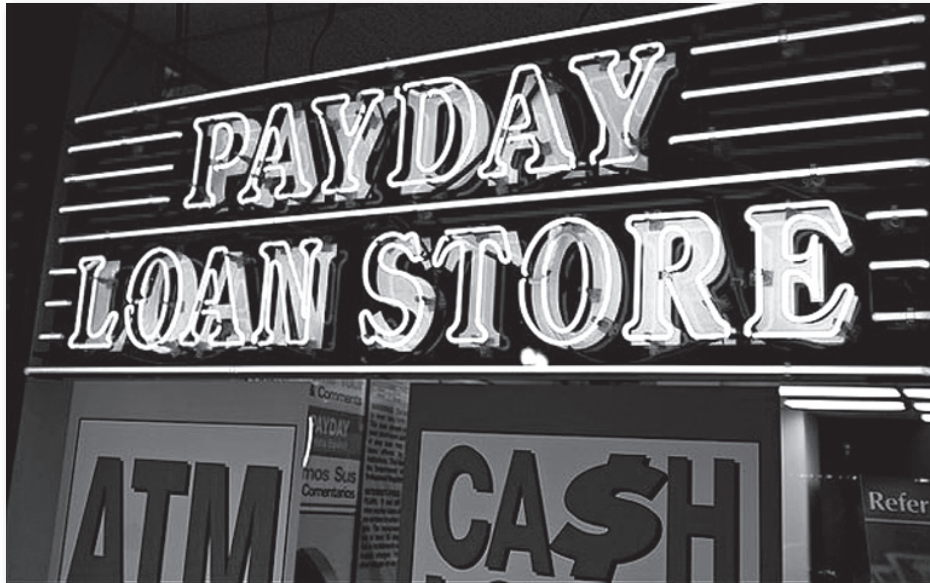

Payday Lending: Friend or Foe?

An Analysis of the CFPB's 2016 Proposed Rules

By Lowell Ritter*

Introduction

While working as a security guard in Kansas City, MO, Elliot Clark received a phone call from his daughter telling him his wife had fallen in the backyard of their house.[1] She had broken her ankle in two places, requiring two pins and a metal plate. Mrs. Clark was working for JC Penney and fell three days before becoming eligible to receive full health benefits. She ended up being out of work for almost eight months. Mr. Clark, a Vietnam veteran and father of two, quickly found himself responsible for all of the day-to-day expenses, as well as a $25,000 hospital bill. When, at the end of the month, he could not make ends meet, he went to the bank to get a loan, but was told he did not qualify.

Feeling as though he was out of options, Mr. Clark approached a payday lender to borrow $500. He still struggled to keep up with it all. He recalls "taking one step forward, then two steps back." Mr. Clark ended up borrowing five payday loans for a total of $2500. It took Mr. Clark over five and a half years to pay the loans off. In the end, he ended up paying more than *$55,000 in interest and fees* – twenty-two times the original principal of the loan.

When Trudy Robideau faced an $800 car repair and had no way to pay for it, she, like Mr. Clark, turned desperately to a payday loan.[2] When the loan came due, Robideau could not afford to repay it; the lender offered to renew it, but only if Robideau was willing to pay a fee on top of the fee she already paid to receive the loan in the first place. She decided to "renew" the loan, meaning she paid the fee instead of repaying the principal balance of the loan. Robideau continued doing this until she was eventually borrowing from other payday lenders to repay the $800. That car repair ultimately cost Robideau thousands of dollars.

Raymond Chaney's story is similar. He borrowed $400 for car repairs, and when he could not afford to pay it back, he renewed his loan several times, not much different from Robideau.[3] Caught in the cycle, Chaney borrowed $3000, but owed close to $12,000 with fees and interest.

Mr. Clark, Ms. Robideau, and Mr. Chaney all found themselves trapped by payday loans.

There are many advertisements for these loans such as: "Get up to $1000 as soon as tomorrow!;" "$100-$1000 approved in two minutes!;" "bad credit OK." The loans can seem like an optimal idea in a desperate situation and can quickly resolve necessary and unexpected expenses. However, the loans can also have unintended consequences, even for the most well-intentioned borrowers. For that reason, the loans are not without controversy, as consumer watchdog groups and federal agencies view the potential negative consequences as far outweighing the potential positive aspects. This led the Consumer Financial Protection Bureau (CFPB) to issue proposed regulations in June 2016 as a way of combatting harmful practices related to the payday lending industry.

This article analyzes the CFPB's proposed regulations in the context of the historical background of the industry, applicable federal and state legislation, and other relevant legal authority. The first section provides background on the payday lending industry and today's prevalence of payday lending. The second section analyzes the CFPB's 2016 proposed regulations, including its authority to promulgate the rules and the central components of the rules. The third section examines the arguments for and against payday lending, including reaction to the proposed regulations and an evaluation of whether national regulation is appropriate.

Background

What is a payday loan?

Payday loans are small amounts of money lent to borrowers for a short period of time with high interest rates and fees, not secured by any collateral.[4] The amount of the loan is typically small, ranging from as little as $100, with some lenders lending up to $1000. The average loan is $375.[5]

The fee ranges from $10 to $30 for each $100 borrowed, according to the CFPB. While some describe the fee as an interest rate, it is typically a fee charged on the loan. Under federal law, lenders must calculate the fee as an Annual Percentage Rate, which gives more meaning to the number. In other words, a fee of $50, for example, turns into an annual percentage rate.[6] Based on the CFPB's fee estimates, consumers are charged an effective APR of close to 400 percent on a $15 fee for each $100 borrowed.[7] Other financial products, such as credit cards, typically carry an annual interest rate of twelve to thirty percent.[8] Many payday lenders give consumers the option to extend the loan for an additional fee.

This led the Consumer Financial Protection Bureau (CFPB) to issue proposed regulations in June 2016 as a way of combatting harmful practices related to the payday lending industry.

The loans are called "payday" loans because borrowers write a check in the amount of the loan plus any fee or provide their bank account information to the lender at the time the funds are distributed. The check is then cashed (or funds withdrawn, if bank account information was provided) on an agreed upon later date, typically the consumer's next payday. In theory, the small-dollar loan is one the borrower will use for an emergency expense and pay back within the two weeks. However, as mentioned above, consumers have the option of extending the initial loan period for an additional fee.[9]

Payday loans are often criticized for several reasons. Critics point to large fees, as in Mr. Clark's case, which stem from initial fees charged and the ability to renew loans. Indeed, one author writes that "the debt trap is the business plan."[10] In fact, "[t]he average payday borrower is in debt for nearly 200 days – more than half a year and one-in-four borrowers spends at least eighty-three percent of their year owing money to payday lenders."[11] Others refute the idea that payday loans trap borrowers in debt[12] and point to the fact that low-income consumers have no other option in an emergency. These ideas are discussed more extensively later in this paper.

The Prevalence of Payday Lending

"Literally, do anything else." This was Sarah Silverman's advice on what to do instead of taking out a payday loan when she appeared on John Oliver's *Last Week Tonight.*[13] Payday lending has grown significantly and is now a $46 billion industry.[14] The number of payday lenders now exceeds the number of McDonalds in the United States.[15] Former President Obama has even commented that "[i]n Alabama…there are four times as many payday lending stores as there are McDonald's."[16]

Growth in the industry is unprecedented, indicated by the fact that "payday and other short-term loan outlets nearly tripled in number between 1999 and 2006."[17] Today, there are more than 20,000 payday loan locations in the United States.[18] Even Google joined the debate when they banned all payday loan ads by prohibiting ads for loans in which the due date is within 60 days of the issue date.[19]

Who Uses Payday Loans?

5.5 percent of adults in the United States have used a payday loan.[20] This figure rises among certain income brackets. For example, about eleven percent of those earning between $15,000 and $25,000 per year have used a payday loan.[21] The rate similarly rises for other categories of individuals. "Thirteen percent of those who are separated or divorced have used a payday loan" and "Twelve percent of those who are disabled have used a payday loan."[22]

The typical payday borrower is often a female.[23] In addition, a significant proportion of borrowers are single mothers.[24] The reasons for female prevalence in payday loan borrowing are not clear, but one author notes that it may be because of "persisting wage gaps between women and men."[25] The Pew study further identified five unique categories of individuals, combining various characteristics, most likely to use payday lending services: (1) individuals who do not have a four-year college degree; (2) home renters; (3) African Americans; (4) individuals earning less than $40,000 per year; (5) individuals who are separated or divorced.[26]

The Pew study found that most borrowers (sixty-nine percent) use their very first loan for recurring expenses, including

utility bills, credit card payments, rent, and food.[27] This finding is significant because it means that most borrowers are *not* using the funds for emergency expenses, as many argue to be the purpose of the loans. The borrower is over-extended and is not earning enough to meet his or her expenses. Thus, when the bill comes due, even if that due date is extended into the future, some expense will likely go unpaid.

Interestingly, "[i]n the past five years, forty-two percent of Millennials used an Alternative Financial Services product, such as payday loans, pawnshops, auto title loans, tax refund advances, and rent-to-own products."[28] This suggests that payday lending is becoming more prevalent as millennials are exploring it as an option.

The CFPB and Its June 2016 Regulations

When the Dodd-Frank Wall Street Reform Act was enacted in 2010, it created the Consumer Financial Protection Bureau (CFPB). The CFPB is an agency of the United States government and one of its roles is to "supervise banks, credit unions, and other financial companies, and enforce federal consumer financial laws."[29] The CFPB has been heavily involved in payday lending, possessing "the [clear] authority to regulate payday and title loans."[30] Importantly, however, the CFPB does not have the power to set interest rate caps.[31] The agency has enforcement authority to ensure "consumers are protected from unfair, deceptive, or abusive acts and practices and from discrimination."[32] This includes the authority to investigate and issue subpoenas, hold hearings, and pursue litigation.[33]

The Dodd Frank Act also explicitly authorizes the CFPB's broad rulemaking authority.[34] As of January 2015, it was widely known that "[f]or the first time, the [CFPB] has started to examine payday loans to consider regulating them."[35] In early June 2016, the CFPB released its long awaited proposed rules regulating payday loans and lenders.[36] The CFPB expressly utilized its authority under the Dodd Frank Act to do so.[37] The agency's motivations in issuing the proposed regulations are clear. The proposal states that typical users of loans are those who live paycheck to paycheck, that lenders engage in "harmful practices," and that there is a "high likelihood" of harm to consumers who cannot repay their loans.

Coverage of the Regulations

The proposed regulations would apply to short-term payday loans of forty-five days or less and short-term vehicle title loans. They would also apply to longer-term loans when two conditions are met: the loan has "(1) a total cost of credit that exceeds thirty-six percent; and (2) either a lien or other security interest in the consumer's vehicle or a form of 'leveraged payment mechanism' that gives the lender a right to initiate transfers from the consumer's account or to obtain payment through a payroll deduction or other direct access to the consumer's paycheck."[38] Thus, both short-term and long-term payday loans are likely covered if the money can be withdrawn from the consumer's checking account.

The proposed regulations define a lender as "a person who regularly makes loans to consumers primarily for personal, family, or household purposes."[39] The rest of the regulations are tied to this definition. Many different types of lenders could be included under this broad language, thus importantly expanding the scope of the proposed regulations even further than the Truth in Lending Act.[40]

In early June 2016, the CFPB released its long awaited proposed rules regulating payday loans and lenders.

Purported Problems with Payday Lending and Their Associated Proposed Regulation

This section of the paper will follow a problem and solution approach by: (1) identifying a major criticism of payday loans; (2) identifying a key proposed regulation designed to address that problem; and (3) analyzing the potential implications of the proposed regulation in practice.

Problem: Payday lenders perform inadequate checks of credit worthiness. The CFPB indicates one of its primary concerns is "...that consumers are being set up to fail with loan payments that they are unable to repay."[41] Currently, as Ronald Mann and Jim Hawkins point out, "[t]o assess the creditworthiness of the borrower, the typical lender...will collect a few pieces of information about the borrower, including proof of identification, evidence of income, and a current bank statement."[42] The information is typically input into a software program that will then either indicate a borrower is approved or denied.[43]

Unfortunately, little information is available about what goes into the current scoring systems because they are often proprietary. For example, ACE Cash Express notes on its website that its method is a "proprietary loan scoring system"[44] Thus, there is no way to know what (if any) restrictions are placed on potential borrowers, such as minimum income requirements, or a meaningful comparison of income and expenses. Nonetheless, many argue that the checks that are performed do not truly assess a borrower's ability to repay, issuing loans to those who will not have the means to repay them (and sometimes knowingly doing this).

Associated Proposed Regulation: Dubbed the "Full Payment Test,"[45] Proposed §1041 would require lenders to better assess a borrower's ability to repay the full loan on time. §1041.4 would make it "an abusive and an unfair act or practice for a lender to make a covered short-term loan without reasonably determining that the consumer has the ability to repay the loan."[46] "Ability to repay" is further defined by the proposed regulation to mean "that the consumer has the ability to repay the loan without reborrowing and while meeting the consumer's major financial obligations and basic living expenses."[47]

Proposed §1041.5 would require a prescribed minimum methodology "using a residual income analysis and an assessment of the consumer's prior borrowing history."[48] Specifically, the minimum methodology would take into account "...projections of the consumer's net income, major financial obligations, and basic living expenses..."[49]

Implications: The "Full Payment Test" could result in fewer defaults on loans and a higher on-time repayment rate. This would be accomplished through the enhanced up-front screening of borrowers. Specifically, it would be ensured that borrowers have enough money to not only repay the loan, but also to pay for basic living expenses. However, this would also have the effect of screening out potential borrowers who truly need the loans. As described later in this paper, the borrower who *does not* have the funds to pay for basic living expenses is the one who needs these loans. That borrower could be screened out under these proposed regulations. While that may be the intent (not loaning to that customer to prevent default or renewals on the loan), that person is left without options in the case of a financial emergency.

Problem: The structure of payday lending provides an incentive for payday lenders to target people with an inability to repay on time because those borrowers will ultimately pay more by renewing their loan. The CFPB explicitly recognizes this, writing in the proposal that "[t]he business model of lenders who make payday and single-payment

vehicle title loans is predicated on the lenders' ability to secure extensive reborrowing."[50] The choice essentially comes down to "paying $30 to keep the loan for another two weeks or paying $230 to repay the loan all at once."[51] Borrowers often only see the short term benefits in paying the smaller amount while failing to realize the long term drawbacks of paying the $30. Indeed, a limit on the amount of times a loan may be rolled over is often the "response of choice among states."[52]

Associated Proposed Regulation: The proposed regulations specifically address these concerns. A "presumption of unaffordability" would apply "when a consumer seeks a covered short-term loan during the term of a covered short-term loan made under proposed § 1041.5."[53] Thus, a lender would be prohibited from making a loan to a consumer when that consumer already has an outstanding loan. That presumption, however, can be overcome if the lender satisfies specific, narrow requirements set out in the rules. For example, one way to rebut the presumption is to show that the consumer "paid the prior covered short-term loan in full and the amount that would be owed by the consumer for the new covered short-term loan could not exceed fifty percent of the amount that the consumer paid on the prior loan."[54] The point here is, again, to ensure a borrower's ability to repay. In no case would a fourth loan in a row be allowed.

There is a further "presumption of unaffordability" for 30 days after an initial loan is received ("cooling off period"). This presumption can be overcome in the same way stated above. However, if the new loan would be the fourth loan in a row, the "cooling off period" is *mandatory* and cannot be overcome by the lender.[55] The CFPB's intent seems to be to allow a certain amount of successive borrowing, but to place limits on that number of loans that can consecutively be borrowed within a certain time period.

The CFPB provides a "way out" (or an "alternative") of the above restrictions *and* the ability to repay determination if the lender voluntarily chooses instead to comply with the "conditional exemption" of §1041.7. This section would allow consecutive loans, but provides additional protections to borrowers (and puts additional restrictions on lenders). §1041.7 would require the first loan to be no greater than $500, the second to be no greater than two-thirds of the first (no more than about $333), and the third loan to be no greater than one-third of the first (no more than about $167). Importantly, this would apply regardless of whether the loan was made by "the same lender, an affiliate, or unaffiliated lenders."

Thus, the lender can choose to comply with Section 7 or face seemingly stricter requirements, needing to overcome a presumption of unaffordability to loan consecutive loans. The CFPB highlights this as an option for consumers to "take out a short-term loan up to $500 without the full payment test as part of the principal payoff option that is directly structured to keep consumers from being trapped in debt."[56]

Implications: These loans (which I am calling "Section 7 loans") encourage voluntary compliance with the rules by focusing on the number of loans allowed to be taken out. Thus, by following Section 7's rules, a borrower need not meet the full payment test or other requirements. This helps get lenders on board with the rules by having them comply with what the CFPB really wants to crack down on and still aims to protect consumers. By giving lenders the choice, lenders may feel more inclined to comply.

Moreover, the general proposition of limiting loans is positive for consumers, but will certainly not be looked upon favorably by the lending industry. The industry seems to feed off of repeat business and, in particular, borrowers taking out more than one loan at once. The cooling off period would further cut down on the number of loans a borrower carries at any one time. While the industry may not be behind this rule, it would go a far way to achieve a compromise in the sense that loans are not prohibited, but are regulated in a way to protect consumers.

One potential drawback for consumers is the limit on the amount of loans. The amounts could be seen as small by some borrowers and may not fully address a borrower's needs. For example, the borrowers introduced at the beginning of this paper would need more than $500 (consider the $800 car repair).

Problem: Lack of disclosure to consumers. The Truth in Lending Act requires certain disclosures primarily related to APR and finance charges (discussed *infra*). The proposed regulations go further to mandate disclosures more specifically tailored to payday lending. In the spirit of the relative acts, "[t]he Bureau believes that the proposed disclosures would, consistent with Dodd-Frank section 1032(a), ensure that these costs, benefits, and risks are fully, accurately, and effectively disclosed to consumers."[57]

Associated Proposed Regulation: The proposed regulations require disclosures in conjunction with the Section 7 loans. These loans are specifically meant to protect consumers, but also add additional requirements, including the disclosure piece. First, the disclosures must be "clear and conspicuous."[58] They would further be required to be "segregated from all other written materials" without any additional content.[59] Second, the disclosures would be required to be disclosed in writing or electronically, viewable either on paper or on a screen, but not "orally or through a recorded message."[60] While those disclosures are already required by the TILA, these new rules would go further.

The new rules go further by requiring detailed forms be sent to borrowers; the CFPB has provided model forms similar to those required by Proposed §1041.7(e)(3).[61] The first required notice clearly communicates to the consumer that any loan taken out after the first loan must be smaller. The notice must be issued before distributing the first funds to the consumer. In addition, the form has a chart which sets out the maximum loans after the first loan and indicates a fourth loan would not be permitted until the cooling off period lapses. An additional notice would be required before making the third loan in a sequence, telling the consumer that "the new Section 7 loan must be smaller than the consumer's prior two loans and that the consumer cannot take another similar loan for at least another 30 days after repaying the new loan."[62]

The proposed regulations would also require "two new disclosures to help consumers better understand and mitigate the costs and risks relating to payment presentment practices in connection with covered loans."[63] These disclosures were not ever required by the TILA. The first requires a notice that the lender will be withdrawing funds for a payment.[64] This would similarly have to be conspicuous and in writing. It would also have to be "substantially similar" to the model forms provided. The notice informs the consumer a payment is upcoming, the method for the payment, the date, and the amount. The model form uses as an example the language: "On November 12, 2016, Willow Lending will attempt to withdraw a payment of $80 from your account ending in 0022. The payment will be withdrawn by check, using check #999." This is significant because the notice is required before *each* payment transfer, not only those that are unique or have changed in some way. In addition, these disclosures apply to *all* covered loans, not just the Section 7 loans. The second would require lenders "to provide a consumer rights notice after a lender has triggered the limitations" in Proposed §1041.14 (discussed *infra*).

Interestingly, most of the disclosures "may" be provided in a language other than English and the lender *must* provide the notice in English if the consumer requests it.[65] However, there does not appear to be a requirement to provide notices in a borrower's primary spoken language (compare California's law, *infra*).

Implications: First, it is important to note that some disclosures would only apply to the Section 7 loans (notated above). Again, the point is to have lenders voluntarily comply with these additional rules, incentivized by the ability to make consecutive loans without further ability to repay determinations.

The latter disclosures (which apply to all loans) are highly positive for consumers because they focus on the idea that alerting consumers to imminent withdrawals will help avoid penalties, such as overdraft fees. Specifically, by telling a borrower that money is about to be withdrawn, the borrower can ensure that money is available to avoid overdraft fees. One area of potential improvement would be to provide notices in languages other than English, particularly when requested. While these additional disclosures will undoubtedly result in an increased cost to lenders (either through mailing costs or labor costs), the benefits certainly outweigh the drawbacks. In addition, disclosures may be made through electronic means, saving lenders mailing costs.

***Problem*:** When a lender attempts to withdraw funds from a consumer's account and the consumer does not have sufficient funds for the transaction to be successfully completed, the bank will often charge an insufficient funds fee. Thus, if the lender makes multiple attempts, the consumer could incur several charges, putting his or her bank account far in the red.

Associated Proposed Regulation: First, Proposed §1041.13 would make it an unfair and abusive act or practice for a lender "to attempt to withdraw payment from a consumer's account in connection with a covered loan after the lender's second consecutive attempt to withdraw payment from the account has failed due to a lack of sufficient funds."[66] Second, Proposed §1041.14 specifically prohibits more than two consecutive unsuccessful transfers unless new authorization is obtained from the consumer.[67]

Proposed §1041.15 requires a notice (as mentioned above) to alert consumers "to the fact that two consecutive payment withdrawal attempts to their accounts have failed."[68] This addresses the fact that consumers may not even know multiple attempts have been made to withdraw funds from their bank account.

Implications: This regulation could help borrowers in two ways. First, it could directly help them by ensuring accounts are not overdrawn, resulting in less fees to consumers. Second, it could indirectly benefit consumers by pressuring lenders to not make loans to consumers when they know that the loan cannot be repaid. It would not be wise for a lender to make a loan knowing that it cannot be repaid and knowing they may never receive their money after two unsuccessful attempts. At the same time, this rule seems a bit strict since it could potentially result in a lender never receiving money that is rightfully theirs. One way to improve the rule may be to increase the number of allowed attempts before requiring new authorization (to 4, instead of 2, for example).

The Case for and Against Small Dollar Lending

Reaction to the CFPB's Proposed Regulations – Differing Views on Payday Lending

As was widely expected, reviews of the regulations are mixed and much of the criticism seems to hinge on the Full Payment Test. Advocates for low income populations argue the proposed regulations do not go far enough. For example, Nick Bourke, Director of the small-dollar loans project at The Pew Charitable Trusts wrote that the proposed rules "miss[] the mark."[69] He suggested that the rules should include a limit on required payments and longer repayment periods.[70] Alex Horowitz, Senior Officer of the same project, said the regulations should focus on "lower prices and fees, smaller installment payments, and quicker application processing."[71] He criticized the current proposed regulations as "provid[ing] more paperwork for the same 400 percent APR loan…[t]hat's not consumer protection."[72]

Payday loan industry advocates, on the other hand, argue the regulations go too far. The Chief Executive Officer of Community Financial Services Association of America (CFSA), Dennis Shaul, said in a statement that the rule "presents a staggering blow to consumers as it will cut off access to credit for millions of Americans who use small-dollar loans to manage a budget shortfall or unexpected expense."[73] He further warns of "financial havoc" across the United States.[74] It is interesting to note that advocates for consumers *and* industry spokespeople both cite *consumers* to support their propositions.

Mr. Shaul's comments are common among those who advocate for payday loans, despite some of their obvious flaws. The most often cited argument is that consumers are in need of these loans that fill an otherwise unmet critical need. Without them, the argument goes, consumers would have no way of paying necessary and often unexpected expenses. The Full Payment Test may exclude borrowers who need these loans the most. It is the borrowers who *do not* have the ability to repay the loans that likely need them the most. Therefore, these loans may simply be good public policy, as they help ensure would-be borrowers do not instead turn to unlawful means of obtaining money.

Another argument is that payday loans are not as expensive as some unfortunate, albeit unintended, alternatives. For example, Aimee Minnich points out that payday loans are often cheaper than over-drafting a checking account or missing a credit card payment.[75] Wells Fargo, for example, charges $35 per overdraft.[76] Wells Fargo further notes that up to four *per day* may be charged, totaling $140. Thus, if a customer made four $5 purchases that over-drafted his or her account unintentionally, he or she could be charged $140 on a $20 "loan." Similarly, banks charge credit card holders late fees of $25-$35, depending on the customer's payment history.[77]

Others point to the fact that consumers use these products voluntarily with awareness of the associated risks.[78] The exceedingly high interest rates can cause some to have a knee-jerk reaction of wanting to regulate without first considering alternatives. However, Thaya Brook Knight points out that these consumers need the loans (and many do repay them on time), the fee charged is no different than other financial services fees, and that rolling over loans only points to slim margins for lenders.[79] As two other authors put it: "Scholars calling for intrusive regulation or outright prohibition of payday lending have skipped over the necessary step of explaining precisely what it is about this market that is so offensive as to justify prohibition or regulation."[80]

On the one hand, many consumers do need these loans

and, as Ms. Knight mentions, do in fact repay the loans on time. However, critics calling for an outright prohibition may be leaving these consumers out in the cold. This is one justification for regulating, rather than prohibiting, payday loans. This is, in essence, what the CFPB's proposed regulations do. While some may argue the proposed regulations go too far, they do not prohibit all payday loans and they leave the loans available to those who need them. It also seems as though CFPB has gone to great lengths to describe what is wrong with payday loans, including extensive research, which seems to contradict the point made by Mann and Hawkins.

Additional Concerns

One item that the proposed rules do not cover is collection practices of payday loans. This is most likely because the Fair Debt Collection Practices Act[81] already covers these practices. For example, the Act prohibits "conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt."[82]

Nonetheless, consumers still face prohibited debt collection practices. The CFPB found that the most common consumer complaints were "continued attempts to collect debt not owed" and unlawful "communication tactics."[83] Some representative examples include: "companies threatening to take legal action (thirty percent), using obscene, profane, or abusive language (seven percent), calling after being sent written cease communication notices (six percent), or calling outside of 8 a.m. to 9 p.m. (three percent)."[84]

ACE Cash Express recently reached a settlement of $10 million with the Consumer Financial Protection Bureau.[85] Some of the claims included that ACE Cash Express "repeatedly called the consumers' employers and relatives and shared the details of the debt."[86] In addition, the company encouraged borrowers to take out a *new* loan to pay back the one they currently owed.[87] The company also threatened the consumers with jail time.[88]

There's Already a Law for That…Right? – Existing Laws Affecting Payday Lending

One argument against national agency created regulations is that there is already sufficient regulation on the federal and state levels. The federal Truth in Lending Act is one the most applicable pieces of federal legislation. In addition, various state laws address the issue and many think this is an issue best left to the states to regulate.

Federal Law

Truth in Lending Act

The Truth in Lending Act[89] (TILA) was enacted in 1968 to "assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit, and to protect the consumer against inaccurate and unfair credit billing and credit card practices."[90]

Courts have consistently held that these regulations are applicable to payday lenders. Under the act, an entity is a "creditor" subject to the statutory requirements if that business "regularly extends credit" and "is the person to whom the debt arising from the consumer credit transaction is initially payable..." The regulations further state that an individual or business is a "creditor" when four conditions are met: (1) "the credit is offered or extended to consumers;" (2) such offering is done on a regular basis; (3) the credit has an associated finance charge or is payable in more than four installments pursuant to a written agreement; and (4) "the credit is primarily for personal, family, or household purposes."[91] In 2000, the Board of Governors of the Federal Reserve System updated the official commentary to the regulations to explicitly state payday loans are "credit" for purposes of TILA.[92]

One argument against national agency created regulations is that there is already sufficient regulation on the federal and state levels.

Thus, payday lenders must comply with the TILA, which focuses primarily on disclosure. Indeed "providing proper disclosures is at TILA's very core."[93] Some of the central required disclosures include: the identity of the creditor,[94] the amount financed,[95] the finance charge,[96] the APR[97], and the payment schedule.[98] The regulations also prescribe *how* the items must be disclosed. The disclosures must be made "clearly and conspicuously in writing, in a form that the consumer may keep."[99] The required disclosures must be grouped together by themselves, without any extraneous information. This grouping together, often within bordered lines on a page, has come to be known as the "federal box" or the "TILA box." The box concept was introduced to "provide consumers with simpler, more understandable information" and requires "all TILA disclosures to be segregated from the contract terms, with the APR and finance charge disclosures receiving the most prominence."[100] Some guidance even recommends enclosing the required disclosures in a box to comply with the statute.[101]

The CFPB's proposed regulations are necessary if more substantive aspects of payday lending, other than simply disclosure, will be addressed. For example, the TILA has nothing to do with a consumer's ability to repay or the number of loans a consumer may borrow at a given time. The TILA is a generally applicable law and is not narrowly tailored to payday lending. For that reason, many see the need for the proposed regulations even with TILA already in existence.[102]

State Law

Because federal legislation, such as the Truth in Lending Act, is limited in its scope and applicability to payday loans, many states have enacted their own legislation to further curb payday lenders or even outlaw payday loans altogether. In the absence of national reform prior to the proposed regulations, states began taking on the task themselves. The approaches vary widely among states: some have a complete ban on the loans, whereas other states effectively prohibit payday loans by prescribing an interest rate so low that no payday lender would operate in the state. Others allow payday lending, but regulate it in an effort to protect consumers. Still others allow payday lending with minimal restrictions. The following is a look at a few approaches.

Arizona: In July 2010, Arizona effectively outlawed payday loans.[103] More accurately, Arizona had previously enacted an exception to a cap on interest rates and that provision expired in July of 2010 (the "sunset provision").[104] Attempts to extend this exception failed, both through a ballot initiative and proposed legislation in Arizona's House and Senate. Arizona's Attorney General has vowed to "aggressively pursue payday lenders who attempt to evade the ban on payday loans."[105]

The payday lending industry reacted by initiating Proposition 200 or the "Payday Loan Reform Act" in 2008.[106] While that proposition contained some positive changes for consumers, including a decreased fee and interest rate cap, it would also, of course, allow payday lending in the state by removing the "sunset provision."[107] Voters rejected the initiative with approximately sixty percent of voters against it.[108]

When the ballot initiative was re-

jected, payday lenders turned to car title loans.[109] According to the New York Times, state records show that ACE Cash Express registered its locations in Arizona as car title lenders, skirting the requirements of the law.[110] A car title loan is different than a payday loan in that the borrower gives his or her title to the lender; it is returned upon full payment of the loan.[111] The vehicle is used as collateral and the lender has the right to seize the vehicle if the loan is not repaid on time. Indeed, the CFPB recently found that one in five borrowers has their car seized as a result of defaulting on one of these loans.[112] The CFPB's new proposed regulations would also cover these loans.

California: While California has not entirely banned payday loans, they have enacted legislation aimed at protecting consumers from some of the perceived harmful aspects of payday loans. Many of the most common criticisms are addressed in California's law. For example, a payday lender may only make one loan to an individual at a time and the loan cannot exceed $300.[113] Further, lenders may only charge a maximum fee of fifteen percent of the total amount of the check (up to $45).[114] The law further specifically prohibits a lender allowing a customer to pay off one loan with another loan.[115] This, therefore, is aimed at avoiding the cycle of debt borrowers can get trapped in.

To address issues of disclosure to consumers, the law requires that payday lenders post a fee schedule at every location.[116] Similar to the CFPB's limit on attempted withdrawals, California allows only one bounced check fee up to $15 in the event a borrower's check bounces.[117] Required notices must be given to the borrower "in the same language principally used in any oral discussions or negotiations leading to execution of the deferred deposit agreement and shall be in at least 10-point type."[118] Finally, payday lenders must *specifically notify* consumers that a consumer cannot be criminally prosecuted or threatened with prosecution for insufficient funds or a returned check.[119]

While the above points are some highlights, California has many additional regulations which protect consumers. The state also has an extensive enforcement provision of the law, including a private cause of action and other penalties for misconduct.[120]

Massachusetts: The state of Massachusetts effectively prohibits payday loans by having a small loan rate cap of twenty three percent.[121] In fact, the Massachusetts government website even states that "[p]ayday lending is not specifically prohibited in Massachusetts but what is generally referred to as a 'payday loan' is illegal due to the high annual percentage rate charged."[122] At this rate, a lender would not be able to be profitable. Nonetheless, those who still wish to lend in Massachusetts must obtain a license to do so.

New York: New York prohibits payday lending and has a usury cap in place for other loans, set at sixteen percent. However, online lenders were still lending in the state and attempting to collect debt after this prohibition went into effect. The state "has managed to exclude payday lenders only through conspicuously aggressive enforcement."[123] The Attorney General's office has aggressively pursued online payday lenders in the state.[124]

State laws have created a patchwork of legislation across the United States. The CFPB rules would at least bring uniformity across the United States. However, in instances where the state had *more* stringent requirements in place, lenders would be required to abide by those. Nonetheless, the proposed rules would set a floor, with states having the ability to enact further protections for consumers.

President Donald Trump's stunning victory in the 2016 election could have a lasting impact on Dodd Frank, the CFPB, and payday lending.

Payday Loans and Native American Tribes[125]

As state consumer protection laws have been becoming more robust, as discussed above, the federal government has consistently "protected the….right of Native American tribes to govern their own affairs."[126] Indeed, "The Supreme Court has long viewed sovereign immunity as a basic feature of tribal sovereignty."[127] The Supreme Court has declared the general principle: "As a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity."[128] This is true even if the commercial activity or contract at issue was made off-reservation.[129]

Generally speaking, tribes themselves and "arms of the tribe" are immune from suit.[130] Litigation has focused on determining exactly what an "arm of the tribe" is. As scholars Nathalie Martin and Joshua Schwartz point out, the Supreme Court has not directly addressed this question.[131] However, the Supreme Court in *Inyo County, Cal. v. Paiute-Shoshone Indians of the Bishop Community of the Bishop Colony* wrote in a footnote that "The United States maintains, and the County does not dispute, that the Corporation is an 'arm' of the Tribe for sovereign immunity purposes."[132] As Schwartz and Martin conclude, "a corporation can be an 'arm of the tribe' for sovereign immunity purposes."[133] Thus, payday lenders see an opportunity in associating with a tribe to take advantage of tribal immunity. Ellen Harnick of the Center for Responsible Lending recently told the Huffington Post that "[t]he very purpose of an online lender affiliating with a tribe is specifically and expressly so that they can lend in violation of state laws."[134]

What is important for the purposes of this paper is whether the CFPB has the power to regulate Indian tribes, in light of the new proposed regulations. This is still a relatively open question.[135] However, a recent case demonstrates what may happen, on at least one set of facts.

A California district court recently sided with the CFPB in a lawsuit against a payday lender associated with an Indian tribe.[136] According to the opinion, Western Sky Loans was located on the Cheyenne River Sioux Tribe Reservation and included a call center and office. Everything prior to and during the application period would include the Western Sky Loans logo and be on its website. However, once Western Sky made the loan, it would immediately sell each loan to CashCall. The consumer "would receive a notice that the loan had been assigned to WS Funding," with consumers making all payments to CashCall.[137] In exchange for a fee paid by CashCall to Western Sky, "all economic risks and benefits of the transaction passed to CashCall."[138]

The CFPB invoked its authority to regulate "unfair, deceptive, and abusive acts and practices" (discussed *supra*) by bringing an enforcement action in federal court against the lender. The agency alleged the practices were "unfair, deceptive, and abusive" because state law outlawed them. Specifically, the CFPB alleged that "by servicing and collecting full payment on loans that state-licensing and usury laws had rendered wholly or partially void or uncollectible," CashCall violated federal law.[139]

The court held that the choice of law provision, mandating that the laws of the Cheyenne River Sioux Tribe Reservation would govern, was invalid. Instead, the court held the appropriate law that applied was that of the state of the individual borrowers.[140] Thus, the usury caps and other state laws applied and the loans were, the court wrote, "void or uncollectible under the laws of most of the Subject States."[141] Part of the holding relied on that fact that the *"true"* lender was not Western Sky Loans, but was CashCall. The court concluded this after "consider[ing] the totality of the circumstances and apply[ing] a 'predominant economic interest'" test.[142]

This case demonstrates that the CFPB is aware of lending practices that attempt to skirt state laws by associating with Indian tribes and that the CFPB is prepared to utilize its enforcement powers in that instance. This will be one of the key areas to watch in the coming years once the final regulations go into effect and the CFPB attempts to enforce them against a tribe, with initial guidance coming from a lower court and any finality only likely to come from the Supreme Court.

Payday Lending Under The Trump Administration

President Donald Trump's stunning victory in the 2016 election could have a lasting impact on Dodd Frank, the CFPB, and payday lending. The future of the CFPB and payday lending is now much more uncertain than it would have been under a Clinton administration, President Trump has stated his plan is to "dismantle the Dodd-Frank Act."[143] The new administration may entirely revoke the proposed rule, as an administrative agency has the power to "terminate the rulemaking" or may make substantial changes to the proposed rules.[144] While President Trump has invoked executive authority to begin the "dismantling," nothing definitive has occurred as of this writing.[145]

Conclusion

Some argue payday loans are a necessary evil, while others demand their total prohibition. Somewhere in the middle lies a sweet spot where consumers can get the short term credit they need while lenders act fairly in their lending and collection practices.

This paper analyzed the CFPB's comprehensive regulations in the historical context while also considering the current regulatory environment. The regulations are aimed at increased disclosure to consumers while also ensuring they have the ability to repay their loans. The analysis revealed how regulations on a national level can protect individuals like Elliott Clark, Trudy Robideau, and Raymond Chaney from a cycle of debt that eventually becomes insurmountable for many.

* *Candidate for Juris Doctor, University of Notre Dame Law School, 2017.* *Thank you to Professor Judith Fox, Clinical Professor of Law at the University of Notre Dame Law School, for her invaluable feedback and suggestions.*

---

1 Re:Dream Project, Elliott Clark, http://redreamproject.org/videos/elliott-clark/. Mr. Clark's story is summarized here.

2 Scott Horsley, *Payday Loans – An Endless Cycles Of Debt – Targeted By Federal Watchdog*, NPR (March 30, 2015), http://www.npr.org/2015/03/26/395421117/payday-loans-and-endless-cycles-of-debt-targeted-by-federal-watchdog.

3 Bob Sullivan, *"Like a drug:" Payday Loan Users Hooked on Quick-Cash Cycle*, NBC News (May 11, 2013), http://www.nbcnews.com/feature/in-plain-sight/drug-payday-loan-users-hooked-quick-cash-cycle-v18088751.

4 Federal Trade Commission, Payday Loans (March 2008), http://www.consumer.ftc.gov/articles/0097-payday-loans.

5 The Pew Charitable Trusts, *Payday Lending in America: Who Borrows, Where They Borrow, and Why* (2012), http://www.pewtrusts.org/~/media/legacy/uploadedfiles/pcs_assets/2012/pewpaydaylendingreport-pdf.pdf.

6 *See* Arkansans Against Abusive Payday Lending, *How to Calculate the Interest Rate on Payday Loans*, http://www.consumerfed.org/pdfs/AAAPL-How-to-Calculate-Interest-Rate.pdf. This is required by the federal Truth in Lending Act, discussed *infra*.

7 CFPB, *What is a Payday Loan?*, http://www.consumerfinance.gov/askcfpb/1567/what-payday-loan.html

8 *Id.*

9 Pew Trusts, *supra* note 5 ("Second, the conventional payday loan business model depends upon heavy
usage—often, renewals by borrowers who are unable to repay upon their next payday—for its profitability.").

10 Nathalie Martin, *1,000% Interest - Good While Supplies Last: A Study of Payday Loan Practices and Solutions*, 52 Ariz. L. Rev. 563 (2010).

11 Chris Morran, *The Average Payday Loan Borrower Spends More Than Half The Year In Debt To Lender*, The Consumerist (April 26, 2013), http://consumerist.com/2013/04/26/the-average-payday-loan-borrower-spends-more-than-half-the-year-in-debt-to-lender/. *See also* Neil Bhutta, Jacob Goldin & Tatianna Homonoff, *Consumer Borrowing After Payday Loan Bans,* 59 J. L. & Econ. 225, 228 (2016).

12 Marc Anthony Fusaro & Patricia J. Cirillo, *Do Payday Loans Trap Consumers in a Cycle of Debt?* (2011) ("We take these results as strong evidence that the high interest rates applicable to payday loans do not drive a 'cycle of debt.'").

13 Predatory Lending: Last Week Tonight with John Oliver (HBO), https://www.youtube.com/watch?v=PDylgzybWAw. *See also* Mehrsa Baradaran, How the Other Half Banks: Exclusion, Exploitation, and the Threat to Democracy (2015).

14 Mandi Woodruff, *The $46 Billion Payday Lending Industry is in for a Big Blow*, Yahoo News (February 10, 2015), http://finance.yahoo.com/news/CFPB-payday-lending-rules-explained-192558796.html

15 Steve Graves, *Think Payday Lending isn't out of control in the United States?*, http://www.csun.edu/~sg4002/research/mcdonalds_by_state.htm; http://www.csun.edu/~sg4002/research/research_home.html

16 Remarks of President Barack Obama, Weekly Address, The White House (March 28, 2015), https://www.whitehouse.gov/the-press-office/2015/03/28/weekly-address-protecting-working-americans-paychecks.

17 Martin, *supra* note 10 at 564.

18 Jeff Cox, *There Are More Payday Lenders in U.S. Than McDonald's*, NBC News (November 24, 2014), http://www.nbcnews.com/business/economy/there-are-more-payday-lenders-u-s-mcdonalds-n255156

19 Google Advertising Policies Help, *Financial Services,* https://support.google.com/adwordspolicy/answer/2464998?hl=en. *See also* David Graff, *An Update to our AdWords Policy on Lending Products*, Google Blog (May 11, 2016), https://blog.google/topics/public-policy/an-update-to-our-adwords-policy-on/ ("In that vein, today we're sharing an update that will go into effect on July 13, 2016: we're banning ads for payday loans and some related products from our ads systems.").

20 Pew Trusts, *supra* note 5.

21 *Id. See also,* Nathalie Martin and Ernesto Long, *High-Interest Loans and Class: Do Payday and Title Loans Really Serve the Middle Class?*, 24 Loy. Consumer L. Rev. 524 (2012) ("Regarding income of customers in Colorado, the mean gross income of all borrowers was $ 2,458

per month, or $29,496 annually. The monthly average was $2,691, or $32,292 annualized, for men and $2,266, or $27,192 annualized, for women.").

22 *Id.*

23 Amy Schmitz, *Females on the Fringe: Considering Gender in Payday Lending Policy*, 89 Chi.-Kent L. Rev. 65 (2013). *See also* Pew Trusts, *supra* note 5 ("Pew's survey found that borrowers are 52 percent women.").

24 *Id.* at 67. *See also* Patrick Hayes, *A Noose Around The Neck: Preventing Abusive Payday Lending Practices and Promoting Lower Cost Alternatives*, 35 Wm. Mitchell L. Rev. 1134 (2009).

25 *Id.* at 68.

26 Pew Trusts, *supra* note 5.

27 Pew Trusts, *supra* note 5.

28 PwC, *Millennials & Financial Literacy—The Struggle with Personal Finance* (2015), http://www.pwc.com/us/en/about-us/corporate-responsibility/assets/pwc-millennials-and-financial-literacy.pdf. The study did not indicate what portion of "Alternative Financial Services" are accessed online.

29 Consumer Financial Protection Bureau, *About Us,* http://www.consumerfinance.gov/the-bureau/

30 Nathalie Martin, *Regulating Payday Loans: Why This Should Make the CFPB'S Short List*; 2 Harv. Bus. L. Rev. Online 44 (2011) (citing Dodd-Frank Act. §1024 (a)(1)).

31 *Id.* ("Even though it cannot set interest rate caps, the CFPB has plenty of power to curb abusive lending.").

32 12 USC § 5511.

33 12 USC §§ 5561-5567.

34 12 USC § 5512 ("The Director may prescribe rules and issue orders and guidance, as may be necessary or appropriate to enable the Bureau to administer and carry out the purposes and objectives of the Federal consumer financial laws, and to prevent evasions thereof.").

35 Alan Zibel, *CFPB Sets Sights on Payday Loans*, Wall Street Journal (January 4, 2015), http://www.wsj.com/articles/cfpb-sets-sights-on-payday-loans-1420410479

36 David Silberman, *We've proposed a rule to protect consumers from payday debt traps*, CFPB (June 02, 2016), http://www.consumerfinance.gov/about-us/blog/weve-proposed-rule-protect-consumers-payday-debt-traps/. The regulations would be codified at 12 CFR §1041 and are available as of this writing at https://www.federalregister.gov/documents/2016/07/22/2016-13490/payday-vehicle-title-and-certain-high-cost-installment-loans. All references to the regulations contained herein are to the proposed regulation section, subject to change upon final enactment.

37 The rules state the "primary authority" is "section 1031 of the Dodd-Frank Wall Street Reform and Consumer Protection Act." Other authority relied on includes "section 1022 of the Dodd-Frank Act to prescribe rules and make exemptions from such rules as is necessary or appropriate to carry out the purposes and objectives of the consumer Federal consumer financial laws, section 1024 of the Dodd-Frank Act to facilitate supervision of certain non-bank financial service providers, and section 1032 of the Dodd-Frank Act to require disclosures to convey the costs, benefits, and risks of particular consumer financial products or services."

38 Proposed 12 CFR § 1041.3(b)(1) – (b)(2).

39 Proposed § 1041.2(a)(11).

40 *See* CFPB Proposal Section V. The CFPB acknowledged that this definition is broader than that in the Truth in Lending Act.

41 *CFPB Proposes Rule to End Payday Debt Traps* (June 2, 2016), http://files.consumerfinance.gov/f/documents/CFPB_Proposes_Rule_End_Payday_Debt_Traps.pdf

42 Ronald Mann and Jim Hawkins, *Just Until Payday*, 54 UCLA L. Rev. 855, 862-63 (2007).

43 *Id.*

44 *Id.* (quoting ACE Cash Express, Inc., Annual Report (Form 10-K), at 9 (Sept. 12, 2005)).

45 *CFPB Proposes Rule to End Payday Debt Traps*, *supra* note 41.

46 Proposed §1041.4. The idea of "covered loans" is discussed above, but essentially includes short-term and long-term loans by a lender to a borrower.

47 *Id.*

48 Proposed § 1041.5(b)(2).

49 Proposed § 1041.5(b).

50 CFPB Proposal at 212, Subpart B(2)(B), http://files.consumerfinance.gov/f/documents/Rulemaking_Payday_Vehicle_Title_Certain_High-Cost_Installment_Loans.pdf.

51 Mann & Hawkins, *supra* note 42.

52 *Id.*

53 Proposed § 1041.6.

54 Proposed § 1041.6(b)(2)(i)(A).

55 Proposed § 1041.6(f).

56 *CFPB Proposes Rule to End Payday Debt Traps*, *supra* note 41.

57 CFPB Proposal at 435, http://files.consumerfinance.gov/f/documents/Rulemaking_Payday_Vehicle_Title_Certain_High-Cost_Installment_Loans.pdf.

58 Proposed § 1041.7(e)(1)(i).

59 Proposed § 1041.7(e)(1)(iv).

60 Proposed § 1041.7(e)(1)(ii).

61 *See* CFPB Model Forms, http://s3.amazonaws.com/files.consumerfinance.gov/f/documents/1_-_Proposed_Model_Forms.pdf.

62 Proposed § 1041.7(e)(2)(ii).

63 Proposed Rules Overview of Section § 1041.15, Disclosure of Payment Transfer Attempts.

64 Proposed § 1041.15(b).

65 *See, e.g.,* Proposed § 1041.15(a)(8) ("Foreign Language Disclosures").

66 Proposed § 1041.13.

67 Proposed § 1041.14(b) (the restrictions) and Proposed § 1041.15(c) (exception allowing one immediate transfer to satisfy the debt) and Proposed § 1041.15(d) (exception allowing further attempts with customer authorization).

68 Proposed § 1041.15.

69 Pew Charitable Trusts, *Pew: CFPB's Proposed Payday Loan Rule Misses Historic Opportunity* (June 2, 2016), http://www.pewtrusts.org/en/about/news-room/press-releases/2016/06/01/pew-cfpbs-proposed-payday-loan-rule-misses-historic-opportunity

70 *Id.*

71 Gillian B. White, *Payday Loan Rule: Progress, but Still a Long Way to Go*, The Atlantic (June 2, 2016), http://www.theatlantic.com/business/archive/2016/06/cfpb-payday-loan-rule/485294/.

72 *Id.*

73 Community Financial Services Association of America Statement, http://www.prnewswire.com/news-releases/cfpb-rule-a-staggering-blow-to-consumers-300278214.html.

74 *Id.*

75 Aimee Minnich, Note, *Rational Regulation of Payday Lending*, 16 Kan. J.L. & Pub. Pol'y 84 (2008).

76 Wells Fargo Overdraft Protection and Overdraft Services, https://www.wellsfargo.com/checking/overdraft-services/.

77 *See, e.g.,* Discover APRs & Fees Interactive Guide, https://www.discover.com/credit-cards/cardmember-agreement/fees.html.

78 *See, e.g.*, Thaya Brook Knight, *Payday Lending is Not Harmful to Low Income Borrowers,* Cato Institute (May 6, 2016), http://www.cato.org/publications/commentary/pay-day-lending-not-harmful-low-income-borrowers.

79 *Id.*

80 Mann & Hawkins, *supra* note 42.

81 15 USC §1692.

82 15 USC §1692d.

83 CFPB, *Fair Debt Collection Practices Act: CFPB Annual Report 2015*, http://files.consumerfinance.gov/f/201503_cfpb-fair-debt-collection-practices-act.pdf.

84 *Id.* Calling outside those hours is prohibited by §1692c(a)(1).
85 Consumer Financial Protection Bureau, *CFPB Takes Action Against ACE Cash Express for Pushing Payday Borrowers Into Cycle of Debt*, July 10, 2014, http://www.consumerfinance.gov/newsroom/cfpb-takes-action-against-ace-cash-express-for-pushing-payday-borrowers-into-cycle-of-debt/
86 *Id.*
87 *Id.*
88 Danielle Douglas, *Payday Lender Ace Cash Express to Pay $10 million Over Debt-Collection Practices*, Washington Post (July 10, 2014), https://www.washingtonpost.com/business/economy/payday-lender-ace-cash-express-fined-over-abusive-debt-collection-practices/2014/07/10/04e9fa08-0858-11e4-8a6a-19355c7e870a_story.html.
89 Pub. L. No. 90-321, 82 Stat. 146 (1968) codified at 15 USC §1601-1667f. The regulations implementing the statute are controlling. *See* 12 CFR § 226.1(a).
90 15 USC §1601(a).
91 12 CFR §226.1.1(c)(1).
92 65 Fed. Reg. 17129 ("This purpose is furthered by applying the regulation to transactions, such as payday loans, that fall within the statutory definition of credit, regardless of how such transactions are treated or regulated under state law."); George F. Magera, *Closed-End Credit Sources Under the Truth in Lending Act: An Update at the Beginning of the 21st Century,* 54 Consumer Fin. L.Q. Rep. 79 (2000) (discussing the update in the regulations).
93 *Abubo v. Bank of New York Mellon*, 977 F.Supp.2d 1037 (D. Haw. 2013).
94 12 CFR §226.18(a).
95 12 CFR §226.18(b).
96 12 CFR §226.18(d).
97 12 CFR §226.18(e).
98 12 CFR §226.18(g). *See also* Julie Anderson, *Payday Loan Laws: A Survey of Illinois' and Federal Law that Applies to Payday Loans*, 17 J. of DuPage County Bar Ass'n (citing 12 CFR § 226.18) (discussing required disclosures).
99 12 CFR §226.17(a)(1).
100 Dee Pridgen, *Putting Some Teeth in TILA: From Disclosure to Substantive Regulation in the Mortgage Reform and Anti-Predatory Lending Act of 2010*, 24 Loy. Consumer L. Rev. 615 (2012).
101 Indiana Department of Financial Institutions, *Truth in Lending Disclosure Examples*, http://www.in.gov/dfi/2583.htm.
102 *See* Hayes *supra* note 24, at 1156 (discussing TILA's "shortcomings").
103 Terry Goddard, Letter to Lenders (June 9, 2010), https://www.azag.gov/sites/default/files/lettertolender.pdf. *See also* ARS Ch. 12.1, Article 1, §6-1263
104 Allison Woolston, Note, *Neither Borrower Nor Lender Be: The Future of Payday Lending in Arizona*, 52 Ariz. L. Rev. 853 (2010).
105 Office of the Arizona Attorney General, *Goddard to Aggressively Enforce Payday Loan Ban with 'Operation Sunset'* (June 9, 2010), https://www.azag.gov/press-release/goddard-aggressively-enforce-payday-loan-ban-operation-sunset.
106 Arizona Payday Loan Reform, Proposition 200, Ballotpedia (2008), https://ballotpedia.org/Arizona_Payday_Loan_Reform,_Proposition_200_(2008).
107 Leslie Parrish, *High-Cost Payday Lending Traps Arizona Borrowers,* Center for Responsible Lending (2008), http://www.responsiblelending.org/payday-lending/research-analysis/high-cost-of-payday-in-arizona.pdf
108 Arizona Payday Loan Reform, *supra* note 106.
109 Jessica Silver-Greenberg and Michael Corkery, *Rise in Loans Linked to Cars is Hurting Poor*, N.Y. Times (2014), http://dealbook.nytimes.com/2014/12/25/dipping-into-auto-equity-devastates-many-borrowers/?_r=1 ("When Arizona effectively outlawed payday loans, ACE Cash Express registered its payday loan storefronts in the state as car title lenders, state records show.").
110 *Id.*
111 CFPB, *CFPB Finds One-in-Five Auto Title Loan Borrowers Have Vehicle Seized for Failing to Repay Debt*, (2016), http://www.consumerfinance.gov/about-us/newsroom/cfpb-finds-one-five-auto-title-loan-borrowers-have-vehicle-seized-failing-repay-debt/ ("For these loans, borrowers use their vehicle – such as a car, truck, or motorcycle – for collateral and the lender holds their title in exchange for a loan amount").
112 *Id.*
113 Cal. Fin. Code §23035. The statute refers to a "deferred deposit transaction," which is a payday loan.
114 Cal. Fin. Code §23036.
115 Cal. Fin. Code §23037(a).
116 *Id.*
117 *Id.*
118 Cal. Fin. Code §23035(f).
119 Cal. Fin Code §23035(c)(3).
120 *See* Cal. Fin. Code §§23045-23064.5.
121 Mass. Gen. Laws Ann. ch. 140 §§ 96 et seq.; 209 Mass. Code Regs. 26.01.
122 Division of Banks, *Payday Loans,* http://www.mass.gov/ocabr/banking-and-finance/loans-and-mortgages/payday-loans.html.
123 Mann & Hawkins, *supra* note 42 at 862-63 (2007) (quoting the New York Attorney General's office).
124 *See* Evan Weinberger, *NY Warns Online Payday Lenders Over Illegal Loans,* Law 360 (August 6, 2013), http://www.law360.com/articles/462813/ny-warns-online-payday-lenders-over-illegal-loans.
125 While a comprehensive analysis of tribal immunity and payday lending is slightly outside the scope of this paper's analysis of the CFPB's proposed regulations, a glimpse is necessary to understand the background and why state legislation can sometimes be inadequate. For a comprehensive analysis on this precise issue, see Heather Petrovich, Note, *Circumventing State Consumer Protection Laws: Tribal Immunity and Internet Payday Lending*, 91 N.C.L. Rev. 326 (2012) (an entire article devoted to the issue of tribal immunity in the context of payday lending).
126 Heather L. Petrivich, Note, *Circumventing State Consumer Protection Laws: Tribal Immunity and Internet Payday Lending*, 91 N.C. L. Rev. 326, 327 (2012) ("This right has been essential to the relationship between the United States and tribes since the eighteenth century.").
127 Catherine T. Struve, *Tribal Immunity and Tribal* Courts, 36 Ariz. St. L.J. 137, 149 (2004).
128 *Kiowa Tribe v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 754 (1998).
129 *Id. See also* Nathalie Martin and Joshua Schwartz, *The Alliance Between Payday Lenders and Tribes: Are Both Tribal Sovereignty and Consumer Protection at Risk?*, 69 Wash & Lee L. Rev. 751 (2012) (citing *Kiowa Tribe v. Mfg. Techs*., 523 U.S. 751 (U.S. 1998)).
130 Petrivich, *supra* note 126 at 335 (citing Felix S. Cohen, Cohen's Handbook of Federal Indian Law §7.05[1][a], at 636 (2005)).
131 Martin and Schwartz, *supra* note 129 at 775.
132 Inyo County, Cal. v. Paiute-Shoshone Indians of the Bishop Community of the Bishop Colony, 538 U.S. 701, note 1 (2003).
133 Martin and Schwartz, *supra* note 129 at 775; *See id.*
134 Ben Walsh, *Outlawed by the States, Payday Lenders Take Refuge on Reservations,* The Huffington Post (September 8, 2015), http://www.huffingtonpost.com/2015/06/29/online-payday-lenders-reservations_n_7625006.html. *See also* Martin and Schwartz*, supra* note 129 at 766-67 (discussing why payday lenders affiliate with Indian tribes).
135 *See* Martin and Schwartz, *supra* note 129 at 798-801 (discussing applicability of Dodd Frank and CFPB regulations to Indian tribes).
136 CFPB v. CashCall Inc. et al., No. 2:15-cv-07522, 2016 WL 4820635 (C.D. Cal. Aug. 31, 2016).
137 *Id.* at *3.

138 *Id.* at *2.
139 *Id.* at *4.
140 *Id.* at *6.
141 *Id.* at *9.
142 *Id.* at *6.
143 Website of President-Elect Donald J. Trump, *Financial Services*, https://www.greatagain.gov/policy/financial-services.html. *See also* Annamaria Andtioyis, *From Mortgages to Payday Loans, How Trump Will Impact Consumer Lending*, The Wall Street Journal (November 10, 2016), http://blogs.wsj.com/moneybeat/2016/11/10/from-mortgages-to-payday-loans-how-trump-will-impact-consumer-lending/; Marilyn Geewax, *Trump Team Promises To 'Dismantle' Dodd-Frank Bank Regulations*, NPR (November 10, 2016), http://www.npr.org/sections/thetwo-way/2016/11/10/501610842/trump-team-promises-to-dismantle-dodd-frank-bank-regulations.
144 Office of the Federal Register, *A Guide to the Rulemaking Process,* ("If the rulemaking record contains persuasive new data or policy arguments, or poses difficult questions or criticisms, the agency may decide to terminate the rulemaking. Or, the agency may decide to continue the rulemaking but change aspects of the rule to reflect these new issues."). Federal agencies even have the ability to "…use a legislative rule to revise or repeal an existing regulation." Randy J. Kozel & Jeffrey A. Pojanowski, *Administrative Change*, 59 UCLA L. Rev. 112 (2011) (citing *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984)). Indeed, rulemaking is defined in the Administrative Procedure Act as "agency process for formulating, amending, or **repealing** a rule." 5 USC §551(5) (emphasis added).
145 *See* Ben Protess and Julie Hirschfeld Davis, *Trump Moves to Roll Back Obama-Era Financial Regulations,* NY Times, February 3, 2017, https://www.nytimes.com/2017/02/03/business/dealbook/trump-congress-financial-regulations.html?_r=0.