UNITED STATES OF AMERICA
Federal Trade Commission
WASHINGTON, D.C. 20580

Office of Commissioner
Rohit Chopra

STATEMENT OF COMMISSIONER ROHIT CHOPRA

Regarding Yellowstone Capital, LLC
Commission File No. 1823202
August 3, 2020

Small businesses across America are struggling to stay afloat due to the impact of COVID-19, and millions are expected to fail.[1]

Unfortunately, many small businesses were unable to access the Paycheck Protection Program (PPP). Our nation's largest banks have been accused of steering limited PPP dollars to their richest clients, shutting out many local businesses.[2] Minority-owned businesses are especially struggling to access PPP and other forms of credit.[3]

I am concerned that this is opening the door to even more predatory actors looking to profit from the pain of small business owners. Today, the Federal Trade Commission is charging Yellowstone Capital with misleading borrowers about key financing terms and withdrawing funds that the company was not even owed. This follows an action last month, when the Commission charged Richmond Capital Group with targeting small businesses with illegal financing and collection practices.[4]

As the Commission proceeds into litigation in these matters and further studies this market, I hope that we will uncover additional information about business practices in this opaque industry. In particular, we should closely scrutinize the marketing claim that these payday-style products are "flexible," with payments contingent on the credit card receivables of a small business. In reality, this structure may be a sham, since many of these products require fixed daily payments, and lenders can file "confessions of judgment" upon any slowdown in payments, with no notice or due process for borrowers.[5]

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[1] *See* Michael Powe & Matthew Wagner, THE IMPACT OF COVID-19 ON SMALL BUSINESS, MAIN STREET AMERICA (Apr. 2020), https://www.mainstreet.org/blogs/national-main-street-center/2020/04/09/new-report-the-impact-of-covid-19-on-small-busines.

[2] *See* Stephen Gandel, *Biggest banks "prioritized" larger clients for small business loans, lawsuits claim*, CBS NEWS (Apr. 20, 2020), https://www.cbsnews.com/news/paycheck-protection-program-big-banks-loans-larger-clients-over-smaller-businesses/.

[3] *See* Ivette Feleciano & Connie Kargbo, *Why minority-owned businesses are struggling to get PPP loans*, PBS NEWS HOUR (Jun. 20, 2020), https://www.pbs.org/newshour/show/why-minority-owned-businesses-are-struggling-to-get-ppp-loans.

[4] *FTC v. RGC Advances, LLC*, FED. TRADE COMM'N, https://www.ftc.gov/enforcement/cases-proceedings/192-3252/rcg-advances-llc, (last visited on Jul. 29, 2020).

[5] Confessions of judgment are take-it-or-leave it contract terms that force borrowers to confess judgment – essentially, plead guilty – without any notice or hearing. While litigation can halt some of the worst practices, the

This raises serious questions as to whether these "merchant cash advance" products are actually closed-end installment loans, subject to federal and state protections including anti-discrimination laws, such as the Equal Credit Opportunity Act, and usury caps.[6] The stakes are high for millions of small businesses.

Predatory lending is not the only area where the FTC has a critical role in combatting harms targeting small businesses. In fact, the Commission has a long list of responsibilities. For example, Congress has entrusted the FTC to ensure that businesses, like local stores and restaurants, have choices when it comes to processing debit card transactions, so that they aren't gouged with fees.[7] The agency is also responsible for policing markets for anticompetitive mergers and conduct, which can block small businesses from even getting off the ground.

The FTC also has unique responsibilities in the franchise market. Many small businesses in the United States are structured as franchises, and a disproportionate number of them are minority-owned. There are a host of troubling trends and practices in this market, including reports of franchisors engaging in practices that disadvantage their own franchisees.[8] The FTC can tackle these practices through its authority under the FTC Act, as well as through its administration of the Franchise Rule, which is currently under review.

Across the board, it is critical that the FTC do everything in its power to ensure fairness for small businesses and new market entrants. Today's lawsuit against Yellowstone Capital is an important step. The FTC will need to build on this work to ensure that our markets are serving small businesses, not exploiting them.

Commission should consider whether it would be appropriate to ban the use of these terms altogether, as we did in 1984 with respect to consumer contracts. *See* Prepared Remarks of Federal Trade Commissioner Rohit Chopra at the Forum on Small Business Financing in Washington, D.C. (May 8, 2019), https://www.ftc.gov/public-statements/2019/05/prepared-remarks-commissioner-rohit-chopra-forum-small-business-financing. In fact, many of the Commission's findings in the 1980s about the problems with these terms appear equally applicable in the small business lending context. *See* Fed. Trade Comm'n, Trade Regulation Rule; Credit Practices, 49 Fed. Reg. 7740 (March 1, 1984) (finding that confessions caused substantial injury that borrowers generally could not avoid, with no clear benefits in terms of access to credit).

[6] *See* N.Y. State Office of the Att'y Gen., Press Release, Attorney General James Sues Predatory Lender That Threatened Violence and Kidnapping, and Illegally Collected Millions from Small Businesses (Jun. 10, 2020), https://ag.ny.gov/press-release/2020/attorney-general-james-sues-predatory-lender-threatened-violence-and-kidnapping (alleging that Richmond Capital's "merchant cash advance" products were actually criminally usurious loans).

[7] *See* 15 U.S.C. § 1693o–2.

[8] *See*, *e.g.*, Tiffany Hsu & Rachel Abrams, *Subway Got Too Big. Franchisees Paid a Price.*, THE N.Y. TIMES (Jun. 28, 2019), https://www.nytimes.com/2019/06/28/business/subway-franchisees.html.