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DATE: MAY 20, 2014

RE: PAYDAY LENDING REGULATION: PAST, PRESENT, AND FUTURE

Table of Contents

INTRODUCTION **1**
- A. Payday Lenders 2
- B. Lender Advertising 3
- C. Payday Borrowers 5

DISCUSSION **6**

I. Current State Regulatory Framework **6**

II. Current Federal Regulatory Framework **10**

III. CFPB's Memorandum of Understanding with States **12**

IV. Future Federal Regulation of Payday Loans **13**
- A. The White Paper 13
- B. Preemption 14
- C. Potential Areas of Regulation 14

V. Trends in International Regulation **16**
- A. The United Kingdom ("UK") 16
- B. Canada 19

VI. Online Payday Lending **20**
- A. Growth of Online Lending 20
- B. Distinctions of the Online Payday Lending Model 23
- C. Offshore Online Lenders 23
- D. Tribal Lenders 25
- E. State Litigation With Tribal Lenders 27

VII. Alternatives to payday lending **29**

CONCLUSION **31**

INTRODUCTION

A payday loan is a short-term loan, for a small amount, which typically comes due on the borrower's next payday. Payday loans are offered by non-depository institutions and require the borrower to either issue a check or give the lender access to the borrower's checking account. The cost of the loan is a "finance charge" that typically ranges from $10-30 for every $100 borrowed.[1] Payday loans are currently regulated by varying state laws that limit loan amounts, duration, repayment terms, the number of loans a borrower can have, and fee caps. Some states effectively ban payday loans[2] through regulation, while other states do not regulate them at all.

In 2012, the Consumer Financial Protection Bureau ("CFPB") began reviewing payday loans to determine " . . . the right approach to protect consumers and ensure they have access to a small loan market that is fair, transparent, and competitive."[3] In its White Paper released on April 24, 2013, the CFPB determined payday loans "raise substantial consumer protection concerns" when used frequently.[4] In March of 2014, the CFPB began rulemaking efforts regarding payday loans with intent to prevent potential consumer harm and released another paper, *CFPB Data Point: Payday Lending*.[5]

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[1] Consumer Financial Protection Bureau, *What is a Payday Loan*, http://www.consumerprotection.gov/askcfpb/1567/what-payday-loan.html (last visited Apr. 1, 2014).

[2] Payday Loan Consumer Information, http://www.paydayloaninfo.org/state-information (last visited Apr. 1, 2014) (Arizona, Arkansas, Connecticut, Washington, D.C., Georgia, Maryland, Massachusetts, New Jersey, New York, North Carolina, Pennsylvania, Vermont, West Virginia).

[3] Press Release, CFPB, White Paper on payday loans and deposit advance products (Apr 24, 2013), available at http://www.consumerfinance.gov/reports/white-paper-on-payday-loans-and-deposit-advance-products.

[4] CFPB, *Payday Loans and Deposit Advance Products: A White Paper of Initial Data Findings*, p.43-44 (2013), available at http://bit.ly/CFPBPaydayPaper.

[5] *CFPB Data Point: Payday Lending*, available at www.consumerfinance.gov/reports/cfpb-data-points-payday-lending (Mar. 25, 2014).

A. Payday Lenders

The payday lending industry began in the mid-1990s, with roughly 200 stores throughout the United States.[6] At its peak, approximately 24,000 payday storefronts existed in the U.S., more than McDonald's and Starbucks combined. The industry is comprised of non-depository institutions that traditionally conducted business through brick-and-mortar establishments. Storefront payday lending peaked in 2007, when storefront loan volume was an estimated $43 billion. However, between 2007-2010, storefront loan volume declined to approximately $30 billion. In 2010, through traditional and online channels, the payday lending industry had an approximate loan volume of $44.3 billion.[7] Today, the industry shows tremendous growth through online lending.

Though the payday lending industry retains independently owned storefronts, nine major operators run roughly half of all U.S. stores. Five of these operators (Cash America, DFC Global, EZCORP, First Cash Financial Services, and QC Holdings) are publicly traded companies. The rest (Advance America, Ace Cash Express, Check Into Cash, and CNG Financial) are privately held, limiting available operational information. As of 2013, an estimated 16,000+ storefronts existed in states without substantial restriction on payday loans. These storefronts accounted for almost $20 billion in loan volume, including approximately $3.4 billion in fees collected. Online lending is a growing channel through which payday lenders operate. In 2007, the online medium had an estimated total loan volume of $6.7 billion. By 2010, total volume increased to approximately $14.3 billion. However, online volume is difficult to track because few online lenders report operational details.

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[6] Marketplace World, Payday Lenders Take to the Web, http://www.marketplace.org/topics/world/payday-lenders-take-web (May 16, 2008).
[7] *See* Montezemolo, Susanna, Payday Lending Abuses and Predatory Practices (http://www.responsiblelending.org/state-of-lending/reports/10-Payday-Loans.pdf) (Sept. 2013).

Tribal lenders operate online lending businesses in a legal gray area, as they are owned and operated by Native Americans.[8] Tribes claim this ownership structure gives lending operations sovereign immunity, allowing them to operate outside of state law. These claims have led to litigation in California, Colorado, and New York over what tribal lenders are permitted to do within those states. Online lenders' general disregard of state payday laws has also drawn criticism from storefront lenders, who are bound by state laws and must compete with online lenders.

B. Lender Advertising

Payday lending institutions use a number of strategies to establish market presence. One approach is forming joint ventures with other companies who specialize in payday lending, while other institutions create payday lending programs internally. Strategies to establish market presence have included buying payday loans from loan brokers, or loaning "…to specialty lenders in the form of loan participations, warehouse lines, liquidity facilities, or dealer lines."[9]

Recently, payday lending has "…adopted more sophisticated sales pitches and branding to lure unwary consumers into loans that can trap them in endless cycles of debt."[10] These sophisticated pitches include direct mail sent to potential borrowers' homes. "Lenders are trying to shed the stigma of typical payday loans, which often are sold in stores in low-income neighborhoods and target people who may lack the financial savvy to understand the hefty

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[8] The Center for Public Integrity, Storefront Payday Lenders Criticize Online Rivals for Affiliating with Indian Tribes, (http://www.publicintegrity.org/2011/07/06/5148/storefront-payday-lenders-criticize-online-rivals-affiliating-indian-tribes) (July 18, 2011).

[9] Federal Deposit Insurance Corporation, *Payday Lending*, http://www.fdic.gov/bank/analytical/fyi/2003/012903fyi.html (last visited March 13 2014).

[10] Consumer Federation of California, *Friendly Sales Pitch Can't Hide Payday Loans' Unfriendly Rates* (Feb. 10, 2014), http://consumercal.org/friendly-sales-pitch-cant-hide-payday-loans-unfriendly-rates/

interest and fees involved."[11] Lenders defend the solicitation by citing the fine print that discloses related interest rates and annual percentage rates ("APR"). Still, these direct mail solicitations are sent to borrowers not likely to understand the details of payday loans and who often do not read the fine print on such offers.

There has been significant government pushback in response to the solicitation of financially vulnerable short term loan borrowers. Specifically, the Office of the Comptroller of the Currency ("OCC") required many national banks to discontinue payday lending after their failure to "properly manage the attendant risks," including the underwriting and advertising of payday loans.[12] However, many payday loan companies use political funding to influence reform efforts in states where payday loans are allowed, or to target new customers in more highly regulated states.

Some states are taking a more proactive approach by enacting legislation that limits lender recourse when a borrower defaults. This discourages lenders from making loans to borrowers who are deemed unlikely to pay it back. For example, California-based lenders do not have many options when attempting to collect on a defaulted payday loan. Because borrowers sign an arbitration agreement when applying for a payday loan, lenders cannot sue the borrowers in court.[13]

At the city level, Chicago implemented new zoning regulations that limit the number of payday lending locations in each zone of regulation. In addition to Illinois, 24 other states have cities that have passed similar zoning ordinances to restrict the number of brick and mortar

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[11] *Id.*
[12] *Id.*
[13] Center for American Progress, *Predatory Payday Lending* (Aug. 20, 2013), http://www.americanprogress.org/issues/economy/report/2013/08/20/72591/predatory-payday-lending/.

payday lending locations.[14] Despite these state and local efforts to protect payday loan borrowers, the majority of such borrowers live in states and localities with minimal or no checks on payday lending.

C. Payday Borrowers

Payday loan borrowers are generally 24-40 years old, do not own a home, and do not have a four-year college degree. The majority of borrowers are single, with an annual salary of $10,000-$40,000.[15] Because a borrower's average salary is just over $22,000, the borrower often cannot pay the loan back by the next paycheck, and may roll the loan over for another pay period. "Nearly half (48%) of borrowers had more than 10 transactions" in a 12-month period, equating to a median annual fee of $458 per borrower. The average borrower is indebted for 199 days of the year due to rollovers, the total number of loans taken out, and subsequent fees.[16]

Most payday loan borrowers' expenses exceed their incomes, which can yield patterns of repeat borrowing rather than intermittent use. Consumers who took out at least seven payday loans often took out a new loan "within a day of the previous loan closing."[17] Most borrowers use payday loans to cover general day-to-day activities or expenses, such as utility bills, groceries and rent, and not for unexpected emergency expenses. Females are slightly more likely than men to take out a payday loan (55%),[18] and while the majority of borrowers are white, African Americans take out a greater number of payday loans.

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[14] *Id.*
[15] CFPB, *supra* note 4 at 17.
[16] *Id.* at 23.
[17] *Id.* at 25.
[18] Payday Lending in America: Who Borrows, Where They Borrow, and Why (www.pewstates.org/uploadedfiles/PCS_Assets/2012/Pew_Payday_Lending_Report.pdf) (July 2012).

Ideal candidates for payday loans are consumers who do not have sufficient funds to cover an upcoming expense, but will have enough cash to pay the bill off by their next paycheck. These candidates would have enough cash by their next pay period to cover the payday loan principal and associated fees within the loan terms. Unfortunately, this is not always the case, and lenders often do not take the critical steps to determine whether borrowers will be able to pay back the loan on time before a payday loan is made. Consequently, regulation of payday loans has become a necessary and exercised response to this alternative financial product.

DISCUSSION

I. Current State Regulatory Framework

Payday loans are currently subject to state regulation. Because most states cap small loans at 24% to 48% APR, payday loans are only legal in states where small loans are unregulated or payday lenders are exempt from small loan laws.[19] Further, states that allow payday lending have varying regulations. Presently, 12 states[20] and the District of Columbia effectively ban payday lending, while 38 states permit payday lending, but subject the loans to certain regulations.[21]

Though state laws vary, the regulated areas remain relatively consistent. In states that allow payday lending, all but six states regulate fees placed on payday loans. Certain states regulate the dollar amount of fees placed on a certain dollar amount of a loan. For example, Oklahoma allows $15 of fees per $100 advanced up to $300 and then an additional $10 fee for

[19] Consumer Federation of America ("CFA"), *Legal Status of Payday Loans by State*, http://www.paydayloaninfo.org/state-information (last visited Feb. 25, 2014).

[20] Arizona, Arkansas, Connecticut, Georgia, Maryland, Massachusetts, New Jersey, New York, North Carolina, Pennsylvania, Vermont, West Virginia.

[21] CFA, *supra* note 19.

every $100 advanced in excess of $300.[22] Other states, such as Alaska, regulate the fees placed on a certain dollar amount of a loan, but also permit a maximum "origination" or "verification" fee (typically around $5).[23] Another typical structure for fee regulation, as implemented in Alabama, is a capped percentage fee on the amount advanced. Alabama allows these fees to be the same percentage regardless of the amount advanced, up to 17.5% APR. However, in other states, such as Indiana, the percentage charged changes based on the amount loaned.[24] In Indiana, fees can be up to 15% on first $250 of the principal; 13% on amounts greater than $250, up to and including $400; and 10% on amounts greater than $400, up to and including $550.[25]

It is important to note that when payday loan fees are regulated by percentage caps, this percentage is not a monthly interest rate. Instead, this is a cap on the one-time fee a payday lender may charge a consumer for the entire loan. For example, if the state has a 15% fee cap on the amount advanced to the consumer, the lender may not charge this fee monthly, but only once, at the time the loan is issued. In states that do not regulate fee amounts, such as Nevada, the parties to the loan must decide on the fees charged.[26]

Another state-regulated payday loan component is the period the borrower has to repay. Of the 38 states that allow payday lending, only five do not regulate repayment terms.[27] The most common structure for regulating repayment terms is by setting a minimum and/or

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[22] CFA, *Oklahoma State Information*, http://www.paydayloaninfo.org/state-information/44 (last visited Feb. 25, 2014).

[23] CFA, *Alaska State Information*, http://www.paydayloaninfo.org/state-information/9 (last visited Feb. 25, 2014).

[24] CFA, *Alabama State Information*, http://www.paydayloaninfo.org/state-information/8 (last visited Feb. 25, 2014); Consumer Federation of America, *Indiana State Information*, http://www.paydayloaninfo.org/state-information/22 (last visited Feb. 25, 2014).

[25] CFA, *Indiana State Information*, http://www.paydayloaninfo.org/state-information/22 (last visited Feb. 25, 2014).

[26] CFA, *Nevada State Information*, http://www.paydayloaninfo.org/state-information/36 (last visited Feb. 25, 2014).

[27] CFA, *supra* note 19.

maximum time a borrower has to repay the loan.   Other states, such as Virginia, base the period of repayment on the length of the borrower's pay cycle.[28] Only Rhode Island sets terms of payday loans to a specific time period, 13 days.[29]

The maximum loan amount issued by a lender is regulated by all but three states that allow payday lending.[30] In a majority of states, the cap on a loan is a maximum dollar amount. However, a few states set the cap at a percentage of the borrower's gross monthly income. Additionally, some states combine these two standards. For example, in Washington, the maximum amount for a payday loan is the lesser of $700 or 30% of the borrower's gross monthly income.[31]

When a borrower is unable to repay a loan, some states will allow the borrower to rollover the loan. Rolling over a loan typically involves paying an additional fee in exchange for extra time to pay back the remainder of the outstanding loan.[32] A majority of states prohibit rollovers.[33] Most states that do not prohibit rollover periods limit the number of times a consumer can rollover a loan. Further, many states that ban rollovers (e.g., Florida) allow 60-day grace periods where no fees or interest are added to the current outstanding loan balance. During Florida's grace period, consumers must meet with a credit-counseling agency and create a payment plan that is proposed to the lender at the end of the grace period. If the repayment

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[28] CFA, *Virginia State Information*, http://www.paydayloaninfo.org/state-information/54 (last visited Feb. 25, 2014).
[29] CFA, *Rhode Island State Information*, http://www.paydayloaninfo.org/state-information/47 (last visited Feb. 25, 2014).
[30] CFA, *supra* note 21.
[31] CFA, *Washington State Information*, http://www.paydayloaninfo.org/state-information/55 (last visited Feb. 25, 2014).
[32] CFPB, *What does it mean to renew or roll over a payday loan?* (Nov. 16, 2013), http://www.consumerfinance.gov/askcfpb/1573/what-does-it-mean-renew-or-roll-over-payday-loan.html.
[33] CFA, *supra* note 19.

period is reasonable, the lender must accept the monthly payment plan.[34] Though few states require payday lenders to offer grace periods, it is valuable to consumers who may have financial troubles going forward. Because rollovers can cause consumers to enter a debt cycle, which may take months to repay, offering a grace period following a payday loan repayment problem can eliminate rollovers for many consumers.

Notably, a majority of states do not regulate "cooling-off" periods associated with payday loans. A cooling-off period is a specified number of days a borrower is prohibited from taking out a payday loan following repayment of a previous one. States that do regulate cooling-off periods set these periods anywhere from 1-60 days. [35]

Payday loans are also regulated by some states through databases. Currently, 15 states require payday lenders to enter a potential borrower's information into a statewide database to determine payday loan eligibility.[36] Therefore, in order to enforce the above mentioned regulations on loan size, rollover periods, and cooling-off periods, licensed lenders are required to enter the loan transaction into a centralized, real time, database used by all licensed lenders. Since the database is in real time, as soon as a payday loan is given to a consumer, all of the other registered payday lenders in the state will be aware of the outstanding loans of that consumer if the consumer tries to obtain a payday loan at a different location.

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[34] Florida Office of Financial Regulation, Payday Loans (Deferred Presentment Providers), http://www.flofr.com/staticpages/paydaylenders.htm (last visited Apr. 21, 2014).
[35] CFA, *supra* note 21.
[36] Alabama, Delaware, Florida, Illinois, Indiana, Kentucky, Michigan, New Mexico, North Dakota, Ohio, Oklahoma, South Carolina, Virginia, Washington, and Wisconsin.

II. Current Federal Regulatory Framework

Most payday lenders are non-depository institutions governed by state consumer protection laws. However, several federal agencies are involved in enforcing certain federal laws related to payday loans. The Federal Trade Commission ("FTC") enforces a variety of consumer protection laws in this area. The FTC has filed enforcement actions against payday lenders for engaging in unfair or deceptive advertising, billing, or collection practices, in violation of the Fair Debt Collection Practices Act.[37] The FTC has also filed enforcement actions against payday lenders for failing to comply with disclosure requirements of the Truth in Lending Act,[38] and conditioning credit on pre-authorization of electronic fund transfers, in violation of the Electronic Fund Transfer Act.[39]

Other federal laws applicable to payday loan products are the Fair Credit Reporting Act, which requires parties who provide information to consumer reporting agencies to ensure the accuracy of data provided;[40] the Gramm-Leach-Bliley Act, which prevents impermissible sharing of consumer information;[41] and the Equal Credit Opportunity Act, which provides requirements for accepting applications and providing notice of adverse action, and prohibits discrimination against any borrower based on: race, color, religion, national origin, sex, marital status, age, because the applicant's income comes from public assistance, or because the applicant, in good faith, has exercised rights under the Consumer Credit Protection Act.[42]

The Federal Deposit Insurance Corporation ("FDIC") and OCC regulate deposit-advance products offered by federally chartered banks. Though these products are not payday loans, they

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[37] *See* 15 U.S.C. §§ 1692 *et seq.*
[38] *See* 15 U.S.C. §§ 1640 *et seq.*
[39] *See* 15 U.S.C. §§ 1693 *et seq.*
[40] *See* 15 U.S.C. §§ 1681 *et seq.*
[41] *See* 15 U.S.C. §§ 6801 *et seq.*
[42] *See* 15 U.S.C. §§ 1691 *et. seq.*

share similar characteristics. Deposit advances have high fees, short repayment terms, and arguably pay inadequate attention to consumer's ability to repay.[43] In November 2013, the FDIC and OCC issued a final guidance regarding deposit advances, which requires banks to consider borrowers' ability to repay, imposes stricter underwriting requirements, and limits the frequency of deposit advances.[44] These rules make deposit advance products undesirable or too costly for banks to offer, and similar regulations applicable to payday lenders may be forthcoming.[45]

The federal agency likely to have the largest regulatory impact on payday loans is the CFPB. The CFPB was created by the Dodd-Frank Act to "identify as unlawful unfair, deceptive or abusive acts or practices in connection with . . . the offering of a consumer product or service" and to prevent entities from engaging in such acts or practices.[46] In April 2013, the CFPB issued a White Paper, *Payday Loans and Deposit Advance Products*, where it noted that agency action was forthcoming. In March of 2014, the CFPB began rulemaking efforts regarding payday loans with intent to prevent potential consumer harm and released another paper, *CFPB Data Point: Payday Lending*.[47] The CFPB has held periodic field hearings and collected consumer complaints on payday loans, which it will use to inform proposed regulation and enforcement actions. Though states and other regulators have already taken some action against payday-type

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[43] Press Release, FDIC, FDIC Issues Final Guidance Regarding Deposit Advance Products (November 21, 2013), available at http://www.fdic.gov/news/news/press/2013/pr13105.html.
[44] *See* FDIC, Guidance on Supervisory Concerns and Expectations Regarding Deposit Advance Products, (Nov. 21, 2013), available at http://www.fdic.gov/news/news/press/2013/pr13105a.pdf.
[45] *See* Ballard Spahr LLP, OCC and FDIC Follow Through on Threat to Kill Deposit Advance Loans (Nov. 27, 2013), http://www.ballardspahr.com/alertspublications/legalalerts/2013-11-27-occ-and-fdic-follow-through-on-threat-to-kill-deposit-advance-loans.aspx.
[46] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, tit. X, 124 Stat. 1376, § 1021(a) (2010).
[47] *CFPB Data Point: Payday Lending*, *supra*.

loan products, the CFPB is likely to issue more comprehensive federal rules, governing all types of payday lenders.[48]

III. CFPB's Memorandum of Understanding with States

In January 2011, the CFPB signed a memorandum of understanding ("MOU") with the Conference of State Banking Supervisors to facilitate information sharing and coordinate regulatory efforts for providers of consumer financial products and services.[49] The MOU provides that state regulators and the CFPB will consult each other regarding standards for conducting compliance examinations of financial products, including payday loans.

Consistent examination practices between state regulators and the CFPB will likely lower compliance costs for regulated entities. However, confidential information sharing will likely increase the risk of enforcement actions by exposure to multiple state regulators and state attorneys general. The CFPB and National Association of Attorneys General agreed to coordinate enforcement activities and share investigatory and consumer complaint information.[50] To date, regulators from 48 states and the District of Columbia have signed the CFPB-CSBS MOU, excluding Florida and New Mexico.[51]

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[48] Rachel Witkowski, CFPB Action Against Payday Lenders Building to a Crescendo, American Banker (Nov. 27, 2013), http://www.americanbanker.com/issues/178_229/cfpb-action-against-payday-lenders-building-to-a-crescendo-1063961-1.html.

[49] *See* Memorandum of Understanding at § IV (Jan. 4, 2011), available at http://www.dfs.ny.gov/legal/mou/ag110104.pdf.

[50] Press Release, U.S. Dept. of the Treasury, Consumer Financial Protection Bureau and National Association of Attorneys General Presidential Initiative Working Group Release Joint Statement of Principles (Apr. 11, 2011), http://www.treasury.gov/press-center/press-releases/Pages/tg1134.aspx.

[51] *See* CSBS, http://www.csbs.org/regulatory/Cooperative-Agreements/Documents/Map of Signed States Revised.ppt (last visited Feb. 24, 2014).

IV. Future Federal Regulation of Payday Loans

A. The White Paper

The CFPB's White Paper documented its initial analysis of data collected on payday loan and deposit-advance products. The White Paper summarized the CFPB's consumer protection concerns, including, but not limited to, repeated or long-term use of payday products, the high costs associated with them, and the consumers' ability to repay. The CFPB recognized the utility of payday loans for "some customers for whom an expense needs to be deferred for a short period of time."[52] However, the CFPB narrowly views this group of consumers and expresses concern that many consumers cannot use payday loans as intended. Data cited in the White Paper indicates that many consumers use payday loans on a sustained basis, suggesting that they cannot repay the loan and other expenses when they are due. Due to a recurring need to borrow, consumers can incur significant fees over time.

The White Paper attempts to hold lenders responsible for consumers' sustained use of payday loans by expressing concern with (i) lending practices, (ii) repayment terms, and (iii) high costs:[53]

(i) Lending Practices: The CFPB is concerned with the consumer's ability to repay the loan. The CFPB bases this concern on the implication that lenders do not consider a consumer's financial health or ability to repay when the loan is made. The White Paper focuses primarily on loan expense and repayment issues, however, and does not provide an in depth evaluation of this financial product in the context of consumer demand for short-term loans and associated lender risk;

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[52] CFPB, *supra* note 4.
[53] *See id.* at 43-44.

(ii) Repayment Terms: Short repayment terms caused the CFPB to express concern that payday loan consumers cannot generate enough cash flow to repay their loans on time.[54] The CFPB blames short repayment terms for catching consumers "in a cycle" of borrowing;

(iii) Fees: The CFPB notes that median fees of $15 per $100 on a $400, two-week loan, equates to 391% APR.[55] This led the CFPB to conclude that some consumers misunderstand the total cost of a payday loan, though payday loan fees are typically flat and charged up-front.[56]

Notably, the CFPB White Paper is limited to data relating to a one-year period and does not distinguish between payday loan activity in states with regulations enforced through real-time databases and those without such enforcement tools in place.

B. Preemption

Regulations enacted by the CFPB may not always preempt state law. Federal consumer protection regulations preempt state consumer financial protection laws only when the state law conflicts with federal regulation.[57] State law will not be preempted when it provides greater levels of consumer protection than federal law.

C. Potential Areas of Regulation

Payday loans are a significant priority on the CFPB's 2014 rulemaking agenda. The CFPB began the pre-rule activity stage of the rulemaking process in March of 2014. Regulatory agencies conduct pre-rule activities (also known as "advance notice of proposed rulemaking") prior to issuing a proposed rule.[58] Agencies enter the pre-rule process when soliciting public comments on whether or not to engage in rulemaking, or how to best initiate the rulemaking

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[54] *See id.*
[55] *Id.* at 8.
[56] *See id.* at 44.
[57] *See* 12 U.S.C. § 5551(a)(2).
[58] Office of Information and Regulatory Affairs, Regulations and the Rulemaking Process, http://www.reginfo.gov/public/jsp/Utilities/faq.jsp (last visited Feb. 24, 2014).

process. The CFPB has not stated which aspects of payday products future rulemaking may cover, but potential areas of regulation may include underwriting standards, more disclosure requirements, fee caps, cooling-off periods, and/or limiting the number of loans borrowers may incur.[59]

Payday loan products have been the subject of federal regulation in the past. In 2006, Congress passed the Military Lending Act ("MLA") to protect military personnel and their dependents from certain lending practices, including payday loans.[60] The MLA regulates payday loans by instituting a 36% APR cap, prohibiting lenders from securing loans with a personal check or bank account access, restricting rollovers or renewals, and mandating oral and written disclosures.[61] In 2012, Congress gave the CFPB authority to enforce MLA requirements.[62] With a common regulator, future payday loan rulemaking may resemble the rules prescribed in the MLA.

Another potential area of regulation is a database requirement. Currently, 15 states require payday lenders to enter a potential borrower's information into a database to determine payday loan eligibility.[63] For example, South Carolina requires payday lenders to submit a borrower's personal identification information and transaction details into a real-time database, prior to issuing a loan.[64] The information is run against the database to determine if a potential borrower has an outstanding payday loan, his/her payday loan borrowing and payment history,

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[59] *See* CFPB, *supra* note 4, at 44 (characterizing these aspects of payday loans as raising "substantial consumer protection concerns").
[60] *See* Sen. John Warner National Defense Authorization Act, 10 U.S.C. § 987 (2007).
[61] *See* 32 C.F.R. § 232(b) (2007).
[62] 2013 Defense Authorization Bill (H.R. 4310).
[63] States with database requirements are: Alabama, Delaware, Florida, Illinois, Indiana, Kentucky, Michigan, New Mexico, North Dakota, Ohio, Oklahoma, South Carolina, Virginia, Washington, Wisconsin.
[64] *See* South Carolina Deferred Presentment Services Act, 34-39-175(A) (2009).

etc., to determine if the borrower is eligible to receive a new loan. If eligible, lenders must notify the database provider immediately when the loan is made and when the loan is paid back.[65]

Consumers' personal identifying information entered into the database is strictly confidential.[66] If a borrower is ineligible for a payday loan, the database will state only that the borrower is ineligible and the reason for ineligibility.[67] The borrower must inquire directly with the database provider for more detailed information regarding the determination.

Payday loan databases serve multiple regulatory functions. Centralized databases help protect consumer rights by providing consumers with clear product guidelines at the time of application.[68] Databases help prevent and identify fraud and product abuse by delivering consumer eligibility checks, requiring loans to be in compliance with state laws, and providing the ability to report suspicious or unlicensed activity, among other things.[69] Because a centralized database helps enforce state payday loan regulations, it is a potential federal regulation tool as well.

V. Trends in International Regulation

A. The United Kingdom ("UK")

Compared to the U.S., the UK's payday loan market is relatively new and consists of approximately 200 payday lenders. Traditionally, weak regulation and high growth potential has made it profitable to lend in the UK (five of the UK's seven largest payday lenders are owned or

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[65] *See* 34-39-270(F).
[66] *See* 34-39-270(I).
[67] *See* 34-39-270(E).
[68] Veritec Solutions, https://www.veritecs.com/PaydaySolution.aspx (last visited Feb. 23, 2014).
[69] *See id.*

controlled by U.S. companies). However, payday loans generate the same consumer protection concerns in the UK as in the U.S., including high price tags and borrowers' ability to repay.[70]

In the UK, payday loans were previously regulated by The Office of Fair Trading ("OFT"), which enforced the Consumer Credit Act of 1974 ("CCA"). The CCA allowed the OFT to suspend lending licenses or issue fines up to £50,000 each time a lender engaged in "offences involving fraud or other dishonesty" or "business practices appearing to the OFT to be deceitful, oppressive, or otherwise unfair or improper, whether unlawful or not."[71] According to the OFT, deceitful or improper business practices included any type of "irresponsible lending."[72]

The OFT required consumer credit providers to comply with the OFT's "General Principles of Fair Business Practice," which required lenders to:

> • not use misleading or oppressive behavior when advertising, selling, or seeking to enforce a credit agreement
>
> • make a reasonable assessment of whether a borrower can afford to meet repayments in a sustainable manner
>
> • explain features of credit agreements so borrowers may make informed choices
>
> • monitor the borrower's repayment record during the course of the agreement, offering assistance where borrowers appear to be experiencing difficulty."[73]

In addition to these general principles, the OFT required transparency and clear disclosure of all material credit agreement terms. The CCA also requires creditors to advise borrowers, prior to entering into a credit agreement, of: (a) features that may make the credit

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[70] Veritec Solutions LLC, Competition Commission Payday Lending Market Investigation, http://www.competition-commission.org.uk/assets/competitioncommission/docs/2013/payday-lending/130310_veritec_solutions_response_to_is.pdf
[71] Consumer Credit Act of 1974, Ch. 39 § 25(3).
[72] Consumer Credit Act § 25(2B) (*amended* 2006).
[73] OFT, *Irresponsible Lending – OFT Guidance For Creditors* (2011), available at http://www.oft.gov.uk/shared_oft/business_leaflets/general/oft1107.pdf

unsuitable for the borrower's particular situation; (b) how much the borrower will have to repay in total; (c) events under the agreement that could have adverse effects on the borrower; (d) principal consequences that could arise from failure to make payments; and (e) effects of withdrawal from the agreement.[74]

For example, the OFT expected payday lenders to inform borrowers that the product is intended for short-term use, is unsuitable for sustained borrowing, and would be expensive as a means of long-term borrowing.[75] The OFT considered the practice of continuously rolling over a borrower's payday loan, where the overall effect was to increase the borrower's indebtedness, as unsuitable and harmful.

However, on April 1, 2014, the Financial Conduct Authority ("FCA") took over regulation of the UK's consumer credit sector. The FCA outlined a regulatory agenda to the payday loan market that began with investigations into lender treatment of borrowers who struggle to repay their loans.[76] The FCA conducts unannounced visits to lenders' offices to analyze their business practices and collection techniques, to ensure lenders treat consumers properly and are not solely concerned with making quick profits.

The FCA's Chief Executive has stated that the agency will regulate by "stopping profits from vulnerable people . . . capping the absolute cost of [payday] loans . . . and stopping lending to people who will never be able to repay."[77] Effective in July of 2014, the FCA will enact "affordability criteria" which will require lenders to consider whether borrowers can repay by

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[74] Consumer Credit Act § 55A(2).
[75] *See* OFT, *supra* note 80 at 24.
[76] BBC Business News, *Quarter of payday lenders may quit under tougher rules,* http://www.bbc.com/news/business-26539569 (March 12, 2014),
[77] *Id.*

analyzing borrower cash flow and income levels, and limit rollovers to two per loan. Effective in January 2015, the FCA will also institute a payday loan interest rate cap.[78]

Trade groups that represent 60% of the UK's payday lenders estimate that new rules could force up to half of the lenders out of the industry.[79] Though the FCA's goal is to remove lenders with unfair or abusive practices, the Consumer Finance Association suggests that many "good-faith" lenders will be forced from the industry solely due to increased compliance costs.[80]

B. Canada

Section 347 of the Canadian Criminal Code makes it a criminal offense to charge over 60% annual interest on a loan, effectively banning payday loans at the federal level. However, in 2006, § 347 was amended to provide an exception for payday loans under certain conditions. Payday lenders are exempted from criminal prosecution if: (a) the loan is for $1500 or less; (b) the loan term is 62 days or less; (c) the lender is licensed by the province in which it operates; and (d) the province has enacted regulations that limit the total cost of payday loans.[81]

Section 347 was amended because Canadian lawmakers recognized that the growth of payday loan companies evidenced that the industry was fulfilling an unmet consumer need for short-term credit.[82] Currently, no payday loan exception to § 347 exists in New Brunswick, Newfoundland, or Quebec because these provinces have not enacted regulations governing payday loans. The remaining provinces (Alberta, British Columbia, Manitoba, Nova Scotia,

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[78] Press Release, FCA, Consumer credit countdown – Review into debt collection practices of payday lenders starts on day one of FCA regulation (March 12, 2014), http://www.fca.org.uk/news/consumer-credit-countdown-review-into-debt-collection-practices
[79] Simon Bowers, Money Shop owner Dollar Financial to be sold to Lone Star for $1.3bn, The Guardian (April 2, 2014).
[80] Hilary Osborne, Half of all payday lenders could be 'taken out of the market', The Guardian (April 1, 2014).
[81] Canadian Criminal Code §§ 347.1(2)(3) (2006).
[82] Parliamentary Information Research Service, Legislative Summary, Bill C-26: An Act to Amend the Criminal Code (Criminal Interest Rate) p.4 (Nov. 22, 2006).

Ontario, Prince Edward Island, and Saskatchewan) have varying laws that: (a) cap payday loan principal interest rates between 17-25%; (b) limit the principal amount to 50% of the borrower's paycheck; (c) limit a borrower's outstanding payday loans to one or two; and (d) require lenders to be licensed.[83]

Some provinces have proposed additional consumer protection laws requiring lenders to display clear signage explaining total costs of payday loans and to not charge fees or penalties for early repayment.[84] Though more consumer protection regulations may be adopted in the future, there have been no prominent calls from Canadian lawmakers to ban payday loans, as the market continues to grow and develop.

VI. Online Payday Lending

A. Growth of Online Lending

Online payday lending has grown significantly over the last decade. While online lending remains a minority of total payday loan volume, its steady growth indicates it will likely be the dominant source of loans in the future.[85] Between 2006 and 2011, loans placed through online lenders increased from $5.8 billion to $13 billion.[86] This growth is expected to continue, with 60% of all payday loans originating online by 2016.

Online lenders offer the speed and simplicity that storefront establishments cannot provide. These are the strongest factors influencing the growth of online payday lending.[87]

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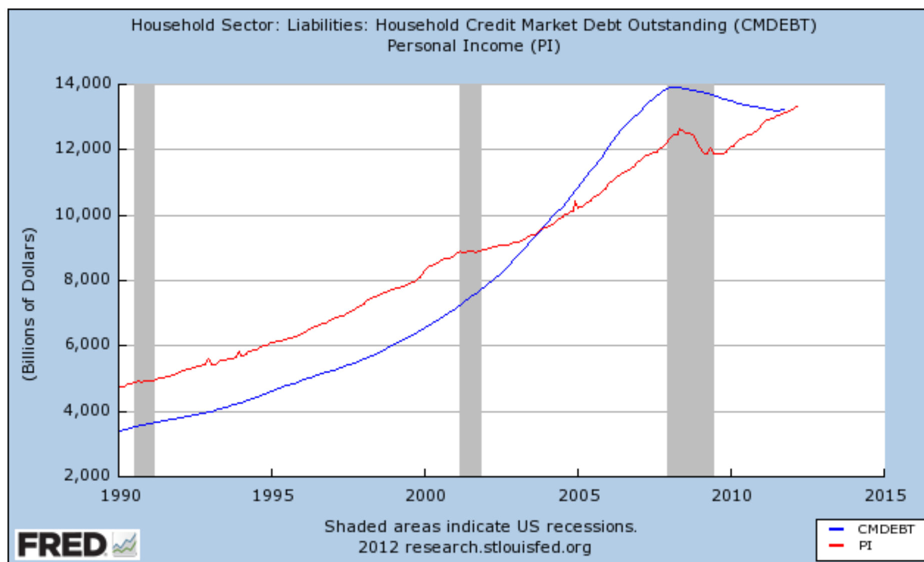
[83] *See* Government Legislation, Canadian Payday Loan Association, http://www.cpla-acps.ca/english/medialegislation.php (last visited April 17, 2014).
[84] *See* Press Release, Province of Manitoba, New Protections for Manitobans using High-Interest Loans (Dec. 4, 2013), available at http://www.cpla-acps.ca/english/pr_2013_05.php.
[85] *See* CFPB, *supra* note 4 at 10.
[86] Jessica Silver-Greenberg, JPMorgan Chase Is Reining in Payday Lenders, New York Times (Mar. 19, 2013).
[87] Competition Commission Payday Lending Market Investigation Submission from Veritec Solutions LLC p.7, available at http://www.competition-

Though payday loan fees are a frequent talking point, consumers tend to place a higher value on speed and convenience. This is evidenced by a potential borrower's proclivity to obtain a loan from the first lender that approves the application, without any further shopping for a better deal.

Economic factors have also played a role in the continued growth of payday loans. Beginning in the early 2000's, total household debt in the United States surpassed personal income (See Below).



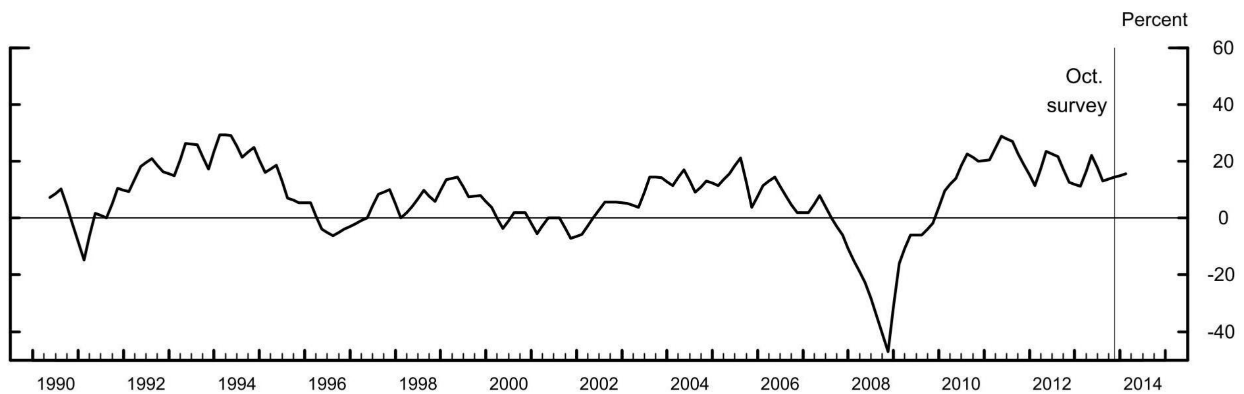
Debt surpassing income meant that American households had become highly leveraged and unable to access traditional forms of credit. This period of high indebtedness coincides with the growth years of online payday loans.[88] Payday loans served as a form of available credit when traditional forms were unavailable.[89]

commission.org.uk/assets/competitioncommission/docs/2013/payday-lending/130310_veritec_solutions_response_to_is.pdf.

[88] Silver-Greenberg, *supra* note 107.

[89] *See* Todd Zywicki and Astrid Arca, "The Case Against New Restrictions on Payday Lending," *Mercatus on Policy* 64 (January 2010).

However, poor credit worthiness does not exist in a vacuum. There are external economic factors that influence a bank's willingness to extend credit to potential borrowers. The Federal Reserve surveys banks' senior loan officers on a quarterly basis. The graph below shows the loan officers' willingness to extend credit to consumers. Each time the line dips below 0, the trend among banks was to tighten their lending standards[90]:



The tightening cycle has occurred roughly every five years since 1990, taking place during times of recession or poor economic conditions. The frequency with which tightening occurs makes it difficult for those with less than optimal credit to rely on traditional sources. The ease of online lending, coupled with borrower inability to secure credit through traditional means, will likely lead to continued growth of the online market and payday lending overall.

[90] Board of Governors of the Federal Reserve, January 2014 Senior Loan Officer Opinion Survey on Bank Lending Practices, available at http://www.federalreserve.gov/boarddocs/snloansurvey/201402/fullreport.pdf

B. Distinctions of the Online Payday Lending Model

The online lending model is distinct from that of the storefront because the online model often includes a third party lead generator.[91] Lead generators advertise payday loans, but are not the actual lender.[92] The lead generator will collect all of the relevant personal information, and rank the leads by the quality of the borrower.[93] The leads are then distributed to a network of lenders who pay commission for the borrower information. Lenders who pay the highest commissions get the first look at the higher quality leads. Because lead generators filter the list of available lenders consumers can see, the process of price comparison between lenders is virtually impossible. This model of lead generation can reduce competitive pressures among lenders that would normally drive down prices and benefit consumers.[94]

C. Offshore Online Lenders

Although storefront payday lenders are advertised in states that allow payday lending, a rising problem is the growth of online lenders advertising across the internet. Due to state consumer protection laws, payday lenders must be licensed so state regulators can be sure lenders follow applicable law.[95] However, many online lenders are not registered in the states that they lend in, and may not follow state consumer protection laws.[96] Although a growing

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[91] *Id.* at 6.
[92] Will an Online Payday Loan Website Find me the Cheapest Loan? http://www.consumerfinance.gov/askcfpb/1619/will-online-payday-loan-website-find-me-cheapest-loan.html (Nov. 6, 2013).
[93] *See* Competition Commission at 6.
[94] *Id.* at 15.
[95] CFPB, *How can I tell if a payday lender is licensed to do business in my state?,* Nov. 6, 2013, http://www.consumerfinance.gov/askcfpb/1597/how-can-i-tell-if-payday-lender-licensed-do-business-my-state.html.
[96] CFPB, *What is the difference between an online payday lender and one with a storefront?*, Nov. 6, 2013, http://www.consumerfinance.gov/askcfpb/1579/what-difference-between-online-payday-lender-and-one-storefront.html.

number of online lenders are located offshore or overseas, lenders are required to comply with laws of the state in which the consumer resides.[97]

As many of these offshore online lenders change the name of their sites from week to week, the Department of Business Oversight (DBO) in California acknowledges the struggle to keep an up-to-date list of these unlicensed companies. Furthermore, the DBO has taken action against illegal online lenders both in the United States and abroad, in countries such as Belize, Costa Rica, and the United Kingdom. However, the DBO recognized that while they can issue sanctions, these sanctions are not easily enforceable. Some of the risks of taking out a loan with an online lender, offshore or US based, include: "higher interest rates than allowed under California law; funds siphoned from your bank account without permission; personal financial data sold or pirated by the lender, even if a loan hasn't been formalized; losing the ability to track down, prosecute and recover lost funds."[98]

Furthermore, the FTC has found that even when payday loans are not taken out, if a consumer types his or her information into a payday loan website, even without submitting it, his or her account may be accessed by these online lenders illegally.[99] However, the problems do not end here. Both storefront and online lenders have direct access to a bank account in order to collect the loan once the consumer's paycheck arrives. Storefront lenders are given a post-dated check to cash when the loan expires if the borrower does not return with cash to pay off the loan. Since online lenders are usually repaid in installments, the online lenders have the ability to electronically withdraw funds. Once access to these funds is provided, it becomes difficult to

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[97] CFA, *States Have Jurisdiction over Online Payday Lenders*, May 2010, http://www.consumerfed.org/pdfs/IPDL-States-Have-Jurisdiction.pdf.

[98] Claudia Buck, *Personal Finance: Illegal online lenders plague payday loan industry*, The Sacramento Bee, Sept. 15, 2013, http://www.sacbee.com/2013/09/15/5731842/illegal-online-lenders-plague.html.

[99] *Id.*

revoke it. If a consumer does not have adequate funds in his or her account, lenders can trigger overdraft fees on the consumer's account, adding to the financial stress of the consumer. Furthermore, borrowers have no control over when the online lenders withdraw these fees, leaving them unable to pay rent or other bills that may be due.[100]

In response to the rise of online lending, the CFPB and FDIC have taken action. The CFPB has continued researching the practices of online lenders, and also those of online lenders claiming tribal sovereign immunity. Additionally, the FDIC issued a letter warning banks of the risks banks could be exposed to from processing payments originated by online payday lenders.[101] In the spring of 2013, Senator Jeff Merkley of Oregon proposed the Stopping Abuse and Fraud in Electronic Lending Act of 2013, which would require online and storefront lenders to comply with all state consumer protection laws. If passed, lead generators would also be illegal, prohibiting companies from collecting employment and bank account information to sell to online lenders. In January 2014, the New York State Attorney General settled with Western Sky Financial LLC and CashCall Inc. to provide consumers with refunds of online-generated payday loan fees in excess of New York's 16% usury limit.[102] The current goal of these regulatory agencies and state regulators is to protect consumers from falling prey to unscrupulous online payday lenders, both domestically and internationally.

D. <u>Tribal Lenders</u>

Relative newcomers to the online payday lending market are American Indian tribal lenders. The tribal lending model typically involves a tribal lending entity ("TLE") formed by

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[100] Tom Feltner, *The Dangers of Online Lending*, U.S. News & World Report, Oct. 22, 2013, http://www.usnews.com/opinion/blogs/economic-intelligence/2013/10/22/the-risks-and-consequences-of-online-payday-lending.
[101] *Id.*
[102] http://www.ag.ny.gov/press-release/ag-schneiderman-announces-settlement-western-sky-financial-and-cashcall-illegal-loans

the tribe and financed by a third party.[103] Using funds provided by the financier, the TLE provides loans to consumers across the nation through the Internet. The TLE is typically tribally chartered, and is considered an "arm" of the tribe. Most of the TLE's operations occur on tribal lands, including the physical location of lending servers and administrative staff. However, most of the economic benefits, generated by the TLE, flow directly to the third party financiers.[104]

Because the TLE is considered an "arm" of the tribe, lenders assert that it falls under the umbrella of sovereign immunity. This immunity limits state laws to certain circumstances on tribal lands; these circumstances are not typically relevant to lending. As a result, the TLE may only be sued when the tribe has voluntarily waived its immunity, or when authorized by Congress.[105] Tribal immunity also exempts the TLE from state court discovery looking to find a relationship between a TLE and its financier. Using the protection of sovereign immunity, the TLE often engages in illegal lending under the laws of the state in which the borrower resides.[106] These practices include charging a single rate nationwide, failing to comply with state limitations on loan rollovers or duration, and providing payday loans in states where they are banned. However, these lenders generally do comply with federal laws applicable to consumer loans.

Article X of the Dodd-Frank Act, which created the CFPB, does not distinguish between tribal and nontribal lenders when discussing "covered persons" in the Act. The CFPB has stated publicly that it presumes to have authority over the regulation of tribal lenders. Accordingly, the CFPB is likely to increase its scrutiny of the tribal model of payday lending.

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[103] Hilary B. Miller, The Future of Tribal Lending Under the consumer Financial Protection Bureau, Business Law Today. http://apps.americanbar.org/buslaw/blt/content/2013/03/article-04-miller.shtml. (Mar. 22, 2013).
[104] *Id.*
[105] *See Kiowa Tribe of Oklahoma v. Manufacturing Tech., Inc.*, 523 U.S. 751, 754 (1998).
[106] *Id.*

E. State Litigation With Tribal Lenders

The argument over sovereign immunity stems from the 1998 Supreme Court case *Kiowa Tribe of Oklahoma v. Manufacturing Technologies*.[107] In *Kiowa*, the Court held that Native American tribes cannot be sued without a Congressional authorization or waiver from the tribe. In addition, the Court would not "confine immunity . . . to transactions on reservations and to governmental activities," meaning that tribes were protected from suit regardless of where the tribal activities occurred. However, the Court also held that although states cannot sue tribes directly, they may tax or regulate tribal activities occurring within the state, but off of tribal reservations.[108]

This ruling has left the door open to whether or not sovereign immunity extends to tribal lending activities conducted over the internet, and has led to litigation in several states.[109] In 2005, Colorado attempted to issue investigative subpoenas to two out-of-state online payday lenders. The lenders repeatedly failed to comply with the subpoenas, and Colorado sought contempt citations against the lenders. In response, the lenders filed a joint motion to dismiss citing tribal immunity, lack of subject matter, and personal jurisdiction. The Colorado Court of Appeals eventually ruled that if the payday lenders were "arms" of the tribe, then they were immune from responding to state investigative subpoenas.[110]

The Colorado ruling is not unique. In 2007, the California Court of Appeals overturning a lower court's decision, ruled that tribal sovereign immunity includes "for-profit commercial

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[107] *Kiowa Tribe of Oklahoma v. Manufacturing Technologies*, 523 U.S. 751 (1998).
[108] Patrick Sullivan, United States: States and Consumers Battle Tribal Payday Lenders (http://www.mondaq.com/unitedstates/x/266750/Gaming/States+And+Consumers+Battle+Tribal+Payday+Lenders) (Oct. 3, 2013).
[109] Center for Public Integrity, footnote 22'
[110] *See* Cash Advance & Preferred Cash Loans v. Colorado, 242 P.2d 1099 (Colo. 2010).

entities that function as 'arms of the tribes'" like payday lending businesses. The case was remanded to the lower court to determine if payday lending companies are "arms of the tribe."[111]

Unlike California and Colorado, West Virginia has been able to reach a settlement with some payday lenders. In 2007 the West Virginia Attorney General issued investigative subpoenas against seventeen online payday lenders.[112] Three of these lenders claimed tribal immunity, challenging the court's subject matter jurisdiction. By 2008, the West Virginia Attorney General had reached a settlement with the lenders, which included the offer of cash refunds and cancelation of debt for West Virginia consumers worth $128,239.50. However, the tribes were not required to admit any wrongdoing.[113]

New York has begun its own unique fight against online tribal lenders. In August of 2013, the New York Department of Financial Services sent letters to 35 online lenders ordering them to stop making loans within the state that violated the 25% cap on interest rates. Letters were also sent to over 100 banks, asking that they "choke off" the payday lenders' access to the Automated Clearing House, an electronic payments network used to process loan payments. For the most part, banks have complied with the request.[114]

In September 2013, two tribes brought suit against Benjamin Lawsky, New York State's Superintendent of Financial Services, alleging that their sovereign immunity protects them from

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[111] *See* Ameriloan v. Superior Court, 86 Cal. Rptr. 3d 572 (Cal. App. 2008).
[112] *See* W. Va. Att'y Gen.'s Office, 2007 Annual Report, 31 (2007), *available at* http://www.wvago.gov/pdf/annualreports/2007_report.pdf.
[113] Press Release, W. Va. Att'y Gen.'s Office, Attorney General McGraw Continues His Success in Halting the Making and Collection of Payday Loans in WV. $1.57 Million in Total Relief to Date (Sept. 17, 2008), *available at* http://www.wvago.gov/press.cfm?fx=press&ID=447.
[114] *See* Andrew R. Johnson, Judges Question Tribal Payday Lenders Over Online Activites, The Wall Street Journal (Dec. 5, 2013), available at http://online.wsj.com/news/articles/SB10001424052702304096104579240443901748418.

regulation by New York.[115] The District Court in Manhattan quickly dismissed the tribes' claims. The Court held that "[The Plaintiffs'] contention that the state is regulating activity that occurs on the tribes' lands" is flawed. "The State's action is directed at activity that takes place entirely off tribal land, involving New York residents who never leave New York State."[116] Plaintiff appealed the decision to the United States Court of Appeals for the Second Circuit and as of the date of this memo, a decision is pending.[117]

VII. Alternatives to payday lending

Payday loan alternatives exist but carry similar risks and trade-offs to payday loans. For example, one alternative is credit union loans, which include salary advance loan programs. Salary advance loans offer no-fee loans with 12% interest rates.[118] Borrowers can take up to $500 per month, and like payday loans, can pay it back with their next paycheck. However, unlike payday loans, the loans are connected to an account that automatically deducts 5% of the loan to be put in a savings account for the borrower, should there be a need for the loan for a "rainy day." Some payday loan branches such as *GoodMoney*, offer monetary workshops and budget counseling. Unlike payday loans, credit union loans are only available to credit union members and, therefore, are unavailable to many borrowers.

[115] Peter Lattman, Tribes Challenge New York's Authority Over their Lending, New York Times (Sept. 11, 2013), available at http://dealbook.nytimes.com/2013/09/11/indian-tribes-press-their-online-loan-case-against-new-york/?_php=true&_type=blogs&_r=0,
[116] Peter Lattman, Tribes lose Battle to Shield Payday Sites From New York State Crackdown, New York Times (Oct. 1, 2013), available at http://dealbook.nytimes.com/2013/10/01/tribes-lose-effort-to-block-new-york-from-regulating-their-online-lending/.
[117] PACER Service Center search May 20, 2014 U.S. Court of Appeals, 2nd Circuit Docket 13-3769, The Otoe-Missouria Tribe of Indians, et al. v. New York State Department of Financial Services, Benjamin M. Lawsky, in his official capacity as Superintendent of the New York State Department of Financial Services.
[118] Nancy Mann Jackson, 4 Alternatives to Payday Lending. http://www.bankrate.com/finance/personal-finance/4-alternatives-to-payday-lending-2.aspx. (Jul. 10, 2009).

Small bank loans are a second alternative to payday loans. Though they offer a lower interest rate (18% at Citizens Union) and no additional fees, such as prepayment penalties, these loans are much more difficult to access than payday loans.[119] Credit counseling can act as a different form of financial help, but it is not a substitute for payday lending. Counseling is free and focuses on budget counseling, debt management planning, and mortgage-default or rent delinquency counseling, but borrowers will not be able to obtain a loan from the counseling facilities. Cash advances from credit cards are another form of monetary loans, but they carry 25-30% interest rates, which can be hefty prices for someone in financial trouble.[120] In addition to bank loans, small consumer finance companies also offer small, short-term loans that are usually in the range of 25-36% APR but can cost up to 60% APR.

There are also alternatives that are less conventional, such as advances from employers, emergency assistance programs, and payment plans with creditors.[121] Yet all of these options have their own potential problems. Cash advances from employers may be a good choice the first time a borrower is in need of a cash advance. However, many employers do not or cannot provide a salary advance. If employers do provide a cash advance, it is usually a one-time only option. Emergency assistance programs, in addition to family assistance programs, are usually only offered to borrowers who have children, and are single parents. These assistance programs require the borrower to be in dire need of the loan, whether it be that they were served with an eviction notice, had their utilities shut off, or are actually homeless.[122] These programs are not ideal alternatives for borrowers trying to mitigate consequences by paying their bills.

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[119] *Id.*
[120] *Id.*
[121] *See* Six Smart Alternatives to Payday Loans. http://www.credit.com/money/six-smart-alternatives-to-payday-loans/. (Sept. 19, 2013).
[122] *Id.*

While there are alternatives to payday loans, each alternative has its own set of gambles and drawbacks. Many of these options are only available to a small demographic of people or are only offered for limited use. Payday loans offer a generally lenient approval process as well as more convenient and timely cash access.

CONCLUSION

Payday lending has grown from a small lending market to an industry with a loan volume approaching $50 billion. The rise of the internet as a popular medium for consumer purchases, recent recessions and household debt crises have contributed to the enormous growth of this industry over the past 20 years. While there are many alternative credit options available, they do not all suit a consumer's needs in every circumstance. Payday loans have filled a previous void in the financial product arena, acting as a more flexible credit option to consumers with less than optimum credit histories.

However, payday lending is not a perfect solution to consumers' economic problems and many people are working to eliminate it from the marketplace because of potential negative impact upon borrowers. The current international and domestic (state) regulatory climate is trending toward increased control of payday loans in an attempt to protect the consumer. Federal regulation of payday loans by the CFPB is imminent. Payday loans will likely be one of the agency's first major targets as the agency seeks to establish its role and value in the consumer protection landscape. The need for this product in the market has been demonstrated by the industry's tremendous growth. Given this, federal abolition of payday lending is unlikely.

Future federal regulation of payday lending will likely borrow from states that have successfully implemented payday lending controls. Reasonable limitations on loan rollovers, cooling off periods between loans, and real-time databases are likely to play a key role as the

CFPB determines how to regulate this product. Such payday loan controls may represent a feasible compromise if they allow lenders to continue to supply credit at rates that allow them to operate effectively, while protecting borrowers from falling into a financial trap from which they are unable to escape. Payday lending, even if regulated at the federal level, appears likely to remain a viable, and legitimate, form of alternative credit for some consumers.