By the mid-1990s, the growth of abusive home equity lending prompted Congress to take a small step toward reregulation. The Home Ownership and Equity Protection Act of 1994 forbade a few particularly abusive terms and practices in a small subset of very high-cost home equity loans. Irresponsible mortgage lending continued to grow, however, ultimately leading to the 2007 market collapse and the failure or near-failure of most of the nation’s largest lenders, including many banks and savings associations.

In the area of non-mortgage credit, the situation facing the policymakers who designed the Uniform Small Loan Laws at the beginning of the twentieth century had resurfaced by its end. Many of the finance companies that grew out of that effort had themselves moved out of the genuinely small loan business into larger-balance, home-secured lending. A variety of alternate sources with effective rates that would make a loan shark jealous sprang up to fill the void left by conventional lenders.

Payday loans, which operate with remarkable similarity to the old salary lenders, are now offered (legally or not) in many states. These loans, in small amounts, for terms of only a week or so at a time, may have effective interest rates of 300% to 700%.Pawnbrokers are with us still, but some have developed new variations, such as the “auto-pawn,” in which the borrower “pawns the title, and keeps the car.” This is essentially an auto-secured loan at pawnbrokers’ rates of over 300%. Rent-to-own companies provide a species of retail sales credit for household goods at effective rates which can reach triple digits.

Extensive efforts since the 1990s to ban or regulate these products at the state level have met with positive results in many states, though not all. Many payday and other lenders, however, are now providing high-cost installment loans, in addition to or as a substitute for, single-payment payday and car title loans. Despite the potentially positive aspect of multiple payments over time, these loans share the same troubling characteristics as single-payment payday and auto title loans: “a lack of underwriting; access to a borrower’s bank account or car as security; structures that prevent borrowers from making progress repaying; and excessive rates and fees that increase costs further when loans are flipped.”

High-rate installment loans can be profitable for the lenders even when a high percentage of borrowers default, thus discouraging the application of a responsible ability-to-repay standard. As of August 2017, one report notes that, for a $500 six-month loan, twenty states and the District of Columbia cap the full APR at 36% or less; twelve states cap it at 36% to 60%; eleven states cap it at over 60%; four states have no cap other than unconscionability; and three states have no cap. For a $2,000 six-month loan, thirty-three states and the District of Columbia cap the full APR at 36% or less; six states cap it at 36% to 60%; one state cap it at over 60%; six states have no cap other than unconscionability; and four states have no cap. At these high rates, the longer the term, the longer it takes to make a dent in repaying the principal. Moreover, high interest rates can dramatically increase the total amount that must be paid on a larger loan that is repaid over an extended period of time. Consumers are likely to end up repaying many times the amount borrowed. As of October 2018, twenty states limit the APR on loans of $10,000 containing a term of five years to 25% or lower; seventeen states limit the APR from 26% to 36%; two states have APR caps of either 40% or 60%. Most egregiously, seventeen states have no cap at all.

Abuses in credit card lending also grew. In 2009, Congress enacted the Credit Card Accountability Responsibility and Disclosure Act, providing some meaningful regulation of credit cards.

In 2010, Congress dramatically restructured the credit marketplace by enacting the Dodd-Frank Wall Street Reform and Consumer Protection Act (hereinafter the Dodd-Frank Act). The Dodd-Frank Act represents the culmination of a series of hearings that documented the dangers, instability, and need for regulation in the credit marketplace. Among the major features of the Dodd-Frank Act are:

- Significant narrowing of the authority of federal banking regulators to preempt state law, creating substantially more room for states to regulate consumer credit.
- Abolition of the Office of Thrift Supervision and consolidation of oversight of both national banks and federal savings and loan associations in the Office of the Comptroller of the Currency.
- Addition to the Truth in Lending Act of a host of substantive restrictions on mortgage loan and servicing abuses.
- Expansion of the remedies under the Truth in Lending Act.
- Expansion of the enforcement authority of state attorneys general and banking regulators.
- Creation of the Consumer Financial Protection Bureau (CFPB), with authority to write rules prohibiting unfair, deceptive, and abusive practices, and to supervise and examine major non-bank financial services providers.
The CFPB also has authority to ban mandatory arbitration clauses after conducting a study, and the authority, transferred from a variety of other agencies, to write rules under a number of key federal statutes such as the Truth in Lending Act. The CFPB does not, however, have authority to impose a usury cap.

Public opinion, expressed through ballot initiatives and in surveys, appears to overwhelmingly favor the imposition of usury caps. There are increasing calls for a broad-based federal usury cap of 36% on consumer credit, such as payday and auto title lending laws, applicable to all consumers and not just those serving in the military. Others have suggested increased regulation through local ordinances, such as a Dallas zoning ordinance. Others suggest the application of a human rights framework to complement the consumer protection approach to credit regulation, arguing that the bottom line standard related to consumer credit ought to be: “contracts that substantially interfere with the debtor’s ability to meet her basic needs should be unenforceable.”

Footnotes


64 {61} See § 1.2.3 [2], supra.

65 {62} See, e.g., Jessica Silver-Greenberg, Payday Lenders Go Hunting: Operations Encroach on Banks During Loan Crunch; “Here, I Feel Respected,” Wall St. J., Dec. 24, 2010 (describing how payday lenders have increased lending as banks have decreased lending).

66 {63} See § 1.2.3 [2], supra.

67 {64} See Creola Johnson, Payday Loans: Shrewd Business or Predatory Lending?, 87 Minn. L. Rev. 1 (Nov. 2002) (analyzing survey data that vividly portrays the payday lending industry’s abuses); Center for Responsible Lending, Triple-Digit Danger: Bank Payday Lending Persists (2013); Eamon Javers, How Some Payday Lenders Charge Over 700% on Loans, CNBC (Sept. 17, 2012); Ch. 9 [3], infra (discussing payday lending generally).

68 {65} Jean Ann Fox et al., Consumer Fed’n of Am., Driven to Disaster: Car-Title Lending and Its Impact on Consumers 2 (2013); Ch. 12 [4], infra.

69 {66} See Christine Bradley et al., Alternative Financial Services: A Primer, 3 FDIC Quarterly (No. 1) 45 (2009); Creola Johnson, Welfare Reform and Asset Accumulation: First We Need a Bed and a Car, 2000 Wis. L. Rev. 1221 (2000) (describing the reasons welfare recipients are forced into RTO transactions to acquire basic necessities); Ch. 13 [5], infra.


75 Id.


77 Id. at 7.

78 Id. at 8.


1.2.6 Steps Toward Reregulation to Address the Resurgence of Abusive Lending


82 [70] See § 3.2 [30], infra; Arthur E. Wilmarth, Jr., The Dodd-Frank Act’s Expansion of State Authority to Protect Consumers of Financial Services, 36 J. Corp. L. 893 (Summer 2011).


84 [72] National Consumer Law Center, Truth in Lending Ch. 9 [31] (10th ed. 2019), updated at www.nclc.org/library (full discussion of these provisions).

85 [73] See National Consumer Law Center, Truth in Lending Ch. 9 [31], Chs. 11 [32] (10th ed. 2019), updated at www.nclc.org/library (full discussion of these provisions) (full discussion of these provisions).


87 [75] See Dee Pridgen, Sea Changes in Consumer Financial Protection: Stronger Agency and Stronger Laws, 13 Wyo. L. Rev. 405, 412–414 (2013) (highlighting new possibilities for consumer regulation under the “abusive” practices standard of the CFPB); § 2.2.5.6.2 [34], infra.


92 [80] See, e.g., Lake Research Partners & Chesapeake Beach Consulting, New Poll Reveals Strong Bipartisan Support for Financial Regulation; Americans Say Wall Street’s Influence in Washington Is Too High [36] (July 18, 2017), available at www.responsiblelending.org (“More than nine in ten Americans (91%) believe it is important to regulate financial services, including 71% who believe it is very important. Strong bipartisanship majorities say financial regulation is very important. While Democrats believe this most intensely (81% very important), majorities of independent voters (75%) and Republicans (58%) also say financial regulation is very important.”); Nathalie Martin, Public Opinion and the Limits of State Law: The Case for a Federal Usury Cap, 34 N. Ill. L. Rev. 259, 269–272 (2014) (noting successful ballot initiatives in Arizona, Montana, and Ohio; summarizing opinion surveys in Colorado, Iowa, Rhode Island, and Texas and a national survey conducted by the Center for Responsible Lending); Nathalie Martin & Timothy Goldstein, Interest Rate Caps, State Legislation, and Public Opinion: Does the Law Reflect the Public’s Desires?, 89 Chi.-Kent L. Rev. 115, 123–130 (2014) (results from a survey of 199 individuals in New Mexico revealed that 86% of
the respondents believe that the government should set limits on interest rates; a high degree of consensus persisted even among the “conservative” respondents (82% agree) and very conservative respondents (57% agree) and across party lines (94% of Democrats and 73% of Republicans agree)).

93 Nathalie Martin, Public Opinion and the Limits of State Law: The Case for a Federal Usury Cap, 34 N. Ill. U. L. Rev. 259, 274–281, 297 (2014) (detailing why state law attempts to curtail high-cost consumer loans have failed; arguing that a federal law is a better solution, in part, because: “[T]he entire country is a common market, such that any state’s regulation of interest rates inherently reaches across borders. Thus, there is a need for uniformity on interest rates across those borders, which only Congress can provide.”). See also Creola Johnson, Congress Protected the Troops: Can the New CFPB Protect Civilians from Payday Lending?, 69 Wash. & Lee L. Rev. 649, 679 (2012) (“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.”). See generally § 2.2.5 [37], infra (discussion of Military Lending Act).


96 Id. at 418.
1.2.6 Steps Toward Reregulation to Address the Resurgence of Abusive Lending

[30] https://library.nclc.org/nclc/link/CCR.03.02
[31] https://library.nclc.org/nclc/link/TIL.09
[32] https://library.nclc.org/nclc/link/TIL.11
[34] https://library.nclc.org/nclc/link/CCR.02.02.06.02
[37] https://library.nclc.org/nclc/link/CCR.02.02.05
[38] http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=4841&context=lcp
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