GETTING FROM PROTECTING THE TROOPS TO PROTECTING CIVILIANS: CAN THE CFPB AFFORD CIVILIAN CONSUMERS THE SAME PROTECTION FROM PAYDAY LENDING NOW ENJOYED ONLY BY MILITARY FAMILIES?

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I. CONGRESS PASSED LEGISLATION TO PROTECT MILITARY FAMILIES FROM PAYDAY LOANS
   A. The Military Lending Act Imposes a 36% APR Cap and Other Restrictions on Payday Loans
   B. After Enactment of the MLA, Payday Loans Decreased and Affordable Loans Increased

II. ARGUMENTS MADE TO PASS THE MLA TO PROTECT SOLDIERS ARE APPLICABLE TO CIVILIANS
   A. Lenders Offer Civilians the Same Predatory Payday Loans Once Offered to Soldiers
   B. Lenders Target Civilians in Ways Similar to their Targeting of Soldiers
   C. Both Civilians and Soldiers Are Lacking in Financial Sophistication
   D. The Payday Loan Trap Hinders the Preparedness of Both Civilians and Soldiers
   E. Payday Loans Lead to Unmanageable Debt for Both Civilians and Soldiers

III. EFFORTS TO AFFORD CIVILIANS PROTECTIONS FROM PAYDAY LENDING
   A. Federal Lawmakers Have Been Unable to Muster Bi-partisan Support to Protect Civilians
   B. Mainstream Financial Institutions Alone Cannot Be Trusted to Protect Civilians

IV. THE CONSUMER FINANCIAL PROTECTION BUREAU HAS AUTHORITY TO PROTECT CIVILIANS
   A. The CFPB Should Issue Guidelines Identifying Many Payday Loan Practices as Deceptive
      1. The Guide Needs to Warn Lenders about their Debt Entrapment Practices
      2. The Guide Needs to Warn Lenders about their the Debt Treadmill Practices
   B. The CFPB Should Issue a Policy Statement Granting Responsible Lenders a Safe Harbor
      1. The CFPB Could Consider the FDIC’s Guidelines for its Loan Pilot Program
      2. The Policy Statement Can Create a Safety Zone for Affordable Low-Cost Loans
   C. The CFPB Can Use its Educational Mandate to Foster Expansion of Affordable Low-Cost Loans

In summer 2003, Navy Petty Officer 2nd Class Jason Withrow, stationed at a naval base in Georgia, obtained a $300 payday loan. But when the loan became due, he had to borrow from another lender to pay back that loan since he could not repay the original $300 loan in a single payment, as required by the contract. By February 2004, he had paid $5,000 in interest and fees on payday loans totaling $1,800 from four different lenders. If Petty Officer Withrow were in need of a short-term loan

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3 Id.
today, he would not have to settle for the typical payday loan, which carries a triple-digit interest rate, and has to be repaid in a single balloon payment in a short time frame (e.g., two weeks).  

For military personnel in need of quick cash, the financial landscape has dramatically changed for the better.  Persuaded by testimony that payday loans trap soldiers like Petty Officer Withrow in debt and interfere with their military preparedness, the United States Congress passed in 2006 a federal law, commonly referred to as the Military Lending Act (“MLA”).  It protects not only combat soldiers but all active-duty military personnel and their dependents from usurious loans by capping interest rates on several short-term loans, including payday loans, at 36 percent annual percentage rate (“APR”). Since passage of the MLA, loans offered by payday lenders to military families have drastically decreased.  However, this decrease did not leave military families without access to short-term credit. Military relief societies, which are non-profit organizations established to help military families, expanded their personal finance education outreach and began offering several interest-free loan products to help military families avoid payday loans.  Similarly, many credit unions and banks rose to

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4 See Steven M. Graves & Christopher L. Peterson, Predatory Lending and the Military: The Law and Geography of “Payday” Loans in Military Towns, 66 Ohio St. L. J. 653 (2005) (discussing interest rates for payday loans issued to military personnel and stating that interest rates averaged 498.75 percent in Indiana, 528.49 percent in Utah, and 474 percent in Washington, DC).

5 While there are stories reporting that military families remain a target of predatory lenders, this article demonstrates that military families have substantially more and better options for dealing with a financial crisis than the average low-to-moderate income civilian worker.

6 See John Warner National Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364, § 670(a), 120 Stat. 2083, 2266 (codified at 10 U.S.C.A. § 987(b) (West Supp. 2007) (capping interest rates on payday loans, tax refund loans and car title loans at 36%). Because the new law protects all active-duty soldiers, it protects many military personnel who will never see combat due to their gender or occupation and who live stateside just like civilians, yet the civilians have no protection.

7 Id.

8 See infra notes 51-7 and accompanying text.

9 See, e.g., Kevin, Lonergan, et. al., Before You Consider a Payday Lender, Consider This, US FED. NEWS, April 19, 2011, available at http://www.army.mil/article/55185/Before_You_Consider_a_Payday_Lender__Consider_This/ (stating that the Rock Island Arsenal Army Community Service offers to soldiers the “Army Emergency Relief” loan, which is an interest-free loan for $1,000 or less payable in a year or less; the Navy and Marine Corps Relief Society offers the "Quick Assist Loan" for up to $300 to be repaid no later than 10 months; the Air Force Aid Society offers the
challenge the payday loan industry’s assertion that triple-digit-interest loans are necessary and began offering to military personnel loans with APRs below 36 percent and on terms resulting in successful loan repayment.\(^\text{10}\) Because of the foregoing, military families now have access to and are increasingly using safe, affordable short-term loans.\(^\text{11}\)

In contrast to the landscape for military families, the financial landscape for civilians seeking short-term loans was already bad and has gotten increasingly worse, due in part to online lending and other tactics used by payday lenders. For example, in 2007, the same year the MLA took effect to protect military families, Bonnie Bernhardt, a civilian single mother from Wisconsin, borrowed $300 from a Delaware-based online payday lender.\(^\text{12}\) However, two weeks later, when she could not repay it, the lender debited her bank account for $90 to roll over—extend the due date on the loan.\(^\text{13}\) After the lender debited Ms. Bernhardt’s account for a total of $810 in rollover fees, it still insisted that she owed the original $300 loan.\(^\text{14}\) Her case reflects a common debt trap for civilians borrowing online.\(^\text{15}\)

Payday lenders are cleverly expanding their payday loan business to civilian consumers. For instance, an online payday loan company purportedly operating out of the Cheyenne River Reservation in South Dakota is fighting a cease-and-desist order issued by Maryland financial regulators and is claiming to have the right under tribal sovereign immunity to issue to Maryland residents loans with

"Falcon Loan" for up to $500 payable in 10 months, and the Coast Guard Mutual Aid offers the "Quick Loan" for up to $500 with flexible repayments).

\(^\text{10}\) See, e.g., The Credit Union Connection LOANS, National Credit Union Administration, Sept. 30, 2008, available at http://www.ncua.gov/resources/CreditUnionDevelopment/ResourceConnection/Files/CuConnection/TOC%20Loa ns.pdf ("[T]he Military Appreciation Loan (MAL) was created as a solution to high interest rate, unsecured loans granted to military personnel. Typically those loans are granted by predatory lenders in the form of Cash Advance loans, Payday Loans, etc. The MAL grants military members an opportunity to break the cycle of high interest rates and questionable practices exhibited by predatory lenders.");

\(^\text{11}\) See infra notes 51-57 and accompanying text.


\(^\text{13}\) Id.

\(^\text{14}\) Id.

\(^\text{15}\) See infra note 16 and accompanying text.
interest rates as high as 1,800 percent. Although several states have in the last four years passed statutes imposing greater restrictions on payday lending and capping APRs at 36 percent or less, payday lenders are routinely ignoring these laws and are developing more schemes to claim they are not subject to these laws.

While state legislators have been wrangling over how to prevent payday lenders from circumventing state laws, major banks, such as U.S. Bancorp, Wells Fargo, and Fifth Third Bank—all three recipients of taxpayer bailout funds—have been stealthily creating their own payday loan products, cleverly labeled as “direct deposit advances.” These loans have triple-digit APRs, exceeding 100 percent, and also have short maturity dates and require single balloon payments, just like payday loans. Moreover, although credit unions largely have a reputation for offering consumers low-cost loans, a few of them have been accused of issuing loans that are similar to payday loans and also carry triple-digit APRs.

The outlook for civilian borrowers like Ms. Bernhardt at first glance appears bleak. However, this Great Recession, which originated in irresponsible subprime mortgage lending, has a silver lining—enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the “Dodd-Frank Act”). Title X of the Dodd-Frank Act is entitled the Consumer Financial Protection Act of 2010 (“CFPA”), and it creates the Bureau of Consumer Financial Protection (the “CFPB”). The CFPB is empowered to enforce existing federal consumer laws as well as adopt new regulations to carry out these

17 See infra notes 194-200 and accompanying text.
18 See Chris Serres, Biggest Banks Stepping in to Payday Arena, STAR TRIB. (Minneapolis-St. Paul), Sept. 6, 2009, at D1.
federal consumer laws. The CFPB can become the champion for civilian borrowers by taking on America’s financial institutions to combat predatory short-term loans.

Part I of this Article describes the predatory characteristics of payday loans. It also analyzes provisions of the Military Lending Act that prohibit some payday loan practices, including prohibiting rollovers and interest rates higher than 36 percent. Part I also explains how enactment of the MLA eventually led to a dramatic decrease in payday lending to military personnel and substantial increase in safe affordable loans to military families.

Part II describes the arguments used to pass a federal law that protects only military families from payday lending. Applying these same arguments to the civilian borrower, Part II makes a compelling case as to why civilian families need federal laws protecting them from payday lending. Payday lenders issue to civilians the same predatory loans it did to soldiers; however, the financial situation for the average civilian is worse, thereby making the civilian borrower more susceptible to the payday loan trap. Because of the sacrifices of military members in volunteering to protect America, we rightfully reward military families with a strong social safety net, which is comprised of numerous benefits, including free comprehensive healthcare and subsidized housing and higher education. In contrast, the average low-to-moderate-income civilian worker lacks these benefits and is in a precarious situation due to continuing high unemployment rates and an ever-shrinking benefits package. If military families, who enjoy a strong safety net, need protection from payday loans, then unquestionably civilian families, who are largely left to fend for themselves, deserve protection from payday loans.

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21 See infra notes 102-126 and accompanying text (discussing the disparity in the benefits received by military families and civilian families). The discussion about the disparity in social safety nets for civilians and soldiers is not intended to downplay the sacrifices of military personnel. It is, however, intended to show that civilians should be afforded protection from payday lenders because, while military personnel may face other forms of hardship, the average civilian is likely to be financially worse than those in the military, consequently, many civilians will obtain payday loans and get caught in a debt trap. The author was a member of the United States Army Reserves for six years and recognizes that incentives, such as free healthcare, are necessary to persuade some people to join America’s all volunteer armed forces.
Both groups of consumers are lacking in financial sophistication and are no match for the $40-billion payday loan industry or Wall Street titans like Wells Fargo and other banks engaged in payday lending.

Part III discusses failed attempts by federal lawmakers to pass laws directly regulating payday loans. The need for federal regulation continues to grow as payday lenders and their affiliates devise new schemes to circumvent laws passed by several states to protect civilians from predatory payday loans. Part III also explains why, in the absence of actions taken by the CFPB, mainstream financial institutions cannot be relied on alone to offer nationwide safe affordable loans to civilians. While prudential regulators of nationally-chartered banks and federal credit unions have taken measures to try to get these institutions to offer alternatives to payday loans, many so-called alternatives are nothing more than payday loans by another name.

Part IV discusses the emergence of the CFPB as a watchdog to protect civilian borrowers from payday lending. It asserts that the CFPB has rulemaking authority to prohibit many payday loan practices as unfair, deceptive, or abusive as well as authority to issue a guide warning bank and non-bank lenders what practices it considers unfair, deceptive, and abusive. Because the guideline-making process can be much shorter than the rule-making process and has other advantages over the rule-making process, the author proposes in Part IV that the CFPB issue guidelines for financial institutions offering payday loans (“CFPB’s Guide for Payday Loan Providers”) to deter their proliferation. This guide is soundly rooted in provisions of the Military Lending Act and actions taken by state law makers and federal banking regulators and should warn lenders that the CFPB considers common payday lending practices, such as those described above, unfair, deceptive, and abusive. The author also proposes that the CFPB should use its authority to issue a policy statement to create a zone of safety for loan products that meet criteria for affordable low-cost loans (“Policy Statement for Safe Low-Cost

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22 See Dodd-Frank, § 1031(a), 124 Stat. at 2005.
Loans”). The statement is meant to encourage responsible lenders to develop loan products that can truly be considered low-cost alternatives to payday loans.

Having used its authority to issue the proposed Guide for Payday Loan Providers and the proposed Policy Statement for Safe Low-Cost Loans, the CFPB, as discussed in Part IV, can use its Office of Financial Education to fulfill its educational mandate to provide consumers “with timely and understandable information to make responsible decisions about financial transactions.” Because the possibility exists that the CFPB’s funding will be substantially reduced, the CFPB has to become adept at effectively using its funding for education outreach. Rather than the CFPB relying primarily a web page with a wealth of information the CFPB hopes consumers will visit and learn from, the author proposes that the Office of Financial Education launch a public service education campaign using a strategy that harnesses the power of social media, consumer-generated advertising, and wireless technology. Part IV sets forth the author’s proposed six-step strategy that includes, among other things, the CFPB increasing the number of fans on its social networking sites, conducting a contest for the creation of consumer-generated advertising promoting safe affordable loans, securing the agreement of banks and credit unions in every state to supply safe affordable loans, and developing an electronic application that consumers can download to make it easy for consumers to find these loans. This would nudge consumers in the right direction and enable them to select appropriate loans, thus freeing them from their bounded rationality.

By taking the above actions, the CFPB will foster the expansion of affordable small-dollar loan programs and cause them to emerge as a viable alternative to the typical payday loan. As a result, the

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23 See Dodd-Frank, § 1021(b)(1)
CFPB will afford ordinary Americans protections from payday lending similar to those extended to military families.

I. CONGRESS PASSED LEGISLATION TO PROTECT MILITARY FAMILIES FROM PAYDAY LOANS

Payday lenders have been claiming for years that they offer consumers payday loans as a solution to a financial crisis, but the evidence shows otherwise. A payday loan is a consumer loan that averages an APR in the triple, even quadruple, digits and that requires borrowers to repay in a single balloon payment when they receive their next paycheck. Because the high-cost loan must be repaid in a single payment and in a short period of time, the majority of payday borrowers cannot pay off the entire loan by its initial due date. Therefore, borrowers get trapped in a cycle of paying rollover or refinancing fees to extend the loan’s due date and ultimately end up paying far more than the original loan amount. In states where rollovers or multiple outstanding loans are banned, lenders do back-to-back transactions to skirt state law or borrowers get loans from different lenders to pay off the prior loans, thereby essentially borrowing from Peter to pay Paul. This cycle of multiple rollovers or loans is exacerbated by payday lenders’ rapacious electronic access to the borrower’s bank accounts to facilitate repayment of the loan. For example, prior to enactment of federal legislation protecting military

26 See, e.g., Cash America Net of Nevada, LLC v. Pennsylvania Department of Banking, 978 A.2d 1028, 1032 (2009) (stating that out-of-state online payday lender’s APRs were as high as 1140.63% on a loan for 8 days and as long as APR 260.71% on a loan for 35 days and holding that online lender must be licensed to issue loans to Pennsylvania’s residents and is subject to its laws limiting interest rates).
29 See, e.g., Ohio Coalition for Responsible Lending, Trapped by Design: Payday Lending by the Numbers, figure 2 page 4 and chart in Appendix "Michigan Deferred Presentment Data" (September 19, 2007) available at http://ohiocOalitionforresponsiblelending.org/Trapped%20By%20Design%20Final.pdf (finding in one study that the one-time borrowers constituted only 1.1% of the payday borrowers and that 13 loans per year was the most common number of loans per borrower).
families, a soldier based in Florida was charged $200 by his credit union for 10 returned debit fees as a result of the payday lender’s repeated attempts to electronically debit his account to collect on one single $300 payday loan.31 Besides the credit union’s charges, the payday lender also charged him fees for the unsatisfied debits.32

As early as 2002, military commanders started complaining to state lawmakers that soldiers were getting trapped in payday loan debt.33 When military leaders realized state lawmakers were unable or unwilling to pass laws protecting the troops, military leaders continued their efforts on a federal level. In 2006, the United States Department of Defense (“DOD”) issued its Report on Predatory Lending Practices Directed at Members of the Armed Forces and Their Dependents (the “DOD Report”).34 This report examined payday loans, vehicle title loans, and other short-term consumer financial products and specifically concluded that payday loans were predatory.35 The DOD Report stated that payday lending “harms the morale of troops and their families, and adds to the cost of fielding an all-volunteer fighting force.”36

31 Testimony of Jean Ann Fox, Director, Consumer Federation of America, before the House Financial Services Cmte Hearing on Payday Loan Revision, April 2, 2009, H.R. 1214; H.R. 1608; H.R. 2871 available at WLNR 6170181 (West)
32 Id.
33 See, e.g., Tom Shean, Payday-Loan Bill Draws Criticism From Military, Effort to Regulate High-interest Loans Would Backfire, They Say, VIRGINIAN-PILOT & LEDGER STAR (NORFOLK VA.) at D1, Feb 16, 2002 available at 2002 WLNR 2427527 (reporting that Rear Adm. David Architzel, then commander of the Navy’s mid-Atlantic region, wrote a letter to members of Virginia’s House Commerce and Labor Committee urging them to vote against a bill that would make it easier for payday lenders to charge usurious rates for their loans); Kristen Wyatt, Ga. Lawmakers Take up Payday Loans, Macon Telegraph (Ga.), Jan. 22, 2004, at B1, available at 2004 WLNR 18973050 (reporting that “military officers across the state [of Georgia] started complaining that payday loans are sinking their troops in debt”).
35 See Id. at 45 (The Defense Department reported that the “debt trap is the rule, not the exception: the average borrower pays back $834 for a $339 loan.”).
military families. The author describes some of the key provisions of this law and explains in detail why the same arguments used to legislatively afford protections to military families can be used to afford protections to all Americans.

A. The Military Lending Act Imposes a 36% APR Cap and Other Restrictions on Payday Loans

Section 670 of the John Warner National Defense Authorization Act (NDAA), and subsequent regulations issued by the Department of Defense (DOD), collectively and commonly known as the Military Lending Act, regulates certain consumer credit extensions to military borrowers, defined as active-duty military personnel and their dependent families. Under the Military Lending Act ("MLA"), Congress capped the APR at 36% for payday loans, vehicle title loans, and tax refund loans to active-duty military personnel and their dependents. It contains a definition of APR that is broader than the APR definition under the Truth in Lending Act. This expanded APR definition is called the Military APR ("MAPR") and is intended to keep lenders from misleading military borrowers about the true cost of credit by including all of their fees in the MAPR calculation. The MLA restricts a lender’s

Department reported that the “debt trap is the rule, not the exception: the average borrower pays back $834 for a $339 loan.” Id. at 45.

40 See John Warner National Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364, § 670(a), 120 Stat. 2083, 2266 (codified at 10 U.S.C.A. § 987 (2008)) ("A creditor ... may not impose an annual percentage rate of interest greater than 36 percent with respect to the consumer credit extended to a covered service member or a dependent of a covered service member.").
41 Id.
43 Id.
ability to debit the borrower’s bank account unless the loan complies with the MAPR calculation and the MAPR is capped at 36 percent or less. The MLA also preempts any inconsistent state or federal laws; consequently, military personnel and their families are entitled to whatever laws provide them with stronger consumer protection. The MLA prohibits rollovers and prohibits lenders from distributing multiple loans simultaneously to a military borrower. It makes unenforceable any agreement to arbitrate disputes involving the extension of consumer credit to military borrowers. The MLA applies to all financial institutions, not just non-bank lenders, so long as their loans meet the definition of a payday loan.

B. After Enactment of the MLA, Payday Loans Decreased and Affordable Loans Increased

Enactment of the MLA is not a panacea for all predatory lending to military borrowers, but it has resulted in a dramatic decrease in payday lending to military personnel. Since the MLA took effect October 1, 2007, official reports and anecdotal evidence confirms the decrease. For instance, according to a 2008 report by the Washington State Department of Financial Institutions, the majority of the payday lenders in Washington State stopped lending to military borrowers, resulting in a 92-percent decrease of loans to military borrowers from 2006 to 2008. In 2009 hearings held by Rep. Chet Edwards on the quality of life among service members, military commanders testified about a reduction in payday lending and stated that payday lenders were “going out of business” around Camp Pendleton. In 2007, the Navy-Marine Corps Relief Society (“NMCRS”), a charitable organization that

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44 See 10 U.S.C. § 987.
46 See 10 U.S.C. § 987
48 See infra notes 51-57 and accompanying text.
50 See Rep. Chet Edwards Holds a Hearing on Servicemembers Quality of Life, CQ Cap. Transcripts, Feb. 4, available at 2009, 2009 WLNR 2268048 (reporting statements by Carlton Kent, Sergeant Major of the Marine Corps, and Rick West, Master Chief Petty Officer of the Navy) (admitting that they lacked specific survey data to confirm what they were observing).
aids active-duty and retired sailors, assisted sailors in trouble with predatory loans by dispersing $1.1 million to pay off the loans.\(^{51}\) But in the first three quarters of 2008, which was post-enactment of the MLA, the NMCRS reported disbursements were down to only $250,000 as result of the decrease in payday loans.\(^{52}\) Other military relief societies also reported a reduction in monetary assistance given to military members struggling with payday loan indebtedness.\(^{53}\)

The success in the decrease in payday loans is not attributable solely to passage of the MLA but also to an increase in education outreach directed to military families and an increase in the supply of affordable loans.\(^{54}\) The NMCRS continued offering sailors financial counseling and began offering interest-free $300 loans called the Quick Assist Loan.\(^{55}\) The Rock Island Arsenal Army Community Service also issues to soldiers interest-free loans (up to $1,000) and assists them in creating budgets and developing debt repayment plans.\(^{56}\) Other military societies offer similar loan products and services.\(^{57}\)

Besides military societies’ offering military members interest-free loans and financial counseling to decrease their reliance on payday loans,\(^{58}\) politicians and military leaders used their influence to get banks and credit unions near or on military bases to offer low-interest loans to military members.\(^{59}\) For example, during congressional hearings related to passage of the MLA, Rep. Duncan Hunter (R-CA)
stated “we have got to get these credit unions that are [o]n the base, the guys in the institutions we allow to be inside the perimeter of that base, to reach out and establish short-term loans for our servicemembers so servicemembers go there instead of feeling they have got to go a to a loan shark to get that loan.”

While the author cannot prove that such statements by politicians and military leaders caused credit unions and banks to expand their offering of alternatives to payday loans, the author found several low-interest loan programs that were created in 2006 and 2007. For example, in 2006, VyStar Credit Union, announced that, with the help of the NMCRS, it would offer military members based in Jacksonville a lower-priced alternative to payday loans called a “Pay & Save Loan,” which would have a 14.25 percent APR and be due within six months.

In its 2008 report on implementation of the regulations adopted under the MLA, the DOD stated that several banks and credit unions were offering low-cost loans to military families at hundreds of military installations worldwide and military families were increasingly using these loan products. The Defense Credit Union Council, for instance, has 47 credit unions offering low-cost loans and lines of credit at 135 military installations. The average interest rate on these loans was a 17-percent APR with no additional fees. Similarly, 92 percent of the 157 credit union members of the National Association of Federal Credit Unions reported offering loans of $500 or less without origination fees and “with APRs well below 36 percent,” and 75 percent of them reported their loans “are offered with

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63 Id. at 22.
64 Id.
payment periods beyond one pay period.” 65 Clearly, loans like these are immensely better than the typical payday loan with a triple-digit interest rate, a two-week maturity date, and a single balloon payment requirement. 66

As the discussion above demonstrates, passage of the MLA did not result in military families’ lacking access to credit as some payday lenders tried to scare members of Congress into believing. Instead several forces came together to expand the military families’ access to affordable loan products and increase their knowledge about how to better manage their finances. 67 Similar results can happen for civilian consumers if federal politicians and policymakers combine forces. Perhaps, they must be first convinced that compelling reasons exist to afford civilians protections from payday lending.

II. ARGUMENTS MADE TO PASS THE MLA TO PROTECT SOLDIERS ARE APPLICABLE TO CIVILIANS

When congressional testimony was presented to urge members of Congress to pass the MLA, five major arguments were made: (1) payday lenders offer predatory loan products, (2) payday lenders target soldiers as customers, (3) these customers lack financial sophistication, (4) payday loans interfere with preparedness, and (5) payday loans lead to a cycle of unmanageable debt. Each of these arguments will be discussed below and the author will demonstrate that nearly the exact same arguments can be made for protecting civilian borrowers.

A. Lenders Offer Civilians the Same Predatory Payday Loans Once Offered to Soldiers

The congressional record is replete with statements actually referring to payday lenders as loan sharks and arguing that their loans are predatory due primarily to their short maturity dates, high interest rates, and repeat rollovers. For example, Duncan Hunter (R-CA), a Representative from a state with several military bases, expressed his opinion that military members should not have “to go a to a loan

65 Id.
66 See infra notes 69-72 and accompanying text (describing common payday loan characteristics).
67 See supra notes 51-57 and accompanying text.
shark to get that loan,” and thanked members of Congress for ensuring “our troops have a good situation now and will not be the victims of loan sharks.” Republican Representative Thelma Drake (Va.), who hails from a state with strong military interests, urged for passage of legislation protecting the troops and decried payday lenders’ extremely high interest rates, with rates “as high as 780 percent.” Similarly, Senator Richard Durbin (D-IL) criticized the practice of rollovers and commented “[p]ayday lenders are legal loan sharks that offer small, short-term loans at interest rates of 100, 500, even 1,000 percent.”

Although payday lenders are banned from offering such loan products to military families, compelling evidence shows payday lenders continue to peddle to civilian borrowers loans with the same short maturity dates, triple-digit interest rates, and multiple rollovers or refinancing or multiple loans per year. For example, in its 2010 annual report on payday lending, the California Department of Corporations found that, in California, the payday loan had an average term of 17 days and an average APR of 414%, and payday borrowers obtained almost eight loans per year. Repeated-rollover and multiple-loan problems have been consistently reported and thereby seriously undermine the industry’s contention that payday loans are a short-term solution. The foregoing characteristics of payday loans were prevalent among military borrowers prior to enactment of the MLA and were all identified as predatory along with other terms in the DOD’s report to Congress on predatory lending in the military.

69 Id. Representative Robert Simmons (R-CT) concurred with his statement that passage of legislation to protect the troops would “get the [sharks] off the backs of our soldiers.” Id.
70 See 151 CONG. REC. S1820, S1803 (daily ed. March 1, 2005) (commenting on a bill to bankruptcy law that contained provisions protecting the soldiers from payday loans).
72 See, e.g., Keith Ernst, et. al, Quantifying the Economic Costs of Predatory Payday Lending, Center for Responsible Lending (2003) (finding that 91 percent of payday borrowers obtain five or more loans per year), available at http://www.responsiblelending.org/pdfs/CRLPaydayLendingStudy121803.pdf.
B. Lenders Target Civilians in Ways Similar to their Targeting of Soldiers

In addition to the predatory characteristics of payday loans, targeting by payday lenders was another justification for passage of the MLA and is another similarity shared by civilian families and their military counterparts. Geographic mapping evidence was used to demonstrate targeting.\(^73\) This blatant targeting was easy to identify due to the abundance of payday loan stores that were located near military bases and that had military sounding names.\(^74\) Various means of doing electronic searches made it relatively easy for researchers to uncover the types of businesses clustered around military bases and, therefore, determine the extent to which military-base populations were being targeted by payday lenders.\(^75\)

Pockets of civilian populations are also being targeted in a similar manner even though it is more costly and difficult for researchers to gather such data.\(^76\) These pockets consist largely of low-income

\(^{73}\) See 152 CONG. REC. S6405, S6406 (daily ed. June 22, 2006) (statement of Sen. Jim Talent (R-Mo.)) (relying on geographic mapping research done by Professors Peterson and Graves and stating “irrefutable geographic evidence demonstrates that payday lenders are actively and aggressively targeting U.S. military personnel”); 151 CONG. REC. S11423, S11437 (daily ed. Oct. 17, 2005) (statement of Sen. Akaka) (introducing the Predatory Payday Loan Prohibition Act, a bill that was not passed, and stating “[p]ayday lenders are concentrated around military bases, such as the Navy bases in Norfolk, Virginia, the Army’s Fort Lewis in Washington State, and the Marine Corps base at Camp Pendleton in California”).


\(^{76}\) See, e.g., WEI LI ET AL., CENTER FOR RESPONSIBLE LENDING, PREDATORY PROFILING: THE ROLE OF RACE AND ETHNICITY IN THE LOCATION OF PAYDAY LENDERS IN CALIFORNIA 2 (2009), available at http://www.responsiblelending.org/california/ca-payday/research-analysis/predatory-profiling.pdf (noting that California Department of Corporations released a survey of payday loan borrowers revealing that, “while they represent about a third of the overall adult population, over half of payday borrowers are African American or Latino”); Credit Segregation: Concentrations of Predatory Lenders In Communities of Color, NATIONAL PEOPLE’S ACTION, Feb. 2011, available at http://showdowninamerica.org/files/images/Credit_Segregation_NPA_Report_v5.pdf (analyzing Advance America, the nation’s leading payday lender, and finding that its stores are “closest to and most densely concentrated in communities of color”).
white and minority communities.\textsuperscript{77} For instance, one study found that low-income consumers had a much higher probability of living near a payday loan store than consumers with relatively high income.\textsuperscript{78} Another study found that over 75\% of payday lending stores in Arizona were located in only two counties and were clustered in those counties in minority neighborhoods comprised of African Americans, Latinos, and/or Native Americans.\textsuperscript{79} Minority consumers being disproportionately represented among payday loan borrowers is not by accident. For example, former employees of one Ohio-based payday lender testified that it targeted African-American borrowers in Washington, DC and surrounding areas\textsuperscript{80} and made their employees use various strategies to increase the number of African-American borrowers.\textsuperscript{81}

Although these civilian communities are more difficult to identify as targets than military-base populations, this difficulty should not make the targeting of civilian communities of any less concern to

\textsuperscript{77} Even elderly Americans are particularly susceptible to the payday lending debt trap since “they are typically dependent on smaller fixed incomes and are rarely able to pay off their loans quickly.” See, e.g., Ellen E. Schultz & Theo Francis, \textit{High-Interest Lenders Tap Elderly, Disabled}, A1 \textit{THE WALL STREET JOURNAL} (Feb. 12, 2008), available at http://online.wsj.com/article/SB120277630957260703.html.

\textsuperscript{78} See, e.g., Steven M. Graves, \textit{Landscapes of Predation, Landscapes of Neglect: A Location Analysis of Payday Lenders and Banks}, 55 Prof. Geographer 303 (2003) (showing that a person with an income of $15,000 had an 88\% probability of loving near a payday lender while a person with income of $75,000 only had a 12\% probability of living near one).

\textsuperscript{79} See \textsc{Aracely Panameño & Keith Corbett, Center for Responsible Lending, Issue Brief 2, Wealth Stripping Payday Loans Trouble Communities of Color} (Oct. 2008). \textit{See also Wei Li et al., Center for Responsible Lending, Predatory Profiling: The Role of Race and Ethnicity in the Location of Payday Lenders in California 2} (2009), available at http://www.responsiblelending.org/california/ca-payday/research-analysis/predatory-profiling.pdf (noting that California Department of Corporations released a survey of payday loan borrowers revealing that, “while they represent about a third of the overall adult population, over half of payday borrowers are African American or Latino”); Nathalie Martin & Koo Im Tong, \textit{Double Down-and-out: the Connection Between Payday Loans and Bankruptcy}, 39 Sw. L. Rev. 785, 793 (2010) (citing studies showing a concentration of payday loan stores in minority communities).

\textsuperscript{80} See Statement of William Harrod, available at http://ohiocoalitionforresponsiblelending.org/Harrod.pdf (last visited July 9, 2009) at 2 (stating that “[w]e didn’t restrict our marketing to businesses in the District [of Columbia][;] [w]e went into Maryland, to College Park, Landover, Laurel, Bowie – always to areas with a high percentage of black customers”); Statement of Michael Donovan, at http://www.cohio.org/pdf/nr_091112007.pdf (last visited July 31, 2009) (A former Caucasian store manager testified “[w]e seek out low-income African-American and Latino neighborhoods because we know that this is where our most profitable client base is located.”).

\textsuperscript{81} See, e.g., Harrod, supra note 80, at 2 (A former African-American store manager testified that he was instructed to visit an African-American church to get into the “customer base” and to pay the pastor a $20 referral fee for each member sent to the payday lender).
lawmakers. Federal lawmakers are overwhelmingly college-educated, white and male, and many come from wealthy backgrounds. That makes most of these lawmakers susceptible to being out of touch with payday loan borrowers, especially those lawmakers who do not spend time in low-income white and minority communities to understand the financial conditions confronting them. Congress should not view payday loans as magically turning into a viable short-term credit option just because Shenequa obtains the loan and not Private Ryan. If the targeting of military families was a justifiable basis for protecting them from payday lending, then likewise the targeting of civilian families is equally a justifiable basis for protecting civilians.

C. Both Civilians and Soldiers are Lacking in Financial Sophistication

The lack of financial sophistication among soldiers was a third argument raised in support of passage of the MLA, and this also is another borrower characteristic that civilians and soldiers share. Senator Talent argued that payday lending “is ruining the financial lives of thousands of our service men and women who unknowingly, because of their lack of sophistication, get into debts from these abusive lenders, far greater than they are able to pay.” His lack-of-sophistication argument hinged on the young age of many of the soldiers as well as their possessing only a high school diploma. These characteristics are common among civilian borrowers as well. Add to these characteristics the fact that consumer credit contracts tend to be more complicated than necessary, and one can then understand

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83 Both of these persons are fictional characters. The movie character Private Ryan was a white male. Shenequa is common name for African-American females and is meant in this Article to represent a typical payday loan customer.
85 See id. (stating “these young men and women, many of whom are just out of high school, are not financially sophisticated and fall way behind in these payments”).
86 See Martin & Tong, supra note 27, at 793 (citing “[s]tudies have consistently found that typical payday loan customers tend to be under the age of forty-five, have only a high school diploma or GED, and are disproportionately racial minorities”).
why borrowers lack the sophistication to comprehend the likely negative consequences of getting a payday loan.

**D. The Payday Loan Trap Hinders the Preparedness of Both Civilians and Soldiers**

A fourth argument for passing a federal law protecting soldiers from payday lending was that payday loans interfere with military preparedness. Master Chief Petty Officer of the Navy, Terry Scott, testified that “the No. 1 reason our sailors are forced from one job to another is because they lose their security clearance . . . and the No. 1 reason they lose their security clearance is because of financial difficulties.”

Similarly, Republican Senator Jim Talent, who is credited with large responsibility in getting the MLA passed, testified that “[t]he abuse of payday lending is compromising the readiness of the U.S. military.”

This military preparedness argument is not just about clearances but also means that soldiers ensnared by payday loans cannot devote their attention to their jobs and, therefore, the loans negatively affect their performance. As Representative Walter Jones, Jr., (R-NC) put it succinctly, “[w]hen relatively unsophisticated borrowers are unable to readily repay a loan from these lenders, they can become consumed with worries over their debt and this undercuts their abilities to fulfill their military duties.”

Military leaders like Staff Sgt. Carlton Brown echoed concerns that once soldiers are trapped by payday loans, they become distracted from performing their duties as they struggle to make loan payments.

Although civilians cannot claim the payday loan trap may interfere with their ability to obtain security clearances, they nevertheless suffer in their job performance due to stress of over-indebtedness and stress from aggressive collection tactics of payday lenders. Payday lenders or their agents have

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repeatedly harassed civilian borrowers by calling their friends, relatives, and employers and have threatened civilian borrowers with criminal prosecution for passing bad checks to pressure them into repaying the debt or paying rollover fees. As the author has previously pointed out, payday lenders have sometimes been able to make good on their threats of arrest or criminal prosecution due to the ignorance of some local judges and prosecutors. Some lenders have also threatened to call or have actually repeatedly call borrowers’ employers to purposely get them fired for failure to repay.

Unlike military personnel, civilian Americans do not have the benefit of powerful people or groups fighting to protect them from the stress brought on by payday loans. Most civilians are at-will employees and, therefore, their employers can fire them for being “deadbeats” as a result of aggressive debt collection practices by payday lenders. When military brass complained to Congress to pass the MLA on the basis that payday loans lead to revocation of soldiers’ security clearances, military brass

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92 Sept. The author has been the recipient of telephone calls from payday lenders looking for friends and relatives who have failed to repay the loans.
93 See, e.g., Bill Would Clamp down on Interest Charged by Payday Lenders, NEWS JOURNAL (MANSFIELD, OH), Sept. 10, 2007, 2007 WLNR 28051189 (reporting that payday lenders have harassed by telephone young children of borrowers by warning them that bad things will happened to their parents if they fail to repay).
94 Id.
95 See, e.g., Boyce v. Attorney’s Dispatch Service, Inc., 1999 WL 33495605 (S.D. Ohio April 27, 1999) (assessing $10,000 in actual damages where debt collection agents for payday lender made numerous telephone calls to the borrowers, represented they were police officers and would criminally prosecute the borrowers for failure to pay, contacted the borrowers’ co-workers with warnings that borrowers would be criminally prosecuted. In that case, the court found that as a result of these debt collection practices, the borrowers suffered significant distress and strained marital relationships. Id. at 1. See also In re Hodge, 367 B.R. 843, 849 (Bankr. M.D. Ala. 2007) (imposing $1,000 in punitive damages on payday lender, the Money Shop, by finding its “conduct involve[d] intentional malice, trickery, or deceit through its threat of arrest and criminal prosecution when such action was unavailable under [Alabama] law); See, e.g., Don Baylor, The Hidden Costs of Payday Lending, TEX. BUS. REV., Apr. 1, 2008, available at 2008 WLNR 9942702 (reporting complaint by borrower that payday lender “threatened to have [a] constable come to her place of employment and have her arrested”).
96 Creola Johnson, Payday Loans, Shrewd Business or Predatory Lending?, 87 Minn. L. Rev. 10, 32-33, 87-89 (discussing how bad check prosecution by one Ohio judge was a misapplication of the state law because the borrower would have had to possess the intent to defraud at the time the post-dated check was given to the payday lender and such intent is lacking by virtue of the borrower’s intent to get a loan only). Consumers have had to post bail just to get of jail for failure to repay a payday loan, not for the actual commission of a crime. See, e.g., Dean Foust et al., Easy Money: Subprime Lenders Make a Killing Catering to Poorer Americans, BUS. WK., Apr. 24, 2000.
97 See, e.g., Baylor, supra note 95 (reporting consumer complaints about numerous types of threats made by payday lenders).
stated that the loss of clearances “forced [the soldiers] from one job to another,”98 not their termination of employment. Unlike soldiers who have had superiors come to their aid,99 civilians trapped in payday loan debt do not have employers looking for ways to help them get free from the payday loan trap and help them maintain employment. If payday loans have a negative impact on the job performance of soldiers, it has to have a similar negative impact on civilian job performance, especially when civilians have to function under the constant threat of criminal prosecution or employment termination.

E. Payday Loans Lead to Unmanageable Debt for Both Civilians and Soldiers

The last argument made in favor of protecting military families from payday loans is that these loans lead to unmanageable debt. Representative Drake made several references to payday loan debt being unmanageable and that it is exacerbated by lenders’ “encouraging extensions of the loan through refinancing.”100 Her sentiments were repeated by several members of Congress.101

As explained further below, if one accepts the argument that payday loans turn into a debt trap for military families, one should be able to accept the same argument for civilians given that they lack a strong social safety. Below is a comparison and contrast of military families and civilian families that demonstrate that military families enjoy benefits that exceed the private sector. The discussion about the huge disparity in benefits is not intended to downplay the sacrifices of military personnel. It is, however, intended to show that civilians should be afforded protection from payday lenders because, while military personnel may face other forms of hardship, the average civilian is financially worse off than those in the military; consequently, many civilians will obtain payday loans and get trapped in debt.

99 See, e.g., Annys Shin, On Payday, Many GIs Pay Back, WASH. POST, Sept. 11, 2006, at A8, available at 2006 WLNR 15759883 (reporting that after receiving threats from his payday lender, a sailor overwhelmed by payday loan debt went to his commanding officer, who then helped him find a lawyer and obtain credit counseling).
100 See supra, notes 56-7
101 See supra, note 57
The employment benefits enjoyed by active-duty military members vastly differ from those available to civilian families. The first of these benefits is relatively good compensation with job security. The Congressional Budget Office reported that, with cash allowances and associated tax advantages, regular military compensation for the average enlisted soldier exceeded the 75th percentile of civilian earnings.\(^{102}\) In addition to being well paid, members of the military have the option to retain their jobs and receive scheduled across-the-board pay increases.\(^{103}\) Soldiers also receive free training to improve their skills and, as a result, become qualified for higher-skilled and higher-paid positions. Furthermore, they can receive free or largely-subsidized college education. As of August 2009, service members with at least three years of active duty service can attend any public college at government expense or apply for a subsidy payment toward tuition at a private university.\(^{104}\) In addition to benefits related to further career advancement, active-duty military personnel, eligible military retirees, and dependents of both groups receive free health care through the Military Health Services System.\(^{105}\)

Besides healthcare, housing cost is another large expense soldiers are primarily relieved of paying. They can live on base for free or they and their family can live off base and receive a monthly housing subsidy to cover housing cost.\(^{106}\) Soldiers also can go to on-base commissaries and post exchanges to buy groceries at or near cost and do not pay sales tax on them.\(^{107}\) Soldiers also receive free legal representation that is guaranteed and is an important benefit, especially when facing a legal battle with a


\(^{103}\) *Id.*


\(^{105}\) JOHN V. LUND, MILITARY PAY, BENEFITS AND RETIREMENT 39 (2004).

\(^{106}\) *Military Personnel: Active Duty Benefits Reflect Changing Demographics, but Opportunities Exist to Improve: Before the S. Subcommittee on Personnel, Committee on Armed Services*, 107th Cong. 47-48 (2002).

\(^{107}\) *Id.* at 42
payday lender.\footnote{108} Finally, bankruptcy filings are easier to accomplish as result of laws passed to protect troops in need of bankruptcy relief due to insurmountable debt, such as payday loan debt.\footnote{109}

Civilians, who are largely unprotected from payday loans,\footnote{110} are facing persistent employment and have very few benefits in comparison to military families. In the midst of the current economic crisis, unemployment rates continue to rise.\footnote{111} In 2008, 2.6 million jobs were lost—the highest loss since 1945.\footnote{112} In January 2009, 598,000 jobs were lost.\footnote{113} This unemployment trend has continued with the unemployment rate jumping from 5.8\% in 2008 to 9.6\% in 2010, and in 2011, it has been hovering around 9.1\%.\footnote{114} Studies demonstrate that job losses have affected minorities disproportionately more than Caucasian Americans.\footnote{115} The current unemployment rate for African Americans is 16.2\% and Latinos is 11.9 while it is only 8.0\% for Caucasians.\footnote{116} This racial disparity is important because research shows African Americans and Latinos are disproportionately more likely to obtain payday loans than Caucasians.\footnote{117} This is not surprising, considering data showing the concentration of payday

\footnotesize{\begin{itemize}
\item \footnote{108}{\textit{Id.} at 50}
\item \footnote{110}{Unless they are poor enough to qualify for free legal aid, civilian American have to pay for their own legal counsel. Moreover, unlike the soldier’s, civilians do not have federal laws making it easier to file bankruptcy.}
\item \footnote{111}{See Liz Wolgemuth, \textit{What’s in a Number?}, U.S. NEWS AND WORLD REPORT, July 1, 2009, at 46 (discussing what happens during a recession, including rising unemployment).}
\item \footnote{112}{\textit{Id.}}
\item \footnote{113}{\textit{Id.}}
\item \footnote{114}{\textit{United States Bureau of Labor Statistics, Labor Statistics From The Current Population Survey}, http://www.bls.gov/cps/cpsaat1.pdf; also consult 18. REP. CLARKE ISSUES STATEMENT ON MAY'S JOB REPORT, US Federal News Author: N/A; 6/3/11 USFEDNEWS 00:00:00}
\item \footnote{115}{Patrick McGeehan & Mathew R. Warren, \textit{Job Losses Show Wider Racial Gap in New York}, N.Y. TIMES, Jul. 13, 2009, at A1 (By the end of March, 2009, there were about 80,000 more unemployed blacks than whites, even though there are roughly 1.5 million more whites than blacks in New York City. Because of the disproportionate number of Blacks unemployed than Whites, the military could be an attractive option for Black youths).}
\item \footnote{116}{\textit{United States Bureau of Labor Statistics, Employment Situation Summary}, http://www.bls.gov/news.release/emsit.nr0.htm.}
\item \footnote{117}{See, e.g., ARACELY PANAMENO & KEITH CORBETT, CENTER FOR RESPONSIBLE LENDING, ISSUE BRIEF 2, \textit{Wealth Stripping Payday Loans Trouble Communities of Color} (Oct. 2008); WEI LI ET AL., CENTER FOR RESPONSIBLE LENDING, \textit{Predatory Profiling: The Role of Race and Ethnicity in the Location of Payday Lenders in California} 2 (2009), available at http://www.responsiblelending.org/california/ca-}
\end{itemize}
lenders in minority communities and, as one study found, these lenders are three times more prevalent in African American neighborhoods than Caucasian ones, even when it controlled for other factors.\footnote{Uriah King, Wei Li, Delvin Davis & Keith Ernst, \textit{Race Matters: The Concentration of Payday Lenders in African-American Neighborhoods in North Carolina}, CENTER FOR RESPONSIBLE LENDING, Mar. 22, 2005 at 11.}

Instead of an increase in well-paying jobs, low-to-moderate income civilian workers can expect stagnant wages and “automation, outsourcing, and the march of workers toward jobs in the [low-paying] service sector.”\footnote{Liz Wolgemuth, \textit{Workers Do the Shuffle: The Labor Force is Shifting Toward Science and Health}, U.S. NEWS AND WORLD REPORT, July 1, 2009, at 38.} After being adjusted for inflation, wages for most workers have actually been falling for the last few years.\footnote{See Jared Bernstein & Lawrence Mishel, \textit{Economy’s Gains Fail To Reach Most Workers’ Paychecks}, ECONOMIC POLICY INSTITUTE, Aug. 30, 2007, available at http://www.epi.org/publication/bp195/} That means that those who are fortunate to receive pay increases in this Great Recession are most likely earning wages that do not actually keep pace with the cost of living. An estimated three million jobs have been outsourced to China alone\footnote{See Robert E. Scott, \textit{Unfair China Trade Costs Local Jobs}, ECONOMIC POLICY INSTITUTE, Mar. 23, 2010, available at http://www.epi.org/publication/bp260/ (EPI, a liberal research organization, reports that between 2001 and 2008, 2.4 million jobs were lost or displaced due to a growing trade imbalance between the U.S. and China)} and thousands of jobs have gone to other low-income countries such as India.\footnote{See Kimberley Blanton, \textit{An Honest Disturbing Look At Outsourcing}, Boston Globe, Jul. 10, 2005 available at 2005 WLNR 10872874(West); See also J. Bonasia, \textit{Outsourcing, For Good or Ill, Comes of Age Putting India On The Map}, INVESTOR’S BUSINESS DAILY, Dec. 3, 2010 available at 2010 WLNR 23970044(West)} Given these bleak statistics, many Americans will remain unemployed or under-employed.\footnote{See United States Bureau Of Labor Statistics, \textit{The Employment Situation – September 2011}, http://www.bls.gov/news.release/pdf/empsit.pdf} For those civilians fortunate enough to have decent jobs, some will face financial difficulties due to an ever-shrinking compensation and benefits package.\footnote{See supra note 120 (and accompanying text)}

Opportunities for job training, career advancement, and higher education are substantially less for civilians in comparison to military members. The training a civilian does receive is specific to the job at hand, and generally inapplicable to other fields. In order to pursue significant advancement or change in career, a civilian usually must go back to school to gain the proper credentials at his or her own

payday/research-analysis/predatory-profiling.pdf (noting in its report that African Americans and Latinos make up a disproportionate share of payday loan borrowers in California).

\footnote{payday/research-analysis/predatory-profiling.pdf (noting in its report that African Americans and Latinos make up a disproportionate share of payday loan borrowers in California).}
expense. Post-secondary education comes at no small cost.\textsuperscript{125} The majority of civilians will not be fortunate enough to receive scholarships along the way and, therefore, will be responsible for the entire cost of higher education, which has been steadily rising for the last two decades.\textsuperscript{126} Besides lack of free higher education, most civilian workers and their family members do not get free healthcare, subsidized housing, discounted groceries, or free legal aid. Even if civilians are able to take advantage of move-in specials for housing, scholarships for higher education, coupons for groceries and services, and other special offers, these cannot compare to free healthcare services, free public higher education, subsidized housing, and other benefits provided to active-duty military families.

Without these numerous benefits awarded to military families, average civilian families are even more vulnerable to economic hardship and, therefore, likely to rely on payday loans. Without the protection afforded to military personnel, civilian families who obtain payday loans will get caught in a cycle of debt and some will even wind up filing bankruptcy to get out of this debt.

\section*{III. EFFORTS TO AFFORD CIVILIANS PROTECTIONS FROM PAYDAY LENDING}

Some federal lawmakers have tried but have been unsuccessful in passing legislation to curb payday lending to protect ordinary Americans. While several states have enacted laws to restrict payday lending, payday lenders are either ignoring the laws outright or finding clever ways to get around them.

\textbf{A. Federal Lawmakers Have Been Unable to Muster Bi-partisan Support to Protect Civilians}

The United States Congress acted bipartisanly in 2006 to protect only active duty soldiers and their families from payday loans; however, since that time, Congress has had inertia when it comes to passing legislation that would extend protection to all Americans.


\textsuperscript{126} \textit{Id.}
In 2009, U.S. Representative Luis Gutierrez (D-Ill.), then head of the House Financial Services Subcommittee on Financial Institutions and Consumer Credit, introduced a bill entitled the “Payday Loan Reform Act of 2009.” The proposed bill would have required lenders to provide specific disclosures to payday loan customers and purported to extend protections of the Military Lending Act to all Americans. However, because the bill would not have capped APRs on payday loans or offered many protections already required under state law, critics rightfully argued that the Gutierrez bill would have in effect given Congressional approval to lenders that charge triple-digit-interest rates for payday loans.

In the same year the Gutierrez bill was introduced, Senator Richard J. Durbin (D-Illinois) introduced a bill called the Protecting Consumers from Unreasonable Credit Rates Act of 2009 in order to establish “a national usury rate for consumer credit transactions.” Like the Military Lending Act, Durbin’s bill would have capped the APR on payday loans at 36 percent. The 36% interest rate cap

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127 The proposed bill would require lenders to provide specific disclosures to payday loan customers and purports to extend protections of the Military Lending Act to All Americans. It would require payday lenders to post notices in English and Spanish, and offer extended repayment plans if consumers cannot make due dates. Lenders would also be prohibited from threatening criminal prosecution or taking a security interest in property against people who can’t repay on time. Payday Loan Reform Act, H.R. 1214, 111th Congress, 1st Session (2009). Because the Gutierrez bill actually protects payday lenders and legalizes predatory lending, consumer advocates have labeled it the “Payday Lender Protection Act.” Mierzwinski, supra note 10605.

128 Id.

129 Id.

130 The Gutierrez bill provides that: “It shall be unlawful for a payday lender to require a consumer to pay interest and fees that, combined, total more than 15 cents for every dollar loaned in connection with a payday loan.” Americans for Fairness in Lending contends that the rate of charging interest at 15 cents for every dollar translates into an APR of 390 percent for two weeks or 780 percent APR for one week. See Payday Loan Reform Act Does Not Contain Much Reform, Americans For Fairness in Lending, http://blog.affil.org/2009/04. Thus, Gutierrez’s bill is “an ersatz reform that would allow payday lenders to charge at what amounts to an annual percentage rate of 391 percent.” Andrew Rosenthal, Editorial, 391 Percent Payday Loan, N.Y. TIMES, April 13, 2009, at A20.

131 Because of the lack of a federal usury cap on interest rates, consumers pay as much as $8,600,000,000 annually in fees for payday loans. Protecting Consumers from Unreasonable Credit Rates Act of 2009, The original bill introduced as S. 500 IS, 111th Congress, 1st Session. Full Text is available at http://thomas.loc.gov/cgi-bin/query/z?c111:s.500.IS: Unlike the Gutierrez bill, consumer protection proponents support Durbin’s bill. See Payday Loan Reform Act Does Not Contain Much Reform, supra note 99 (stating that the consumer groups that support Durbin’s Bill and oppose Gutierrez’s bill include ACORN, Consumer Federation of America, Consumers Union, National Association of Consumer Advocates, National Consumer Law Center, National Fair Housing
was arguably fair to consumers and ensured payday lenders would obtain a reasonable profit.\footnote{132}{See The FDICs Small Dollar Loan Pilot Program: Results of the First Year, FDIC, http://www.fdic.gov/bank/analytical/quarterly/2009_volume3_2/small_dollar.html (last visited Feb. 4 2010) (discussing a pilot program demonstrating the profitability of short-term loans with APRs less than 36%).} Durbin’s bill, however, fell short of providing needed consumer protection because it had “tolerances” or exceptions that payday lenders would have used to skirt the usury cap.\footnote{133}{For example, section 141(b)(2) of the bill provides that the definition of fee and interest rate does not include “credit obligations that are payable in at least 3 fully amortizing installments over at least 90 days.” For loans of $300 or more, lenders can charge additional fees, including origination fees of no more than $30, and late fees of either $20 or a fee authorized by state law. For example, if the loan is payable in three installments and has a 90-day maturity, lenders will be allowed to charge origination fees between $30 and $120 on loans of $300 or more. Id.} 

In 2010, Senator Kay Hagan (D-NC) introduced a bill that was weaker than Durbin’s bill because it contained no usury cap and would have only required payday lenders to offer customers an extended repayment plan upon their default and would have allowed payday lenders to issue up to six loans to an individual borrower in a 12-month period. Senator Hagan also introduced the text of this bill as an amendment to the bill that eventually became the Dodd-Frank Act.\footnote{134}{Restoring American Financial Stability Act, S. 3245, 111th Cong. (2010).} The amendment failed due in part to the lobbying efforts of payday lenders. In response to her proposed amendment, payday lenders told their customers that the bill would put payday lenders out of business and would deny their customers the ability to receive loans.\footnote{135}{David Lazarus, Payday Lenders Scuttle Financial Reform Amendment to Limit Such Loans, L.A. Times, May 21, 2010.} Payday lenders even provided their customers with scripts and letters to contact their lawmakers in an effort to begin a “grass-roots” campaign to stop the amendment.\footnote{136}{Id.}
In summary, none of the foregoing proposed bills would have required lenders to offer reasonably-priced loans to all Americans or imposed reasonable restrictions on payday lending practices; therefore, these bills were not worth passing.\textsuperscript{137}

While federal lawmakers have been unsuccessful in getting any bills passed to protect civilians, several states have passed legislation to protect their civilian residents from payday lending. Due to reasonable publishing constraints, the author is unable to discuss numerous schemes employed by payday lenders to circumvent state laws. These schemes are, however, fully expounded in a forthcoming article\textsuperscript{138} to demonstrate why federal regulation from the CFPB is necessary to curb payday lending.

**B. Mainstream Financial Institutions Alone Cannot Be Trusted to Protect Civilians**

Before proposing specific recommendations that the CFPB could consider implementing, this Article addresses why the CFPB cannot just leave it solely to traditional banks and credit unions to offer nationwide low-cost loans to civilian consumers, and thereby obviate the need for the CFPB to act.

While credit unions are perceived by millions to be a trustworthy source for low-interest mortgage and auto loans, some credit unions are marring this image by purporting to offer alternatives to payday loans that are actually no alternative at all. The National Credit Union Association (NCUA) amended in 2010 its lending rules concerning short-term, small-dollar loans\textsuperscript{139} to make it easier for a federal credit union (“FCU”) to offer short term, small amount loans as an alternative to payday loans.\textsuperscript{140} Under the new rules, the APR for such loans is capped at 28\% and FCUs are prohibiting from charging


\textsuperscript{138} See Id.

\textsuperscript{139} Short-Term, Small Loan Amounts, 12 C.F.R. Part 701

\textsuperscript{140} See Id. ( stating “The amendment permits FCUs to charge a higher interest rate for an STS loan than is permitted under the general lending rule, but imposes limitations on the permissible term, amount and fees associated with an STS loan”)


application fees in excess of $20 or issuing loan amounts in excess of $1,000. Note that this amendment raised the allowable rate from 18 percent to 28 percent, thereby allowing FCUs to create slightly more expensive loans. However, the loan maturity date must be a minimum of one month and rollovers are prohibited.

Despite the promise offered by these new rules, the media has reported that some credit unions are offering high-cost loans similar to traditional payday loans. Critics argue that the amendments have enabled, rather than curbed, the conduct of such rogue credit unions. One specific criticism is that because of a $20 application fee for each loan, the cost to borrow $200 for two months translates into an APR of more than 100 percent and even greater since some credit unions are charging application fees far above the $20 cap. For example, Kinecta Federal Credit Union charges an application fee of $39.95. This practice is clearly in violation of NCUA rules which require FCUs to charge an application fee that reflects the actual costs associated with processing an application for a short-term small-dollar loan. There are also allegations that some credit unions have found inventive ways of circumventing these rules, including selling loans in exchange for a commission by third-party payday companies. Although the NCUA rules are an important starting point, they are meaningless and ineffective if member credit unions can circumvent them without fear of enforcement actions from the NCUA. Debbie Matz, Chairman of the NCUA, responded to the media reports about these credit

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142 Id.
143 Id.
144 Proposed Rules, Short-Term, Small Loan Amounts, at 5, available at 2010 WL 3712584 (noting that Reg Z limits application fees to the recovery of costs associated with procession applications for credit that charged to all consumers who apply, regardless if credit is actually extended. However, if FCU undertakes a more limited application process with repeat borrowers, there is no justification for charging the same application fee each time the borrower applied)
145 Id. (some CUs such Mountain America, the second biggest credit union in Utah, is partnering with Capital Finance LLC, a payday lender, to offer high cost loans)
unions by strongly condemning such practices but did not announce any plans to investigate possible violators and bring enforcement action against them.\textsuperscript{146}

Along with credit unions, traditional banks cannot be relied upon to self-regulate and offer widespread low-cost loans to consumers. Albert Kelly, CEO of SpiritBank in Oklahoma and chairman-elect of the American Bankers’ Association gave congressional testimony where he claimed “[b]anks are working hard every day to make credit available” and argued that “the Bureau [CFPB] should focus its energies on supervision and examination of nonbank financial providers.”\textsuperscript{147} He urged “Congress to ensure that this focus on nonbanks is a priority of the Bureau.” Such comments ignore the fact that part of the blame for the rapid expansion of payday lending by non-banks is due to the scarcity of traditional banks in neighborhoods that rely on payday loans. All types of predatory high-cost credit establishments are ubiquitous in urban neighborhoods while traditional banks are difficult to find.\textsuperscript{148} Mr. Kelly’s comments also assume only non-banks are guilty of predatory lending and, as explained further below, banks now issue payday loans that are arguably more predatory than the typical payday loan.

Major banks, such as U.S. Bancorp, Wells Fargo, and Fifth Third Bancorp—all three recipients of taxpayer bailout funds—have been stealthily creating their own payday loan products,\textsuperscript{149} cleverly labeled by some as “direct deposit advances.”\textsuperscript{150} For example, some Fifth Third Bank branches have signs posted on their drive-through windows that state: “I CAN HELP YOU ACCESS YOUR DIRECT

\textsuperscript{147}See, e.g., Rep. Shelley Moore Capito Holds a Hearing on Dodd-frank Impact on Community Banks, \textit{CQ CAP. TRANSCRIPTS}, Mar. 2, 2011, available at 2011 WLNR 4165390 (Albert Kelly, CEO of SpiritBank in Bristow, Oklahoma and chairman-elect of the American Bankers Association failed to explain to whom are the banks “working hard” to extend credit and for what type of loan transactions).
\textsuperscript{148}See Michael S. Barr, \textit{Banking the Poor}, 21 Yale J. on Reg. 121, 149-50 (2004).
\textsuperscript{149}See Chris Serres, \textit{Biggest Banks Stepping in to Payday Arena}, \textit{STAR TRIB.} (Minneapolis-St. Paul), Sept. 6, 2009, at D1.
\textsuperscript{150}See, e.g., \textit{supra} note 140 at 30 (discussing recent empirical study conducted by the author showing some borrowers had obtained payday loans called “direct deposit advances” from traditional banks such as US Bank and Wells Fargo).
When the teller explains the early access program, she or he is careful not to use the word “loan” but, instead, describes it as a “service” offered to customers with direct deposit, thereby implying that these customers are especially valued. Fees for the “service” are not mentioned unless the customer asks and the APR is never mentioned. A comparison of Fifth Third’s loan product to the typical payday loan demonstrates that many of these bank-provided short-term loans are nothing more than payday loans.

<table>
<thead>
<tr>
<th>Loan Process and Features</th>
<th>Fifth Third’s Early Access Loan153</th>
<th>Typical Payday Loan154</th>
</tr>
</thead>
<tbody>
<tr>
<td>Application</td>
<td>None required</td>
<td>Short Application</td>
</tr>
<tr>
<td>Direct Deposit</td>
<td>Required</td>
<td>Not Required</td>
</tr>
<tr>
<td>Term of Loan</td>
<td>As short as one day and up to 35 days depending on when the next direct deposit of borrower’s income check occurs.</td>
<td>Usually 2-week loan but could be shorter if borrower’s payday is sooner than two weeks.</td>
</tr>
<tr>
<td>Fee/Interest Rate</td>
<td>Finance charge $10 for every $100 borrowed. Fifth Third states this is an APR of 120%.</td>
<td>Finance charge of $15 to $20 per $100 for a two-week loan, with a resulting APR of 390% to 520%.</td>
</tr>
<tr>
<td>Repayment Process</td>
<td>Repayment on the loan automatically occurs when the borrower’s next direct deposit of at least $100 goes into the checking account, or else the bank will withdraw the amount due at the end of 35 days if no direct deposit transpires.</td>
<td>Repayment occurs when the borrower pays in person on the due date or when the lender debits the borrower’s bank account for repayment of entire loan or for a rollover fee if the balance is too low.</td>
</tr>
</tbody>
</table>

151 The author photographed the sign on Jan. 29, 2010. Mid-way on the sign was a clipart image of the horn of plenty.
152 The author has been a Fifth Third customer for 12 years. She regularly goes into a Fifth Third bank branch for service and is, therefore, describing what she has observed about the Early Access Loan. Almost every time, the author enters a Fifth Third branch for service, a bank employee tries to get her to sign up for this loan program and has gotten into arguments with bank employees for refusing to admit that this “early access program” is nothing more than a loan! The author can only assume that the employees are instructed to never use the word “loan”. The failure to state the APR is a violation of the Truth in Lending Act. See Johnson, supra note 96, at __.
153 See Fifth Third Bank, Fifth Third Early Access Loan (brochure on file with the author).
154 See Johnson, supra note 96, at 11; Bank Payday Loans... They’re Baaaaaaaack, NAT’L CONSUMER LAW CENTER, June 2009, http://www.nclc.org/issues/payday_loans/content/Bank_Prepaid_Payday_Loans.pdf [hereinafter Bank Payday Loans].
Although Fifth Third claims its fee translates into a 120% APR, experts demonstrate that the actual APR is 520% for a one-week loan or 260.71% for a two-week loan. One could hardly call Fifth Third’s Early Access Loan a reasonable alternative to payday loans, especially given that the bank will automatically offset the loan against the next direct deposit, and thereby cause the bank to be paid ahead of all other creditors, including the borrower’s landlord or mortgage company. By doing this, the bank can cause the borrower’s account to be overdrawn and incur multiple NSF fees. One could easily see then how a Fifth Third loan could set the borrower on a course of indebtedness just like any other payday loan.

These bank-provided payday loans can be worse for the consumer than non-bank payday loans. By requiring direct deposit and using their automated technology to cause payment immediately when the deposit hits the account, banks are depriving the borrower of using the funds for necessities such as food, and banks are evading garnishment laws that protect a certain amount of income and certain income sources (e.g., social security checks) from creditors. The bank’s direct deposit requirement was not implemented to benefit the consumer but to assure the bank of an easy way of facilitating payment of itself ahead of all other creditors via technology and automated processes. In contrast, non-bank payday lenders will have to continue their practices of using manpower to attempt multiple bank-account debits to collect and to harass borrowers with insufficient balances into repaying the loans or paying to rollover fees.

Ironically, payday lenders, who have a track record of circumventing state laws, are complaining that banks like Fifth Third are ignoring interest rate caps imposed under state payday lending statutes. However, these national banks can ignore state law because federal banking laws protect them from

155 See id., at 2; E-mail from Ron Elwood, Staff Attorney, Mid-Minnesota Legal Assistance, to Creola Johnson 15:56:49 (Jan. 27, 2010) (on file with author).
156 See Bank Payday Loans, supra note 152, at 2
157 See id. (stating that payday lenders are contending that Fifth Third is “ignoring Ohio’s 28 % payday loan cap”).
state laws capping interest rates. The Office of the Comptroller of the Currency (OCC) recently announced proposed guidelines on safe and sound banking practices in connection with deposit-related consumer credit products, which would include direct deposit advance programs, which are really the banks’ version of a payday loan. These guidelines are merely suggestions for banks to follow and lack any serious restraints on bank-issued payday loans; therefore, these guidelines would likely have an inconsequential effect on the supply of such loans and are not worth discussing.

Although a few banks and credit unions are offering to civilians short-term loans with effective APRs below 36 percent, too many of these mainstream institutions are eagerly offering an increasing number of higher-priced loans. For example, according to a trade magazine for banks, Wells Fargo’s direct deposit advance loans, which carry APRs ranging from 120% to 1,200%, are offered in 26 states, and the bank had allegedly “planned to use its status as a federally regulated bank to get around [New York’s] usury cap” to expand its loan business in New York.

In summary, there is no groundswell of mainstream financial institutions offering low-cost loans to civilians. Consequently, the CFPB has to rise to the occasion to change the small-dollar short-term loan industry to protect civilians from high-cost loans.

IV. THE CONSUMER FINANCIAL PROTECTION BUREAU HAS AUTHORITY TO PROTECT CIVILIANS

The CFPB’s intervention is critical and necessary in addressing the plight of the civilian borrower. The US Department of Defense, numerous military organizations, and politicians from jurisdictions with large military installations combined forces in ways to ensure that military families receive protection from predatory lenders. In other words, these combined forces became a very

\[\text{References}\]

158 See Johnson, supra note 96, at 107-08.
159 See Guidance On Deposit-Related Credit Products available at 2011 WLNR 11434088 (West).
160 See id.
161 See Alex Ulam, Consumer Groups Call N.Y. Plan An Invitation To Usury, AM. BANKER, at 7, Jun. 2, 2011 available at 2011 WLNR 10957959
powerful voice that captured the ear of Congress to act on behalf of military borrowers. Civilian borrowers, on the other hand, have had a very difficult time getting the attention of Congress to afford them similar protections from payday lending, and this is due in part to the strong lobbying efforts of the payday loan industry. Consequently, civilians’ cries for protection from payday lending have largely fallen on deaf ears.

The nascent CFPB now has the chance to act on the cries of civilians and afford them basic protections. In the absence of a confirmed director of the CFPB, director-nominee Richard Cordray and his colleagues at the CFPB are, undoubtedly, strategizing about how to regulate payday lending. The author has, in another article, described in detail how the CFPB could use its rulemaking authority to declare many payday loan practices are deceptive, unfair, and abusive and, therefore, prohibit them. However, because various forces are hard at work to substantially limit the CFPB’s rulemaking authority, the author has to confront the real possibility that the CFPB may be unable to adopt rules prohibiting many common payday loan practices. This Article, therefore, sets forth a road map for the CFPB to consider following to get providers of payday loans to voluntarily make substantial improvements of their loans to consumers.

This section asserts that, in order to decrease the supply of payday loans and expand the availability of low-cost loans with reasonable terms to civilian consumers, the CFPB has to seek to accomplish three major tasks. The first major task for the CFPB is to use its guideline-making authority to make clear (1) that high-cost, short-term consumer loans offered by non-bank and mainstream financial institutions are subject to regulations, (2) that entities disguising their operations or their versions of payday loans are “covered persons” subject to regulations; and (3) that typical payday

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162 See Johnson, supra note 137
163 See Johnson, supra note 137; Mary Spector, Taming the Beast: Payday Loans, Regulatory Efforts, and Unintended Consequences, 57 DEPAUL L. REV. 961, 983-95 (2008) (describing how payday lenders are
loan practices are considered unfair, deceptive, and abusive. The second major task for the CFPB to accomplish is to use its authority to issue policy statements to signal to the market place the characteristics of affordable loans to afford a safe harbor for financial institutions offering such loans and desiring to be promoted by the CFPB. The third major task is for the CFPB to use its educational mandate to develop innovative ways of disseminating information about safe affordable loans and making it easy for consumers to locate lenders offering these loans.

A. The CFPB Should Issue Guidelines Identifying Many Payday Loan Practices as Deceptive

The first step in decreasing the supply of the typical payday loan is for the CFPB to use its authority to issue a guideline identifying as abusive, deceptive and unfair several payday loan practices. The Dodd-Frank Act transfers to the CFPB various FTC powers, including the authority to issue guidelines, and grants to the CFPB itself the power to issue guidelines. FTC guides (also known as guidelines and guidance) are statements of interpretation about what practices are considered unlawful and are intended to promote voluntary compliance among industry participants. FTC guides provide “the basis for voluntary and simultaneous abandonment of unlawful practices by members of industry.”

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164 See Dodd-Frank Act, § 1061(b)(5)(B)(i) (“The Bureau shall have all powers and duties under the enumerated consumer laws to prescribe rules, issue guidelines, or to conduct studies or issue reports mandated by such laws, that were vested in the Federal Trade Commission on the day before the designated transfer date.”).
165 See Dodd-Frank Act, § 1012(a)(10) (authorizing the CFPB to “implement[] the Federal consumer financial laws through rules, orders, guidance, interpretations, statements of policy, examinations, and enforcement actions”); § 1021(c)(5) (stating that one of the primary functions of the CFPB is “issuing rules, orders, and guidance implementing Federal consumer financial law”).
166 See 16 C.F.R. § 1.5 (2011)
167 See 16 C.F.R. § 1.5 (2011)
The CFPB’s issuance of a guide covering payday loans has several advantages. Although a guide would not have the force of law like a promulgated rule, courts and state laws can accord to the guide deference in deciding which practices are unlawful under state consumer statutes. Moreover, an industry participant’s actions that are inconsistent with the guide may subject the participant to corrective action by the FTC, and now the CFPB. A guide may be introduced as evidence of the FTC’s “interpretation as to the appropriate standard of conduct and measure of fairness concerning a particular method, act or practice.” By issuing a guide, the CFPB would not have to follow the lengthy process of promulgating a rule because it can publish a guide on its own in the Federal Register after giving interested parties a time period to submit comments. If the FTC’s track record is any indication regarding the length of the rulemaking process, it could take the CFPB nearly ten years to finalize a rule regulating payday lending. Given the ever-changing political winds, the CFPB probably will not have that kind of time to take effective action. Another advantage of issuing a guide is that it would not be subject to the veto power of the Financial Stability Oversight Council, which can veto, by a two-thirds majority vote, any rule adopted by CFPB if it would threaten the safety and soundness of the banking system or the stability of America’s financial system. Nothing in the Dodd-Frank Act requires the CFPB to make certain findings or conclusions before issuing a guide about questionable acts or practices.

170 See 16 C.F.R. § 1.5 (2011) (“Industry guides are promulgated by the Commission on its own initiative or pursuant to petition filed with the Secretary or upon informal application therefor, by any interested person or group”).
171 See Jennifer L. Pomeranz, Television Food Marketing To Children Revisited: The Federal Trade Commission Has The Constitutional And Statutory Authority To Regulate, 38 J.L. MED. & ETHICS 98 (2010) (stating that FTC’s rulemaking process “is quite onerous and time-consuming” and it took the FTC almost 10 years to get a rule finalized); Annemarie Ellig & Rebecca Lanctot, A Decision Looms: How Passage of the United States Arbitration Fairness Act of 2007 Would Contradict Principles Underlying the New York Convention and Affect the United States’ Role in International Commerce, 12 V. J. 249 (2008) (stating the FTC’s rulemaking process for revising a franchise rule took ten years).
172 See Dodd-Frank Act, § 1023(a) (describing the process by which a CFPB rule can be set aside).
by providers of consumer financial products or services. Consequently, the CFPB should issue a guide to quickly signal to the marketplace what types of payday loan practices are considered unlawful.

The CFPB has examples of FTC guides that it can consider in formulating a guide for payday loan providers. Some FTC guides are applicable to several industries because they are of general application, such as its Guides for the Use of Environmental Marketing Claims, commonly known as Green Guides, which are considered successful in establishing standards for truthful and substantiated environmental claims in advertising.\(^\text{173}\) Other FTC Guides are directed toward particular industries,\(^\text{174}\) such as the Guides for Private Vocational and Distance Education Schools (“FTC Guide for For-Profit Schools”), which was adopted to address deceptive practices by “private vocational or distance education schools.”\(^\text{175}\)

Since the CFPB has its own authority to issue a guide as well as the FTC’s authority to do so, it should issue a guide for financial institutions offering payday loans (“CFPB’s Guide for Payday Loan Providers”) to deter their proliferation. An FTC guide for particular industries typically consists of sections identifying a list of the entities covered by the guide, a number of definitions, and a list of practices the FTC considers deceptive and misleading.\(^\text{176}\) Using as an example the FTC Guide for For-Profit Schools, the CFPB should first identify the entities that are providers of payday loans. A broad list is necessary to cover (1) banks offering their own versions of payday loans but calling them


\(^{174}\) See 16 C.F.R. §20.0 (2011) (setting out guides for the manufacture, sale, distribution, marketing and advertising (including advertising in electronic format, such as on the Internet) of used parts and assemblies containing used parts designed for use in automobiles, trucks, motorcycles, tractors, or similar self-propelled vehicles whether or not such parts or assemblies have been reconstructed in any way)

\(^{175}\) See 16 C.F.R. §254.0(b) (2011).

\(^{176}\) See 16 C.F.R. §254.2 (2011)
something else, (2) non-bank lenders claiming to be an entity other than a payday lender to circumvent state laws imposing APR caps on payday loans, and (3) tribal members in partnership with non-bank lenders claiming tribal sovereign immunity to charge usurious interest rates. The CFPB’s Guide for Payday Loan Providers should also broadly define “payday loan” to cover transactions disguised to look like something else. For example, both non-bank payday lenders and banks offering short-term unsecured consumer loans claim their financial products are equity lines of credit when in reality they function just like regular payday loans.

In addition to identifying covered entities and defining payday loans, the CFPB’s Guide for Payday Loan Providers should identify the practices that are considered deceptive, abusive and unfair. As stated previously, the CFPB has the FTC’s power to issue a guide interpreting an act or practice as deceptive or unfair and has its own power to issue a guide interpreting an act or practice as abusive in addition to unfair and deceptive.\(^\text{177}\) The CFPB has several bases on which to issue a guideline interpreting as unfair, abusive or deceptive several payday loan practices. For example, in the 2006 DOD Report that pre-dated passage of the Military Lending Act (“MLA”), the Department of Defense identified payday loans as predatory, defined predatory to include a loan that is unfair or abusive, and urged passage of federal and state laws “to protect Service members from unfair, deceptive lending practices and usurious interest rates.”\(^\text{178}\)

The author categorizes below common payday loan practices into the following two groups that the CFPB’s guide should address: debt entrapment practices and debt treadmill practices. Debt entrapment practices ensure that the borrower will not be able to repay the loan by the initial due date and will eventually default or have to do something to extend the life of the loan. Debt treadmill

\(^{177}\) See supra nn. 164-166 and accompanying text.
\(^{178}\) See DOD Report, supra note 34, at 50
practices are designed to ensure the lender of receiving a continuing stream of fee payments from the borrower, who continues to remain on the hook for the original principal loan amount.

1. The Guide Needs to Warn Lenders About their Debt Entrapment Practices

The CFPB’s Guide for Payday Loan Providers needs to identify the following debt entrapment practices as unfair or deceptive: (1) triple-digit interest rates, (2) minimal credit checks, (3) large principal amounts, (4) single balloon payments, and (5) short loan due dates.

The first debt entrapment practice the CFPB’s Guide for Payday Loan Providers needs to address is the lending practice of habitually charging interest rates in violation of applicable laws. The MLA caps the APR on payday loans to covered military families at 36 percent, and all financial institutions, not just non-banks, must comply with this APR cap. Moreover, a federal rule subjects payday loans offered by federal credit unions to an APR cap of 28 percent\textsuperscript{179}, and several state statutes subject payday loans by non-banks to APR-caps of 36 percent or less.\textsuperscript{180} Accordingly, a large number of federal and state lawmakers believe a triple-digit interest rate is usurious and, therefore, unfair.\textsuperscript{181}

Lenders that charge APRs in excess of applicable laws are engaged in a deceptive practice because even if they make accurate APR disclosures, as required by the Truth in Lending Act. That is because they will mislead consumers into believing the APR is legal when it is not. Unfortunately, the CFPB is prohibited from establishing a national usury limit;\textsuperscript{182} consequently, it cannot assert that all payday loans with APRs exceeding 36 percent are unfair, deceptive or abusive. It can, however, place in its Guide for Payday Loan Providers a provision stating that it is unfair and deceptive for a lender to charge an APR that is in excess of the interest rate permitted under applicable state and federal laws.\textsuperscript{183}

\begin{itemize}
\item \textsuperscript{179} Short-Term, Small Loan Amounts, 12 C.F.R. § 701.21(c)(7)(iii)
\item \textsuperscript{180} See DOD Report, supra note 34, at 50-51
\item \textsuperscript{181} See 152 CONG. REC. S6405, S6406 (daily ed. June 22, 2006) (Representative Thelma Drake (R-Va.) stated that the 36-percent APR was necessary to promote fairness).
\item \textsuperscript{182} Dodd-Frank Act § 1027(o).
\item \textsuperscript{183} See supra notes 194-206 and accompanying text (discussing the CFPB’s exclusive rulemaking authority).
\end{itemize}
CFPB’s Guide for Payday Loan Providers could then state, as an example, that a federal credit union or a non-bank lender would be engaging in an unfair or deceptive practice if it charged an Ohio civilian resident an APR greater than 28 percent because both institutions are subject to this APR cap.\(^{184}\) With such an advisory interpretation, lenders that disregard the applicable interest-rate caps would be on notice that they are subject to the CFPB’s corrective action and risk imposition of liability in states with strong consumer protection statutes that accord deference to FTC rules and guidelines.

Besides usurious interest rates, the lending practice of doing minimal credit checks is the next debt entrapment practice that needs to be addressed. Payday lenders advertise that consumers can get a loan within minutes without undergoing a credit check.\(^{185}\) However, the author discovered years ago that they use Teletrack, a company that was recently fined $1.8 million in civil penalties\(^ {186}\) and that provides credit reporting services to payday lenders, rent-to-own stores, and other non-bank companies that extend credit to cash-strapped consumers.\(^ {187}\) If Teletrack reports that a consumer has recently defaulted on one of these subprime transactions, the payday lender will decide that the consumer is ineligible for a loan.\(^ {188}\) When payday lenders claim they do not conduct credit checks, not only are they falsely advertising, but what they are really revealing is that they do no assessment of the consumer’s ability to repay the loan. This practice is in violation of some state laws\(^ {189}\) and is identified in the DOD report and by federal regulators as a predatory lending practice. By advertising that they will not

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\(^{184}\) See supra note 250 and accompanying; OHIO REV. CODE ANN. § 1321.40(A) (West 2009). If the CFPB defines payday loans broadly as proposed herein, banks would be in violation of the CFPB if they issued open-end loans with APRs exceeding 36 percent to military personnel covered under the MLA. See supra notes 161 & 225 and accompanying text (explaining how national banks are subject to the MLA but can circumvent application of the MLA by claiming their loan products are open-end credit).

\(^{185}\) Johnson, Shrewd Business or Predatory Lending?, supra note 96, at 32-33.

\(^{186}\) See Press Release, http://www.ftc.gov/opa/2011/06/teletrack.shtm (Teletrack recently entered a consent agreement with that FTC to pay $1.8 million in civil penalties for violating the Fair Credit Reporting Act by creating and selling to numerous entities lists of consumers who had applied for payday loans.).

\(^{187}\) Johnson, Shrewd Business or Predatory Lending?, supra note 96, at 61-62 (uncovering in a study of payday lenders in central Ohio that they use Teletrack in deciding whether to issue a payday loan to a consumer).

\(^{188}\) Johnson, Shrewd Business or Predatory Lending?, supra note 96, at 61-62.

\(^{189}\) See, e.g., Vernon’s Ann. Mo. Stat. § 408.500 (“When making or negotiating loans, a licensee shall consider the financial ability of the borrower to reasonably repay the loan in the time and manner specified in the loan contract.”).
perform credit checks, by refusing to assess a consumer’s loan repayment ability, and by issuing loans based on minimal documentation, lenders knowingly mislead consumers into a loan product where they are destined to default, i.e., be unable to pay by the initial due date. Consequently, the CFPB’s Guide for Payday Loan Providers should identify this lack of repayment ability assessment as a deceptive practice.

Connected to the lenders’ lack of repayment ability assessment is the debt entrapment practice of issuing loans with large principal amounts. Payday lenders are known for issuing loans that are large in comparison to the consumer’s gross income as well as the disposable income. The author also discovered in her survey of payday lenders that they usually encourage the consumer to borrow the maximum amount allowed under law even when a lower loan amount is requested. That is why several states, in addition to capping the maximum amount of the loan, restrict the loan amount at 30 percent or less of the borrower’s income. Similarly, the regulator for federal credit unions requires them to limit the loan amount in relation to the consumer’s wealth and to do some type of assessment of the consumer’s ability to repay the loan. Therefore, the CFPB’s Guide for Payday Loan Providers should identify as deceptive a lender’s practice of issuing loans with large principal amounts relative to the borrower’s income.

Single balloon payments and short maturity dates are the next two debt entrapment practices that should be addressed in the CFPB’s Guide for Payday Loan Providers. Bank as well as non-bank lenders

190 See Johnson, Shrewd Business or Predatory Lending?, supra note 96, at 58.
191 Id. at 74-75.
192 See, e.g., Wash. Ann. Code § 31.45.073(2) (capping the total loan amount at the lesser of $700 or 30 percent of the borrower’s monthly income); Ind. Code Ann. § 24-4.5-7-402 (West, Westlaw through 2006 2d Reg. Sess.) (prohibiting a lender from issue a loan where the “total payable amount of the ... loan exceeds fifteen percent (15%) of the borrower’s monthly gross income”); OHIO REV. CODE § 1321.41(E) (2008) (prohibiting payday lenders from issuing loans that exceed 25 percent of the borrower’s gross monthly income).
193 See, e.g., 12 C.F.R. § 701.21(c)(7)(iii)(8) (“The Federal credit union includes, in its written lending policies, a limit on the aggregate dollar amount of loans made under this section of a maximum of 20% of net worth and implements appropriate underwriting guidelines to minimize risk; for example, requiring a borrower to verify employment by producing at least two recent pay stubs.”); FDIC Pilot Program, supra note 271, at 28.
do not allow payday borrowers to make partial payments but require them to repay the loan in a single payment and in a very short time period, typically two weeks or less. Because the majority of Americans live paycheck to paycheck, it should not be surprising that that majority of payday loan borrowers are unable to repay the loan in a lump sum and in a short period. The DOD Report found that “75% of payday customers are unable to repay [the entire] loan within two weeks and are forced to get a loan ‘rollover’ at additional cost.” Again, by requiring the borrower to repay a high-cost loan in a short period of time and in a single payment, the lender’s practice is unfair and deceptive because it knows at the outset that the majority of consumers are obtaining loans that the lender knows the consumer cannot repay.

As for arguments that the consumer should bear the burden of financially unwise decisions, it is noteworthy that consumer protection laws are about protecting the least sophisticated consumer. Because financial literacy education is not mandatory in most of America’s K-12 schools, very few consumers obtain such education prior to leaving high school. That means they are ill-prepared to negotiate with cunning and often highly-educated business people offering complex financial products and services. Moreover, when it comes to consumer credit, behavioral research shows consumers often process complex information in ways that lead to systematic errors in judgment. Furthermore, consumers tend to place heavy weight on the immediate consequences of a decision, and thereby tend to borrow too much. One should also keep in mind that America’s current economic crisis that began in 2008 arose from mortgage lending practices that destined homeowners to fail. By passing the Dodd-Frank Act, Congress has made it clear that irresponsible lending practices are unacceptable.

194 See Johnson, Shrewd Business or Predatory Lending?, supra note 96.
195 See Mark Coindreau, More Americans Living Paycheck to Paycheck, REUTERS, Sept. 15, 2008, available at http://www.reuters.com/article/pressRelease/idUS194666+15-Sep-2008+PRN20080915 (reporting that 71% of Americans reported living “paycheck to paycheck,” defined as being unable to meet or having difficulty meeting their current financial obligations if their paychecks were delayed for only one week).
196 Burr, supra note 63, at 156-57.
Accordingly, the CFPB’s Guide for Payday Loan Providers needs to identify the following debt entrapment practices as unfair or deceptive: minimal credit checks, large principal loan amounts, usurious interest rates, single balloon payments, and short loan due dates. These practices put consumer borrowers in the position of defaulting or entering the debt treadmill and both options are economically harmful to the consumer.

2. The Guide Needs to Warn Lenders About their the Debt Treadmill Practices

In addition to the debt entrapment practices, the proposed Guide for Payday Loan Providers needs to address the following debt treadmill practices: (1) multiple rollovers, (2) multiple back-to-back loans, (3) rapacious electronic debits, (4) illegal garnishments, and (5) criminal prosecution threats.

As found in the DOD Report and many other studies, the majority of payday borrowers cannot pay the loan by its initial due date and have to resort to multiple rollover payments, which do not reduce the loan’s principal. In states where there is no ban or limitation on the number of rollovers, payday lenders require borrowers to pay rollover fees to extend the loan’s due date for another two weeks, and this leads to a cycle of rollovers. For example, a study conducted by the Indiana Department of Financial Institutions revealed that the payday loan borrower “rolls over” his or her loan an average of 10 times, so that the loan is actually outstanding for five to six months. Because lenders do not permit partial payments, the rollover fees do not count towards reducing the principal; therefore, the cycle of rollovers can lead to the borrower into paying rollover fees that are several times the original loan amount. Because the rollover cycle is considered very harmful to consumers, the MLA, NCUA rule, 197 See DOD Report, supra note 34, at 19 & 43.
198 Even if there is an applicable law regarding rollovers, many payday lenders routinely ignore legal restrictions on rollovers. See Johnson, Shrewd Business or Predatory Lending?, supra note 96, at 64-70.
and many states ban rollovers. Therefore, the CFPB’s guide should warn banks and non-banks that rollovers are considered a deceptive practice.

In states where rollovers are banned, payday lenders issue multiple “touch and go” or back-to-back loans, which are transactions where the borrower repays the payday loan in full and then immediately (within a few hours or days) issues another loan for the same amount. Some lenders structure the back-to-back loans in a manner to circumvent a few state statutes that require cooling-off periods between loans. In states that have databases to track payday lending, one can determine that consumers are in a cycle of debt even though the lenders claim these repeat borrowers are successful. For example, in one state with a tracking database, 49 percent of all subsequent loans were obtained within 24 hours of the previous loan being repaid and almost 90 percent of all subsequent loans were obtained within the two-week pay period of the previous loan being repaid. Unfortunately, although several states ban rollovers, these states are silent about multiple outstanding or back-to-back loans, which some advocates claim are the most frequently used lending practice to keep the borrow indebted to the payday lender.

Some states attempt to ban or limit multiple successive and concurrent payday loans. However, advocates claim they are ineffective in the absence of an electronic database to track payday lending. Both banks and non-banks are accused of issuing multiple loans, and this practice serves to generate additional fees just like multiple refinancing in the residential mortgage market serve to increase the

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201 See, e.g., 32 C.F.R. § 232.8(a)(1) (making it unlawful under the MLA if a lender “rolls over, renews, repays, refinances, or consolidates any consumer credit extended to the covered borrower by the same creditor with the proceeds of other consumer credit extended by that creditor to the same covered borrower, unless the new transaction results in more favorable terms to the covered borrower.”); 12 C.F.R. § 701.21(c)(7)(iii)(4) (“The Federal credit union must not roll-over any STS [short-term small] loan.”); OHIO REV. CODE ANN. § 1321.41(G).

202 See Johnson, Shrewd Business or Predatory Lending?, supra note 96, at 54-64.

203 Id.

204 Id. at 64-65

205 Id.

206 See Testimony of Jean Ann Fox, Director, Consumer Federation of America, before the House Financial Services Cmte Hearing on Payday Loan Revision, April 2, 2009, H.R. 1214; H.R. 1608; H.R. 2871 available at WLNR 6170181(West)
revenues of mortgage brokers and lenders. Because the various forms of multiple successive and concurrent payday loans allow lenders to perpetuate consumer indebtedness and allow lenders to skirt state law, the CFPB’s guide should advise that it considers deceptive the practice of payday lenders issuing multiple successive or concurrent payday loans to the same borrowers. If the borrower cannot repay, the lender should be trying to work out an extended repayment plan, not dupe the borrower into getting multiple loans.

Besides the practice of issuing multiple successive or concurrent payday loans, the CFPB’s Guide for Payday Loan Providers has to deal with the practice of lenders raiding consumers’ bank accounts via electronic debits. Payday loan contracts by banks and non-banks usually contain a provision authorizing the lender to debit the consumer’s bank account to facilitate repayment of the loan or rollover/refinancing fees. Horror stories abound where lenders have used electronic debits to withdraw far more than the outstanding loan. For example, in one California case involving a payday lender claiming immunity due to a tribal affiliation, the consumer alleges that after borrowing $300, the Internet lender, over the next five months, debited her bank account for rollover fees totaling $977, and then informed her that she still owed $430. This lender’s absurd position arises from the fact that payday lenders do not allow partial payments and, therefore, these extra fees are due to multiple rollovers or refinancing.

If the consumer does not have money in the account to cover these rollover fees, the withdrawals dramatically worsen the consumer’s financial situation because the consumer’s bank will charge the consumer bounce check fees for these attempted debits. Prior to passage of the MLA, a military service member sued a payday lender after it debited his bank account 11 times in a single day and,

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208 See supra notes 31-2 and accompanying text.
thereby, caused him incur hundreds of dollars in bounced check fees from his bank as well as additional fees from the payday lender due to the unsatisfied debits.\(^{209}\)

Consumers obtaining bank-issued payday loans can likewise have their bank accounts raided and incur hefty bounced check fees. For example, an elderly Social Security recipient who obtained a loan from Wells Fargo, wound up obtaining 24 successive loans in a 39-month period, paid $1,200 in finance charges, and paid $676 in overdraft fees on loans marketed as a means of avoiding such fees.\(^{210}\) Clearly, no consumer would grant a lender a debit authorization if he or she knew ahead of time that rapacious electronic debits such as the examples described above would follow. Such abuse of debit authorizations was considered unfair to military families, and, therefore, the MLA bans lenders from using electric debits unless the loan meets certain conditions, including the APR being capped at 36 percent or less and no rollovers being allowed.\(^{211}\) Consequently, the CFPB’s Guide for Payday Loan Providers should warn lenders that debiting a consumer’s bank account more than once to facilitate loan repayment is deceptive unless it has received explicit future consent in writing to any subsequent debit. The Guide for Payday Loan Providers should encourage lenders to create, at no additional cost, an extended payment plan to borrowers who have defaulted on the initial payment.

Along with multiple successive debits, the CFPB’s guide should warn lenders that illegal garnishments of consumers’ bank accounts and paychecks are considered deceptive practices. To illustrate this problem consider the following examples. The FTC recently filed a complaint against


\(^{210}\) See Letter from Adam Rust, Research Director, Community Reinvestment Association of North Carolina, to the Office of the Comptroller of the Currency at 6 (July 14, 2011) available at http://cra-nc.org/files/pdf/occ%20guidance%20comment2.pdf, [hereinafter Rust Letter to OCC] (providing comments by the Community Reinvestment Association of North Carolina in opposition to the OCC’s proposed guidance on direct deposit advances and describing how the banks’ direct deposit advances have the same characteristics as payday loans and lead to a cycle of debt just like any regular payday loan).

\(^{211}\) Warner National Defense Act, supra note 6.
Martin Webb, a Native American member of the Cheyenne River Sioux Tribe, and several of his online payday loan companies for illegal garnishment practices.\textsuperscript{212} When Webb and his companies were unsuccessful in collecting repayment of payday loans from the consumers directly, they would send bogus official-looking documents to the consumers’ employers in an attempt to garnish wages.\textsuperscript{213} The defendants simply chose to ignore state law requirements such as actually getting a judgment against the consumers and following procedural requirements for garnishments.\textsuperscript{214} Similarly, MetaBank once offered its version of a payday loan called an iAdvance until it agreed to pay a $400,000 civil penalty to the Office of Thrift Supervision to settle claims that the bank engaged in unfair and deceptive practices in the marketing of its iAdvance loan.\textsuperscript{215} After the settlement, consumer advocates uncovered consumer complaints suggesting that MetaBank had engaged in a pattern of illegal garnishments against protected income sources, such as social security benefits.\textsuperscript{216} These stories of illegal garnishments are not isolated incidents.\textsuperscript{217} It is considered so problematic that the U.S. Department of the Treasury is making efforts to prohibit direct deposit of government benefits into bank accounts that have payday loan debit authorizations attached to them.\textsuperscript{218} As a result of actions taken by the FTC and OTS and expected action by the Treasury Department, the CFPB has sound reasons for warning banks and non-banks that illegal

\begin{footnotesize}
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\item \textsuperscript{213} Id.
\item \textsuperscript{214} Id.
\item \textsuperscript{215} See Letter from Adam Rust, Research Director, Community Reinvestment Association of North Carolina, to the Office of the Comptroller of the Currency at 1 (July 14, 2011) available at http://cra-nc.org/sites/cra-nc.org/files/pdf/occ%20guidance%20comment2.pdf, [hereinafter Rust Letter to OCC] (reporting several consumer complaints, including: “MetaBank today garnished my Social Security Deposit for my loan payment in full after giving me little time to make alternate arrangements. I am now risking eviction and becoming homeless.”); \textit{Idaho Issues Cease And Desist Order Against Online Payday Lender, Allege Garnishing Of Wages Violating Law, IDAHO STATESMAN (BOISE)}, Dec. 21, 2010, available at 2010 WLNR 25167059 (West) (reporting that Idaho Department of Finance banned Flobridge group from engaging in payday lending in Idaho because it never obtained a license from the department and was doing illegal garnishments)
\item \textsuperscript{216} Id.
\item \textsuperscript{217} See \textit{Minnesota AG Sues Five Short-Term Loan Companies}, PAYMENTSSOURCE, (Pg. Unavail. Online), Sep. 7, 2011, available at 2011 WLNR 17678071 (reporting Minnesota Attorney General is suing several online payday lenders for numerous violations, including illegally garnishing consumer’s paychecks).
\item \textsuperscript{218} See 31 C.F.R. 208 (new rules issued by Dept. of Treasury limit creditors’ ability to seize funds from Social Security, Supplemental Security Income (SSI), VA, and other federal benefits held in bank accounts in favor of direct deposit or prepaid cards)
\end{itemize}
\end{footnotesize}
garnishments of bank accounts and paychecks are deceptive acts and may subject the wrongdoers to corrective action.

Last in the long list of debt treadmill practices that the CFPB’s guide should address is the lender’s practice of threatening consumers with criminal prosecution or threatening to take any other action it cannot legally take or has no intention of taking.\footnote{See supra note 195.} Despite legal advocates making it clear for over a decade that payday lenders have no legal basis for threatening borrowers with being arrested or criminally prosecuted for failing to repay a loan, payday lenders continue to scare consumers into repaying out of fear of going to jail for passing bad checks.\footnote{Id.} In September 2011, Minnesota Attorney General Lori Swanson sued five Internet payday lenders for various violations of state law, including using illegal debt collection tactics, such as threatening arrest or criminal prosecution.\footnote{Id.} Some victims had not actually obtained payday loans but were hounded by scam artists who obtained their information when the consumers submitted information online to a purported lender.\footnote{Id.} While the Fair Debt Collection Practices Act can reach some violators making unlawful threats, it cannot reach lenders attempting to collect their own debts.\footnote{Id.} Therefore, it is important that the CFPB’s Guide for Payday Loan Providers warn all lenders issuing payday loans that threats to take any action they cannot legally take, or have no intention of taking, are considered deceptive practices.

In summary, the proposed Guide for Payday Loan Providers needs to warn bank and non-bank lenders that the debt entrapment and debt treadmill practices discussed above are considered deceptive.

\footnote{15 U.S.C. §1692 (2009).}
B. The CFPB Should Issue a Policy Statement Granting Responsible Lenders a Safe Harbor

Along with issuing guidelines identifying the payday loan practices the CFPB considers deceptive, unfair, or abusive, the CFPB should issue a policy statement regarding characteristics of safe affordable loans. The Dodd-Frank Act transfers to the CFPB various FTC powers, including the authority to issue policy statements, and also grants to the CFPB itself the power to issue policy statements. Some lenders, particularly credit unions, already offer safe affordable short-term unsecured loans to consumers. Therefore, the CFPB can balance out lender concerns over the breadth of the proposed Guide for Payday Loan Providers by issuing a policy statement indicating what type of loan products will not subject the lender to enforcement action. The CFPB can look to prior policy statements issued by the FTC as an example for issuing policy statements that contain safe harbor provisions for certain actors. For example, in 1993, the FTC and the Department of Justice jointly issued six policy statements containing “safety zones” that exempted from antitrust enforcement action certain hospital mergers, physician network ventures, and other cooperative arrangements among hospitals, doctors, and/or other healthcare providers.

1. The CFPB Could Consider the FDIC’s Guidelines for its Loan Pilot Program

Before issuing a policy statement regarding a safe harbor for affordable loans, the CFPB could consider the guidelines issued by the Federal Deposit Insurance Corporation (FDIC) for its two-year

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224 See Dodd-Frank Act, § 1061(b)(5)(B)(i) (“The Bureau shall have all powers and duties under the enumerated consumer laws to prescribe rules, issue guidelines, or to conduct studies or issue reports mandated by such laws, that were vested in the Federal Trade Commission on the day before the designated transfer date.”).

225 See Dodd-Frank Act, § 1012(a)(10) (authorizing the CFPB to “implement[ ]the Federal consumer financial laws through rules, orders, guidance, interpretations, statements of policy, examinations, and enforcement actions”); § 1021(c)(5) (stating that one of the primary functions of the CFPB is “issuing rules, orders, and guidance implementing Federal consumer financial law”).

226 See Dep’t of Justice & FTC Statements of Antitrust Enforcement Policy Statements in the Health Care Area, 4 Trade Reg. Rep. (CCH) PP 13,150-51 (Sept. 15, 1993) [hereinafter Dep’t of Justice & FTC Statements] (including, for example, a safety zone for hospital mergers where one of the hospitals is small and other conditions are met).
pilot program for member banks participating in a program offering small-dollar, short-term consumer loans. The main purpose of the program was to demonstrate how banks can profitably offer affordable small-dollar loans as an alternative to high-cost credit products such as payday loans and fee-based overdraft programs. According to the Affordable Small-Dollar Loan Guidelines (“FDIC Guidelines”), banks offering small dollar loans had to (1) charge reasonable interest rates, (2) encourage principal reduction, (3) streamline the underwriting of loans, (4) maximize their automated and technology processes, (5) consider offering loan repayment programs that have a savings component, and (6) collaborate with for-profit and non-profit institutions in developing small dollar loan programs and financial literacy education.

A full discussion of the results of the pilot program is beyond the scope of this Article; however, the results show that the participating banks met or exceeded the FDIC Guidelines for charging reasonable interest rates and encouraging principal reduction. The average interest rate for all types of loans ranged from 13 to 16 percent; however, the most common interest rate charged was 18 percent. The average origination fees amounted to $31 for small dollar loans (“SDLs”) and $46 for nearly-small dollar loans (“NSDLs”). Even when these fees were factored into the interest rate calculation, all participating banks had effective APRs that were at or below the suggested 36-percent cap. The FDIC Guidelines suggested a minimum maturity period of 90 days and an unspecified payment plan to reduce

228 See FDIC Quarterly. A TEMPLATE FOR SUCCESS: THE FDIC SMALL DOLLAR LOAN PILOT PROGRAM, 2010 vol. 4, no. 2 at 28, available at http://www.fdic.gov/bank/analytical/quarterly/2010_vol4_2/FDIC_Quarterly_Vol4No2_SmallDollar.pdf (the parameters of the program required a loan amount of $2,500 or less, a loan term of at least 90 days and an annual percentage rate no higher than 36%; the pilot began with 31 banks and concluded with 28 banks ranging in size from $28 million to nearly $10 billion)
229 Id.
230 Id.
231 Id.
232 Id.
principal and interest. The results of the FDIC’s two-year pilot program demonstrated that the average loan amount for SDLs was approximately $700 and allowed payments over an average loan term of 10-12 months.\(^{233}\) The average loan amount for NSDLs was $1,700 and allowed payments over an average loan term of 14-16 months.\(^{234}\)

The loan performance for the FDIC’s pilot program is encouraging. Overall, the delinquency rate—an indication of the borrower’s ability to make payments on time—for both SDLs and NSDLs were higher than for general unsecured consumer loans.\(^{235}\) However, the participating consumers’ default rate—failure to pay back the loan—was very similar to consumers in the general population with unsecured debt.\(^{236}\)

The pilot program provided some valuable lessons for participating banks.\(^{237}\) The most important key to success of the banks’ loan programs was affording consumers longer periods to pay off the loans.\(^{238}\) Another lesson was that small-dollar loans were a useful business strategy for developing or retaining long-term relationships with consumers.\(^{239}\) While short-term profitability was rare, banks participating in the pilot program were able to achieve long-term profitability through volume and cross-selling of other products.\(^{240}\) One of the elements linked to program feasibility was location.\(^{241}\) Banks with offices in communities with large populations of low- and moderate-income, military or immigrant

\(^{233}\) Id.
\(^{234}\) Id.
\(^{235}\) Id. at 30-31. The delinquency rate for SDLs climbed to 11% for the fourth quarter of 2009 from a stable rate of 9% for much of 2009. Id. The increase is attributed largely to adverse economic conditions. The delinquency rate for NSDLs was 9.4% in the fourth quarter of 2009. Id.
\(^{236}\) Id. at 32 (comparing charge-offs for loans in the pilot program to charges offs for credit cards and stating “[p]erformance statistics of loans originated during the pilot show that while small-dollar loan borrowers are more likely to have trouble paying loans on time, they have a default risk similar to those in the general population”).
\(^{237}\) Id.
\(^{238}\) Id.
\(^{239}\) Id.
\(^{240}\) Id.
\(^{241}\) Id.
households tended to benefit from greater demand for small-dollar loan products. Based on the foregoing, low-cost loans with reasonable terms are not only profitable in the long run but the overwhelming majority of consumers obtain a loan product they can successfully repay.

2. The Policy Statement Can Create a Safety Zone for Affordable Low-Cost Loans

While the FDIC Guidelines for its pilot program led to positive results, they cannot be adopted wholesale in a policy statement by the CFPB for a safe harbor for lenders. The FDIC Guidelines are insufficient because they do not address several practices such as rollovers, which are prohibited under the MLA and many state statutes. Bank-issued payday loans can also lead to rollovers or back-to-back transactions. Although the Office of the Comptroller of the Currency (“OCC”) has issued proposed guidelines for banks offering direct deposit advances; these guidelines are less substantive than the FDIC Guidelines and have been heavily criticized as nothing more than the OCC’s approval of bank-issued payday loans. Given that some banks have ignored the FDIC Guidelines and that the OCC’s proposed guidance is not substantive, the CFPB should develop its own criteria in issuing a policy statement regarding a safe harbor for affordable loans.

As several reports and studies have shown, the majority of payday borrowers are led in to a cycle of indebtedness due to debt entrapment practices such as usurious interest rates, short maturity dates, and single balloon payments, and debt treadmill practices such as multiple rollover/refinancing fees,

\[\text{footnotes continue}\]
and repetitive bank account debits. Assuming the CFPB has, at a minimum, issued guidelines warning lenders that these practices are considered deceptive, unfair, and abusive, the CFPB can use these guidelines for establishing a policy statement regarding a zone of safety for lenders offering loans that meet or exceed a base-line set of criteria for safe low-cost loans (“Policy Statement for Safe Low-Cost Loans”). By using the label “Safe Low-Cost Loan,” the author wants the CFPB to eschew the term “payday loan” as it is synonymous with predatory lending and is considered one of the worse forms of consumer credit. Furthermore, by issuing the Policy Statement for Safe Low-Cost Loans, the CFPB could, as explained later, make it easy for consumers in the market place to find such loans.

The author’s proposed Policy Statement for Safe Low-Cost Loans are based on her analyses of actions taken (1) by Congress in passing the MLA to protect military families, (2) by state legislatures in passing statutes restricting payday lending, and (3) by prudential regulators in establishing standards for low-cost loans offered by financial institutions. Besides several state statutes capping APRs at 36 percent or less, the FDIC’s Guidelines cap the APR at 36 percent on short-term consumer loans issued by participating banks and the NCUA’s rules cap the APR at 28% on short-term consumer loans issued by federal credit unions. The MLA caps the APRs at 36 percent and the cap applies to all lenders, not just non-bank lenders, issuing payday loans to soldiers. Congress decided that 36 percent was a fair rate for all lenders to make a reasonable profit.

248 See Report on Implementation of Limitations on Terms of Consumer Credit Extended to Service Members and Dependents, DEPARTMENT OF DEFENSE, 18-19 (July 22, 2008), http://www.dcuc.org/PDF%20Files/Senate%20Report%20Final.pdf (discussing the high cost of short term predatory loans and how restrictions on them have not made access to credit unavailable).

249 See, e.g., 151 Cong. Rec. E1386 (daily ed. June 28, 2005) (statement of Luis Gutierrez (D-Ill.) (In statements calling for passage of the Military Lending Act, one congressman stated “[t]hose who claim to support the troops should agree to restrict the worst financial product out there.”).  

250 See Johnson, supra note 96 and accompanying text.  

251 FDIC Pilot Program, supra note 227.  

252 Short-Term, Small Loan Amounts, 12 C.F.R. Part 701  

253 See supra note 6 and accompanying text.
In addition to APR caps, the MLA, NCUA and several states ban rollovers and similar methods of generating additional fees to extend the borrower’s obligation to pay, as well as ban payday lenders from issuing a consumer more than one outstanding loan.\textsuperscript{254} The NCUA and several states also limit the number of loans a lender can issue to a consumer within a 12-month period and some states impose cooling off periods between loans.\textsuperscript{255} Moreover, regulations and guidelines exist to require the lender to do some type of assessment of the prospective borrower’s ability to repay, afford the debtor a longer maturity date than the typical payday loan\textsuperscript{256} and afford the debtor the option to pay off the loan in installments.\textsuperscript{257} Finally, the MLA restricts a lender’s ability to access the consumer’s bank account to facilitate repayment of the loan\textsuperscript{258} and makes mandatory arbitration clauses unlawful.\textsuperscript{259}

As a result of the above actions taken by federal and state lawmakers as well as prudential regulators, the author proposes that to prevent debt entrapment, the CFPB’s Policy Statement for Safe Low-Cost Loans establish a zone of safety if a lender’s loan has the following features: (1) contains an effective APR at 36 percent or less as required by applicable law where the consumer resides,\textsuperscript{260} (2) contains a repayment plan period greater than ninety days, (3) allows repayment of the loan in partial payments of at least four installments, and (4) contains no penalties for paying off the loan early.

Besides these features, a lender that wants to be in the zone of safety from enforcement should also have procedures in place that demonstrates an adherence to the following practices: (1) applying reasonable

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\textsuperscript{254} See, e.g., 12 C.F.R. § 701.21(c)(7)(iii)(4); OHIO REV. CODE ANN. § 1321.41(E) (prohibiting a licensed lender from “mak[ing] a short-term loan to a borrower if there exists an outstanding loan between the licensee and that borrower”).

\textsuperscript{255} See id.; FDIC Pilot Program, supra note 227; DOD Report, supra note 34; See Johnson, supra note 96 and accompanying text.

\textsuperscript{256} See, e.g., N.M. Stat. Ann. §58-15-35(B), (C) (requiring that the specifies that the installment payment plan allow for relatively equal installments over a minimum period of 130 days at no additional cost to the borrower).

\textsuperscript{257} See, e.g., N.M. Stat. Ann. §58-15-35(A) (stating that the lender must offer borrowers “opportunity to enter into an unsecured payment plan for any unpaid administrative fees and principal balance [owed on] the payday loan”).

\textsuperscript{258} See 32 C.F.R. § 232.8(a)(5).

\textsuperscript{259} See 32 C.F.R. § 232.8(a)(3).

\textsuperscript{260} This 36-percent APR cap must include in the interest rate calculation any origination and application fees. See supra notes 42-3(discussing MLA where APR calculation is very broad to cover origination fees and any other fees that are disguised finance charges).
criteria to assess consumers’ ability to pay, (2) disallowing any practice (including rollovers) that serves only to generate fees for the lender to extend the loan’s due date, (3) limiting the number of times it can electronically access consumers’ bank accounts, (4) offering classes or having partnerships with organizations that teach consumers budgeting and debt management skills, and (5) refusing to threaten consumers with criminal prosecution or unlawful debt collection practices.

Potential critics of the CFPB’s Policy Statement for Safe Low-Cost Loans may argue that such loans are not profitable and result in lower availability of short-term loans to people that need them. That contention is without merit. The widespread increase in loans to military families by mainstream institutions at effective APRs at or below 36 is proof that such loans are profitable, especially when done as part of programs focused on long-term profitability, not with an eye on high short-term profits using irresponsible lending practices. Moreover, the FDIC pilot program demonstrated that the default rate among participating borrowers was very close to the default rate in the general population. Consequently, the CFPB’s Policy Statement for Safe Low-Cost Loans will afford lenders that are actually committed to responsible lending practices a zone of safety from enforcement action.

C. The CFPB Can Use its Educational Mandate to Foster Expansion of Affordable Low-Cost Loans

One of the mandated objectives of the CFPB is to provide consumers “with timely and understandable information to make responsible decisions about financial transactions.” The CFPB can accomplish this objective through its Office of Financial Education, which is authorized to develop and implement mechanisms to improve consumer knowledge and awareness to educate the public in

261 See supra notes 49-60 and accompanying text.
262 See supra note 227 and accompanying text.
263 See Dodd-Frank,§ 1021(b)(1).
order to improve consumer financial decisions. Leadership at the CFPB and the Office of Financial Education need to be cognizant of inside and outside forces that could render a consumer awareness campaign ineffective. An awareness campaign cannot be predicated on the leadership’s assumption that the consumers with the greatest need for a safe affordable loan have home computers with unlimited high-speed internet access or that consumers know how to navigate through the ocean of online loan information, much of which is biased, misleading, and false. Moreover, external forces are at work to greatly limit the CFPB’s funding and effectiveness. If they are successful, the CFPB will have to be extremely careful in deciding the best way to use a portion of its funding for education. The CFPB, therefore, needs to take a cue from corporate America, which maximizes its advertising dollars by increasingly using social networking sites and allowing consumers to generate advertising to increase product awareness.

A six-step strategy is proposed as an example for the CFPB to consider implementing for increasing consumer understanding about and awareness of safe affordable loans. Every component of the strategy is at play in the efforts by corporate America to increase branding and customer loyalty and should be considered by the CFPB’s Office of Financial Education.

Under the author’s proposed six-step strategy, the CFPB needs to (1) increase the number of fans it has on social networking sites, (2) conduct a contest for the creation of consumer-generated advertising, (3) utilize crowdsourcing to select the best advertisements, (4) secure the commitment of banks and credit unions nationwide to supply safe affordable loans, (5) start a public service announcement campaign to increase consumer awareness, and (6) take advantage of cell phone app technology to develop an easy way for consumers to find these loans. Such a strategy implemented via

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264 Dodd-Frank Act, §1013(d). To protect sub-groups of the population, the CFPB also has an Office of Service Member Affairs, section 1013(e), as well as Office of Financial Protection for Older Americans. Id. §1013(g).

the CFPB’s the Office of Financial Education would harness the power of social media, consumer-generated advertising, and wireless technology.

The first step is to increase the number of fans on the CFPB’s social networking page and specifically create a webpage for the Office of Financial Education. At this writing, the Office of Financial Education does not have its own webpage and the CFPB has recruited a mere 8,174 Facebook fans\(^\text{266}\) and about 6,000 Twitter followers.\(^\text{267}\) These numbers are abysmal when one considers that the total number of Twitter users is 200 million\(^\text{268}\) and Facebook users is 750 million.\(^\text{269}\) Corporate America has spent years trying to increase the number of customers going to their websites but is now going to where the potential customers are by increasing its presence on and use of social networking sites.\(^\text{270}\)

One cannot simply create a Facebook page like the CFPB has already done, but one must actively develop creative ways to recruit new fans and keep the interest of current fans by posting relevant information.\(^\text{271}\) Such active engagement can cause the number of fans/followers to grow exponentially in a very short period of time and increase the use of the CFPB’s website by consumers to obtain important information.\(^\text{272}\) The CFPB does not need to be deterred by concerns that their message needs more than a 30-second sound bite. Companies that have to educate consumers about the nature of their services

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\(^{272}\) See, e.g., CW Network Is Now Making Digital Dollars, Comm. Daily, Jan. 19, 2011, available at 2011 WLNR 1315148 (reporting that the CW network has in excess of 30 million Facebook fans and 100,000 Twitter followers and that “unique viewers to cwtv.com increased 77 percent over a year ago, and viewers are watching 59 percent more episodic video on the site than last year”).
have found effective ways to use social networking to spread the word about their services and to get their influential fans to continue spreading the message on their own independent sites.273

A key to increasing the number of fans may be for the CFPB to seek free endorsements from influential figures, bloggers or celebrities on Facebook and Twitter to promote the CFPB’s education materials.274 High-profile figures, such as Oprah and Lady Gaga, have millions of followers on Twitter and Facebook. Product endorsements by Oprah lead to record sales,275 and Lady Gaga is recognized as a superstar with “monster influence.”276 With the help from celebrities with mass appeal and an army of fans, the CFPB’s social media sites can benefit immensely and increase the number of people accessing them.

After expanding its presence in social media, the CFPB’s next step is to create a contest inviting the public to create a user-generated advertisement with a catchy slogan and related to consumers’ avoiding payday loans and selecting safe loans. The contest should have guidelines for submissions and must be announced through the social networking sites and offer prizes large enough to create an incentive for numerous people to enter the contest. Using such a strategy will not only dramatically decrease advertising cost but, more importantly, will greatly expand the number of consumers learning about affordable loan options through the social media buzz generated by the contest.

273 See, e.g., Christopher Hosford, Twitter Drives Traffic, Leads, Conversions At Mongoose Metrics, B TO B, at 14, Jun. 13, 2011, available at 2011 WLNR 12049003 (reporting that Mongoose Metrics, a company that operates a phone call tracking service, considered its Twitter campaign a success where it relied heavily on providing links to its website offering white papers and research materials explaining its services, where another company noticed the tweets and re-tweeted the information on its website, and where “Mongoose saw its own tweets retweeted 1,248 times, for a total retweet reach of 2.9 million eyeballs”).
274 See, e.g., id (reporting how retweets from fans of a phone-call tracking company greatly expanded its reach of people finding out about its services).
Consider the success of Pepsico, the owner of the Doritos product, in creating numerous contests that strengthened brand loyalty and increased the number of new customers. In 2007, Pepsico had its first “Crash the Super Bowl” contest where contestants had to create a Doritos commercial to be aired during the next Super Bowl game. Two amateur filmmakers won the contest and collected one million dollars as the prize. The company considered the contest so successful that it has done it every year since then and now gets thousands of submissions for the contest. To further the expansion of the Dorito brand, Pepsico has launched other contests, including the Doritos Crash Course contest, where contestants had to create a game designed for the Xbox 360. In 2010, a 28-year old copy center employee at Staples beat out 1,500 contestants to become one of two finalists. Consumer voters chose her game over the other finalist and she won $50,000.

Contests that use consumer-generated advertising and consumer-voting to select the winner are not done solely for marketing purposes. Traditional advertising has become less effective. However, consumer contests coupled with social media results in the subject of the contests fostering a continuing engagement about the product among fans. For example, a study of more than 50,000 discussions on social networking sites found that Doritos was one of the most discussed products advertised during the Super Bowl. By the CFPB taking advantage of this type of marketing strategy, it would not only cost far less than a hiring professional advertising firm, but can result in a successful

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278 Id.
279 Id.
281 Id.
282 Id.
283 See Erika D. Smith, 09’ Doritos Ad Winners Work On Social Networking Buzz For Contest, INDIANAPOLIS STAR (INDIANAPOLIS, IND.), Feb. 6, 2010, available at 2010 WLNR 2655533
284 Id.
285 Id.
286 Id.
campaign about safe low-cost loans and can ultimately help spread the word about the CFPB and its mission.  

In addition to conducting a consumer-generated advertising contest, the CFPB should next use crowdsourcing to select finalists and a winner as means of keeping consumers informed and engaged with the CFPB. Crowdsourcing is the practice whereby an organization enlists a variety of people to accomplish a specific task or solve a specific problem. Crowdsourcing is an increasingly popular marketing tool that can be as simple as allowing the public to vote on who should be the winner in consumer-generated advertising contests or be as elaborate as allowing consumers to develop product lines and designs. For instance, after initially conducting consumer-generated advertising contests and allowing consumers to vote for the winner, the makers of Mountain Dew fully embraced crowdsourcing to allow consumers to develop new flavors and credited crowdsourcing as a reason for its continued growth. The company reported that the “Dewmocracy” campaign attracted new customers

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287 Other brand companies, such as PepsiCo, utilized the user-generated marketing strategy to have consumers create and market new flavors through the “Dewmocracy campaign,” along with Doritos creating successful advertisements with its user-generated Superbowl ads. Natalie Zmuda, Pass or fail, Pepsi's Refresh Will Be Case for Marketing Textbooks: Rest of Industry Eyeing Bold Social-Media Experiment, ADVERTISING AGE, Feb. 8, 2010, available at 2010 WLNR 2878042. A user-generated content strategy made substantial big contributions to deepening the connection with consumers, building ongoing relationships, and obtaining their loyal support for the brands, while saving costs. Id. For Old Spice, having consumers generate and upload parodies and clips amassed 80 million views for its “Responses” campaign, with Revlon seeing sales reach a two-year high as a result of its YouTube contest. Andrew Hampp, Your Digital Questions Answered: How to Make Your Branded Video Go Truly Viral, ADVERTISING AGE, Feb. 28, 2011, available at 2011 WLNR 4175689. Revlon’s campaign received 150 submissions and over 3 million views. Id. Converse’s successful campaign received 1500 submissions of user-generated contents and created a buzz.

288 Barbara Wallraff, “Word Of The Year” Worth Roundup, TIMES UNION (ALB.) at 13, Jan. 9, 2011, available at 2011 WLNR 1037527; See also Ms. Adverthinker Reports From SXSW: Day Two, Mar. 14, 2010, available at 2010 WLNR 5351561. Eleftheria Parpis, Crowd Control: Is Turning to the Masses for Creative Input a Quick Fix or the Way of the Future?, MEDIA WEEK (USA), Nov. 2, 2009, available at 2009 WLNR 22771474. Id. While critics have claimed this to be too “gimmicky,” that it “encourages low-quality creative,” and “eschews strategic thinking and relationship management,” marketers see the value in the strategy for adding “a consumer-engagement punch” to a company’s marketing efforts. Id.

to its fan base. The CFPB can use a crowdsourcing strategy that allows for mixture of input from professional firms as well as consumers. For example, personnel within the Office of Financial Education or a professional firm hired by the CFPB could select ten finalists with videos that best capture the CFPB’s message about safe low-cost loans and then use a consumer voting process via social media to select the first-place winner. Of course, members of the CFPB should use all forms of free media opportunities to spread the word about the contest-entry phase as well as the voting phase.

Along with the consumer-generated advertising strategy, the CFPB should also implement a strategy that secures the commitment of banks and credit unions in every state to promise to set aside and use funds for issuing short-term consumer loans that meet the safe harbor provisions of the CFPB’s Policy Statement for Safe Low-Cost Loans. This would counter the trend among some banks and credit unions to offer high-priced loans rather than offer low-interests safe loan products. These mainstream institutions may be acting based on the perception that the consumers seeking short-term loans are more likely to default, thereby justifying triple-digit interest rates. However, this perception is not supported by the results of the FDIC’s two-year pilot program, which showed consumers obtaining loans from the participating banks did not pose substantially greater risk of defaulting than the general population. Almost all bankers reported the program was a useful business strategy and achieved long-term

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291 Id.
292 See, e.g., Jed Gottlieb, Doritos Hopes Winner Scores Big With Fans, BOSTON HERALD, at E05, Feb. 1, 2008, available at 2008 WLNR 1955116 (discussing a Dorito contest where consumers created an ad with a one-minute music video and reporting that “a panel of music industry heavies picked 10 finalists out of thousands of homemade videos” and then consumers voted online for three finalists, one of which would be announced during the Super Bowl Game).
294 Id.
profitability through volume and cross-sale.\textsuperscript{295} The study defeats the argument for imposing outrageously high interest rates on consumers deemed “risky borrowers” to generate a high profit.

In addition to securing the commitment of banks and credit unions to offer safe affordable loans described above, the CFPB could use their input in creating disclosure forms for such loans as part of its “\textit{Know Before You Owe}” campaign.\textsuperscript{296} Currently, the CFPB is fine-tuning a new simplified disclosure form for consumers shopping for mortgage loans\textsuperscript{297} and recently introduced a prototype “financial aid shopping sheet” for student loans.\textsuperscript{298} By using the \textit{Know Before You Owe} campaign to develop an effective simplified disclosure form for consumers in need of short-term loans, the CFPB will fulfill its mandate to make disclosure forms more comprehensible.\textsuperscript{299}

Recognizing that mainstream financial institutions need continuing incentives to offer low-cost safe loan products, Congress also included Title XII in the Dodd-Frank Act.\textsuperscript{300} Title XII is entitled the \textit{Improving Access to Mainstream Financial Institution Act of 2010}, and its purpose is “to encourage initiatives for financial products and services that are appropriate and accessible for millions of

\begin{itemize}
\item \textsuperscript{295} \textit{Id.} \\
\item \textsuperscript{296} \textit{Know Before You Owe}, http://www.consumerfinance.gov/knowbeforeyouowe/ \\
\item \textsuperscript{297} \textit{See} Press Release, \textit{Consumer Financial Protection Bureau Announces Initiative To Combine Mortgage Loan Disclosures}, May 18, 2011, http://www.consumerfinance.gov/pressrelease/consumer-financial-protection-bureau-announces-initiative-to-combine-mortgage-loan-disclosures/ (stating that the CFPB introduced its “Know Before You Owe” Project in May 2011 “combine two federally required mortgage disclosures into a single, simpler form that makes the costs and risks of the loan clear and allows consumers to comparison shop for the best offer”). The combination of the two forms was mandated by the Dodd-Frank Act and the Bureau is required to issue proposed forms and implementing regulations by July 2012. The CFPB has been testing the prototype disclosure forms through interviews with consumers, bankers and brokers. The testing and feedback process will inform the CFPB’s formal rulemaking process. \\
\item \textsuperscript{298} \textit{See} http://www.consumerfinance.gov/students/knowbeforeyouowe/ (stating that the sample financial aid shopping sheet is to help schools improve the information they present to prospective students and their families about educational costs). \\
\item \textsuperscript{299} \textit{See} Dodd Frank Act (CFPB has power to make rules in order to ensure the features of consumer financial products and services are “fully, accurately and effectively” disclosed to consumers, including the power to create model disclosures). \\
\end{itemize}
Americans who are not fully incorporated into the financial mainstream.” Title XII also authorizes the Secretary of Treasury to establish programs to encourage low-cost alternatives to high-cost small dollar loans, such as payday loans. An earlier draft of § 1205 of Title XII actually used the words “Low-cost alternatives to payday loans,” but the words “payday loans” were removed probably as result of lobbying by the payday loan industry. Despite the removal of the words “payday loans,” these loan products remain the elephant in the room. The CFPB, which is housed in the Federal Reserve System, should work with the Secretary of Treasury to expand the offering of mainstream financial Institutions offering low-cost loans by establishing a loan-loss reserve fund in order to defray the costs of mainstream financial institutions establishing loan programs complying with the criteria in the CFPB’s Policy Statement for Safe Low-Cost Loans.

In addition to working with the Secretary of Treasury to expand the offering of such loans, the CFPB needs to work with the prudential regulators to secure written agreements from banks and credit unions promising to offer loans in accordance with safe harbor provisions of the CFPB’s Policy Statement for Safe Low-Cost Loans. Such efforts will increase the supply of affordable short-term loans. Without such a supply, an advertising campaign may prove disastrous when consumers show up at mainstream financial institutions and are told no such loans are available. Consider what happened to KFC as a horrible example of lack of preparedness in succeeding with a campaign to increase consumer use of a product. KFC, the largest fast-food chicken restaurant, launched a campaign offering free pieces of its new grilled chicken product. The company enlisted Oprah to promote the campaign and, consequently, generated an overwhelming number of consumers visiting its website to download the

free chicken coupons.\(^{303}\) Not only was KFC unable to fulfill its promise from the sheer volume of demand, the event led to negative results after its failure was widely reported in the media.\(^{304}\) The lesson to take away from this horror story is that for the marketing of and education about safe affordable loans to succeed, banks and credit unions must be committed to provide such loans to consumers lacking high credit scores but are nevertheless creditworthy. Before completion of the consumer-generated advertising contest promoting safe affordable loans, the CFPB must ensure that participating banks and credit unions in major cities in every state have been identified and that a list of these institutions are easily available at the CFPB’s website.

After securing the commitment of mainstream financial institutions, the CFPB should implement step five, which is to partner with the Ad Council to turn the winning consumer-generated amateur ad into a public service announcement (PSA) to disseminate the CFPB’s message about safe affordable loans. This strategic step is important if efforts to dramatically reduce the funding of the CFPB are successful. The reader may recall the Ad Council is responsible for several successful PSA ads; therefore, the CFPB can work with an organization with a proven track record of getting consumers to modify their behavior in accordance with the action urged in the ad.

The Ad Council’s PSA campaigns are produced pro bono by advertising agencies that donate their services to create professionally-done PSA ads.\(^{305}\) Each PSA campaign is sponsored by a non-profit organization or federal government agency, like the CFPB, which would then be responsible for paying the production and distribution costs.\(^{306}\) The production and distribution costs for an ad are

\(^{303}\) See id.

\(^{304}\) Id.


roughly $950,000 each year, totaling $2.8 million over a three-year campaign period. After the campaign ad is produced, the Ad Council distributes the PSAs via a nationwide network of over 33,000 media outlets that donate space on TV and radio stations, in print sources (e.g. newspapers, magazines), in outdoor venues (e.g. billboards), and on internet sites (e.g. web banners). The value of the donated air time and space amounts to $30 million each year in free advertising and totals $90 million for the typical three-year campaign. In addition, the Ad Council uses social media technologies, such as Facebook, MySpace, texting, video email, and satellite radio to further an advertising campaign. The foregoing demonstrates that the CFPB, working in conjunction with the Ad Council, would sow very little to reap so much—$2.8 million compared to $90 million—in a national campaign that would steer thousands of consumers to safe affordable loans.

The final step in the author’s proposed strategy is for the CFPB to create a free Facebook and cell phone app that consumers can download and quickly and easily locate institutions offering safe low-interest loans in their area. The CFPB could use a consumer-generated app contest to accomplish this. The app phenomenon, triggered by the “Facebook Class,” has become known as the “new wave of technology innovation.” Stanford University students enrolled in the Facebook Class were given the task to devise free apps for Facebook in the fall of 2007, and, after doing so, they acquired millions of users and helped pioneer a new model of entrepreneurship. One group of 75 students collectively had

307 Sr. Vice President, the Advertising Council, Telephone Call, 12:48pm, July 25, 2011.
309 Sr. Vice President, the Advertising Council, Telephone Call, 12:48pm, July 25, 2011.
313 Id.
16 million users within ten weeks of creating the apps and then used them to generate millions in revenue from companies willing to sponsor the apps. 314 Apps have now become wildly popular on social networking sites and have transitioned to Android and iPhones, with thousands of them being available to customers. 315 Additionally, apps are not costly or time-consuming to create. 316 One popular app was created in only five hours by two students. 317 Consequently, it would not be difficult for the CFPB to create an app for Facebook and smartphone users to find institutions identified by the CFPB as offering low-cost loans within the CFPB’s guidelines. This final strategy would keep the CFPB from merely having a webpage where only a few consumers visit.

Professor Elizabeth Warren recently stated that the CFPB’s Office of Financial Education is to be “a 21st-century resource for consumers who are looking to better understand how different products and services work, and…will provide access to tools and information that can help consumers select the products that are best for them.” 318 However, without using 21st century social media, technologies, and advertising, the CFPB’s website, no matter how much information is available there, will fall under the radar for the majority of civilian consumers in need of short term loans.

CONCLUSION

Several years ago, Congress decided that payday loans were predatory and passed legislation to severely curtail payday loans issued to active-duty military families. By all accounts, payday lending to

314 Id.
315 See id.
316 Id.
317 Id.
318 Elizabeth Warren, Warren Outlines Goals for New Consumer Agency, AM. BANKR. INST. J. 10, 103, Apr. 30, 2011. In 2010, President Obama named Elizabeth Warren as the Assistant to the President & Special Adviser to the Secretary of the Treasury on setting up the CFPB. Professor Warren was the first to argue for the creation of a consumer financial protection agency, and she is responsible for helping to set up the CFPB.
military families has been drastically reduced. Banks and credit unions followed the urging of politicians and military leaders and began offering nationwide low-cost loans to military families.

Civilian families, on the other hand, have not only continued receiving predatory payday loans from non-banks but are now being targeted with such loans from mainstream financial institutions. The newly-created Consumer Financial Protection Bureau (“CFPB”) has the opportunity to do what many federal politicians have been unwilling to do—protect civilian consumers from payday lending. While another article analyzes how the CFPB can use its rulemaking authority to make all financial institutions subject to the same payday lending regulations, this Article provided a three-step roadmap that the CFPB can use to increase the supply of safe low-cost loans and to put at a competitive advantage those community banks and credit unions with a track record of offering such loans. First, by issuing guidelines identifying the common payday loan practices it considers unfair, deceptive and abusive, the CFPB can influence some lenders to voluntarily cease such practices to avoid enforcement action by the CFPB and other regulators. Second, by issuing a policy statement establishing a safety zone for lenders desiring approval of their loan products, the CFPB will incentivize some lenders to offer low-cost affordable loans meeting the criteria in the policy statement. Third, by following a multi-faceted strategy that harnesses the power of social media and uses a national public service announcement campaign, the CFPB can make it easy for consumers to find lenders that offer safe affordable loans.

Professor Warren has described the CFPB as the “cop on the beat.”319 Police officers do not just enforce the law. They also create programs, such as gun surrender programs for limited amnesty, to get wrongdoers to voluntarily change their behavior. As the nation’s first cop for consumers, the CFPB should use every available tool to get lenders to stop issuing payday loans and offer safe low-cost loans to civilian consumers.

319 Warren, supra note 314, at 104 (stating that the CFPB will engage in enforcement actions “as the cop on the beat watching huge credit card companies, local payday lenders and others in between”).