAS-DO-2015-0007-0001

Ladies and Gentlemen:

We are writing on behalf of the Online Lenders Alliance (“OLA”) in response to your Request for Information regarding Online Marketplace Lending. As described in greater detail below, Internet commerce demands national standards, and true innovation in financial services markets – as demonstrated by the example of credit cards, described below – only occurs on a national basis. The current regime, which requires non-bank innovators to rely on partnerships with banks to realize national standards and scale, is too uncertain to support the heavy investment in capital, technology and human resources needed to build a national Internet lender. A national charter regime would expand the market beyond those hardy pioneers who are currently offering financial services over the Internet.

About Online Lenders Alliance

OLA represents the growing industry of online companies offering consumers small-dollar, short-term loans. OLA members include online lenders, and vendors and service providers to lenders, such as consumer reporting agencies, marketing firms and loan servicing
platforms. Besides complying with applicable federal consumer financial protection laws, OLA member companies have agreed to comply with additional requirements under the organization’s Best Practices and Code of Conduct. OLA also supports efforts by the Consumer Financial Protection Bureau (“CFPB”), Federal Trade Commission and federal banking agencies to halt bad actors who engage in abusive lending practices.

We are focusing our comments on question number 9, which requests the role that the federal government can play “to facilitate positive innovation in lending…to evaluate the competitive advantages and, if any, the disadvantages for non-banks and banks to participate and grow in this market segment” and “[h]ow can policymakers address any disadvantages for each?” As set forth in greater detail below, we believe that positive innovation in lending can only be accomplished through the development of national standards. The reason that innovative products like credit cards have been developed by banks is because they are able to design and implement products on a national basis, and new entrants to the market delivering innovative products to consumers and small businesses through the Internet will only be able to survive if they can reach a national marketplace.

OLA is committed to fostering new and innovative ways to bring financial services to more people – faster, cheaper and with a larger number of choices. The online capabilities of marketplace lenders enable them to provide potential borrowers with lending products that typical “bricks and mortar” lenders – be they storefront, bank branches or even electronic kiosks, such as ATMs – cannot provide, with the same degree of service, convenience, safety or choice.
The internet has been the most disruptive development of our generation. The utility that online lending provides should not be stifled but allowed to grow and develop.

Banks have been very slow to adapt to these rapid changes in technology, and even when they have, they have not been able effectively and efficiently to offer the financial products that marketplace lenders have been able to bring to market in a comparatively short time period. Having the benefit of speed to market, unburdened by the slow and bureaucratic historical way of lending, particularly as it relates to small business lending, marketplace lenders have used savvy marketing techniques, innovative underwriting methods, and rapid, almost instantaneous, loan decisions. Marketplace lenders have disrupted the traditional lending industry in a very short period of time.

In the small business lending industry in particular, marketplace lenders have filled a huge void left by the abandonment of the space by traditional bank lenders. As a result of tightening credit conditions, increased regulatory pressures on traditional banks, and market turmoil resulting from the “Great Recession,” banks have only approved 10% of the loan applications they have received. Banks understand that, with their business model, underwriting, approving and funding a much larger loan is much more profitable than making a small loan but it entails the same amount of work. Marketplace lenders on the other hand, have mastered the art of underwriting small business loans quickly, providing loan decisions in minutes – not days or weeks – and have captured an increasing amount of market share as a result.
Marketplace lenders focusing on consumer and small business loans face a dizzying array of state and local laws with which they must comply, unlike their bank competitors. These various licensing laws impose substantial cost and compliance burdens, and severely limit the types of financial services products that can be offered. These burdens prevent loans from being provided on a commercially viable basis; they stifle innovation, reduce competition, and leave many businesses and consumers unable to obtain the credit they need.

Development of Credit Card Lending

The development of the national credit card industry in the 1980s provides some interesting parallels to the marketplace lending industry today. Until the 1978 U.S. Supreme Court case of *Marquette v. Omaha Serv. Corp.*, banks would not engage in interstate credit card lending because of the uncertainty as to whether the bank’s home state interest rate could be “exported” to consumers nationwide. The *Marquette* decision, and the subsequent passage by Congress of Section 521 of DIDMCA, the Depository Institution and Deregulatory Monetary Control Act of 1981, which granted exportation powers to state chartered banks and others, clarified this issue and prompted the explosion of the credit card marketplace allowing consumers nationwide to obtain a credit card from a national issuer such as Chase Manhattan, Citibank, or MBNA. Prior to that time, banks would only issue credit cards to local customers and cancelled accounts when a consumer moved to a different state. Given the ease and utility of using a credit card today, many do not realize that it was the advent of uniform federal standards
relating to interest rate exportation that allowed this important payment industry to develop as it has.1

Without this power to operate on a 50 state basis, free from substantial restrictions imposed by individual states, a robust, efficient, and innovative industry was allowed to develop, to price the product appropriately for the cost of funds and the costs of doing business. Innovations such as no fee cards, rewards programs, cash rebates, and added services were made possible by allowing credit card issuers to operate on a large nationwide scale. Consumers in all states were able to take advantage of the added convenience of a competitively priced credit card issued by a national lender with the added benefits that we take for granted today.

Marketplace lenders today find themselves in the same position that banks did until 1978, having to navigate the confusing array of state laws that restrict a national lending market for marketplace lenders from developing. Not only do you have the compliance costs of figuring out what the rules are in all 50 states, but also you need to worry if a state even allows your product to be offered. A good example of this is open end loans. It is not possible to operate this product on a uniform 50 state basis because a number of states do not permit open end products to be offered in their state. This restriction impedes the development of innovative products such as lines of credit to consumers. In addition, just as states in the pre-Marquette era restricted interest

---
1 An excellent history of the development of the national credit card marketplace is by Mark Furletti, The Debate Over the National Bank Act and the Preemption of State Efforts to Regulate Credit Cards, 77 Temple L. Rev. 425 (2004) a copy of which is enclosed.
rates that credit card issuers could charge, many states today have very restrictive interest rates regimes that prohibit a viable credit product to be offered in their state.

**National Internet Lending Charter is Needed**

What is needed today is a new paradigm, a new way of looking at how financial products are delivered in the 21st century. While the internet knows no state boundaries, operating a loan program on a 50 state basis leaves non-depository lenders, such as those operating in the marketplace space, unable to take advantage of this powerful delivery mechanism due to outdated and restrictive state laws governing lending.

That new paradigm would create a national charter for interstate online lenders who offer both consumer and small business loans. This would give marketplace lenders and others who operate on a national basis online the ability to provide more products, provide more innovation and efficiencies, promote more competition, and most importantly bring more credit to small businesses and consumers at a lower cost than today.

The national interest will be served by allowing those lenders who wish to obtain the benefits of a national charter – a national internet lending corporation – to do so in a cost effective and efficient manner. These national charters would be more than adequately regulated under federal laws and regulations that would be promulgated by the Comptroller of the Currency, the agency best suited to charter these national online lenders, as well as the CFPB to the extent the loans made are within its jurisdiction. An example of such a national charter scheme was introduced in the last Congress in HR 1566, the Consumer Credit Access,
Innovation, and Modernization Act, which would have established a federal charter for Internet consumer credit corporations. We have enclosed a copy of the bill with this letter.

These new lenders would be able to operate on a 50 state basis bringing online products to the laptops, tablets, and phones of small businesses and consumers without the restrictions imposed by 50 different set of rules, regulations and restrictions. They would be free from duplicative and conflicting state laws which in many cases restrict innovation and choice and raise the cost of the limited credit choices available to borrowers today. Note, we are proposing a national charter for online lending by “non-depository” institutions. Entities that do not wish to submit to the national charter regulatory regime could continue to submit to the 50 state patchwork.

Allowing only online lenders to obtain the benefit of this new charter is consistent with the fact that consumers and small business borrowing habits have shifted rapidly seeking more and different financial products and services with the convenience, ease of credit access, and more alternatives provided by todays electronic access points such as tablets and phone. Our lending laws need to catch up with these new innovations and provide the types of products and services that borrowers are demanding.

Current System is Risky and Discourages Investment

This new nationally chartered online lender would solve some of the uncertainty facing marketplace lenders today, many of which partner with regulated financial institutions to originate loans, enabling them to lend nationwide at uniform rates and on uniform terms. Some
courts, however, have questioned these relationships, finding that the nonbank partner is the “true lender”, creating the risk that the laws of the home state of each individual borrower will govern each loan transaction. This can mean that the loan is void or voidable by the consumer or that agreed-upon interest and fees must be refunded. In extreme cases, it can subject the nonbank partner to the threat of criminal prosecution for alleged violations of state licensing and lending laws. Creating a structure to allow marketplace participants to become nationally chartered online lenders ameliorates this uncertainty and will open up the market for more participants, competition, and borrower choice.

The case of **Madden v. Midland Funding, LLC** is another drag on marketplace lenders today. That case, recently decided by the U.S. Second Circuit Court of Appeals, held that when a national bank sold a loan portfolio to a debt buyer, the purchaser was not able to take advantage of the right of the seller bank to export its home state interest rate. As a result, the loans purchased lost their character as national bank loans and became subject to the New York usury statute making the loans void in the secondary market sale. This decision, which invalidates the centuries old “valid at inception rule” likely will be appealed to the U.S. Supreme Court, but it has created a gridlock in the marketplace lending industry since many marketplace participants purchase loans from banks to facilitate their purchase by investors. Many investors in marketplace loans have significantly cut back on their investments in these loans as a result of the **Madden** decision, or have limited participant’s abilities to write and/or hold loans from borrowers resident in New York, Connecticut and Vermont – a truly bizarre consequence.
A national online charter would solve this problem by allowing marketplace lenders to make direct loans on a 50 state basis without having to worry about the *Madden* decision or others that may come along and adopt its faulty reasoning. This would encourage more marketplace lenders to engage in 50 state online lending without the fear of buying a loan that may have lost its exportation character.

* * *

We appreciate the opportunity to take part in this effort on your part to better understand the burgeoning marketplace lending industry. We believe that the thoughts expressed in this letter would better enable marketplace lenders to engage in more lending to more borrowers through the country, resulting in more capital and credit being made available which is vital to continued economic expansion.

We thank you for the opportunity to respond to your request for information. If you have questions, please feel free to contact me at mcgreevy@oladc.org.

Truly Yours,

![Signature]

Lisa S. McGreevy
President and CEO

Enclosures

[Mark Furletti article]
[HR 1566]
Enclosure

See attached.
COMMENT: THE DEBATE OVER THE NATIONAL BANK ACT AND THE PREEMPTION OF STATE EFFORTS TO REGULATE CREDIT CARDS

Summer, 2004

Reporter
77 Temp. L. Rev. 425

Length: 17748 words

Author: Mark Furletti*

* Payment Cards Center, The Federal Reserve Bank of Philadelphia, Ten Independence Mall, Philadelphia, PA 19106. Thanks to Rick Lang, Peter Burns, Bob Hunt, Melissa Jacoby, Elizabeth Schiltz, and Justin Kaufman. The views expressed here are not necessarily those of the Federal Reserve Bank of Philadelphia or of the Federal Reserve System.

LexisNexis Summary

...Nationally chartered banks underwrite almost three-quarters of the credit card loans made in this country. Over the past two decades, these banks have relied on the National Bank Act ("NBA") to preempt a variety of state and municipal regulations involving credit card interest rates, fees, and disclosures. ... Part II of this paper describes the interpretation of the NBA as it relates to the credit card industry and proposes an analytical framework for thinking about consumer-protection-type preemption. ... The Scope of NBA Preemption With Regard to Credit Card Industry Regulation ... The next two subsections will detail how sections 85 and 24 (Seventh) have been interpreted as preempting a host of price-and non-price-related consumer protection laws enacted by states to protect credit card consumers. ... Before the Supreme Court interpreted the NBA as preempting non-home-state credit card interest rate laws, card issuer regulation varied by state. ... It provides that when a state consumer protection regulation does not involve a credit card's price (i.e., "interest"), it is automatically preempted, regardless of whether it emanates from a home-or non-home state. ... This finding essentially immunizes credit card issuers from state consumer protection regulation. ...

Highlight

Abstract

The National Bank Act ("NBA"), the 140-year-old statute that led to the creation of nationally chartered banks, has likely been one of the most influential forces in the formation and development of the U.S. credit card industry. The NBA gives nationally chartered banks a wide range of powers and protections. One of these protections, the ability to disregard certain state laws, is currently at the center of a very heated debate. The regulator of national banks, the Office of the Comptroller of the Currency ("OCC"), recently issued a rule that interprets the act as essentially preempting most state efforts to protect credit card consumers. State attorneys general, consumer advocates, and members of Congress have charged that the OCC's ruling is overly aggressive and results in bad public policy. This paper examines the current debate over preemption and its regulatory consequences. It analyzes how the expanding scope of preemption has affected the development of the credit card industry and the likely impact of the current debate on the industry's future.

Text

[*425]

I. Introduction
Nationally chartered banks underwrite almost three-quarters of the credit card loans made in this country. Over the past two decades, these banks have relied on the National Bank Act ("NBA") to preempt a variety of state and municipal regulations involving credit card interest rates, fees, and disclosures. Recent state and municipal efforts to require national banks to adhere to local predatory lending laws, although directed at home equity and mortgage lending rather than credit card lending, have significantly raised the profile of the preemption debate. The Office of the Comptroller of the Currency ("OCC") (the regulator of national banks) and various state authorities are engaged in a battle over the NBA's preemption power. This battle involves principles of federalism that are almost 200 years old and is of intense interest to state attorneys general, consumer groups, industry executives, and bank regulators. The courts, through the interpretation of the NBA, have repeatedly ruled against the states and municipalities when they have attempted to enforce their own consumer protection laws against out-of-state nationally chartered banks. These rulings, coupled with the OCC's vigorous assertion of preemption, have not stifled state efforts to regulate. Some observers, however, have characterized this most recent fight over state predatory lending laws as "the states' Alamo."

This paper will examine the regulatory consequences of the NBA's near total preemption of state statutes designed to protect credit card consumers. Part II of this paper describes the interpretation of the NBA as it relates to the credit card industry and proposes an analytical framework for thinking about consumer-protection-type

---


Under our country's dual banking system, banks have the option of seeking either a state or national charter. A national bank has a charter approved by the Office of the Comptroller of the Currency ("OCC") and is primarily regulated by that agency. A state bank has a charter approved by the regulatory authority of the state in which it is located and can be primarily regulated by that authority as well as the Federal Reserve, or by that authority and the FDIC. Board of Governors of the Federal Reserve System, The Federal Reserve System: Purposes & Functions 1-7, 71-73 (1994).


7 Id. See also infra note 67 for a list of the cases in which states have failed at attempts to enforce state laws against nationally chartered banks.


9 Shenn, supra note 4, at 9.

10 This paper will not consider the broader issues of federalism raised by the preemption of state laws. For a discussion of such issues, see The Federalist Nos. 44, 45, 46 (James Madison).
preemption. 11 This section also analyzes the legal basis for the NBA's expanding scope of state law preemption, including relevant case law and regulatory pronouncements. 12 Part III provides an overview of how expanded NBA preemption has affected the development of the credit card industry and consumers' access to credit. 13 Part IV examines the current debate over preemption and its regulatory consequences for the credit card industry. 14

[*427] The paper concludes that the current debate over preemption will likely have little regulatory effect on the card industry in the near term. 15 Recent interpretations of the NBA make the legal environment at the state level for card issuers much more predictable. States, in effect, have no authority to provide their resident cardholders with consumer protections, as this power is exclusively reserved to the federal government under the OCC's ruling. To the extent history can be a guide, any future regulation of credit cards by Congress is likely to be targeted and in response to demands for specific consumer protections.

II. The Scope of NBA Preemption With Regard to Credit Card Industry Regulation

A. The National Bank Act's Power of Preemption

The National Banking Act of 1863 and the National Bank Act of 1864 ("NBA") established a federally chartered banking system. 16 In 1863, just prior to the passage of the NBA, all 1,466 of the country's banks were state-chartered institutions. 17 Congress created the new system to provide for a national and uniform currency and to help stabilize the economy during and after the Civil War. 18

To oversee the new national system, Congress created a federal agency within the Department of the Treasury called the Office of the Comptroller of the Currency ("OCC"). 19 The NBA gives the OCC the power to examine, supervise, and regulate all national banks and to protect national banks from what the OCC describes as "potentially hostile state interference." 20 States, however, are not powerless in relation to nationally chartered banks. Although the NBA establishes a federal banking system independent of state control, in certain instances, it calls for the application of the laws of the state in which a national bank is chartered. 21 For example, even today, a national bank must adhere to the interest rate ceiling established by the legislature of the state in which it is

11 See infra notes 16-49 and accompanying text for a discussion of the NBA's relation to the credit card industry.
12 See infra notes 50-150 and accompanying text for a legal analysis of the NBA's broader scope of state law preemption.
13 See infra Part III for a discussion of the impact of expanded NBA preemption.
14 See infra Part IV for an examination of the preemption debate.
15 See infra notes 254-56 and accompanying text for concluding remarks on the preemption debate's effect and its regulatory consequences for the credit card industry.
17 Id. at 1.2-1.3.
19 Id.
20 Id.
21 Id. at 46,129.
organized (i.e., its home state). National banks may also have to adhere to non-home-state contract, debt collection, taxation, zoning, criminal, [*428] and tort laws. 23

The majority of disputes involving nationally chartered credit card banks 24 and the NBA concern whether the laws of a state that is not the bank's home state can be applied to the card-issuing bank. 25 The extent to which these laws are overridden or "preempted" by the NBA is the key legal issue in most of these cases. 26

The broad authority granted to the OCC by the NBA, along with the operation of the Supremacy Clause of the United States Constitution, 27 is the basis of the OCC's power to preempt state banking laws. 23 Preemption occurs when the laws of a particular government (e.g., the federal government) supersede those of another government (e.g., a state or municipal government). 28 There are essentially three theories of preemption on which the Supreme Court has relied: "express" preemption, "field" preemption, and "conflict" preemption. 29 The first involves Congress directly stating in the language of an act that it is preempting state law (e.g., this federal law supersedes state law). 31 The second theory of preemption, commonly referred to as "field" preemption, occurs when, regardless of whether it explicitly or implicitly preempts state law, Congress indicates that it intends federal law to "occupy an entire field of regulation." 32 "Field" preemption requires states to abandon any regulatory [*429] activity in that field. 33 Finally, federal law can trump a state law under the theory of "conflict preemption." 34 Even if Congress has not preempted an entire field, it can preempt any state law that is in direct conflict with federal law

22 See First Nat'l Bank of Omaha v. Marquette Nat'l Bank of Minn., 636 F.2d 195, 198 (8th Cir. 1980) (holding that national banks must adhere to their home state usury laws).

23 See, e.g., Bank of Am. v. S.F., 309 F.3d 551, 559 (9th Cir. 2002) (describing state powers to regulate national banks); Bank Activities, supra note 18, at 46,131-32 (explaining that these laws apply to extent to which they "incidentally affect" lending activities).

24 As used in this article, the term "nationally chartered credit card bank" refers to national banks that issue general purpose credit cards, such as those that bear Visa, MasterCard, American Express, or Discover logos.


26 Marquette, 439 U.S. at 305-06; Ament, 849 F. Supp. at 1018; Tikkanen, 801 F. Supp. at 279.

27 U.S. Const. art. VI, cl. 2. The clause reads as follows:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Id.


32 Mich. Canners, 467 U.S. at 468. See also Conference of Fed. Sav. & Loan Ass'n's v. Stein, 604 F.2d 1256, 1260 (9th Cir. 1979) (holding that regulatory control of the Federal Home Loan Bank Board over federal savings and loan associations is "so pervasive as to leave no room for state regulatory control").

33 Mich. Canners, 467 U.S. at 469.
or any state law that "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

The ways by which the NBA preempts state consumer protection laws are complex and not easily categorized. This paper proposes that there are essentially two distinct strands of preemption: one involving section 85 of the act and another involving section 24 (Seventh). The lines that divide these two strands, however, are not always as clear as the framework may suggest. The extent to which these lines are blurred is discussed later in this section. Thinking about the strands as distinct and discrete, however, makes it easier to understand NBA preemption and analyze its consequences.

The first strand of preemption, based on section 85, involves non-home-state regulation of credit card pricing (such as interest rates, fees, or other price-related items). Typically, substantive federal laws preempt substantive state laws. For example, the Fair Credit Reporting Act ("FCRA") explicitly preempts state laws that provide consumers with certain protections concerning the privacy of their credit data. In lieu of these state protections, the FCRA gives consumers a host of federal protections. Similarly, federal laws that address environmental problems, such as the Clean Air Act and Clean Water Act, preempt existing state statutes and set forth federal environmental standards. Section 85 of the NBA, the section that preempts price-related state regulation, is different. It preempts state lending laws, not to make way for federal laws about credit card pricing, but to make way for the laws of states in which card issuers are headquartered. In this way, it preempts non-home-state lending statutes with home-state lending statutes.

---


35 See, e.g., Gade v. Nat'l Solid Wastes Mgmt., 508 U.S. 88, 108-09 (1992) (finding that state regulation of occupational safety and health issues was preempted because it was in conflict with Occupational Safety and Health Act).

36 Mich. Canners, 467 U.S. at 469 (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).

37 12 U.S.C. 85 (2004). The NBA addresses interest rate regulation as follows:

Any association may take, receive, reserve, and charge on any loan or discount made, or upon any notes, bills of exchange, 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 of 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located, whichever may be the greater, and no more, except that where by the laws of any State a different rate is limited for banks organized under state laws, the rate so limited shall be allowed for associations organized or existing in any such State under this chapter.

Id.

38 12 U.S.C. 24 (Seventh) reads as follows: [A national banking] association shall ... have power ... to exercise ... all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; ... by loaning money on personal security...

39 See infra Part II.D for a discussion of the complexities of two preemption strands.

40 See infra notes 145-50 and accompanying text for further discussion of the blurring of the two preemption strands.

41 See infra Part II.B for a detailed discussion of section 85.


46 See, e.g., Marquette, 439 U.S. at 308 (interpreting the NBA as allowing national banks to export home-state interest rates).
Recently, the NBA has been read to preempt state laws in a second way. Section 24 (Seventh) has been interpreted as preempting all state laws involving non-price-related consumer protection regulation (e.g., disclosure requirements). This second strand of preemption is also unique. It preempts, not to make way for a comprehensive federal consumer protection scheme, but to make way, to a large extent, for a loose patchwork of federal regulation.

Overall, the OCC has used the preemption powers read into the NBA to stop various state and municipal efforts to regulate card issuers over the past twenty-five years. The next two subsections will detail how sections 85 and 24 (Seventh) have been interpreted as preempting a host of price-and non-price-related consumer protection laws enacted by states to protect credit card consumers.

B. Preemption Under Section 85 of the NBA

Before the Supreme Court interpreted the NBA as preempting non-home-state credit card interest rate laws, card issuer regulation varied by state. Many states imposed ceilings on the interest rates that credit card issuers could charge consumers. Regardless of where a national bank was chartered or located, it typically followed the specific usury laws of the states in which it marketed credit cards. For example, a Maryland-based, nationally chartered card issuer followed Ohio usury laws when offering credit cards to consumers in Ohio, and Pennsylvania usury laws when offering credit cards to consumers in Pennsylvania. Effectively, nationally chartered banks with customers throughout the entire country could have had fifty-one different regulators of interest rates on credit card loans (i.e., fifty state regulators and the OCC).

The Supreme Court's 1978 decision in Marquette National Bank of Minneapolis v. First Omaha Service Corporation clarified the role of state usury laws. In Marquette, a national bank chartered in Minnesota (Marquette) sued a competing national bank chartered in Nebraska (First Omaha) for violating a Minnesota usury statute. The Court decided that First Omaha did not have to comply with the Minnesota statute, clearing the

47 See infra Part II.C for a discussion of section 24 (Seventh) preemption.

49 See infra notes 243-4 and accompanying text for a discussion of the disparate federal laws that aim to protect consumer payments and consumer credit.


54 Although Marquette is credited with changing interest rate exportation practices (i.e., the ability of a bank to charge its home-state interest rate to an out-of-state resident), some courts prior to 1978 held that national banks could choose to charge a credit card customer the higher of the bank's or customer's home state usury ceiling rate. See, e.g., Fisher v. First Natl Bank of Omaha, 548 F.2d 255, 259 (8th Cir. 1977) (holding that national credit card bank located in Nebraska could charge customer living in Iowa highest rate allowed by either state); Fisher v. First Natl Bank of Chicago, 538 F.2d 1284, 1291 (7th Cir. 1976) (holding that credit card bank located in Illinois could charge customer living in Iowa highest rate allowed by either state).

55 Marquette, 439 U.S. at 304.

56 Id. at 313.
way for nationally chartered credit card issuers to export credit card rates from their own state to any other state in the country. The Supreme Court's decision was based on section 85 of the NBA. Section 85 allows national banks to charge an interest rate as high as that allowed by the usury laws of the state where the bank is "located." Marquette asserted that First Omaha was "located" in Minnesota, where its credit cards were used to effect transactions. The Court found, however, that the location of a national bank can only be the one state that is listed on the bank's certificate of organization—essentially the state where the bank is headquartered. To interpret section 85 any other way, the Court reasoned, would render the term "location" meaningless and lead to the destruction of the nation's complex system of interstate bank lending. Overall, the Marquette ruling found that the NBA effectively preempted the interest rate regulations of the forty-nine states in which a card issuer could not actually be organized.

For over a decade after Marquette, nationally chartered card issuers faced little section 85 litigation. In the early 1990s, however, consumers challenged a variety of credit card fees as violating the usury statutes of the states in which they lived. Cardholders asserted that the late, over limit, return check, and annual fees that their out-of-state card issuers charged were prohibited by the cardholders' home state usury laws. In response, national banks asserted that these usury statutes were preempted by the NBA. With only one exception, courts sided with the banks.

57 It is interesting that First National Bank of Omaha (First Omaha) ultimately sued Marquette National Bank (Marquette) for lobbying the Minnesota legislature to pass the interest rate ceiling statute at issue in Marquette, First Nat'l Bank of Omaha v. Marquette Nat'l Bank of Minn., 636 F.2d 195, 196 (8th Cir. 1980). Agreeing with the Minnesota District Court's assessment that Marquette's lobbying did not violate federal law, the Eighth Circuit Court of Appeals dismissed First Omaha's claim. Id. at 199-200.


59 Id.

62 Id. at 312.

63 Despite Marquette, nationally chartered credit card issuers continue to defend themselves against claims that non-home-state interest ceilings apply. See, e.g., Patten v. Md. Bank, N.A., 126 S.W.3d 532, 533-34 (Tex. App. 2003) (striking down claim that nationally chartered bank located in Delaware is bound by Texas interest rate ceiling). For a criticism of Marquette's legal reasoning and public policy implications, see Ralph J. Rohner, Marquette: Bad Law and Worse Policy, 1 J. Retail Banking 76 (1979).


65 In 1995, it was estimated that there were at least thirty-two late fee cases pending in state and federal courts. Denise Gray, A Penalizing Ruling on Penalty Fees, Credit Card Mgmt., Mar. 1, 1995, at 18.

66 Tikkanen, 801 F. Supp. at 272-73 (arguing that late and over limit fees charged by out-of-state federally chartered bank violated Minnesota statute).


68 While this paper focuses on the NBA and nationally chartered, OCC-supervised credit card banks, courts also preempted state usury laws as they applied to state-chartered, FDIC-insured credit card banks. See supra note 1 for a description of...
Section 85 permits a national bank to charge "interest at the rate allowed by the laws of the State" in which the bank is organized. 68 Although Marquette cleared the way for the exportation of the highest interest rate allowed by the [*433] laws of an issuer's home state, it did not specifically address whether home-state-allowed fees (e.g., late, over limit, return check fees) could be exported. 69 The U.S. Court of Appeals for the Third Circuit, 70 the U.S. District Court for the District of Minnesota, 71 and the Supreme Courts of Colorado, 72 Pennsylvania, 73 and New Jersey, 74 amongst others, have ruled on this issue.

The decision in Spellman v. Meridian Bank (Delaware) 75 is generally representative of the reasoning and analysis that many of these courts used to evaluate the meaning of the word "interest" and answer the fee exportation question. 76 Spellman involved eleven consolidated actions brought in Pennsylvania courts against nationally chartered banks. 77 One of the questions presented to the three-judge panel was whether the word "interest" as used in section 85 of the NBA included fees. 78 The Third Circuit began its analysis by examining the plain meaning of the statute's language. 79 It found that the word "interest," as used in section 85, was ambiguous. 80 The Court then looked to the NBA's 100-year-old legislative history and its subsequent interpretation by the courts. 81 Although the legislative materials from 1864 (the time of the bill's passage) were not particularly instructive, the panel found that an interpretation of the NBA by the Supreme Court just ten years after the act's passage was state-chartered banks. Relying on a provision in the Depository Institutions Deregulation and Monetary Control Act of 1980 ("DIDMCA"), 12 U.S.C. 3501 (1982), that is similar to section 85 of the NBA, courts struck down various state usury law challenges. See, e.g., Greenwood Trust Co. v. Mass., 971 F.2d 818, 831 (1st Cir. 1992) (holding that state statute prohibiting imposition of late fee by state-chartered, federally insured bank was preempted by DIDMCA); Hill v. Chem. Bank, 799 F. Supp. 948, 954 (D. Minn. 1992) (holding that state statute prohibiting imposition of late and over limit fees by state-chartered, federally insured bank was preempted by DIDMCA); but see Hunter v. Greenwood Trust Co., 668 A.2d 1067, 1069 (N.J. 1995) (holding that state statute prohibiting imposition of fees is not preempted by DIDMCA as to state-chartered, federally insured credit card bank). For a description of the DIDMCA and an analysis of the preemption issues it raises, see Elizabeth Schultz, The Amazing, Elastic, Ever-Expanding Exportation Doctrine and Its Effect on Predatory Lending Regulation, 88 Minn. L. Rev. 518, 565-69 (2004).

69 See generally Marquette, 439 U.S. 299.
70 See Spellman, 1995 WL 764548, at 18 (holding that state statute limiting late and over limit fees charged by out-of-state federally chartered bank was preempted by NBA).
71 See Tikkanen, 801 F. Supp. at 279 (holding that state statute limiting late and over limit fees charged by out-of-state federally chartered bank was preempted by NBA); Nelson, 794 F. Supp. at 320 (holding that state law claims to recover flat fees were preempted by the NBA).
72 See Richardson v. Citibank (S.D.) N.A., 908 P.2d 532, 533-34 (Colo. 1995) (holding that a Colorado law prohibiting late fees on credit card bills was preempted by NBA); Copeland v. MBNAAm. Bank, N.A., 907 P.2d 87, 94 (holding that state statute limiting late and over limit fees charged by out-of-state federally chartered bank was preempted by NBA).
73 See Bank One, Columbus, N.A., v. Mazzotta, 660 A.2d 845, 847 (Pa. 1996) (holding that state statute limiting penalty fees charged by out-of-state federally chartered bank was preempted by NBA).
74 See Sherman, 668 A.2d at 1053 (ruling that late fees violated New Jersey usury statute).
75 1995 WL 764548.
76 Spellman, 1995 WL 764548, at 15.
77 Id. at 1.
78 Id.
79 Id. at 3.
80 See id. at 14 (explaining why it found the term ambiguous).
81 Id. at 5.
insightful. 82 In Tiffany v. National Bank of Missouri, 83 the Supreme Court addressed the issue of whether a national bank in Missouri was limited by the interest rate ceiling imposed on state banks by Missouri or whether it could charge a higher rate made available to other non-Missouri lenders in the state. 84 [434] In finding that national banks could charge the highest rate allowed to any lender in the state, the Tiffany court interpreted the NBA as establishing national banks as "national favorites" that should be free from banking regulations that could hinder their lending efforts. 85 It also asserted that Congress' ultimate goal in passing the NBA was to help national banks actually take the place of state banks. 86

The Third Circuit relied on the "most favored lender" doctrine articulated in Tiffany and the interest rate exportation ruling in Marquette as persuasive evidence that Congress intended national bank lending activities to be especially protected from state intervention. 87 In light of this intent, the Spellman court examined whether "interest" should be interpreted narrowly (i.e., not to cover fees), so as to allow all fifty states to regulate a critical pricing component of credit card loans made to their residents, or broadly, so as to allow national banks to be free from non-home-state fee regulation. 88 It concluded that restricting interest to non-fee finance charges would result in "an unworkable and undesirable hodgepodge" of state regulation that would favor certain state lenders over national bank lenders. 89

In support of its decision, the Third Circuit cited other courts that had interpreted the word "interest" broadly so as to include commissions, closing costs, and penalty fees. 90 It also relied on the OCC’s interpretation that "interest" includes all fees that offset the costs of risky cardholder behavior (e.g., paying late, charging over your credit limit) or the costs of opening and maintaining an account. 91

Although most courts that heard Spellman-type cases arrived at the same conclusion as the Third Circuit, the Supreme Court of New Jersey created a conflict with Spellman-type decisions in Sherman v. Citibank (South Dakota), 92 N.A. Sherman, a resident of New Jersey, claimed that a late fee charged by Citibank, a national

83 85 U.S. (18 Wall.) 409 (1873).
84 Id. at 410-11. Although state legislatures often capped the interest rate that state banks could charge consumers, during the 1980s they allowed other lenders, such as those that financed automobiles and durable consumer goods, to charge higher rates. Glenn B. Canner & Charles A. Luckett, Developments in the Pricing of Credit Card Services, Fed. Res. Bull. 652, 653-56 (Sept. 1992). Essentially, nationally chartered card issuers wanted to be able to charge the higher of the state bank or consumer lender rates. Id.
86 Id. at 413. The Court asserted:

National banks have been National favorites. They were established for the purpose, in part, of providing a currency for the whole country, and in part to create a market for the loans of the General government. It could not have been intended, therefore, to expose them to the hazard of unfriendly legislation by the States, or to ruinous competition with State banks. On the contrary, much has been done to insure their taking the place of State banks.

Id.
88 Id.
89 Id.
90 Id. at 17 (citing, inter alia, Citizens' Nat'l Bank of Kansas City, Mo. v. Donnell, 195 U.S. 389, 373-74 (1904) (including penalty charges for late payment). See also Greenwood Trust Co. v. Mass., 971 F.2d 818, 831 (1st Cir. 1992) (including late fees); Fisher v. First Nat'l Bank of Omaha, 548 F.2d 255, 257 (8th Cir. 1977) (including cash advance fees).
91 Id. (citing letter from Julie L. Williams, Chief Counsel, OCC, to John L. Douglas, Alston & Bird, LLP (Feb. 17, 1995)).
92 668 A.2d 1035 (N.J. 1995).
bank organized in South Dakota, violated New Jersey's Retail Installment Sales Act of 1960. The Sherman case, as with Spellman, hinged on the interpretation of the word "interest" as used in section 85. Relying on a literal reading of Marquette (finding section 85 applying only to interest rates), a conflict between a 1964 and a 1986 OCC interpretation of the word "interest," and the clear language of New Jersey's statute, the Court concluded that interest only includes periodic finance charges and not fees.

With the law in conflict over the definition of the word "interest," the Supreme Court in 1996 agreed to review the lower court's decision in Smiley v. Citibank (South Dakota), N.A., a section 85 case involving a South Dakota bank, a late fee, and a California usury statute. Unlike lower courts, which had to sift through statutory language, legislative history, and congressional purpose, and existing case law, the Supreme Court had the benefit of an official regulation issued by the OCC just two months before it heard the case. The OCC's regulation interpreted "interest" as used in section 85 to include a wide range of fees that card issuers charged, including late fees, overlimit fees, annual fees, and cash advance fees. Writing for a unanimous Court, Justice Scalia analyzed the case using general principles of administrative law. Resolving the fee issue required just two inquiries: first, whether the Comptroller's interpretation was entitled to deference; and second, if the interpretation warranted deference, was it "arbitrary or capricious"? Answering the first question in the affirmative, the Court reasoned that the OCC, as the NBA's implementing agency, was empowered with the discretion to resolve any of the act's statutory ambiguities. In addition, the Court noted that the agency followed the appropriate notice-and-comment procedures when issuing its rule. The Court then determined that the Comptroller's interpretation was an acceptable one.

---

93 Id. at 1040 (citing N.J. Stat. Ann. 17:16C-50, 17:16C-54 (West 1995)).
94 Id. at 1047.
95 See Sherman, 660 A.2d at 1047-48 (comparing Letter from James J. Saxon, Comptroller of the Currency (June 25, 1964) to OCC Interpretive Letter No. 452 from Robert B. Serino, Deputy Chief Counsel, OCC (Aug. 11, 1988)).
97 Sherman, 668 A.2d at 1042-48.
100 Smiley, 517 U.S. at 742-43. The OCC's interpretation was put out for comment on March 3, 1995, and adopted on February 9, 1996. 61 Fed. Reg. 4849, 4849-50 (Feb. 9, 1996). Smiley was argued in front of the Supreme Court on April 24, 1996. The OCC interpretation is as follows:

The term "interest" as used in 12 U.S.C. 85 includes any payment compensating a creditor or prospective creditor for an extension of credit, making available of 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, not sufficient funds (NSF) fees, 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.

Id. at 4869 (codified in 12 C.F.R. 7 4001(a)).
101 Id.
102 Id. at 741.
104 Id. at 742 (citing Chevron, 467 U.S. at 844).
105 Id. at 739-40.
106 Id. at 741 (citing 5 U.S.C. 553).
acceptable one. It reviewed dictionary definitions of the word "interest" and compared them with the text of section 85. In the end, the Court did not find the OCC's interpretation unreasonable or in direct conflict with the NBA's language (the threshold established by prior administrative case law). The Court ultimately upheld the Supreme Court of California's decision to dismiss Smiley's usury claim for not stating a cause of action.

As after the Marquette case, card issuers faced little NBA-related litigation in the years immediately following Smiley. Both cases seemed to firmly establish that states could not enforce any price-related regulations against out-of-state national banks. The decisions also strengthened OCC interpretations by setting for them a relatively deferential standard of judicial review of not "arbitrary or capricious." Despite these developments, it seemed clear that non-home-state banking regulations outside of the scope of section 85 were still permissible.

C. Preemption Under Section 24 (Seventh) of the NBA

In 2000, the California legislature passed a law that required credit card issuers to warn consumers about the dangers of making only a minimum credit card payment (generally two percent of the balance) each month. The credit card industry opposed this legislation, which was ultimately vetoed by California Governor Gray Davis. The following year, Citibank and other card issuers worked with the legislature to craft what legislators termed a "compromise" disclosure bill. Governor Davis signed that bill in September 2001. Shortly after the bill's passage, a group of large credit card issuers, including Citibank, petitioned a U.S. District Court judge to enjoin the state from implementing the law. The issuers argued that the NBA preempted the minimum payment.

107 Smiley, 517 U.S. at 744-47.
108 Id. at 746.
109 Id. at 744-47.
110 Id. at 747. Despite Smiley, nationally chartered credit card issuers continue to defend themselves, albeit infrequently, against claims that non-home-state fee regulations apply. See, e.g., Kent v. Bank of Am., No. G030262, 2003 WL 327465, at 2 (Cal. Ct. App. Feb. 11, 2003) (rejecting assertion that national bank organized in Arizona is subject to fee limitations imposed by California statute when bank lends money to a customer in California).
112 Holler, supra note 111, at 2.
114 The compromise bill that Davis signed required card issuers to place the following warning on the front of consumers' credit card statements: "Minimum Payment Warning: Making only the minimum payment will increase the interest you pay and the time it takes to repay your balance." Cal. Civ. Code 1748.13(a)(1) (2003). This bill also required that issuers either create a customized disclosure regarding the amount of time it would take the cardholder to pay off his or her balance if he or she made only the minimum payment required or provide a generic disclosure (e.g., "A five thousand dollar ($5,000) balance will take 40 years and two months to pay off at a total cost of sixteen thousand three hundred five dollars and thirty-four cents ($16,305.34). This information is based on an annual percentage rate of 17% and a minimum payment of 2% or ten dollars ($10), whichever is greater."). The bill also required that issuers provide consumers with a toll-free phone number that they could use to find out payoff information. The disclosure associated with that provision was as follows: "For an estimate of the time it would take to repay your balance, making only minimum payments, and the total amount of those payments, call this toll-free telephone number: (Insert toll-free telephone number)." Id. 1748.13(a)(3)(A).
115 Am. Bankers Ass'n v. Lockyer, 239 F. Supp. 2d 1000, 1001-02, 1006 (E.D. Cal. 2002); See also The Battle Over Minimum Payments, supra note 113, at 6 (noting that a federal judge enjoined California from implementing the disclosure law and requested that defendants, the California Attorney General, and the Director of California's Department of Consumer Affairs provide the judge information demonstrating how the law would help consumers).
statute, as it applied to nationally chartered banks. On June 28, 2002, just a few days before certain provisions of the bill were to take effect, the judge granted the issuers a preliminary injunction.

The card issuers, represented by the American Bankers Association, sued Bill Lockyer, the Attorney General of California, challenging the constitutionality of the new law. The issuers claimed that the start-up costs of the program, including printing the disclosures and staffing a special phone unit for the first six months, totaled over $20 million. The issuers also asserted that the warnings were misleading and a provision regarding credit counseling information was not necessarily effective. Above all, the issuers claimed that the NBA preempted the statute.

The issuers, however, did not solely rely on section 85 to argue that California's disclosure law should be preempted. Section 85 of the NBA, as discussed above, generally preempts non-home-state regulation of price-related card features (i.e., those involving "interest"). The statute at issue in Lockyer did not involve interest or fees; it involved disclosures. As such, the issuers primarily asserted their preemption claim under a different section of the NBA: section 24 (Seventh). That section, they argued, gives national banks the power to lend money without being "burdened" by costly state regulations, like those imposed by California's disclosure bill.

Ultimately, the OCC filed an amicus brief in support of the national banks' position. The OCC had the authority to assess the burdens that state laws placed on national banks. Having reviewed the California law, the OCC determined that the disclosures imposed substantial direct and indirect costs on the issuers' lending activities. In addition, the OCC found that the minimum payment warning intruded "massively" on the first page of consumers' credit card billing statements. The additional postage, printing, paper, and processing costs, the agency reasoned, infringed on the power of national banks to lend money; a power explicitly

---

116 Lockyer, 239 F. Supp. 2d at 1006.  
117 Id.  
118 Id.  
119 Id. at 1005.  
120 Id. at 1006. The credit counseling information was to be provided as follows: 
In addition, the cardholder shall be provided with referrals or, in the alternative, with the "800" telephone number of the National Foundation for Credit Counseling through which the cardholder can be referred, to credit counseling services in, or closest to, the cardholder's county of residence. The credit counseling service shall be in good standing with the National Foundation for Credit Counseling or accredited by the Council on Accreditation for Children and Family Services. The creditor is required to provide, or continue to provide, the information required by this paragraph only if the cardholder has not paid more than the minimum payment for six consecutive months, after July 1, 2002.
121 Lockyer, 239 F. Supp. at 1016.  
122 See supra notes 70-74, 90-91 and accompanying text (discussing section 85 preemption).  
123 Lockyer, 239 F. Supp. at 1002-04.  
124 Id. at 1016 (citing 12 U.S.C. 24 (Seventh) (2004)).  
125 Id.  
127 Id. at 2.  
128 Id. at 3.  
129 Id. at 20.
provided for in section 24 (Seventh) of the NBA. The OCC explained that any state or local restriction that represents an obstacle to a national bank's lending power is preempted by operation of the Supremacy Clause.

The U.S. District Court for the Eastern District of California agreed with the issuers and the OCC and granted the national banks a permanent injunction. Central to the case's outcome was section 24 (Seventh) of the NBA and the OCC's determination that California's law was overly burdensome. Reviewing a host of NBA cases, the court found that any state law that "impairs the efficiency" of national banks is unenforceable. Efficiency-impairing laws, in the court's view, include any state regulations that increase a national bank's operating costs or hinder its marketing activities. Based on the OCC's estimation that the California disclosure law would impose significant costs on national banks, the court ultimately concluded that the law represented a significant interference with the powers granted national banks by the NBA. It also noted that state consumer protection laws had not traditionally been enforceable against national banks.

In an effort to clarify the applicability of state regulation to national banks in light of Lockyer (and to settle legal issues raised by other kinds of state consumer protection statutes), the OCC issued rules expounding on section 24 (Seventh) in January 2004. Based on previous court decisions and theories of express and conflict preemption, the OCC explained that state regulation of a national bank involving any of the following was impermissible: advertising, non-interest charges, credit account management, terms of offers of credit, mandatory statements or marketing activities, and, for non-home-states, interest rates and fees. The OCC also asserted that the NBA limits the scope of state regulation to the following areas when the areas only "incidentally affect" bank lending: contracts, torts, criminal law, rights to collect debts, acquisition and transfer of property, taxation, zoning, and any other area of law that the OCC determines to be "incidental to the ... lending operations of national banks."

Although the OCC's rulemaking has elicited a wide range of responses, a plain reading of the agency's interpretation indicates that it broadens the OCC's preemption powers. The agency essentially declared that states have little or no authority to impose any consumer-protection-oriented regulation on nationally chartered banks and that any such regulation is the province of federal law. This interpretation seems to be the logical

---

130 Id. at 4-5, 23-25.
131 Amicus Curiae of OCC, supra note 126, at 14-16, nn.10-13.
132 Lockyer, 239 F. Supp. 2d at 1022.
133 Id. at 1012 (quoting First Nat'l Bank v. Cal., 262 U.S. 366, 369 (1923)).
134 Id. at 1015.
135 Id. at 1018.
136 Id. at 1016 (citing Bank of Am. v. San Francisco, 309 F.3d 551, 559 (9th Cir. 2002), cert. denied, 538 U.S. 1069 (2003)).
138 Bank Activities, supra note 18, at 46,123.
139 12 C.F.R. 7.4008.
142 See Bank Activities, supra note 18, at 46, 122-46 (explaining limits of state power to regulate national banks).
next step in the Marquette-Smiley-Lockyer progression. Although the interpretation remains untested, the courts, as seen above, have historically sided with the OCC's interpretations. 143

Overall, Lockyer and the OCC's recent rulemaking create a second legal theory on which card issuers can base a claim that state laws are preempted. The [*440] first theory, based on section 85, provides that non-home-state consumer protection regulations that are price-related (i.e., involving "interest") are preempted by any home-state price regulation. This is the theory on which issuers relied in Marquette and Smiley. The second theory is based on section 24 (Seventh) and card issuers in Lockyer relied on it. It provides that when a state consumer protection regulation does not involve a credit card's price (i.e., "interest"), it is automatically preempted, regardless of whether it emanates from a home-or non-home state. The OCC's interpretation of the NBA with regard to this latter type of preemption is what triggered the current debate over the NBA. This debate, and its consequences, will be examined later in this paper. 144

D. Complexities of Section 85 and 24 (Seventh) Preemption

As explained earlier, the division of NBA preemption into two discrete strands (i.e., section 85 and 24 (Seventh)) is somewhat of a simplification. There may not always be a bright line that distinguishes price-related consumer protections from non-price-related protections. For this reason, section 85 and 24 (Seventh) claims are not likely mutually exclusive. 145 Consider, for example, if a state were to pass a disclosure statute that applied exclusively to credit card loans with interest rates in excess of twenty-eight percent. A nationally chartered credit card bank could argue that such a statute is preempted by section 85 to the extent it is price related and section 24 (Seventh) to the extent it places a burden on the bank's lending operations. An argument very similar to this one was successfully made in Lockyer. 146 Overall, the distinction between section 85 (i.e., price-related) and 24 (Seventh) (i.e., non-price-related) preemption may not always be very clear.

It is also somewhat of a generalization to assert that, under section 24 (Seventh), all non-price-related state regulation, whether emanating from home-states or non-home states, is preempted. While this is the current position of the OCC, existing federal consumer protection legislation alludes to at least a theoretical possibility of allowing states to impose stricter regulation. 147 For example, the Truth in Lending Act expressly allows states to enact disclosure statutes as long as they are not "inconsistent" with the federal scheme. 148 [*441] Attorney General Lockyer argued unsuccessfully that this provision gave California the right to enforce its disclosure regulations. 149 Although the District Court in Lockyer did not find this argument persuasive, 150 it is likely that this

---

143 See supra notes 3, 57 and accompanying text for examples of holdings that give great deference to the OCC and its interpretations.

144 See infra Part IV and accompanying text for a discussion of the current debate over preemption and the future of credit card industry regulation.

145 See generally Schiltz, supra note 67, at 560-65 (describing expansion of section 85's scope to include lending terms other than interest rates and fees).

146 The banks argued that section 1748.13(1) of the California law violated section 85 of the NBA because it exempted from the disclosure statute banks that charged no interest on their loans. Lockyer, 239 F. Supp. 2d at 1014.


148 The Truth in Lending Act directly addresses how it affects state laws as follows: [The provisions of this act involving credit transactions and the advertising of credit] do not annul, alter, or affect the laws of any State relating to the disclosure of information in connection with credit transactions, except to the extent that those laws are inconsistent with the provisions of this subchapter and then only to the extent of the inconsistency. 15 U.S.C. 1610(a)(1).

149 Lockyer, 239 F. Supp. 2d at 1009.
argument will be raised in the future. It is also possible that states could indirectly regulate national banks by framing consumer protection issues as within the boundaries of state law. For example, contract law has historically been the domain of states. If a state were to declare certain provisions of the contracts between card issuers and cardholders invalid under state contract law, the state’s action might have immunity from the OCC’s preemptive reach. While these theories remain largely untested, they represent a few ways by which states may circumvent section 24 (Seventh)’s broad reach and regulate non-price credit card terms.

III. Card Industry Development as a Result of the Expanding Scope of NBA Preemption

The legal decisions discussed in the previous section significantly altered the economics and competitive landscape of the credit card industry. This section will examine how Marquette, Smiley, Lockyer, and OCC rulemaking affected credit card issuers and cardholding consumers.

Economists and other scholars partially credit the Supreme Court’s decision in Marquette with triggering a rapid expansion of our nation’s credit card industry and significant increases in the availability of, and access to, consumer credit. The state of the economy at the time of the ruling, however, likely played an important role in shaping this outcome. Announced in December 1978, the Court decided the Marquette case during a time of much economic turmoil. Overall, the mid-to late 1970s were marked by high inflation and increasing interest rates. Card issuers, who had done very well in the early part of that decade, found their spreads (i.e., the difference between the rate they charged cardholders to borrow and the rate issuers had to pay for funds) shrinking. In the majority of states that had adopted usury laws, the interest rates issuers needed to charge to maintain profitability began to exceed the rates allowed by state rate ceilings. The Minnesota statute at issue in Marquette, for example, capped credit card loan interest rates at twelve percent. According to the Federal Reserve, the federal funds rate, the rate at which banks lend money unsecured to each other overnight, was over 10.0% in 1978 and reached as high as 19.1% in June 1981. Considering that banks also incur expenses associated with operations, marketing, and chargeoffs, credit card lending in the late 1970s and early 1980s would

[150] Id. The Court concluded the following: "The express language of the savings clause indicates that its anti-preemptive effect is limited to TILA. The text provides no indication that the savings clause reaches beyond TILA to control the preemption analysis applicable under any other federal laws, including the federal banking laws." Id.


[155] Id. Card issuers did well because prevailing interest rates were low. This allowed them to borrow money at a low rate and lend it out at a higher rate. Id.

[156] Id.

[157] Ellis, supra note 151.


not have been feasible in states with low rate ceilings. As a result, issuers stopped marketing cards to consumers in states with interest rate ceilings that were at or below the costs required to fund the loans. \(160\)

Immediately after the Supreme Court allowed issuers to export home-state interest rates with its Marquette decision, various state legislatures scrambled to entice nationally chartered credit card issuers to relocate to their states by repealing or amending their usury statutes. \(161\) South Dakota, for example, attracted Citibank's credit card operations away from New York by raising its state interest rate ceiling to 19.8\%. \(162\) Similarly, MBNA and three other large, Maryland-based card lenders moved their operations to Delaware after that state repealed its rate ceiling and made creditor-friendly amendments to its consumer lending laws. \(163\) Ultimately, between 1980 and 1985, a total of fifteen states did away with their rate ceilings, and many raised rate ceilings to accommodate creditors. \(164\)

\[\text{[*443]}\] As states liberalized lending statutes and card issuers took advantage of interest rate exportation, the card industry and, in particular, nationally chartered card issuers, flourished (see Figure 1). The Federal Reserve reported that total U.S. revolving credit grew 172\% between 1978, the time of the Marquette decision, and 1985. \(165\) The percentage of U.S. families that held bank-type credit cards (e.g., MasterCard, Visa) increased from 38\% in 1977 to 55\% in 1986. \(166\) From 1983 to 1986, the portion of consumer debt payments that went to credit card issuers increased approximately 50\%, and the average credit card balance of consumers who carried a balance increased from $ 959 to $ 1,472. \(167\) The expansion of credit during this period particularly affected lower income consumers. \(168\) The percentage of households earning less than $ 10,000 who held a credit card increased from 28\% in 1977 to 42\% in 1986. \(169\) Overall, Marquette, and an economic expansion that started in the early 1980s, helped trigger a period of unprecedented credit card purchasing and borrowing. \(170\)


\(161\) See, e.g., Evans & Schmalensee, supra note 151, at 72 (explaining how state legislatures modified usury laws to attract card issuers); Ellis, supra note 151 (describing how states deregulated banking functions to attract lenders).


\(163\) Ellis, supra note 151, at n.15. It is interesting to note that in 1981, national banks located in Delaware had a total of $ 8,000 in outstanding on-balance-sheet credit card loans, or 0.003\% of the U.S. total. Five years later, nationally chartered Delaware banks held over $ 10 billion in on-balance-sheet credit card loans, or 16\% of the national total. Outstanding Balances, Credit Cards and Related Plans for National Banks, June 30, 1981, Comptroller of the Currency Q.J., Pilot Issue 1982, at 175; Outstanding Balances, Credit Cards and Related Plans for National Banks, September 30, 1986, Comptroller of the Currency Q.J., March 1987, at 190.

\(164\) Canner & Luckett, supra note 162, at 654.

\(165\) From December 1978 to December 1985, revolving credit grew from $ 48.3 billion to $ 131.6 billion. Fed. Reserve Statistical Release G.19 (Sept. 8, 2004), available at http://www.federalreserve.gov/releases/g19/hist/cc_hist_r.txt (last visited Aug. 27, 2004). Revolving credit includes unsecured obligations such as credit card loans and consumer installment loans. It excludes mortgages and automobile loans. See id. at nn.1 & 4 (describing the kinds of loans reported in line items).

\(166\) Glenn B. Canner, Changes in Consumer Holding and Use of Credit Cards, 1970-86, 10 J. Retail Banking 13, 14 (1988). Canner's study is largely based on consumer credit surveys conducted by the Federal Reserve Board. Id.

\(167\) Id. at 20.

\(168\) Ellis, supra note 151.

\(169\) Canner, supra note 166, at 14.

\(170\) Id. at 13. Despite significant increases in the use of credit card credit, the costs of credit remained high throughout most of the 1980s. Regardless of their credit risk, consumers paid interest rates in the 18 to 19\% range. It was not until the early 1990s that issuers began to compete on price and card interest rates fell. See Mark J. Furletti, Credit Card Pricing Developments and Their Disclosure, Federal Reserve Bank of Philadelphia Discussion Paper, Jan. 2003, at 6 (describing credit card pricing in the 1980s and 1990s), available at http://www.phil.frb.org/pcc/discussion/ discussion0103.pdf; The
Despite its age, the Marquette interpretation of the NBA continues to strongly influence the structure and organization of the credit card industry. Consider Delaware, South Dakota, Nevada, Arizona, Rhode Island, and New Hampshire - six states that are home to four percent of the country's population. As of September 2003, the national banks located in these states were owed over $350 billion of the $490 billion in U.S. consumer credit card loans.\(^{171}\) This concentration of very large credit card banks in only a few states is a direct result of the NBA's allowing the creditor-friendly laws of these states to be exported throughout the country.

\(^{171}\) Call Report Data, National Information Center (Sept. 2003) (data on file with author). These loan totals include both on- and off-balance-sheet credit card loans.

\(^{172}\) See Paul M. Barrett, Justices Ruling on Credit Cards Favors Banks, Wall St. J., June 4, 1996, at B1 (reporting that Smiley would have had a tremendous impact on credit card industry had Court found that fees were not included in section 85 definition of interest).

Although Smiley's impact was not nearly as monumental as Marquette's, the case had the potential to significantly alter the way credit cards were priced.\(^{172}\) Throughout the 1980s, credit card pricing was simple.\(^{173}\) Card issuers charged relatively high interest rates (e.g., eighteen percent) and annual fees of around twenty-five dollars.\(^{174}\) The revenues that this pricing scheme generated were more than sufficient to cover most of the expenses associated with an account's usage.\(^{175}\) In the 1990s, however, competition in the industry became fierce and issuers looked for innovative ways to attract new customers.\(^{176}\) Card issuers cut interest rates, enhanced card features, and eliminated annual fees.\(^{177}\) Annual fee revenues began to decline.\(^{178}\) Even though outstanding credit card loans grew 44% between 1993 and 1996, issuers' annual fee revenues during that period dropped from $2.0 billion to $1.2 billion.\(^{179}\) In an effort to mitigate the impact of declining annual fee revenues, issuers introduced many new kinds of fees, including late fees, over limit fees, cash advance fees, and bounced-check fees.\(^{180}\) The use of these fees ultimately reversed the downward fee revenue trend and more than made up for lost annual fee revenue.\(^{181}\) The graph in Figure 2, which shows the industry's fee revenues as a percentage of total revenues from 1990 to 1999, illustrates this trend.

The new fees also eliminated many of the cross-subsidizations that had been inherent in the annual-fee-only product.\(^{182}\) Late fees, for example, made it possible for card issuers to allocate some of the costs associated with collections phone calls and payment reminders to those cardholders who actually made these costly activities...

---

\(^{171}\) Call Report Data, National Information Center (Sept. 2003) (data on file with author). These loan totals include both on- and off-balance-sheet credit card loans.

\(^{172}\) See Paul M. Barrett, Justices Ruling on Credit Cards Favors Banks, Wall St. J., June 4, 1996, at B1 (reporting that Smiley would have had a tremendous impact on credit card industry had Court found that fees were not included in section 85 definition of interest).

\(^{173}\) Furletti, supra note 170, at 9.

\(^{174}\) Id. at 6, 9.

\(^{175}\) Id. at 9.

\(^{176}\) Id.

\(^{177}\) Id. at 9-10.


\(^{179}\) Id.

\(^{180}\) Furletti, supra note 170, at 12-13.

\(^{181}\) Id. After introducing these fees, issuers aggressively raised them. Late and over limit fee amounts increased about 25% from 1995 to 1997 and cash advance fees rose 17% during the same period. Kevin T. Higgins, Issuers Take a Seat at the Fee Feast, Credit Card Mgmt., Sept. 1, 1997, at 34.

\(^{182}\) See, e.g., Valerie Block, Supreme Court Upholds Nationwide Card Charges Says States Can't Regulate Outside Issuers' Fees, Am. Banker, June 4, 1996, at 1 (explaining how Smiley will allow banks to continue to price efficiently).
necessary. Similarly, cash advance fees helped mitigate some of the increased fraud expense associated with such transactions. By tying fees to expensive cardholder behavior (and not charging all cardholders a single annual fee), issuers lowered the fee burden of the majority of consumers who pay on time or who do not take out cash advances.

Had Smiley come out differently and the Supreme Court allowed states to regulate card fees, issuers would have had to abandon many of their emerging (and previous) fee strategies. Instead of charging risky and service-consuming cardholders' fees, issuers would have been forced to rely on non-fee price components (e.g., interest rates) to fund the expensive behaviors of a minority of their customers. Such a strategy may have, for example, burdened those who pay on time with the costs of the minority of cardholders who do not. Instead of bringing the use of risk-and service-based fees to a halt, however, Smiley affirmed issuer fee practices and relieved issuers of much fee-related litigation. Although it may be a coincidence, after the Smiley decision, card industry fee revenues soared (see Figure 2), growing two to four times faster than credit card receivables. By preventing non-home states from regulating fees, Smiley ultimately allowed issuers to continue to eliminate cross-subsidizations and reduce the costs of most consumers' credit card credit.

---

183 Furletti, supra note 170, at 10-11.
184 Id. at 12.
185 Id. at 10.
186 This is the case because of the number of states that were trying to enforce more aggressive limits on credit card terms. Paul M. Barrett, Consumer's Ire Could Shift Law on Bank Fees, Wall St. J., May 15, 1996, at B1 (indicating that about half of states in U.S. were trying to enforce more aggressive limits on credit card terms in 1996).
187 See Profitability Report, supra note 170, at 10 n.13 (explaining development of credit card pricing in light of Marquette).
188 The Supreme Court Gives Issuers a Penalty-Fee Victory, Credit Card News, July 1, 1996, at 1. Despite Smiley's affirmation of the OCC's interest interpretation, it remains unclear whether other kinds of fees (such as credit card replacement fees, copy fees, currency conversion fees, and access check stop payment fees) are considered "interest" under section 85. It is also unclear whether balance calculation methods, grace periods, and term changes are so much a part of interest as to be beyond the reach of state regulation. Card-issuing national banks have proceeded as if these other fees and terms are exportable. For a discussion of the questions that remain after Smiley, see Jeffrey L. Langer, Banks Gain Right to "Export" Late Fees and Other Loan Fees: The Boundaries of Exportation After Smiley v. Citibank, 85 Credit World 10, 11-13 (Nov./Dec. 1996).
189 Card Industry Directory, supra note 178. The year-over-year growth rates in fee revenue in 1997, 1998, and 1999 are as follows: 16%, 21%, and 9%. The corresponding year-over-year growth rates in credit card receivables were 11%, 4%, and 5%. Id.
190 Economists and scholars have conducted extensive research into the effects of usury laws (including rate ceilings and other price controls) on the availability and cost of credit. Much of this research was prompted by Congress' consideration of several bills in 1986 that would have imposed a nationwide credit card rate ceiling. Almost uniformly, these economists found that such price controls would seriously affect consumer access to credit. In support of their conclusions, some of these researchers relied on pre-Marquette data from states that had strict usury statutes. See, e.g., Glenn B. Canner & James T. Fergus, The Effects on Consumers and Creditors of Proposed Ceilings on Credit Card Interest Rates, Fed. Res. Bd. of Governors Staff Study No. 154 (October 1987) (describing negative effects of usury statutes); William F. Baxter, Section 85 of the National Bank Act and Consumer Welfare, 1995 Utah L. Rev. 1009, 1019-28 (asserting that federal preemption of state usury statutes improves consumer and total welfare); Christopher C. DeMuth, The Case Against Credit Card Interest Rate Regulation, 3 Yale J. on Reg. 201, 237-42 (1986) (discussing harmful effects of usury controls); Daniel J. Villegas, The Impact of Usury Ceilings on Consumer Credit, 56 S. Econ. J. 126, 140 (1989) (explaining how usury statutes reduce access to credit and increase overall cost of credit). But see Vincent D. Rougeau, Rediscovering Usury: An Argument for Legal Controls on Credit Card Interest Rates, 67 U. Colo. L. Rev. 1, 2-3 (1996) (challenging generally accepted economic principles regarding harmful effects of usury laws). Researchers also found, however, that increased access to credit may harm consumer welfare. See, e.g., Jonathan Zinman, The Impact of Liquidity on Household Balance Sheets: Micro Responses to a Credit Card Supply
Lockyer is a less significant decision than was Marquette or Smiley. First, Marquette and Smiley were decided by the Supreme Court and as such represent the law of the land until Congress or the Supreme Court itself declares otherwise. Second, Lockyer, in contrast, was decided by the District Court for the Eastern District of California - a court whose holdings have limited effect outside of the thirty-four counties in its district. Second, Attorney General Lockyer has decided not to appeal the District Court's decision in the case. Given this, the decision will not be subject to any further judicial review.

Despite these considerations, Lockyer is important because it represented one of the first major cases in which section 24 (Seventh) was successfully used to preempt a state effort to enforce a non-price-related consumer protection. The Lockyer decision, and the OCC’s subsequent rulemaking, made clear that states, regardless of whether they are home or non-home states, have little or no authority to enforce substantive disclosure statutes against national banks. The case also reaffirmed the courts’ duty to defer to the OCC’s opinion when determining the extent to which a local law interferes with a national bank’s powers. In part, the district court’s decision in Lockyer triggered the OCC’s finding of broad preemption powers in section 24 (Seventh). This finding essentially immunizes credit card issuers from state consumer protection regulation.

Lockyer and the latest OCC ruling also make clear that issuing non-price-related consumer regulations is now the province of the federal government. For lenders and consumers, this has important implications. Now the distinction between price and non-price protections will be even more important for lenders and consumers. Price-related terms will be generally governed by home-state regulations while non-price terms will be governed by federal regulations (to the extent to which either exist).

IV. How the Current Debate Over Preemption Will Likely Shape the Future of Card Industry Regulation

The OCC’s issuance of preemption rules has generated much media attention and debate. The American Banker, a trade publication of the banking industry, published over thirty articles on preemption during the three months ending in February 2004. The articles included editorial pieces from industry leaders supporting the OCC’s decision and state banking commissioners deriding it. Senior OCC officials have argued their case for broader...
preemption power in front of Congress and during all but one of their public speaking engagements from September 2003 to February 2004.201

Those opposing the OCC's preemption rules, however, have also been quite vocal. For example, Elliot Spitzer, New York's Attorney General, claims that the OCC's latest regulations strip consumers of important protections and are "opposed by all 50 states, Democrats and Republicans."202 On January 15, 2004, Spitzer filed suit against a national bank in an effort to challenge the OCC's ruling.203 Consumer advocacy groups are also intensely interested in the issue. The U.S. Public Interest Research Group ("USPIRG"), for example, launched a web site devoted to educating consumers about what it perceives to be the OCC's "abusive preemption policies."204 Congress has also taken notice of the issue. The House Financial Services Subcommittee on Oversight and Investigations held a hearing on the OCC's rulemaking on January 28, 2004, at which one representative charged that the preemption rule "demonstrates a lack of respect for Congress and [the Oversight] committee."205 How will this rather contentious debate over the preemptive powers of the NBA likely be resolved? What are the likely consequences of this debate for card issuers and card-holding consumers? This section will examine the debate over preemption in more detail and its potential regulatory consequences.

A. The Current Debate

The current debate over preemption is complex and multifaceted. In part,248 the debate is about territory. State legislators and attorneys general argue that the OCC's rule denies states the power to issue non-price-related consumer protections, a power states thought they had prior to Lockyer and the OCC's preemption ruling.206 They advocate a state-by-state regulatory approach in which state officials can enact and enforce legislation that protects the unique interests of their citizens.207 They claim that such a system benefits everyone by allowing states to serve as "laboratories" for regulatory "best practices."208 The OCC's latest preemption ruling, they argue, disallows state-based experimentation and leaves consumer protection initiatives to the sole discretion of Congress.209 Overall, the effect of state law preemption is to take away from states the consumer protection powers they once thought they had.210

---

201 Six of the seven public speeches made by senior OCC officials between September 2003 and February 2004 addressed the preemption issues raised by the agency's rulemaking. A list of OCC speeches can be found on the agency's web site, at http://www.occ.trees.gov/speeches.htm (last visited Sept. 19, 2004).


206 See, e.g., Dudley Gilbert, OCC's Preemption Rule Is About Keeping Market Share, Am. Banker, Feb. 20, 2004, at 11 (noting that national banks have been complying with state laws for over 140 years before OCC "clarified" the NBA with its interpretation).


208 See OCC Watch Web Site, supra note 204 (advocating for power of states to regulate financial services).

209 Id.

Another significant part of the debate concerns substantive consumer protections. Over the past few years, the NBA has been interpreted as preempting substantive state consumer protection laws involving ATM usage fees, credit card balance payoff disclosures, and "predatory lending." Although the NBA's preemption of municipal ATM laws and California's disclosure law generated controversy, it is the last of these three issues that triggered intense debate and recent congressional interest. Predatory lending involves a wide range of disreputable home lending practices, including equity stripping, loan flipping, and credit insurance packing. Predatory lending became the centerpiece of the preemption debate after Georgia attempted to enforce provisions of its anti-predatory lending statute against a national bank. In response, the OCC issued a determination and order declaring that the Georgia statute, to the extent that it applies to national banks, was unenforceable. Unlike the ATM fee and credit card disclosure issues, which generated moderate public interest, the predatory lending issue drove preemption to the front page of newspapers and to the top of the agendas of attorneys general.

To a large extent, consumer groups have not joined the preemption debate because of the territorial issues, but rather because of the substantive issues. These groups do not actually want fifty different state laws that protect consumers in various lending situations to varying degrees. They would prefer a federal standard that benefits all consumers. Gail Hillebrand, an attorney with the Consumers Union who is lobbying against the OCC's preemption rule, contends that state laws provide Congress with the necessary impetus to act. She sees the OCC's preemption rules as potentially disengaging state lawmakers and, in turn, removing the states' ability to pressure Congress for substantive federal reforms.

Given that the OCC's preemption ruling raises both territorial and substantive issues, opponents of the ruling are seeking two distinct remedies from Congress. The first is an overruling of the OCC's position that states have no

The OCC asserts that it has the authority to investigate such claims under section 5 of the FTC Act and that this power preempts states' UDAP powers. Recently, the House Committee on Financial Services, in essence, voted to chastise the OCC for preempting state investigative powers because, in the Committee's view, the OCC lacks the resources to pursue such claims. This paper and its conclusion do not address UDAP issues, which usually involve accusations of bad bank behavior in the past (i.e., the bank is accused of doing something "deceptive" that may not violate a specific provision of federal or state law). The focus of this paper is on state statutes that prospectively set particular consumer protection standards for state residents (i.e., California's disclosure statute).

211 See, e.g., Bank of Am. v. S.F., 309 F.3d 551, 558 (9th Cir. 2002) (holding NBA preempts San Francisco ATM fee caps), cert. denied, 538 U.S. 1069 (2003).
212 See Lockyer, 239 F. Supp. 2d at 1022 (holding NBA preempts credit card disclosure statute).
217 See supra notes 193-99 and accompanying text for a description of the current public debate.
218 In a recent interview, Gail Hillebrand, a Consumers Union attorney, explained, "If you look at how consumer-protection law has developed from a state to a federal level, you don't get 50 state laws.... Generally, you get one or two state laws, and then Congress acts." Davenport, supra note 202, at 10.
219 Id.
220 Id.
221 Id.
authority to enforce their own consumer protection statutes. The second is the enactment of a federal anti-predatory lending statute. While it is difficult to say exactly how the debate will resolve itself in the near term, it is possible, given the history of preemption and its effects on the card industry’s development, to make some observations about the likely long-term effects of this complex debate on card industry regulation.

B. Likely Regulatory Consequences for Card Market Participants

For credit card issuers and consumers, the OCC’s latest preemption ruling creates a regulatory environment that is more predictable in some ways and less predictable in others. Unless the courts or Congress overrule the OCC’s interpretation, for example, card issuers and consumers can be rather confident that the only non-price consumer protection regulations that must be followed are those issued by the federal government. At the same time, the current debate increases the chances that Congress will consider enacting an anti-predatory lending statute. For card market participants, such a statute will not have direct effects, since its primary focus would be home equity and mortgage lending. But it could have indirect effects and unintended consequences for credit card lending. The remaining part of this section considers the future of state and federal consumer protection laws that apply to credit cards.

1. State Consumer Protection Laws

Given the holdings in Marquette and Smiley, the only states that can enact and enforce laws regarding credit card pricing (i.e., interest rates and fees) are those in which card issuers are chartered. As explained in the previous section, six states with just four percent of the population are home to the banks that issue almost three-quarters of U.S. credit card loans. Most of these states modified their lending laws in the early 1980s to attract card issuers from less lender-friendly states. Since that time, these states have benefited from the jobs and tax revenues associated with the growth of the card industry. Given these states’ incentives, it seems unlikely they will enact any price-related consumer protection statutes. Overall, consumers and issuers can probably expect to see little in the way of price-related state regulation as long as section 85 of the NBA remains unchanged.


224 See supra note 195 and accompanying text for a description of the power of states to regulate after the OCC’s preemption rulemaking.


226 See generally The Prohibit Predatory Lending Act of 2004, H.R. 3974, 108th Cong. 2(d) (2004) (addressing predatory lending on a national basis by regulating practices of "high-cost mortgage lenders" (emphasis added)).

227 See supra notes 63, 90-100 and accompanying text for a discussion of these holdings’ effect on the industry.

228 See supra note 171 and accompanying text for these statistics.

229 See supra notes 161-64 and accompanying text for a description of the modification of state usury laws.

230 For example, Delaware’s banking sector employs over 38,000 of the state’s 500,000 working-aged adults. Maureen Milford, Bank Merger Has Pros, Cons For State, News J., Jan. 25, 2004, at 16A. These banking sector employees earned, on average, almost $48,000 per year and generated over 12% of the state’s personal income tax receipts. In addition, Delaware banks paid the state $142 million in bank franchise taxes in 2003. Id.
While section 85 allows for home-state regulation of price terms, the latest interpretation of section 24 (Seventh) precludes any state regulation of non-price card terms.\textsuperscript{231} Prior to this interpretation, however, states were not very active in providing credit card consumers with non-price consumer protections. Besides the disclosure law at issue in Lockyer, the most significant non-price consumer protection law that applied to card issuers was California’s Areias-Robbins Credit Card Account Full Disclosure Act of 1986.\textsuperscript{232} The solicitation disclosure mandated by that act is thought to be the basis for the “Schumer Box,” a federal credit card disclosure scheme adopted by Congress two years later.\textsuperscript{233} Going forward, however, states will be prohibited by the OCC’s interpretation of section 24(Seventh) from enacting any kind of credit card disclosure statutes. The unlikely possibility of Congress’ giving states the power to regulate non-price credit card terms is addressed in the next section.

2. Federal Consumer Protection Laws

Although national banks have organized themselves to avoid most state-level price regulation, they are not immune from federal price regulation. Were Congress to consider regulating card issuers’ prices, it would not be the first time. In 1991, when interest rates began to fall and credit card rates did not, President Bush and Congress threatened the card industry with price controls.\textsuperscript{234} Such controls would have tied credit card interest rates to an index rate plus some margin (e.g., 800 basis points over the six-month Treasury bill rate).\textsuperscript{235} Although the price caps were never adopted, subsequent research suggests that the threat of regulation precipitated the lowering of credit card annual percentage rates (“APRs”) for most consumers.\textsuperscript{236} The prospects of federal price controls prompted a host of other research, most of which concluded that price caps would restrict consumers’ access to credit.\textsuperscript{237} This research, Congress’ ultimate decision to abandon price regulation, and a broader trend away from federal price controls seem to support the conclusion that card market participants are not likely to see much from the federal government in the way of federal usury laws.

\textsuperscript{[452]} The future of non-price federal consumer protections, however, is more complicated. For now, unless the Supreme Court changes its position on the deference it provides OCC determinations and overrules the agency’s interpretation of section 24 (Seventh), non-price consumer protection regulation remains the exclusive province of Congress.\textsuperscript{238} Given this, those that oppose the OCC’s preemption rule have already begun concentrating their lobbying efforts at the federal level.\textsuperscript{239} These groups are calling upon federal legislators to, among other things, allow states to legislate in this area and to provide consumers with predatory lending protections.\textsuperscript{240} Based on

\begin{itemize}
\item \textsuperscript{231} See supra notes 137-39 and accompanying text for a discussion of section 24 (Seventh)’s interpretation.
\item \textsuperscript{232} Cal. Civ. Code 1746.10 (West 1998).
\item \textsuperscript{233} See Fair Credit and Charge Card Disclosure Act of 1988, Pub. L. No. 100-583, 102 Stat. 2960, 2967 (codified in part at 15 U.S.C. 1637(c), 1610(e)) (describing federal disclosure requirements very similar to California’s).
\item \textsuperscript{235} Id.
\item \textsuperscript{236} Id.
\item \textsuperscript{237} See supra note 190 and accompanying text for a description of the impact of price controls on credit card interest rates.
\item \textsuperscript{238} See supra note 142 and accompanying text for a description of Congress’ powers given OCC’s interpretation of section 24 (Seventh).
\item \textsuperscript{239} See, e.g., Allen J. Fishbein, Remarks at National Association of Attorneys General Spring Meeting (Mar. 17, 2004) (explaining that Consumer Federation of America “looks forward to working with those in Congress seeking to undo [the OCC’s] rules should they not be withdrawn”), available at http://naca.net/CFApreremontstatement0316.pdf.
\item \textsuperscript{240} See, e.g., id. (advocating that “best system for consumers” is one in which federal and state regulators work together).
\end{itemize}
recent developments in the regulation of financial services, if Congress acts at all, consumer advocates are likely to have more success with the latter than with the former.

The trend in card industry regulation is a movement toward more federal standards. Prior to Marquette, the vast majority of protections on which cardholding consumers could rely were state-based. Today, much of the consumer-issuer relationship is directly or indirectly governed by federal law. For example, before a potential cardholder can be solicited by phone, a card issuer or its agent must ensure that such a call is permissible under the Telemarketing and Consumer Fraud and Abuse Prevention Act (1994). Once the issuer has the consumer on the phone, or if the issuer contacts the consumer via mail, the offer of credit must include specific disclosures under the Truth in Lending Act (amended in 1988). In evaluating a consumer’s credit information for the purpose of determining whether he or she should receive a credit card, the issuer must comply with the Fair Credit Reporting Act (amended in 2003). After the consumer is approved for the card, the issuer will likely be able to enforce contractual provisions that require that all disputes be resolved in arbitration, a result of recent interpretations of the Federal Arbitration Act [*453] (1925). If the issuer wants to share data it has collected on the cardholder in order to offer him or her another product, it must comply with the privacy provisions of the Gramm-Leach-Bliley Act (1999). Finally, if a cardholder fails to make payments on an account and it is placed with a collection agency, the agency must comply with the Fair Debt Collection Practices Act (amended 1996). Overall, it is clear that, over the past fifteen years, federal laws have come to comprise a significant portion of all regulation imposed on credit card issuers.

Given Congress’ proclivity for adopting standards for cardholder protections and a broader trend toward federal deregulation of the financial industry, it does not seem likely that Congress will pass legislation that authorizes states to force national banks to comply with state-level consumer protections. It is more likely, to the extent to which history can be a guide, that Congress will respond to particular consumer protection concerns with some kind of targeted federal protection.


243 See infra notes 244-49 and accompanying text for examples of federal consumer protections.


246 See, e.g., 15 U.S.C. 1681(m) (2004) (requiring that users of credit reports notify consumers when credit report information is used to deny them credit).

247 See 9 U.S.C. 1-16 (2004) (enabling lenders to compel arbitration if consumer and lender have agreed to arbitrate disputes).


As mentioned earlier, the concern at the heart of the current debate over preemption is predatory lending.\textsuperscript{250} As such, support for an anti-predatory lending statute is gathering momentum in Congress.\textsuperscript{251} While on its face such legislation seems to not involve the credit card operations of national banks,\textsuperscript{252} card market participants should continue to monitor the current debate. As with any statute, a predatory lending bill could end up affecting card issuers and cardholders to the extent to which a last minute amendment or rider pertaining to unsecured lenders is added. In addition, the bill could burden card issuers or cardholders in some unanticipated manner. Overall, barring unforeseen amendments or consequences, card market participants will likely not see much in the way of card-specific regulation come out of the current debate.

Unless Congress significantly alters the NBA or overrules the OCC, card issuers will likely benefit from a more predictable legal environment at the state level. Immunity from state-by-state regulation, however, may put more pressure on Congress to consider federal legislation. To the extent Congress now views consumer credit regulation as its full responsibility and views consumers as deprived of any state regulatory alternatives, it may become more interested in exercising its regulatory powers. At present, however, much of the debate about the need for consumer protection legislation has tended to focus on issues in which the credit card industry is not directly involved, such as predatory lending in the home equity and mortgage markets.\textsuperscript{253} For card market participants, such a statute will not have direct effects, but, unless narrowly targeted, it may have indirect effects and unintended consequences for the card industry.

V. Conclusion

It is highly unlikely that those responsible for the passage of the National Bank Act of 1864 could have anticipated how it would ultimately influence our nation’s $ 550 billion credit card lending industry. Overall, the reach of this Civil-War-era of legislation is profound. Evidence of this includes the industry’s highly concentrated organization, product pricing methods, and immunity from state consumer protection regulation.

Today, after Lockyer and the OCC’s preemption ruling, the NBA essentially grants the home states of nationally chartered banks the power to regulate price-related consumer protections and gives the federal government the exclusive power to regulate non-price-related consumer protections.\textsuperscript{254} This interpretation has states lobbying for Congress to overrule the OCC and has consumer advocates demanding expanded substantive federal consumer credit protections.\textsuperscript{255} Based on the federal government’s past role in the development of the card industry and current regulatory trends, it is likely that the recent debate about consumer protection—which has tended to focus on predatory practices in home equity and mortgage lending—will have little direct impact on card issuers in the near term. Nevertheless, the passage of any type of federal legislation regarding consumer protection can always have unintended and indirect consequences for the credit card industry.\textsuperscript{256} So while the OCC’s ruling may have

\textsuperscript{250} See supra notes 213-17 and accompanying text for a discussion of the centrality of predatory lending in the current debate.


\textsuperscript{252} See infra note 226 describing proposed federal anti-predatory lending statute’s focus on mortgage lenders.

\textsuperscript{253} See supra notes 214-17 and accompanying text for a description of the current debate on consumer protection legislation.

\textsuperscript{254} See supra notes 195-97 and accompanying text for a description of the effects of Lockyer.

\textsuperscript{255} See supra notes 199-205 and accompanying text for a description of the current debate.

\textsuperscript{256} See supra notes 204-05 and accompanying text for a discussion of the effects of federal legislation on the credit card industry.
immunized the card industry from state-by-state consumer protection regulation, the industry still has a stake in the current debate about the need for additional consumer protection regulation.

[455] [SEE FIGURE 1 IN ORIGINAL]

Credit Card Loans by Bank Charter Type 1968-2002

[456] [SEE FIGURE 2 IN ORIGINAL]

Fee Income as a Percentage of Total Revenue* 1990-1999

Copyright (c) 2004 Temple University of the Commonwealth System of Higher Education
Temple Law Review

---

257 See supra notes 195-197 and accompanying text for an explanation of the effects of preemption.
Enclosure

See attached.
113TH CONGRESS  1ST SESSION  H. R. 1566

To create a Federal charter for Internet consumer credit corporations, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

APRIL 15, 2013

Mr. Luetkemeyer (for himself and Mr. Meeks) introduced the following bill; which was referred to the Committee on Financial Services

A BILL

To create a Federal charter for Internet consumer credit corporations, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the “Consumer Credit Access, Innovation, and Modernization Act”.

SEC. 2. FINDINGS; PURPOSE; AND INTENT.

(a) FINDINGS.—Congress finds the following:

(1) Studies by the Federal Deposit Insurance Corporation (FDIC), National Bureau of Economic Research, FINRA Investor Education Foundation,
and other credible parties have shown that roughly half of all American families, including not only lower and moderate income families but also a large segment of middle and higher income families who have poor credit scores and limited disposable incomes, are literally living paycheck-to-paycheck, lacking adequate savings and other resources to cover unplanned expenses that frequently arise in every household.

(2) These consumers (in this Act referred to as “underserved consumers”) include those who are “unbanked”, having neither a checking or savings account at a depository institution, and those who are “underbanked”, having such an account and frequently having higher incomes but credit impairments, while nonetheless needing to rely on non-depository financial institutions for short-term, small loans and other credit products and financial services they desperately need, but generally cannot obtain from traditional banking institutions.

(3) Credit alternatives for underserved consumers generally are limited and often not well suited to their particular needs and in some instances lack any statutory consumer protections.
(4) Programs by the FDIC and other parties to expand access to small loans and other financial products or services for underserved consumers through banking institutions have had very limited success because banks, which typically have relatively high operating costs, generally have been unable to make affordable small personal loans on a widespread, commercially viable basis to these higher risk consumers, most of whom may not even qualify for a loan under the high-credit standards regulators necessarily require insured depositories to maintain.

(5) To the extent that depository institutions offer underserved consumers affordable small loans and other financial products or services on a commercially viable basis, they should be encouraged to do so, but it must be recognized that overcoming the practical business obstacles for depositories to offer such products or services appears to be quite difficult at best for most depositories, and given the massive scope of the short-term credit needs of such consumers, depositories most likely will be unable to provide affordable small loans and other financial products or services for a significant number of them.
(6) Efforts of governmental, nonprofit, and private sector institutions to help underserved consumers manage their personal finances more effectively through financial education and counseling programs also are important and must continue, but given the tremendous number of consumers who face significant ongoing financial challenges, most such underserved consumers are likely to be unable to overcome their financial difficulties through such efforts.

(7) Nondepository creditors historically have been primarily State-regulated, are not federally insured, generally pose little or no systemic or taxpayer risk, typically have lower operating costs and can employ less restrictive credit standards than depositories, and are a major source of small loans and financial products or services for underserved consumers, providing such consumers annually with billions of dollars in credit.

(8) A number of nondepository creditors have developed advanced proprietary loan underwriting and servicing procedures and cutting-edge technologies allowing them to offer credit to more underserved consumers, but such creditors lack the authority available to national banks to operate on a
multistate or nationwide basis using a single lending
charter and subject to strong, uniform Federal regu-
lation that would enable them to maximize their ca-
pacities to operate more innovatively and efficiently.

(9) Nondepository creditors are instead subject
to widely differing State licensing laws that impose
substantial cost and compliance burdens, and, more
significantly, laws that severely limit the types of fi-
nancial products or services that may be offered,
prevent loans from being provided on a commercially
viable basis, stifle innovation, reduce competition,
and leave underserved consumers with a limited
choice of products or services that in many cases are
not well suited to their personal needs and cost sig-
nificantly more because of these conflicting and out-
dated restrictive State laws.

(10) It is in the national interest and will great-
ly benefit the millions of underserved consumers who
have pressing needs for additional credit alternatives
for Congress to adopt legislation to authorize credi-
tors the option of receiving a Federal charter under
which they can provide such consumers loans and
other financial products and services through the
Internet and electronic devices and not traditional
brick-and-mortar storefront locations, allowing them
to operate more innovatively and efficiently on a na-
tionwide basis.

(11) An Internet consumer credit corporation
chartered under this Act will be adequately regu-
lated under Federal laws and regulations prescribed
by the Comptroller of the Currency and the Director
of the Consumer Financial Protection Bureau, and
such laws and regulations shall be enforced in ac-
cordance with this Act without such corporation
being subjected to duplicative and conflicting State
laws that in many cases severely and unnecessarily
restrict product innovation and choice and raise the
cost of the limited credit choices now available to un-
derserved consumers.

(12) Allowing such federally regulated lending
by Internet creditors as authorized by this Act
through the Internet and by electronic devices, but
not through traditional storefront, brick-and-mortar
locations, on a nationwide basis, is consistent with
the fact that consumers’ borrowing habits are shift-
ing rapidly to seeking more financial product and
service choices with the convenience, ease of credit
access, and more alternatives provided by computers,
mobile phones, and other electronic devices, and mil-
lions of underserved consumers will be able to secure
credit from Internet consumer credit corporations that are subject to applicable State and Federal laws.

(13) Small businesses, which are vital to job creation and the health of the Nation's economy, also have a continuing need for additional credit alternatives, and allowing Internet consumer credit corporations to offer certain financial products and services to small businesses through the Internet and by electronic devices will be in the national interest.

(b) PURPOSE AND INTENT.—The purpose and intent of this Act is to—

(1) provide underserved consumers greater access to innovative, affordable, commercially viable, and better suited financial products and services;

(2) create a Federal charter for creditors that offer financial products or services through the Internet and electronic devices and not traditional brick-and-mortar storefront locations and focus their business primarily on meeting the credit needs of underserved consumers and small businesses, enabling such Internet creditors to provide more innovative, affordable, and appropriate credit options, subject to uniform Federal lending standards rather
than operating under the widely varying, often conflicting, overly restrictive, and unnecessarily costly system of State lending laws that currently prevent nondepository creditors from offering underserved consumers and small businesses the credit options they need;

(3) clarify that Congress understands that even with the more innovative and efficient lending authorized by this Act and reasonable pricing by Internet consumer credit corporations, the cost of commercially viable, short-term, small-dollar credit for higher risk underserved consumers typically will be considerably higher than the cost for other consumers who have no credit impairments and that when the cost of such credit is expressed in terms of an annual percentage rate, in most cases such rate will be much higher than such rate for larger, longer term loans, especially those made to consumers with unimpaired credit records, and therefore it should not be presumed or necessarily concluded that such credit extensions to underserved consumers are unfair or abusive, provided full disclosure of the cost of such credit is made as required by this Act and such corporation has a reasonable basis for determining that an underserved consumer
can repay, therefore indicating that the credit is afford-
able;

(4) require that the Comptroller exercise his or her authorities to administer, enforce, and imple-
ment the provisions of this Act and regulations pre-
scribed pursuant to this Act to provide for ongoing 
prudential regulatory oversight of Internet consumer 
credit corporations and to promptly adopt reasonable 
and flexible policies and procedures to ensure the ap-
proval of Federal charters for qualified applicants, 
while also promoting the offering of innovative, affor-
dable, and commercially viable financial products 
or services; and 

(5) require that the Director exercise his or her authorities to administer, enforce, and implement 
the provisions of Federal consumer financial laws and applicable provisions of this Act and regulations pres-
bred pursuant to this Act to ensure that un-
derserved consumers receive effective consumer fi-
nancial protections, while also promoting the offer-
ing of innovative, affordable, and commercially viable financial products or services.

SEC. 3. INTERNET CONSUMER CREDIT CORPORATIONS.

(a) FEDERAL CHARTER.—In accordance with the provisions of this Act, and regulations prescribed pursuant
to this Act, the Comptroller shall charter creditors which
shall become Internet consumer credit corporations (here-
inafter referred to as "Internet creditors") to offer finan-
cial products or services primarily to underserved con-
sumers and small businesses as provided for in this Act.

(b) APPLICATION REQUIRED.—

(1) IN GENERAL.—A person that desires to ob-
tain a Federal charter under this Act shall submit
an application to the Comptroller at such time, in
such manner, and accompanied by such information
as the Comptroller may require.

(2) EXPEDITIOUS DETERMINATION.—The
Comptroller shall make a determination as to wheth-
er an application submitted under paragraph (1) is
approved or denied expeditiously.

(c) REQUIREMENTS.—In seeking a Federal charter
under this Act, an applicant shall meet the following re-
quirements:

(1) A business plan shall be established cov-
ering at least the initial 3-year period of operation
as a commercially viable entity with its primary
business activities being to serve the needs of under-
served consumers and small businesses for credit
and related financial services through the Internet
and electronic devices and not through brick-and-mortar locations, and such plan shall—

(A) realistically forecast market demand, the intended customer base, competition, economic conditions, financial projections, and business risks;

(B) include a marketing plan that describes the types of financial products or services such creditor intends to offer, how it will market them, and how such products or services are expected to be affordable for underserved consumers and small businesses and commercially viable for the creditor; and

(C) contain an acceptable plan for—

(i) ensuring compliance with all applicable laws and regulations; and

(ii) for promptly addressing complaints from underserved consumers and small businesses.

(2) A competent and experienced management team of good moral character with expertise in and a commitment to serving the credit needs of underserved consumers, experience in offering financial services products to consumers through the Internet or electronic devices, and awareness and under-
standing of applicable legal requirements shall be es-

tablished.

(3) Adequate capital structure relative to the
operational and financial assumptions and business
plans of the applicant, including the cost of utilizing
advanced technology and information management
systems for its operating and compliance needs, shall
be established.

(4) No Internet creditor shall be directly or in-
directly owned or controlled by any person unless—

(A) the person is an individual, a Federal-
or State-chartered depository institution, a
bank holding company (as defined in section
2(a) of the Bank Holding Company Act of
1956 (12 U.S.C. 1841(a))), a savings and loan
holding company (as defined in section
10(a)(1)(D) of the Home Owners’ Loan Act
(12 U.S.C. 1467a(a)(1)(D))), or a nonprofit
corporation; or

(B) the primary business activity of the
person involves—

(i) providing financial products or
services to consumers; or

(ii) owning or controlling persons
whose primary business activity is pro-
viding financial products or services to con-
sumers.

(5) Any other requirements provided for under
this Act or in regulations prescribed by the Com-
troller consistent with the purposes of this Act.

(d) Authority of Internet Creditors.—Upon
receiving a Federal charter pursuant to subsection (a), an
Internet creditor shall become, as from the date of the
execution of its charter, a body corporate, and, as such,
an Internet consumer credit corporation, and in the name
designated in the charter it is authorized to—

(1) adopt and use a corporate seal;

(2) have succession from the date its charter is
issued until such time as it be dissolved by the act
of its shareholders owning two-thirds of its stock, or
until its charter is revoked by the Comptroller, or
until terminated by an Act of Congress, or until its
affairs are placed in the hands of a receiver and fi-
nally wound up by the receiver in accordance with
title 11, United States Code, or other applicable law;

(3) borrow money, issue stock, and enter into
contracts;

(4) sue and be sued and complain and defend,
in any court of law and equity of competent jurisdict-
tion, as fully as natural persons;
(5) elect or appoint directors, and by its board of directors to appoint a president, vice president, and other officers, define their duties, require bonds of them and fix the penalty thereof, dismiss such officers or any of them at pleasure, and appoint others to fill their places;

(6) prescribe, by its board of directors, bylaws not inconsistent with law, regulating the manner in which its stock shall be transferred, its directors elected or appointed, its officers appointed, its property transferred, its general business conducted, and the privileges granted to it by law exercised and enjoyed;

(7) hire employees and consultants and fix their compensation, define their duties, and give such persons appropriate authority to carry on its business operations;

(8) enter into joint ventures and other business partnerships with other Internet creditors, depository institutions, State-chartered or licensed non-depository creditors, third-party service providers and vendors, and other parties to promote or facilitate providing as herein authorized commercially viable financial products or services to underserved consumers and small businesses;
(9) contribute to community funds, or to charitable, philanthropic, or benevolent instrumentalities conducive to public welfare, such sums as its board of directors may deem expedient and in the interests of the Internet creditor;

(10) invest in, or buy or lease, real estate or tangible personal property, including vehicles, equipment, furnishings and furniture, to be used by the Internet creditor in conducting business related operations authorized under this Act;

(11) provide loans and other financial services only through the Internet and electronic devices as its board of directors or duly authorized officers or agents may determine, in accordance with this Act and regulations prescribed pursuant to this Act, are appropriate for providing financial products or services to consumers, including underserved consumers, and to small businesses in accordance with the provisions of this Act and regulations prescribed pursuant to this Act;

(12) exercise by its board of directors or duly authorized officers or agents, subject to law, all such incidental, implied, or reasonably necessary powers as may be appropriate to carry on its corporate operations and the business of providing commercially
viable financial products or services to consumers, including underserved consumers and small businesses in accordance with the provisions of this Act and regulations prescribed pursuant to this Act;

(13) be affiliated with, or owned by, an insured depository institution, nondepository creditor, non-profit organization, or other qualified entities unless otherwise limited by this Act or regulations prescribed pursuant to this Act;

(14) acquire or merge with other Internet creditors; and

(15) exercise such other powers as may be reasonably necessary or appropriate to offer financial products or services as provided for pursuant to this Act, or provided for through regulations prescribed by the Comptroller pursuant to the provisions of this Act.

(e) Duties and Responsibilities.—

(1) Comptroller of the Currency.—The Comptroller shall—

(A) ensure that Internet creditors only provide loans and other financial products or services through the Internet and electronic devices and that, to the extent reasonably possible, such creditors primarily focus their busi-
ness operations on providing underserved con-
sumers a variety of affordable financial prod-
ucts or services that are commercially viable for
such creditors, including certain products or
services that contain features to facilitate per-
sonal savings and enhance the credit record of
such consumers;

(B) encourage and facilitate—

(i) innovation with respect to the fi-
nancial products or services offered to un-
derserved consumers; and

(ii) joint ventures and other business
partnerships among Internet creditors, in-
sured depository institutions, other non-
depository creditors, third-party service
providers and vendors, nonprofit organiza-
tions, and other parties in order to ensure
greater credit access for underserved con-
sumers and small businesses;

(C) provide, through regulations, details on
how Internet creditors should be organized, in-
corporated, and operated in a prudential man-
ner;

(D) conduct examination and supervisory
activities of Internet creditors to—
(i) access their internal controls and management ability;

(ii) evaluate their financial condition and risk profile;

(iii) determine if they are meeting the needs of underserved consumers and small businesses; and

(iv) monitor their compliance with this Act and other applicable laws and regulations that the Comptroller may have administratively responsibly for, and identify areas in which corrective action is needed;

(E) consult, cooperate and coordinate, as appropriate, with the Director and with other Federal and State regulatory agencies, including State bank supervisors, to promote much greater availability of innovative, affordable, commercially viable credit for underserved consumers, and consistent regulatory treatment of consumer and small business financial products and services;

(F) help ensure that the supervisory activities, including examination schedules, of Internet creditors and affiliated companies are con-
ducted in a coordinated and efficient manner; and

(G) adopt adequate safeguards to ensure appropriate privacy and confidentiality protections with respect to individually identifiable personal data and proprietary corporate data.

(2) DIRECTOR OF THE BUREAU OF CONSUMER FINANCIAL PROTECTION.—The Director shall—

(A) regulate the offering and provision of consumer financial products or services by Internet creditors under the Federal consumer financial laws pursuant to its authorities under the Dodd-Frank Wall Street Reform and Consumer Protection Act (12 U.S.C. 5301 et seq.), this Act, and regulations prescribed pursuant to this Act;

(B) consult, cooperate, and coordinate, as appropriate, with the Comptroller and with other Federal and State regulatory agencies, including State bank supervisors, to promote—

(i) much greater availability of innovative, affordable, commercially viable credit for underserved consumers and small businesses; and
(ii) consistent regulatory treatment of consumer and small business financial products or services;

(C) help ensure that the supervisory activities, including examination schedules, of Internet creditors and affiliated companies are conducted in a coordinated and efficient manner; and

(D) adopt adequate safeguards to ensure appropriate privacy and confidentially protections with respect to individually identifiable personal data and proprietary corporate data.

(3) INTERNET CREDITORS.—Each Internet creditor shall—

(A) make financial education information available to each consumer it offers a financial product or service, including information on how a consumer may obtain financial counseling services, the benefits of following a regular personal savings program, and how consumers can improve their credit ratings;

(B) comply with all applicable Federal laws and regulations, including Federal consumer financial protection law requirements and such State laws, regulations, and enforcement ac-
tions as are authorized under the provisions of this Act;

(C) provide account access to its customers through the Internet and a toll-free telephone number;

(D) provide, in accordance with regulations prescribed pursuant to this Act, to all consumers who are extended credit with a repayment term of 1 year or less by the Internet creditor a clear and conspicuous statement in the loan agreement that discloses the true cost of the loan, including all interest, fees, and other loan-related charges, as a dollar amount and as a percentage of the principal amount of the loan in lieu of the annual percentage rate disclosure that otherwise would be required under the Truth in Lending Act (15 U.S.C. 1601 et seq.) or regulations prescribed pursuant to such Act;

(E) report to the Comptroller or Director such data as either may require regarding its activities, including the types of financial products or services provided to underserved consumers and small businesses, and data demonstrating that its business activities are fo-
ecused primarily on serving underserved con-
sumers and small businesses as required by this
Act;

(F) offer—

(i) an underserved consumer who is
unable to repay an extension of credit by
an Internet creditor that has a loan repay-
ment term of less than 120 days, an ex-
tended repayment plan, at no cost to the
consumer, at least once in a 12-month pe-
period; and

(ii) to the extent reasonably possible,
certain financial products or services that
contain features to facilitate personal sav-
ings that could help underserved con-
sumers enhance their credit records if such
consumers fully comply with the terms and
conditions of such products or services;
and

(G) not—

(i) accept consumer or commercial de-
posits;

(ii) make commercial loans, except to
the extent allowed by the provisions of this
Act and regulations prescribed pursuant to this Act, with respect to small businesses;

(iii) make a consumer loan with a term of 30 days or less;

(iv) make a loan that requires a consumer to repay the loan balance in one lump-sum payment; or

(v) extend credit to a consumer—

(I) unless the Internet creditor has a reasonable basis for believing that the consumer will have the ability to repay the credit extension;

(II) if the maximum principal amount of the credit outstanding from all financial products or services authorized by the Internet creditor to such consumer, in the case of an unsecured credit transaction, exceeds $5,000, or in the case of a secured credit transaction, $25,000, unless a higher amount is authorized by regulations prescribed by the Comptroller; or

(III) if the loan terms include a prepayment penalty; or
(vi) extend credit to a small business in excess of $25,000.

(f) ADDITIONAL PRODUCT OR SERVICE OFFERINGS.—Financial products or services that may be offered to underserved consumers pursuant to this subsection for underserved consumers and certain small businesses may also be offered to other consumers and businesses.

(g) RULE OF CONSTRUCTION.—Nothing in this Act is intended to provide the Comptroller or the Director with the authority to—

(1) regulate financial products or services that are provided or offered by an affiliate company or another entity that the Internet creditor has a business relationship with, but the Internet creditor does not provide or offer to underserved consumers or small businesses in accordance with this Act;

(2) determine, directly or indirectly, pricing applicable to an extension of credit offered by an Internet creditor to a consumer or small business pursuant to this Act through a usury limit, a cap on the rate of interest, fees, or other charges, or otherwise;

(3) prohibit, directly or indirectly, the offering of a financial product or service to underserved consumers or small businesses by an Internet creditor pursuant to this Act unless a determination is made
by the Comptroller or Director, based on a fair and
reasonable determination of the facts and cir-
cumstances regarding the financial product or serv-
ice, that offering such a product or service will seri-
ously harm the financial interests of underserved
consumers or small businesses; or

(4) presume or conclude that a credit extension
offered to underserved consumers by an Internet
er creditor under the provisions of this Act, regulations
prescribed by this Act, and such other statutes and
regulations as either may have administrative and
enforcement authority for is unfair, abusive, or oth-
erwise inappropriate solely on the basis that the in-
terest rates and other charges to such consumers,
who typically pose relatively high credit risks, are
significantly higher than those on credit extensions
offered to other consumers who do not pose such
high credit risks.

(h) INTERNET CREDITOR REGULATORY FEE.—Each
Internet creditor shall pay to the Comptroller an annual
fee in a reasonable amount that the Comptroller deter-
mines is sufficient, in the aggregate of all such fees paid
by Internet creditors, to offset the cost to the Comptroller
of carrying out the provisions of this Act.
(i) **Charter Suspension or Revocation.**—The Comptroller, pursuant to procedures established in regulations prescribed by the Comptroller, may suspend or revoke the charter of an Internet creditor if there has been a material failure by the Internet creditor to comply with the requirements set forth in the charter, provisions of this Act, or other applicable statutes, regulations, or orders.

(j) **Relationship to Other Federal and State Laws.**—

(1) **Federal Law.**—An Internet creditor is subject to—

(A) all otherwise applicable provisions of Federal statutes and regulations, including the consumer financial laws listed under section 1002(14) of the Consumer Financial Protection Act of 2010 (12 U.S.C. 5481(14)), section 987 of title 10, United States Code (relating to consumer credit extended to servicemembers and dependents), and the provisions of this Act and regulations established pursuant to this Act; and

(B) the administration and enforcement of such statutes and regulations by the Comptroller, the Director, any other Federal agency,
or State attorney general (or the equivalent thereof) having enforcement authority.

(2) STATE LAW.—An Internet creditor, or an employee, agent, or other business partner of an Internet creditor, shall not be subject to—

(A) State laws that relate to office location, licensing, education, or training that apply to the operations of an Internet creditor, or its employees, agents, or other business partners to the extent that these operations relate to the exercise of its powers or authorities under this Act and implementing regulations to provide financial products or services to underserved consumers and small businesses; or

(B) other State laws that—

(i) have a discriminatory effect on an Internet creditor compared to the effect of such laws on any other depository or non-depository creditor chartered or licensed in that State;

(ii) consistent with the legal standard for preemption in the decision of the Supreme Court of the United States in Barnett Bank of Marion County, N.A. v. Nelson, Florida Insurance Commissioner,
et al., 517 U.S. 25 (1996), prevent or significantly interfere with the exercise by an Internet creditor of its powers and authorities as set forth in this Act; or

(iii) are preempted by any provision of Federal law.

(3) Determination of Preemption.—An Internet creditor may challenge the applicability of a State law as preventing or significantly interfering with the exercise of such creditor’s powers under this Act, or for violating any provision of paragraph (2), in any court of competent jurisdiction, and the Comptroller or Director, by regulation or order, or any court of competent jurisdiction may make a determination, on a case-by-case basis, that a State law prevents or significantly interferes with the exercise of an Internet creditor’s powers under this Act, or violates a provision of paragraph (2), in accordance with applicable law.

(k) Enforcement.—

(1) In General.—The Comptroller or the Director may enforce in any court of competent jurisdiction the provisions of this Act, regulations prescribed pursuant to this Act relating to their respective regulatory authority in this Act, and their re-
spective cease and desist or other orders or regulatory requirements.

(2) **Action by state.**—The attorney general (or the equivalent thereof) of any State shall have the power to investigate violations of this Act and may bring a civil enforcement action in the name of such State against an Internet creditor in any district court of the United States or in State court that has jurisdiction over the Internet creditor and to secure civil penalties and such other remedies under provisions of this Act or otherwise provided under other applicable law.

(3) **Consultation required.**—

(A) **Notice.**—

(i) **In general.**—When initiating any action in a court or other administrative or regulatory proceeding against any Internet creditor as authorized by this Act to enforce any provision of this Act, including any regulation pursuant to this Act, a copy of the complete complaint filed or to be filed and written notice describing such action or proceeding shall be provided to the Comptroller and the Director by the State attorney general (or the equivalent thereof)
prior to or immediately upon instituting
the action or proceeding.

(ii) CONTENTS OF NOTICE.—The noti-
ification required under this paragraph
shall, at a minimum, describe—

(I) the identity of the parties;

(II) the alleged facts underlying
the proceeding; and

(III) whether there may be a
need to coordinate the prosecution of
the proceeding so as not to interfere
with any action, including any rule-
making, undertaken by the Compt-
troller or the Director.

(B) COMPTROLLER AND DIRECTOR RE-
SPONSE.—In any action brought by a State at-
torney general (or equivalent thereof), the
Comptroller and Director may—

(i) intervene in the action as a party;

and

(ii) upon intervening—

(I) remove the action to the ap-
propriate United States district court,
if the action was not originally
brought there;
(II) be heard on all matters arising in the action; and

(III) appeal any order or judgment, to the same extent as any other party in the proceeding may.

(4) REGULATIONS.—The Comptroller and the Director shall jointly prescribe regulations to implement the requirements of this subsection and, from time to time, consult with State attorneys general (or the equivalent thereof) in order to develop appropriate protocols to coordinate actions with the State attorneys general and other appropriate regulators.

(5) PRESERVATION OF STATE AUTHORITY.—No provision of this Act shall be construed as modifying, limiting, or superseding the operation of any provision of any Federal consumer financial protection law or regulations prescribed pursuant to such laws that relates to the authority of a State attorney general (or the equivalent thereof) to enforce such Federal law and regulations.

(1) PENALTIES FOR VIOLATIONS.—The relief available for violations of provisions of this Act, regulations prescribed pursuant to this Act, or orders or supervisory mandates, including cease and desist orders, with respect to proceedings involving Internet creditors by the Comp-
troller, the Director, or State attorneys general (or the
equivalent thereof) shall be the same as or equivalent to
that provided with respect to actions by the Director in
section 1055 of the Dodd-Frank Wall Street Reform and

(m) REPORTS TO CONGRESS.—Not later than 180
days after the effective date of this Act, and annually for
5 years thereafter, the Comptroller and the Director shall
submit to Congress a joint report on their activities and
progress in helping to expand access to innovative and af-
fordable credit for underserved consumers and small busi-
nesses, and such reports shall include—

(1) a descriptive summary of the actions of the
Comptroller and the Director during the reporting
period to carry out the purposes of this Act;

(2) the number of charter applications received
by the Comptroller;

(3) the number of charter applications that
were approved, disapproved, conditionally approved,
or are pending and a detailed explanation of each
disapproval or conditional approval;

(4) a description of any further actions the
Comptroller or the Director believes should be un-
dertaken to—
(A) facilitate the chartering of qualified nondepository institutions; and

(B) increase the number of financial products that are available to help increase competition and consumer choice for underserved consumers; and

(5) any recommendations the Comptroller or the Director may have regarding other legislative measures that would improve the ability of an Internet creditor to provide additional financial products or services to underserved consumers or small businesses.

(n) REGULATIONS.—The Comptroller and the Director shall consult and prescribe joint regulations implementing the provisions of this Act not later than 180 days after the effective date of this Act.

SEC. 4. DEFINITIONS.

In this Act:

(1) AFFILIATE.—The term "affiliate" means any person that controls, is controlled by, or is under common control with another person.

(2) AFFORDABLE.—The term "affordable" means that a creditor has a reasonable expectation that a consumer or small business will be able to repay an extension of credit.
(3) COMMERCIAL VIABLE.—The term "commercially viable" means that a reasonable economic profit is expected to be made when a financial product or service is provided to a consumer or small business.

(4) COMPTROLLER.—The term "Comptroller" means the Comptroller of the Currency.

(5) CONSUMER.—The term "consumer" means an individual or agent, trustee, or representative acting on behalf of an individual.

(6) CONTROL AND CONTROLLED BY.—The terms "control" and "controlled by" mean that—

(A) a person directly or indirectly or acting through 1 or more other persons owns, controls, or has power to vote 25 percent or more of any class of voting stock of a company;

(B) a person controls in any manner the election of a majority of the directors or trustees of a company; or

(C) the Comptroller makes a determination, after notice and opportunity for hearing, that a person directly or indirectly exercises a controlling influence over the management or policies of a company.
(7) CREDIT.—The term “credit” means the right granted by a person to a consumer or a small business to defer payment of a debt, incur debt and defer its payment, or purchase property or services and defer payment for such purchase.

(8) CREDITOR.—The term “creditor” has the same meaning as is given such term in section 103(g) of the Truth in Lending Act (15 U.S.C. 1602(g)), and for purposes of this Act, shall include a person who extends credit to a small business pursuant to the provisions of this Act.

(9) DIRECTOR.—The term “Director” means the Director of the Bureau of Consumer Financial Protection.

(10) ELECTRONIC DEVICE.—The term “electronic device” means an electronic device that communicates by any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic, or photo-optical system that affects interstate or foreign commerce.

(11) EXTENDED REPAYMENT PLAN.—The term “extended repayment plan” means an installment plan under which a consumer who is unable to repay a credit extension on a loan with a term of less than
120 days on the date due, and who complies with applicable requirements established in regulations pursuant to this Act, may repay a creditor the outstanding balance of the loan in at least 4 substantially equal payments without being charged any additional interest, fees, or other charges.

(12) Federal consumer financial laws.—The term “Federal consumer financial laws” has the same meaning as is given to that term in section 1002(14) of the Consumer Financial Protection Act of 2010 (12 U.S.C. 5481(14)).

(13) Financial product or service.—The term “financial product or service” has the same meaning as is given the term “consumer financial product or service” in section 1002(5) of the Consumer Financial Protection Act of 2010 (12 U.S.C. 5481(5)), and for purposes of this Act, shall also include a financial product or service provided to a small business.

(14) Insured depository institution and depository institution.—The terms “insured depository institution” and “depository institution” (also referred to herein as “depositories”) have the same meanings as are given such terms under section 3(e) of the Federal Deposit Insurance Act (12
U.S.C. 1813(c)), and for purposes of this Act, also includes an "insured credit union" as such term is defined under section 101(7) of the Federal Credit Union Act (12 U.S.C. 1752(7)).

(15) INTERNET.—The term "Internet" means the international computer network of interoperable packet-switched data networks.

(16) NONDEPOSITORY CREDITOR.—The term "nondepository creditor" means an entity that is chartered or licensed by a State and offers personal loans or other financial products or services to consumers or small businesses, but does not accept consumer or commercial deposits.

(17) PERSON.—The term "person" means an individual, partnership, company, corporation, association (incorporated or unincorporated), trust, estate, cooperative organization, or any other entity.

(18) PRIMARY BUSINESS ACTIVITIES.—The term "primary business activities" means that the business activities of an Internet creditor predominately involve providing financial products and services to underserved consumers and small businesses.

(19) SECURED CREDIT TRANSACTION.—The term "secured credit transaction" means—
(A) a consumer credit transaction where
the performance of the credit obligation is se-
cured by an interest in property; and

(B) such transaction is recognized as se-
cured by State or Federal law, provided, how-
ever, a consumer's authorization for an elec-
tronic fund transfer as a payment on a finan-
cial product or service shall not be considered,
for purposes of this Act, as security on a credit
transaction.

(20) SMALL BUSINESS.—The term "small busi-
ness" means a business entity, including a sole pro-
prietorship, that has less than 500 full-time employ-
ees.

(21) STATE.—The term "State" means—

(A) a State, territory, or possession of the
United States, the District of Columbia, the
Commonwealth of Puerto Rico, the Common-
wealth of the Northern Mariana Islands, Guam,
American Samoa, and the United States Virgin
Islands.

(22) UNDERSERVED CONSUMER.—The term
"underserved consumer" means a natural person
who—
(A) does not have a checking or savings account with an insured depository institution; or
(B) has a deposit account with an insured depository institution, but has limited or no ability to obtain small personal loans or other nondepository financial products or services from an insured depository institution.

(23) UNSECURED CREDIT TRANSACTION.—The term “unsecured credit transaction” means a consumer credit transaction where the performance of the credit obligation is not secured by an interest in property or where the security interest is not recognized by State or Federal law.

SEC. 5. CONFORMING AMENDMENT TO TILA.
Section 104 of the Truth in Lending Act (15 U.S.C. 1603) is amended by adding at the end the following:

“(8) Credit transactions involving extensions of credit with a term of 1 year or less in which the creditor provides consumers in all such credit transactions with a clear and conspicuous statement in the loan agreement that discloses the true cost of the loan, including all interest, fees, and other loan related charges, as a dollar amount and as a percentage of the principal amount of the loan.”.
SEC. 6. EFFECTIVE DATE.

This Act shall be effective 180 days after the date of the enactment of this Act.