

THE FUTURE OF MICROLENDING IN THE UNITED STATES: A SHIFT FROM CHARITY TO PROFITS?

OLIVIA L. WALKER*

I. INTRODUCTION

When the economy tanked in 2008, Kimberly Frye of Ramona, California knew what she needed to do in order to save her auto repair shop.¹ She needed to hire more employees so that she could stay open longer and add services for low-income individuals in order to broaden her clientele.² However, the banks she approached were not willing to lend to her.³ Thankfully for Frye, the Small Business Administration's ("SBA") microloan program saw the potential in her business plan and loaned her the program maximum of \$35,000.⁴ Because of this loan she was able to keep her shop open on Saturdays and maintain a cash cushion that allowed her to accept state vouchers for smog repairs—decisions that saved her business.⁵ She now has enough business to support four mechanics, up from two, and she is especially proud of being the only repair shop in the area that is able to participate in the state's program that provides vouchers to low-income clients.⁶ Frye says, "[i]t was the best decision that I could have ever made. Being a single woman, a single mom in business, they saved me."⁷

Two brothers in their twenties, Dan and Joe Gram, had a dream to turn their years of experience in fitness, gymnastics and coaching into their own business.⁸ They stumbled upon the opportunity to purchase an elite gymnastics-training center.⁹ After raising \$15,000 on their own, they needed an additional \$30,000 to take over the business and its ten employees.¹⁰ They visited at least six banks with no success.¹¹ An SBA microloan allowed them to realize their dream, and now Joe says, "[s]o far,

* Juris Doctor, The Ohio State University Moritz College of Law, expected 2012.

¹ Tanya Mannes, *Federal Microloans Big With Small Businesses*, SAN DIEGO UNION-TRIB., Sept. 21, 2010, at C1.

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.* at C2.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

so good. We're pretty much break-even, moving toward profitability. We're learning a lot as we go, being young entrepreneurs."¹²

Brent Baker founded an innovative company in the Bronx that converts used cooking oil from restaurants around New York City into fuel that it then sells.¹³ In 2009, the company was in dire need of an equipment upgrade, but three major commercial banks that had financed the company in the past were suddenly no longer lending.¹⁴ Baker was able to receive a \$50,000 loan from Boc Capital, a lender that received \$750,000 in federal stimulus funds to help small businesses.¹⁵ Baker said, "[t]he loan increased our profitability and put us in a position where we could expand."¹⁶ He was able to hire ten additional workers with the loan.¹⁷ He added, "[i]t shows how a relatively small amount of credit can be such a huge advantage, and we really did create jobs."¹⁸

Each of these individual anecdotes is just one example of the thousands of success stories of American microlending. In the United States, a microloan is usually classified as a short-term loan of \$35,000 or less, and the SBA defines a microenterprise as a business with five or fewer employees.¹⁹ Microlending abroad has become a hotly recognized and discussed topic in recent years, mainly through the successes of Nobel Prize laureate Muhammad Yunus and his international Grameen Bank.²⁰ Microlending is at an all-time high in the United States and has the potential to have a real impact on the business culture and climate of the United States. However, to many Americans, the term "microlending" still has the connotation of a tiny loan given as charity to those in dire poverty in exotic locales.²¹

Abroad, two major microlending organizations have transitioned from traditional non-profits to for-profit corporations being traded on the public

¹² *Id.*

¹³ April H. Lee, *Microloans Taking Hold for U.S. Firms*, CHI. TRIB., Sept. 6, 2010, at C17.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Bill Burrus, *Lessons and Trends of Microcredit in the United States*, ACCION <http://www.accion.org/Document.Doc?id=51> (last visited Mar. 28, 2011).

²⁰ Yunus and the Grameen Bank received the Nobel Peace Prize in 2006. Yunus is considered the leading expert in the world on microfinance issues. The Grameen Bank is a microfinance organization and community bank founded by Yunus in Bangladesh. The bank makes microloans for self-employment to the impoverished without requiring collateral. *See generally* GRAMEEN BANK, <http://www.grameen-info.org/> (last visited Jan. 11, 2011).

²¹ *See* Mannes, *supra* note 1.

market.²² Today in the United States, the time is right for microlending to have a big impact on American business. The growing disparity of income distribution, the loss of blue-collar jobs, the shift from relatively well-paying manufacturing jobs to minimum wage service-sector jobs, corporate downsizing, outsourcing, and unemployment all contribute to a greater opportunity for self-employment that could be helped by microloans.²³ Additionally, more women in the workplace, as well as an increasing number of single and “stay at home” fathers, are seeking self-employment as a way to balance work and family, the aging population is choosing self-employment, and self-employment is being seen as a way to remain in rural communities.²⁴ This note explores the feasibility of microlenders in the United States going for-profit and being publicly traded, the challenges they would face, the benefits and costs of going for-profit and public, and what such a model might look like.

II. THE EVOLUTION OF MICROLENDING IN THE UNITED STATES

While the amount of both funding and total microloans given by the SBA to American microenterprises is currently at an all-time high due to the demand from businesses that have been turned down by traditional banks, the program has been in existence for the past nineteen years.²⁵ The foundation for microlending in the United States was laid in 1977 through the passage of the Community Reinvestment Act (“CRA”), which first started the process of banks being rated by regulators based in part on their participation of funneling resources directly or indirectly (through non-profit organizations) into low-income communities.²⁶ It was not until 1991 that the SBA first recognized microenterprise as a separate category of business and established the Microloan Demonstration Project.²⁷ Also in 1991, a trade organization for microlenders, the Association for Enterprise Organization (“AEO”), was founded.²⁸ By 1992, only a year after this official recognition, there were already 108 separate organizations working in American microfinance.²⁹ Even with this sudden surge of interest, by 1995 no microlender in the United States had come anywhere close to

²² Bruce Einhorn & David Ruth, *An IPO for India's Top Lender to the Poor*, BLOOMBERG BUSINESSWEEK, May 10, 2010, at 16–17. As discussed later in this note, India's SKS Microfinance and Mexico's Banco Compartamos are the two major microlenders that have gone for-profit and public.

²³ See Burrus, *supra* note 19, at 1–2.

²⁴ *Id.*

²⁵ Mannes, *supra* note 1.

²⁶ Burrus, *supra* note 19, at 10; *see also* Appx. I.

²⁷ *Id.* at 1.

²⁸ DAVID BORNSTEIN, *THE PRICE OF A DREAM: THE STORY OF THE GRAMEEN BANK* 332 (1996).

²⁹ Burrus, *supra* note 19, at 4.

breaking even—each individual microlender was functioning strictly as a charity, unable to make a sustainable difference.³⁰ In 1999, federal funding for microlending programs increased through the passing of the Program for Investment in Microentrepreneurs (“PRIME”) Act;³¹ however, during the Bush administration era from 2001 to 2005, federal funding for microfinance was cut drastically.³² By 2002, there were 650 separate organizations in microfinance.³³ Between 2002 and 2008, the total number of microenterprises in the United States grew from 21.5 million to 25.4 million, which was a growth from 13.1 million in 1999.³⁴ Microenterprises now make up roughly eighty-eight percent of the total businesses in America.³⁵

III. THE CURRENT STATE OF MICROLENDING IN THE UNITED STATES

Virtually all microlenders in America are organized as non-profit organizations and serve as local intermediaries for federal funds.³⁶ The SBA dominates the American microloan market; with loans averaging around \$13,000, the federal funds are first lent to specially designated non-profit, community-based organizations that then deal directly with the borrowers.³⁷ There are also a few non-profit organizations in the private sector that issue smaller loans without this federal backing.³⁸ The American Recovery and Reinvestment Act (“ARRA”), signed into law in February 2009, included \$50 million in federal funds designated as microloans for small businesses.³⁹ In the two years following ARRA, the average total of microloans nationwide has grown to \$3.1 million.⁴⁰ Current legislation that establishes programs to aid microfinancing includes the House-passed expansions to the SBA Microloan Program, the SBA PRIME Program,⁴¹ the SBA Women’s Business Center Program,⁴² and the

³⁰ BORNSTEIN, *supra* note 28, at 338.

³¹ *Microenterprise Fact Sheet Series*, AEO, http://www.aeoworks.org/images/uploads/pages/fact_sheet_sources%20of%20government%20funding.pdf (last visited Mar. 28, 2011).

³² *Id.* at 2.

³³ *Id.*

³⁴ *Id.*

³⁵ *Microenterprise Business Statistics in the United States* AEO (2008), <http://www.aeoworks.org/images/uploads/pages/US-MEBS-2008%20rev.pdf>.

³⁶ Burrus, *supra* note 19, at 4.

³⁷ *Microenterprise Fact Sheet Series*, *supra* note 31.

³⁸ *Id.*

³⁹ Mannes, *supra* note 1, at C2.

⁴⁰ Lee, *supra* note 13, at 2.

⁴¹ The SBA Program for Investment in Micro-Entrepreneurs provides grant assistance to organizations that help low-income entrepreneurs gain access to capital and provide training and education. *See generally PRIME Program*, SBA, <http://www.sba.gov/about-sba-info/prime-program> (last visited Mar. 21, 2011).

Department of Treasury Community Development Financial Institution Fund.⁴³

The current major players in American microlending fall into two categories: non-profit organizations that act as distributors of federal funds, and non-profit organizations that operate independently from the government. The biggest and most established network of microlenders in the United States is Accion USA.⁴⁴ Accion serves as an intermediary for SBA funds, and is responsible for more than two-thirds of all the domestic microlending completed in the past twenty years.⁴⁵ Accion's interest rates are set between 8.99% and 15.99%.⁴⁶ Grameen America, founded by Yunus and following his microloan model that was first applied internationally, was started in 2008.⁴⁷ Interest rates hover around fifteen percent.⁴⁸ Yunus is very optimistic about the future of Grameen America and hopes it will be self-sustaining by 2013—he believes that “there has been no financial crisis in microlending.”⁴⁹ In addition to the major non-profits, commercial banks such as Citibank are also beginning to see microcredit as a core business opportunity.⁵⁰

⁴² The SBA Office of Women's Business Ownership oversees a network of Women's Business Centers that provide comprehensive training and counseling to help women who are economically or socially disadvantaged start and grow businesses. See generally *SBA Women's Business Centers*, U.S. SMALL BUS. ADMIN, <http://www.sba.gov/about-offices-content/1/2895> (last visited Mar. 29, 2011).

⁴³ Through programs such as the Bank Enterprise Award Program and the Community Development Financial Institutions Program, the CDFI Fund promotes access to capital and local economic growth in low-income communities through monetary awards and the allocation of tax credit. See generally *Overview of the Bank Enterprise Program*, COMMUNITY DEV. FIN. INSTITUTIONS FUND, http://www.cdfifund.gov/what_we_do/overview.asp (last updated Dec. 17, 2008).

⁴⁴ Burrus, *supra* note 19, at 11.

⁴⁵ Alex Goldmark, *The GOOD 100: Microfinance Comes to America*, GOOD (Oct. 7, 2009, 9:00 AM), <http://www.good.is/post/the-good-100-microfinance-comes-to-america>.

⁴⁶ *Loan Amounts, Interest Rates, and Fees*, ACCION USA, <http://www.accionusa.org/home/small-business-loans/about-our-loans/loan-amounts-interest-rates-and-fees.aspx> (last visited March 21, 2011).

⁴⁷ Rana Foroohar, *The Poor Always Pay*, NEWSWEEK, July 8, 2010, <http://www.newsweek.com/2010/07/08/the-poor-always-pay.html>.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ See generally *Citi Microfinance*, CITIGROUP, <http://www.citigroup.com/citi/microfinance/> (last visited Mar. 21, 2011).

IV. REGULATION

A. *Current Regulation in the United States*

Microlenders in the United States currently operate as non-profits.⁵¹ Because of the non-profit status and the way in which the microlending field grew organically in the United States, there is no regulatory body that specifically oversees microlenders.⁵² This allows microlenders to differentiate themselves from all other financial institutions in that they are operating in a non-regulated gray area.⁵³ Aside from the general Internal Revenue Service (“IRS”) regulations and the state-specific small business and consumer laws that apply to non-profits, there are no formal or separate regulations specifically for microlenders.⁵⁴ However, microlenders must abide by state-specific usury laws.⁵⁵ Congress and lending organizations have begun to establish some accreditation standards for microlenders; for example, in order to receive federal funds, microlenders must undergo a certification process to become a Community Development Financial Institution.⁵⁶ This is a shift from the historical trend of not requiring microlenders to undergo any accreditation in order to operate as a lender.⁵⁷ Additionally, the national trade association of microlenders, the AEO, has recently implemented a process that would “establish minimal standards relating to lending and/or training performance, governance and management issues and financial soundness.”⁵⁸ Regulation is important to long-term stability and growth. If microlenders continue moving into the private sector, then investors will increasingly demand transparency. The microlending community seems to have four possibilities regarding regulation in the future: to remain largely unregulated, to seek brand new laws specifically designed for the unique situation of microlenders, to try to fit microlending into an already existing structure of regulatory law such as that of a credit union, or to become for-profit entities and therefore be regulated more like commercial banks and corporations.

⁵¹ Burrus, *supra* note 19, at 14.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ Barbara Kiviat, *Microfinance in the U.S.: Can Lenders like Grameen Succeed*, TIME, Jan. 11, 2009, <http://www.time.com/time/magazine/article/0,9171,1950949,00.html>. See also *Payday Lending*, NAT’L CONF. OF STATE LEGISLATURES, <http://www.ncsl.org/default.aspx?tabid=12473> (last visited Mar. 29, 2011).

⁵⁶ Burrus, *supra* note 19, at 14.

⁵⁷ See *id.*

⁵⁸ *Id.*

B. The Debate of the Regulatory Future of Microlenders in the United States

There is ongoing debate about whether such microlending institutions can, or should, be regulated by the government. David Bornstein, author of *The Price of a Dream: The Story of the Grameen Bank*, believes that the government can and should play a role in the microfinance industry, but that the government cannot play a leading role.⁵⁹ He believes that the government's role should be to subsidize the costs of institutional development, but that this subsidy should not be infinite.⁶⁰ Yunus has expressed his own strong opinion on the many actions the government could undertake in order to promote the viability of microfinancing and microenterprise. He believes that completely new laws and regulations should be designed exclusively for establishing microfinance banks for low-income people and people on welfare.⁶¹ He also believes that the current law is ultimately inappropriate for microlending institutions, but that one possibility or compromise may be to somehow regulate microlending institutions more like credit unions, as opposed to regulating them like commercial banks.⁶²

Additionally, Yunus thinks that licensing for certain industries should be voluntary and optional in order to encourage the poor to become involved in such industries.⁶³ He believes that as a fundamental philosophy, regulation for the poor should be as minimal as possible—waiver medallions should be explored and there should be simpler laws in general.⁶⁴ As a necessary foundation to foster sustainable and successful microlending, he feels that welfare and Medicaid should be reformed so that these programs foster maximum independence.⁶⁵ Ultimately, Yunus envisions new tax laws that equate “social business” with charities.⁶⁶ Perhaps most interestingly, Yunus thinks that microloans should be non-

⁵⁹ BORNSTEIN, *supra* note 28, at 342.

⁶⁰ *Id.* at 343.

⁶¹ Muhammad Yunus, *How Legal Steps Can Help Pave the Way to Ending Poverty*, 35 A.B.A. HUM RTS. no. 1, winter 2008 at 23.

⁶² *Id.*

⁶³ *Id.* One example is the flower arranging industry in the state of Louisiana, where a person cannot arrange and sell more than one variety of flowers in a vase for resale without taking a test to get a state license. Such regulation discourages new and financially disadvantaged entrepreneurs and keeps the cost of flower arrangement high for both the arranger and the consumer.

⁶⁴ *Id.*

⁶⁵ *Id.* at 23–24.

⁶⁶ *Id.* at 24.

governmental.⁶⁷ He calls for such loans to exist solely in the private sector.⁶⁸

Sujeet Kumar of the Hauser Center for Nonprofit Organizations at Harvard University supports structure and regulation for microlenders because “looser regulation combined with human greed, poor communication and education has played a role in the sub-prime mess and the consequent economic crisis” in the United States.⁶⁹ She explains that regulation of microlending is necessary not only to protect those who benefit from the microloans, classes of people who are often vulnerable to economic exploitation, but also for the protection of the microlending organizations, in order to protect the legitimate microlenders in the event of a market downturn while keeping away unscrupulous and “fly-by-night” lenders.⁷⁰

In 2009 and 2010, the Economist Intelligence Unit, the business arm of the publisher of *The Economist*, conducted an in-depth analysis of the microfinance for-profit business environment in fifty-four countries.⁷¹ One of the study’s most basic conclusions was that because “microfinance is rapidly shifting from a niche product to a globally recognized form of finance . . . as microfinance offerings become more sophisticated and diverse, regulatory and market gaps keep the industry from operating as well as it should.”⁷² This conclusion can be applied to the United States as well as the rest of the world.

C. Regulation of Microlenders Abroad

In September 2010, the Indian Finance Minister responded to the ongoing debate surrounding the regulation of microlenders in India by appealing to the microfinance industry to self-regulate.⁷³ He also supported the implementation of a cap on the interest rates charged by Indian microlenders, which already exists in the United States in the form of usury law.⁷⁴ The Central Bank of India has created a sub-committee to explore

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ Sujeet Kumar, *Should the Microfinance Industry Be Regulated?*, HAUSER CENTER (Nov. 8, 2010), <http://hausercenter.org/iha/2010/11/08/should-the-microfinance-industry-be-regulated/>.

⁷⁰ *Id.*

⁷¹ See generally, *Global Microscope on the Microfinance Business Environment 2010*, ECONOMIST (2010), <http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=35379430>.

⁷² *Id.* at 4.

⁷³ Kumar, *supra* note 69.

⁷⁴ *Id.*

the need for the regulation of microlenders.⁷⁵ In opposition, the President of the Microfinance Institutions Network, which represents forty-four of the leading microlenders in India, spoke out in warning that the Indian microfinance industry would collapse if regulated.⁷⁶ In response to these concerns, a draft of the proposed India Microfinance Regulation Bill of 2010 was released for feedback in 2010.⁷⁷ As of early 2011, the Indian federal government and the Reserve Bank of India were working together on new federal regulations to oversee microlending.⁷⁸ The proposed federal regulations include requiring microlenders to apply for registration with the National Bank.⁷⁹ Requirements in order to be granted the Certificate of Registration include having a net fund worth a certain amount and having been in existence for at least three years.⁸⁰ The National Bank retains the power to cancel a Certificate if the organization fails to submit for inspection its books of account and other relevant documents.⁸¹ Each organization is required to have a reserve fund deposited with the National Bank, and the National Bank can order the organization to invest part or all of its reserve fund into certain securities.⁸² The overall goal of the proposed regulation is to allow the National Bank to formulate and facilitate “appropriate policy for the orderly growth of the micro-finance services so as to ensure greater transparency, effective management, good governance, and to facilitate the flow of thrift services . . . in an efficient manner.”⁸³

Some Indian provinces have already enacted microlending regulation on the local level—in late 2010, the Andhra Pradesh province enacted regulation in response to complaints about the actions of SKS Microfinance, India’s largest microlender and only publicly traded for-profit microlender.⁸⁴ The regulations require that all microfinance institutions register with the government, restrict the total interest payments charged from exceeding the amount of the loan, ban the taking of security

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ Vikas Bajaj, *Fifteen Years In, Microcredit Has Suffered A Black Eye*, N.Y. TIMES, Jan. 6, 2011, at B3.

⁷⁹ *Draft Document Seeking Comments/Suggestions of Stakeholders on Regulation and Development of the Micro Finance Sector*, INDIA MICROFINANCE, <http://indiamicrofinance.com/files/2010/05/MFI-Regulation-bill.pdf> (last visited Mar. 29, 2010).

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ Megha Bahree, *SKS Shares Continue to Slide Amidst New, Strict Regulation*, FORBES BLOG (Oct. 21, 2010, 7:00 PM), <http://blogs.forbes.com/meghabahree/2010/10/21/sks-shares-continue-to-slide-amidst-new-strict-regulation/>.

for loans and impose penalties of jail time and hefty fines for coercing borrowers with strong-handed techniques.⁸⁵

There have also been recent efforts to regulate microlenders in the Philippines.⁸⁶ In 2010, the Central Bank of the Philippines approved a government bill that dictates banking policy designed to screen and qualify microlenders.⁸⁷ Each of these examples of regulation abroad seems to have arisen out of a fear of exploitation of the poor. These countries have recognized the tension between allowing the microlending industry to become self-sustaining and profitable and the negative effect that some of the strategies that seem necessary to achieve this goal may have on the poor. The United States is not exempt from a similar tension, as is illustrated by the fact that the vast majority of microlenders exist as non-profits in the United States, because of restrictions in the for-profit world. These restrictions exist in the form of both explicit legislation such as usury law and corporate governance concerns such as shareholder primacy and the business judgment rule. This tension is manifested in the way that usury law may prevent American microlenders from being profitable, and corporate governance issues may interfere with their fundamental mission toward the poor.

D. *Credit Unions in the United States*

A federal credit union is a non-profit, and therefore tax-exempt, cooperative financial institution that is owned and run by its members; members pool their funds to make loans to each other.⁸⁸ The Federal Credit Union Act ("FCUA") in 1934 formed a national system to charter and supervise federal credit unions.⁸⁹ The National Credit Union Administration ("NCUA") became an independent federal agency in 1970.⁹⁰ The 1980s brought about the deregulation of credit unions, increasing flexibility in merger, membership criteria and member services.⁹¹ The NCUA has taken special steps to reach a low-income demographic and give them access to credit union services.⁹² The FCUA authorizes federally insured credit unions to serve predominantly low-income members in distressed areas or neighborhoods largely unserved by

⁸⁵ *Id.*

⁸⁶ See Kumar, *supra* note 69.

⁸⁷ *Id.*

⁸⁸ *About Credit Unions*, NAT'L CREDIT UNION ADMIN., <http://www.ncua.gov/Resources/CreditUnionDevelopment/aboutCUs.aspx> (last visited Mar. 21, 2011).

⁸⁹ *History of Credit Unions*, NAT'L CREDIT UNION ADMIN., <http://www.ncua.gov/About/History.aspx> (last visited Mar. 21, 2011).

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

traditional banks.⁹³ To achieve this designation as a Low-Income Credit Union, the federally insured credit union must meet various requirements specified in the NCUA Rules and Regulations.⁹⁴ An important benefit of this designation is that Low-Income Credit Unions may receive secondary capital from corporations and organizations that do not qualify for credit union membership.⁹⁵ This process demonstrates that a federal government infrastructure already exists that encourages federally insured credit unions to provide reasonable loans to vulnerable populations.⁹⁶ In contrast to federal microlending avenues, federal support of Low-Income Credit Unions does not involve the federal government as a direct lender, allowing such credit unions to be separated from the whims of Congress.

In 2003, the former Chairman of the NCUA, Dennis Dollar, described the expansion of credit union services to the underserved.⁹⁷ Dollar reported that a record 23.5 million new potential credit union members were added in 2002, a direct result of NCUA's Access Across America initiative.⁹⁸ From 2000 to 2002, credit unions began serving 706 previously underserved areas.⁹⁹ Dollar stated that "these unprecedented numbers . . . further demonstrate that a safe and sound but empowering regulatory approach can result in more lower cost financial services being available to residents in these unbanked communities."¹⁰⁰ Additionally, he added that "[c]redit unions can play an important role in meeting the financial needs of these low-income and underserved communities, many of which will otherwise be driven to the predatory lenders which moved into these neighborhoods when the traditional financial institutions moved out."¹⁰¹

V. MICROLENDERS AS COMMERCIAL ENTITIES

In order to move forward, microfinance must transform into an industry. Becoming an industry involves standardization and accreditation, increased specialization and professionalism, and consolidation in which the smaller and weaker organizations give way to the more efficient ones. Government regulation seems to be inevitable for the conversion of microfinancing into a for-profit industry.

⁹³ Ronald H. Silverman, *Toward Curing Predatory Lending*, 122 *BANKING L.J.* 483, 586 (2005).

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.* at 585.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

A. *Going Public*

Participating in an initial public offering, or “IPO” is the process in which a privately held business is converted into a public business, or a business owned by many.¹⁰² Going public involves the offering of part ownership of the company to the public through the sale of debt or stock.¹⁰³ The principle benefit of an IPO is the potential for increased working capital.¹⁰⁴ Other benefits include enhanced visibility, increased market value, and improved liquidity.¹⁰⁵ Besides the practical considerations of these tangible benefits, the decision to go public can also be based on more intangible factors such as if the market is “hot.” The phrase “sex and numbers” is used to describe the idea that underwriters are looking for a “hot idea likely to send the stock skyrocketing” and that above all, underwriters are interested in companies with a story to tell.¹⁰⁶ While microlending has certainly been seen as a “hot” industry in the recent past, and this popularity is given as a reason for the initial success of for-profit microlenders abroad, the industry is very recently facing new skepticism and criticism.¹⁰⁷ Additionally, American microfinance organizations seeking to go public would face stringent requirements and cost impediments.¹⁰⁸

Going public is a rare and controversial step for a microlender to take. The largest microlender in India, SKS Microfinance, went public in late July of 2010.¹⁰⁹ This is the first microlender in India to go public and the second to go public in the world.¹¹⁰ SKS Microfinance was founded in 1998.¹¹¹ Its IPO was \$347 million dollars,¹¹² and the stock surged eighteen

¹⁰² *Going Public/Initial Public Offerings (IPO's)*, VENTURE ASS'N <http://www.venturea.com/public.htm> (last visited Mar. 24, 2011).

¹⁰³ *Id.*

¹⁰⁴ Roberta Maynard, *Are You Ready To Go Public?*, 83 NATION'S BUS. 1, 30 (1995).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ Bajaj, *supra* note 78, at B3.

¹⁰⁸ Costs include \$50,000 to \$100,000 for legal fees; \$20,000 to \$75,000 for accounting; \$30,000 to \$200,000 for auditing; \$20,000 to \$80,000 for printing; and \$10,000 to \$30,000 for fees. *Going Public*, *supra* note 102.

¹⁰⁹ Deepti Chaudhary & Shraddha Nair, *After SKS Success Share Microfin, Spandana Sphoorty May Go Public*, LIVEMINT & WALL ST. J. BLOG (Aug. 11, 2010, 11:38 PM), <http://www.livemint.com/2010/08/11233822/After-SKS-success-Share-Micro.html>.

¹¹⁰ Bruce Einhorn & David Ruth, *An IPO for India's Top Lender to the Poor*, BLOOMBERG BUSINESSWEEK, May 10, 2010, at 16–17.

¹¹¹ M. Rajshekhar & M. Anand, *More to SKS Script Than Meets the Eye*, ECON. TIMES (Oct. 9, 2010), <http://economictimes.indiatimes.com/news/news-by-industry/banking/finance/finance/More-to-SKS-script-than-meets-the-eye/articleshow/6709648.cms>.

percent on its first public trading day.¹¹³ It earned eighteen million in the 2009 fiscal year on a loan portfolio of \$320 million.¹¹⁴ SKS charges its borrowers annual interest rates ranging from 26.7% to 31.4%.¹¹⁵

B. *Microlending and Commercial Banks*

The CRA created incentives for commercial banks to serve the needs of the communities in which they are chartered to do business, including the need for credit services.¹¹⁶ The Act requires a federal financial supervisory agent to use its authority when examining financial institutions to encourage banks to meet these community goals.¹¹⁷ The CRA has resulted in some increased lending to traditionally unbanked individuals in traditionally unbanked neighborhoods, but the CRA itself does not lift all of the limitations on lending to those traditionally unbanked.¹¹⁸ Because the CRA empowers commercial banks to serve low-income neighborhoods and maintain profitable community banking, commercial banks and microlenders thus have some shared intrinsic goals; with these shared goals, “partnerships between microlenders and community banks seem to be mutually re-enforcing.”¹¹⁹ Perhaps not surprising, then, SKS Microfinance of India is managed by Citigroup.¹²⁰ Currently, the CRA applies to all Federal Deposit Insurance Corporation (“FDIC”) insured commercial banks.¹²¹ CRA regulators recognize banks as being in compliance when they engage in community-banking activities, which include the creation of local microcredit programs.¹²² This provides an incentive for partnerships between non-profit microlenders and commercial banks, as well as the commercialization of microlending in general.¹²³

¹¹² Alex Goldmark, *SKS Microfinance Stock Shares Tumble Just Months After IPO*, GOOD BUS. BLOG (Oct. 8, 2010, 5:00 PM), <http://www.good.is/post/sks-microfinance-stock-shares-tumble-just-months-after-ipo>.

¹¹³ Nin-Hai Tseng, *Can Microfinance Be Both Moral and Profitable?*, CNN MONEY (Aug. 19, 2010), http://money.cnn.com/2010/08/19/news/international/SKS_microfinance_IPO.fortune/index.htm.

¹¹⁴ Einhorn & Ruth, *supra* note 110.

¹¹⁵ *Id.*

¹¹⁶ *See generally* Appx. I.

¹¹⁷ *Id.*

¹¹⁸ Molly Richardson, *Increasing Microlending Potential In the United States Through A Strategic Approach to Regulatory Reform*, 34 J. CORP. L. 923, 934 (2009).

¹¹⁹ *Id.* at 935.

¹²⁰ Einhorn & Ruth, *supra* note 110.

¹²¹ Richardson, *supra* note 118, at 935.

¹²² *Id.*

¹²³ *Id.*

VI. COMMERCIAL MICROLENDING'S POTENTIAL EFFECT ON THE
CHALLENGES CURRENTLY FACING MICROLENDING IN THE UNITED
STATES

Yunus strongly believes that loans should be non-governmental.¹²⁴ This is because microloans dependent on government backing have more of the characteristics of charity or welfare, and the focus is not on the governmental programs themselves becoming self-sustaining.¹²⁵ The biggest backing of microloan programs in the U.S. came through the stimulus bill.¹²⁶ This backing of microloans was merely a byproduct of the government trying to boost the economy through a stimulus; the focus or desired end result was not a sustainable and long-term backing of microloans. When microloans are tied to the government, the funding is contingent on the whims of Congress and the administration. The risk of this was demonstrated in the Bush Administration's lack of interest in microlending, which lead to very limited federal funding to microloan programs.¹²⁷ If microlending becomes an enterprise in the private sector, then the focus can shift to sustainable programs, which would result in profits for the microlending corporations and a separation of the success of the program from the whims of the government. If microlending in America operated as commercial entities and took place completely in the private sector, then by default some of the reform Yunus suggests would occur.¹²⁸ Additionally, if microlenders were for-profit corporations, then instead of requiring the brand new laws and regulations advocated by Yunus, microlenders could be regulated more easily and could fit under already existing law.

While existing in the private sector may address some of the Yunus' concerns and ideas for reform, microlenders operating as for-profit organizations have their own set of challenges. One concern in that going for-profit will force microlenders to behave like controversial fringe lenders. "Fringe lending" envelops the payday lending movement, which features single-payment, short-term loans based on personal checks held for future deposit or on electronic access to personal checking accounts.¹²⁹ Characterized through a value-judgment lens, payday loans are "extremely

¹²⁴ Yunus, *supra* note 61, at 24.

¹²⁵ *Id.*

¹²⁶ *SBA Applauds Stimulus Bill, Planning Underway for Broadest, Quickest Small Business Impact*, U.S. SBA, <http://www.sba.gov/content/sba-applauds-stimulus-bill-planning-underway-broadest-quickest-small-business-impact> (last visited Mar. 24, 2011).

¹²⁷ Richardson, *supra* note 118, at 930.

¹²⁸ See Yunus, *supra* note 61, at 25.

¹²⁹ *Payday Lending*, NAT'L CONF. OF STATE LEGISLATURES, <http://www.ncsl.org/default.aspx?tabid=12473> (last updated Feb. 11, 2011).

high-interest, short-term loans offered to cash-strapped consumers.”¹³⁰ On a very broad level, microlenders already share some similarities to fringe lenders in that they are an alternative to mainstream banks and offer small loans; Yunus himself characterized his Grameen Bank as “sub-sub-prime”.¹³¹ One journal article describes fringe lending as running the gamut “from very small ‘micro’ loans, through auto financing, and into high-dollar equity lending.”¹³² When profits are driving microlending, there is a risk that the microlenders, like fringe banking services, would become exploitive or predatory. Similar to microlending, currently there is no deferral regulatory supervision for fringe banking.¹³³

One challenge currently facing microfinanciers in the United States is restrictive usury law.¹³⁴ Current usury law provide interest rate caps that limit a microlender’s ability to make a profit and be sustainable because they must charge higher interest rates than are allowed in order to achieve these ends.¹³⁵ One reason microlending has been so successful abroad is because such usury caps do not exist in the informal financial markets of developing countries.¹³⁶ While it may seem that usury law reform would be the only way to combat this problem,¹³⁷ fringe bankers, decisively for-profit companies, are in many cases able to “get around” existing usury laws. By partnering with national banks, payday lenders are able to take advantage of a loophole in federal banking law, allowing them to charge high interest rates that are in excess of the state usury law.¹³⁸ While payday lenders also avoid state usury limits through sneaky maneuvers and subterfuge, partnering with national banks seems, for now, to be a legal, although controversial means of avoiding usury limits.¹³⁹ While no proponents of microlending wish to see microlenders begin taking advantage of individuals by unfair means, as is a main criticism of payday lending, short of drastic usury law reform which is unlikely to happen in the United States, mirroring payday lender’s methods of avoiding restrictive usury

¹³⁰ Creola Johnson, *Payday Loans: Shrewd Business of Predatory Lending?*, 87 MINN. L. REV. 1, 2 (2002).

¹³¹ Foroohar, *supra* note 47.

¹³² Lynn Drysdale & Kathleen E. Keest, *The Two-Tiered Consumer Financial Services Marketplace: The Fringe Banking System and Its Challenge to Current Thinking About the Role of Usury Laws in Today’s Society*, 51 S.C. L. REV. 589, 595 (2000).

¹³³ *See generally id.*

¹³⁴ Richardson, *supra* note 118, at 935.

¹³⁵ *Id.* at 936.

¹³⁶ *Id.* at 933.

¹³⁷ *See id.* at 923.

¹³⁸ Drysdale & Keest, *supra* note 132, at 652.

¹³⁹ One case of a Texas payday lender avoiding Texas state usury laws by partnering with a national bank based in Delaware is still pending. *See Drysdale & Keest, supra* note 132, at 335.

laws may be an option worth considering if microlenders are seeking to enter the private sector. Because many microlenders are already partnered with large and established commercial banks, they may be able to avoid restrictive usury law. However, cunningly avoiding usury law would not seem to be in the spirit of microlending's social welfare and common-good goals. In order to become self-sustaining and profitable, for-profit microlenders in the United States must develop a business model and strategy that is successful without being usurious—a challenge not faced in other countries without such usury limitations.

Another challenge currently facing microlenders is the gap that exists between the potential market and the number of customers currently being reached. Especially with the advent of the financial crisis and its resulting vast unemployment, more people are becoming self-employed as a means of survival. Businesses with less than five employees currently make up eighty-eight percent of all United States businesses.¹⁴⁰ The FDIC found that eight percent of the United States population has no access to credit, and that eighteen percent has very little access to credit, which together is a huge populace of “unbanked” individuals.¹⁴¹ However, even with this huge potential market, less than one percent of microentrepreneurs in the United States have received microloans to date.¹⁴² Becoming for-profit could help to close this large gap. Especially if stockholders get involved, then the microlender will be able to raise more capital, leading to more loans for the poor. Decoupling the microfinance industry from governmental dependence for funds means that the amount of potential capital that could be raised could be limitless. However, this solution turns on whether or not for-profit microlending companies would be able to attract investors. The economic downfall has caused a decline in donations to microcredit institutions,¹⁴³ but currently such donations come from the point of view that microcreditors are essentially a charity, and thus the donation is not seen as an investment with the potential to financially reward the investor. While it may be difficult to lure in investors to a for-profit microfinance company in America that has yet to break even, there remains the possibility that some investors could be attracted by the idea that they are doing something good for society that has the potential to benefit them financially as well.

While there exists a huge market for those in need of microfinance services, another challenge facing microlenders is that this need is being filled by conventional bankers moving more “downstream” and by fringe bankers.¹⁴⁴ This is a phenomenon that has only developed in the last ten

¹⁴⁰ *Microenterprise Fact Sheet Series*, *supra* note 31.

¹⁴¹ *SBA Applauds Stimulus Bill*, *supra* note 126.

¹⁴² Richardson, *supra* note 118, at 929.

¹⁴³ *Id.* at 930.

¹⁴⁴ Burrus, *supra* note 19.

years.¹⁴⁵ In order to compete with these fringe lenders, microlenders must be able to play by their same rules. This implies that microlenders will either have to go for-profit or that the rules governing non-profit microlenders must change because non-profits completely lack the tools and ability to compete with for-profit entities, which are self-sustaining and can grow because of their ability to make a profit. Because of the difficulty in competing with these other financial institutions, developing strategic partnerships with some of them may ultimately prove helpful for the microenterprise field.¹⁴⁶

Still another challenge is that there are simply too many competing organizations in the microfinance field.¹⁴⁷ Such inefficiency drives up costs and leads to operations that are not sustainable.¹⁴⁸ If microlenders were to go for-profit, this problem could be remedied because a for-profit market would drive out the inefficient competition. In order to satisfy the requirements for going for-profit or even public, organizations could merge or combine forces so that they could have enough capital. Going public would also aid in transparency, making such corporations more attractive to investors.

VII. CAN FOR-PROFIT MICROLENDING COEXIST WITH ITS HUMANIST AND CHARITABLE ORIGINS?

There is currently debate about whether or not microfinance organizations can transition into for-profit entities without losing their original purpose, mission and successes.¹⁴⁹ For those that say yes, they argue that microfinance is, at its heart, philosophically aligned with capitalism and private markets.¹⁵⁰ Individuals with this point of view argue that being for-profit is a way to solve some of the challenges facing microfinancing discussed above, and that going for-profit could help microfinanciers reach more people, ultimately expanding the mission of microfinancing.¹⁵¹ The proponents of for-profit microlending believe that there can be a balance between the missions of poverty alleviation and making a profit.¹⁵² These proponents also believe that the idea of doing something good will lure in investors.¹⁵³ People who believe that profits

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 13.

¹⁴⁸ *Id.*

¹⁴⁹ Tseng, *supra* note 113; see Jonathan C. Lewis, *Obama Calls Out Microfinance: Taking the Measure of Microfinance*, MICROCREDIT ENTERPRISES (2010), <http://www.ionpoverty.com/LibraryItems/Microfinance%20Considered.pdf>.

¹⁵⁰ Lewis, *supra* note 149.

¹⁵¹ Tseng, *supra* 113.

¹⁵² *Id.*

¹⁵³ *Id.*

and: microloans can co-exist base this opinion on a fundamental understanding of credit as a tool of business development and nothing more.¹⁵⁴ This philosophical underpinning differs completely from Yunus, who believes that credit should be a fundamental human right.¹⁵⁵ A repeated theme that drives the push for microfinance in the private sector is the need for transparency.¹⁵⁶ Proponents of for-profit microlending believe that microlending in America will only ever be successful if the organizations become drastically more transparent.¹⁵⁷ Being for-profit and existing in the private sector would force such desired transparency.¹⁵⁸

In contrast, Yunus himself told the *Wall Street Journal* in July 2010 that “micro credit should not be presented as a money-making opportunity.”¹⁵⁹ He believes that credit is a human right, and that this right should not be subject to the whims of global investment trends or corrupted by unbridled greed any more than the right to vote should be dependent on literacy tests of property ownership.¹⁶⁰ This is a controversial view, and there is an argument that the analogy between the right to credit and the right to vote does seem to be flawed in some ways. Yunus’ concern is that what is profitable is not necessarily just or fair, as we have seen with the tactics of the payday lenders.¹⁶¹

From a strictly business point of view, setting aside Yunus’ concerns of morals versus profits, one real concern is that answering to public shareholders could lead to even higher interest rates for borrowers.¹⁶² Additionally, some analysts and researchers worry that as multiple microlenders turn for-profit in a single market, that intense competition among lenders could lead to substantially higher defaults.¹⁶³ However, the counterargument to this worry is that by getting stockholders involved, more capital could be raised, thus leading to more plentiful loans that would drive interest rates down.¹⁶⁴

One recent study concluded that in Burundi, where non-profit and for-profit microlenders co-exist, there is no significant difference between non-profit and for-profit microlenders regarding the poverty level of their loan

¹⁵⁴ Lewis, *supra* note 149.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ Eric Bellman, *IPO Pits Profit vs. Altruism*, WALL ST. J., July 9, 2010, at C1.

¹⁶⁰ Lewis, *supra* note 149, at 5.

¹⁶¹ *Id.*

¹⁶² Tseng, *supra* note 113.

¹⁶³ Bajaj, *supra* note 78, at B3.

¹⁶⁴ Lewis, *supra* note 149, at 7; *see also* Tseng, *supra* note 113.

recipients.¹⁶⁵ Burundi was chosen as the location for the study because as a nation Burundi has not benefited from outside donors and foreign investors that typically support microlenders in other countries and for-profit and non-profit microlenders have coexisted in Burundi for a longer time than in most countries.¹⁶⁶ The study found that both types of microlenders prefer to allocate loans to the “less poor” versus the “poorest of the poor,” probably in order to seek financial viability.¹⁶⁷ This convergence of the non-profit and for-profits microlenders’ portfolio composition occurs because the non-profits “lose the possibility to cross-subsidize losses made on loans allocated to the most poor with gains from loans allocated to the less poor due to the competitive pressure” from the for-profit lenders.¹⁶⁸ This study supports the overall assertion that microlenders worldwide are, out of necessity, moving toward a self-sustainable model that necessarily includes partial commercialization.¹⁶⁹ The study concludes that the two different types of microlenders in Burundi “do not differ much in terms of microloan allocation patterns, which is in line with the overall global trend of convergence of different types of microfinance institutions.”¹⁷⁰

VIII. SHAREHOLDER PRIMACY CONCERNS

The American shareholder primacy principle mandates that managers’ fiduciary duties require them to maximize the shareholders’ wealth, precluding them from giving independent consideration to the interests of other constituencies.¹⁷¹ This principle is justified in several ways. First, because the costs associated with unproductive managerial conduct and the monitoring costs incurred by the corporation are a drag on a corporation’s economic performance, it follows that “a venture is worth more if managers are tasked with a clear mission, such as the maximization of the stock price, than with a more amorphous mission involving the balancing of competing interests.”¹⁷² Second, shareholders function as the sole “residual claimants,” in that they are only entitled to whatever is left over after other fixed claims have been met.¹⁷³ This is beneficial because having a single group of residual claimants increases the worth of the venture in the aggregate

¹⁶⁵ Moise Sagamba, Oleg Schetinina & Nurmukhammad Yusupov, *Do Microloan Officers Want to Lend to the Less Advantaged? Evidence from a Choice Experiment 21* (Working Paper), available at <http://ssrn.com/abstract=1771665>.

¹⁶⁶ *Id.* at 27–28.

¹⁶⁷ *Id.* at 21.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 28.

¹⁷⁰ *Id.*

¹⁷¹ Ian B. Lee, *Efficiency and Ethics In The Debate About Shareholder Primacy*, 31 DEL. J. CORP. L. 533, 536 (2006).

¹⁷² *Id.* at 537.

¹⁷³ *Id.* at 538.

because of lower agency costs compared to a venture in which there are multiple residual claimants; it follows that the participants will agree that “(1) one of the groups . . . will enjoy the status of sole residual claimant; (2) management’s powers should be exercised towards the end of maximizing the value of the shareholders’ investment; and (3) the other participants will receive fixed terms that compensate them prospectively of agreeing to (1) and (2).”¹⁷⁴ While legal scholars regularly publish critiques of the shareholder primacy system, the fact is that this is the current guiding principle of American corporate law, with the Orthodox Corporate Law Academy concluding that “participants in the corporation are better off, and the rest of us are at least no worse off, when social interests are protected through regulatory laws rather than by tampering with shareholder primacy.”¹⁷⁵ As an end result, choosing shareholder primacy is essentially a statement that a market mechanism, rather than managerial discretion, is “a better device for reconciling individuals’ competing social, moral, and financial preferences.”¹⁷⁶

If microlending organizations were to become publicly held, then, to uphold shareholder primacy, the priority of the corporation would be maximizing profits, and not the consideration of the well-being of individual loan recipients and their entrepreneurial dreams. Ethical questions and considerations can arise in the course of any kind of business. However, the microlending movement’s historical framing of credit as a human right and its stated goal to raise people out of poverty are ethical goals that could easily be compromised by subjecting microlending organizations to shareholder primacy.

Shareholder primacy is the predominate norm in the countries that share a legal system based on English common law and equity principles, including the United Kingdom, Australia and Canada.¹⁷⁷ This differs from other European countries, whose laws include aspects of employee participation in corporate governance.¹⁷⁸ Asian countries, including India, the home of the publicly traded microlender SKS, tend to be more stakeholder-oriented, as corporate governance has a greater focus on interpersonal relationships and the family.¹⁷⁹ Thus, Indian companies do not necessarily follow the Anglo-American shareholder primacy norm.¹⁸⁰ Worldwide, many nations are heading toward a shareholder primacy

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 539.

¹⁷⁶ *Id.* at 571.

¹⁷⁷ Amir N. Licht, *The Maximands of Corporate Governance: A Theory of Values and Cognitive Style*, 29 DEL. J. CORP. L. 649, 733 (2004).

¹⁷⁸ *Id.* at 735.

¹⁷⁹ *Id.* at 736.

¹⁸⁰ Simon Deakin, *The Coming Transformation of Shareholder Value*, 13 CORP. GOVERNANCE: INT’L REV. 11, 15 (2005).

approach; many scholars argue that there is no defensible alternative.¹⁸¹ While India may be “functionally” moving in a direction in which its corporations function with shareholder primacy in mind, structurally Indian corporations are still not legally compelled to do so.¹⁸² Some Indian corporations outright reject the shareholder primacy model in favor of what is being called the “conscious-capitalism movement.”¹⁸³ Twenty-eight Indian investment firms following this business model (as designated by the Conscious Capitalism Institute) returned 1025% from June 1996 to June 2006.¹⁸⁴ The chairman of the Conscious Capitalism Institute stated to the Indian Economic Times that some Indian companies are giving up on the “false premise of shareholder primacy” and focusing instead on an approach that “ultimately rewards shareholders with superior financial returns as well as the satisfaction of knowing that they are helping to impact the world for the better in multifaceted ways.”¹⁸⁵ One can see how the freedom to operate a publicly-held corporation in such a way, an option not legally available in the United States would be a fertile environment for the existence of for-profit microlenders. Indian corporations have much more flexibility in their management decisions, and in the context of microlending, can make short-term decisions that may appear to hurt profits and shareholders while focusing on the well-being of the microloan recipient without the fear of being sued for a breach of fiduciary duties to the shareholders.

Because of this difference in corporate governance, Indian and Mexican for-profit microlenders, along with all for-profit microlenders in countries that do not have formal shareholder primacy, are not a perfect analogy or model for an American for-profit microlender. However, the possibility does remain that shareholders in the U.S. who invest in microlending companies may be self-selected to understand the tension that exists between seeking profits and trying to do something good for society. These shareholders could then choose not to sue for a breach of their managers’ fiduciary duty to them if they understood their managers’ actions to be helpful for the microloan recipients and microlending in general. While profits are of course the priority for investors, perhaps the type of investors

¹⁸¹ See generally Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439 (2001).

¹⁸² Mary C. Gentile & Maureen Scully, *Corporate Governance Revisited: What Do We Know and What Do We Teach Future Business Leaders*, ASPEN INSTITUTE BUS. AND SOC’Y. PROGRAM, <http://www.caseplace.org/d.asp?d=2512> at 7 (last visited, Mar. 30, 2011).

¹⁸³ Kala Vijayraghavan, Op-Ed., *They Reject the Idea of Any Kind of Exploitation in Pursuit of Selfish Goals*, ECON. TIMES (Oct. 1, 2010, 4:49 AM), <http://economictimes.indiatimes.com/opinion/interviews/They-reject-the-idea-of-any-kind-of-exploitation-in-pursuit-of-selfish-goals/articleshow/6661891.cms>.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

who would invest in microlending would be satisfied with ethical decisions that maintain the integrity of microlending without always *maximizing* profits to the fullest.

Closely related to the American shareholder primacy rule is the common law business judgment rule, a standard of judicial review.¹⁸⁶ Under this rule, which is applied in Delaware and a variety of other jurisdictions, the judiciary will defer to the business judgment of corporate directors when it comes to their discretion in making corporate decisions, as long as they make such decisions with a minimum level of care.¹⁸⁷ The freedom of the board of directors to make such a wide variety of decisions without justifying their motives has a direct implication to microlending. If a microlender were to go for-profit in the United States, then when faced with the business decisions that affect corporations that do not affect non-profits, such as, at the most basic level, making a profit, then a board of directors may make decisions that are not necessarily in the best interest of the recipients of the microloans and are contrary to the philosophical mission of microlending. Such decisions would be justified through the board of directors doing what is “best” for the corporation, in that it must make a profit, but would probably be troubling for Yunus and other proponents of credit as a human right and the microlender’s special responsibility to the poor.

This tension highlights the underlying and unresolved debate around whether or not such a charitable mission could function in a for-profit model. There is still the possibility that a for-profit microlending corporation could make the conscious decision to operate itself under the principles of classic non-profit microlending at the expense of some profits. However, such a choice would be a luxury attainable only for an established and already profitable corporation, and a new business struggling to break even would have to make decisions to maximize the business’ success while attempting to balance this need to profit with its driving ideals.

IX. IF MICROLENDERS IN THE UNITED STATES WERE TO GO FOR-PROFIT AND PUBLIC, WHAT WOULD SUCH A MODEL LOOK LIKE?

Currently, there are two major models in the world of for-profit, publicly traded microlenders: SKS in India and Compartamos in Mexico. Compartamos listed its shares for over one billion in its IPO in April 2007.¹⁸⁸ However, it makes its profits by charging borrowers a usurious

¹⁸⁶ 3A WILLIAM MEADE FLETCHER, FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS § 1036 (Feb. 2011).

¹⁸⁷ *Id.*

¹⁸⁸ *Doing Good By Doing Very Nicely Indeed*, ECONOMIST, June 26, 2008, http://www.economist.com/node/11622469?story_id=11622469.

interest rate of at least seventy-nine percent a year.¹⁸⁹ This model, with such high interest rates, could not be followed in the United States. Compartamos was previously a traditional non-profit for a decade, but switched to operating as a for-profit because it had become convinced that “by pursuing profits it will be able to provide financial services to many more poor people far more quickly than it would if it had continued to act as a charity.”¹⁹⁰ Indeed, Compartamos now has over 900,000 clients, compared to the 61,000 it had in 2000. Greater scale and competition has even driven down interest rates, which are down from 115% seven years ago.¹⁹¹

SKS in India is backed by Sequoia, a leading Silicon Valley venture-capital firm.¹⁹² Prominent investors include Vinod Khosla and George Soros, who have stated that they were attracted to invest by both the mission of eradicating poverty in India and the strong growth and profit margins of eighteen percent in its last fiscal year.¹⁹³ SKS has much lower interest rates than Compartamos, at around twenty-seven percent to thirty-two percent annually.¹⁹⁴ Investors sold shares in 2010 for as much as ninety-five times what they paid for them a few years earlier.¹⁹⁵ At the time of the IPO, one Indian analyst explained that there “was a lot of demand for the stock because of its novelty value,” and he predicted that the success of this IPO would, without a doubt, bring about IPOs of other Indian microfinance companies.¹⁹⁶ While the stock surged on opening day in August 2010, and initially was doing very well, the corporation has recently faced problems. Its CEO was abruptly fired on October 4, 2010.¹⁹⁷ Stock prices have been continuing at a downward slide ever since.¹⁹⁸ Now, SKS is under scrutiny over high interest rates, allegations of strong-arm debt collections, and a rash of suicides.¹⁹⁹ Several debt collectors were arrested after more than thirty suicides of borrowers that politicians blamed on

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² Vikas Bajaj, *Microlenders, First in India to Go Public, Trades Higher*, N.Y. TIMES, Aug. 17, 2010, at B4.

¹⁹³ *Id.*

¹⁹⁴ Penny MacRae, *India Microlenders Face Heat Over Rates*, AFP (Oct. 23, 2010), http://www.google.com/hostednews/afp/article/ALeqM5j_DNjSqP0UIDK1z1pzZpipT2aP5A?docId=CNG.57e0818dd0c36f59b99307c62436bf2a.b1.

¹⁹⁵ Bajaj, *supra* note 78, at B3.

¹⁹⁶ Bajaj, *supra* note 192, at B4.

¹⁹⁷ *Come Clean, NRN Tells SKS & Akula*, TIMES OF INDIA, Oct. 27, 2010, <http://timesofindia.indiatimes.com/business/india-business/Come-clean-NRN-tells-SKS-Akula/articleshow/6819025.cms>.

¹⁹⁸ *Id.*

¹⁹⁹ MacRae, *supra* note 194.

aggressive debt recovery techniques.²⁰⁰ As of late October 2010, shares continued to tank, down twenty-two percent from a high in September, due to the firing of the CEO, the news of the suicides, and confusion resulting from stricter government regulations that were implemented in response to the suicides.²⁰¹ In early November 2010, the stock price was below its issue price.²⁰² SKS is ultimately struggling with legal and governmental regulation problems, which include ordinances issued by individual provinces to regulate the money lending operations of all microfinance institutions, the regulation of the Microfinance Institutions Network, the inference of the Indian Reserve Bank, the Ministry of Finance, and the Indian equivalent of the SEC.²⁰³ Such regulation came after political and social pressure resulting from the reported suicides by SKS borrowers.²⁰⁴

Neither Compartamos nor SKS seem like a viable model for the United States. Compartamos' interest rates are much too high to be feasible in the U.S. SKS's operations apparently include aggressive debt repayment techniques that would be illegal in the U.S. Both Compartamos and SKS exist in countries without structural shareholder primacy. One template that could be a model for American for-profit microlenders would be an expansion and adaptation by companies of the existing Small-Dollar Loan Pilot Program. The program, started by the FDIC in February 2008, was designed as a case study to show how commercial banks could profitably offer affordable small-dollar loans as an alternative to high-cost credit products such as payday loans.²⁰⁵ The annual percentage rates ("APR") for the loans were set at thirty-six percent or less, for loans in amounts of \$2500 or less, for a term of ninety days or more.²⁰⁶ The pilot worked with twenty-eight volunteer banks with total assets ranging from twenty-eight million to nearly ten billion.²⁰⁷ In the course of the pilot program, the banks made more than 34,400 small-dollar loans with a principle balance of \$40.2 million.²⁰⁸ While delinquency rates on these loans were higher than for similar types of unsecured loans, default rates were in line with industry

²⁰⁰ *Id.*

²⁰¹ Megha Bahree, *supra* note 84.

²⁰² Prमित Bhattacharya, *A Macro View of Microfinance*, LITEMINT, (Oct. 28, 2010, 2:28 AM), <http://www.livemint.com/2010/10/26233514/A-macro-view-of-microfinance.html>.

²⁰³ *Crisis-hit SKS Microfinance Cuts Rates Further*, ECON. TIMES (Nov. 10, 2010), <http://economictimes.indiatimes.com/news/news-by-industry/banking/finance/banking/Crisis-hit-SKS-Microfinance-cuts-rates-further/articleshow/6898306.cms>.

²⁰⁴ *Id.*

²⁰⁵ *Small-Dollar Loan Pilot Program*, FDIC, <http://www.fdic.gov/smalldollarloans/> (last visited Mar. 30, 2011).

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.*

standards.²⁰⁹ The cumulative charge-off rate for the pilot was “6.2% for Small Dollar Loans (\$1000 or less) and 8.8% for Nearly-Small Dollar Loans (between \$1000 and \$2500)”²¹⁰ which compare to charge-off ratios of “5.4% for unsecured ‘loans to individuals’ and 9.1% for ‘credit cards’ according to the fourth quarter 2009 Call Report.”²¹¹ What emerged from this pilot program was a dominant business model: “most pilot bankers indicated that small dollar loans were a useful business strategy for developing or retaining long-term relationships with consumers.”²¹² To move forward with the information gleaned from the pilot program, “the FDIC is working with the banking industry, consumer and community groups, nonprofit organizations, other government agencies, and others to research and pursue strategies that could prove useful in expanding the supply of small-dollar loans.”²¹³ These strategies include encouraging broad-based partnerships among banks and nonprofits to work together in designing and delivering small-dollar loans, studying the feasibility of emerging small-dollar loan technologies and business models, and considering ways that regulators can encourage banks to offer small-dollar products and how these products can receive favorable Community Reinvestment Act consideration.²¹⁴

It is highly unlikely that the government will heed to the advice of Yunus and create new tax and business regulations to assist microlenders in the transition to reach their goals.²¹⁵ One promising route, and a compromise between non-profit and for-profit, seems to be by partnering with credit unions. Credit unions still receive tax-exempt status, and yet are self-sustaining and make money for their members.²¹⁶ Microlenders that currently operate independently from federal funds could begin backing existing LICUs as a source of secondary capital.²¹⁷ In areas in which hundreds of small microlending non-profits exist, they could even combine their forces and become a LICU themselves.

A conclusion that can be drawn is that, for microlending to become successful from a financial standpoint in America, such organizations must become self-sustaining. This could be achieved by small organizations combining themselves and switching over to be for-profit entities after establishing a period of success in which they are near self-sustaining in

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ See Yunus, *supra* note 61.

²¹⁶ *Frequently Asked Questions*, NAT'L CREDIT UNION ADMIN., <http://www.ncua.gov/About/FAQ.aspx> (last visited Mar. 30, 2011).

²¹⁷ See Silverman, *supra* note 93, at 586.

order to attract investors and divorcing themselves from being solely government funded. While being for-profit appears to be a solution for many of the problems currently facing microlenders in America, becoming publicly traded seems to be unreachable at least for the near future. What does exist is a huge market for microlending in America that is not being reached²¹⁸ and a potential for people to make a profit off of microlending in America in a way that stays true to its ethical origins with a transparency and charitable focus that is lacking in current fringe lending operations.

X. CONCLUSION

Commercial banks are increasingly seeing microcredit as a core business opportunity.²¹⁹ Microlenders abroad are going for-profit and going public with mixed success.²²⁰ Currently, the proper economic and business climate exists in the United States so that many need and would benefit from microlending.²²¹ The District Director of the United States SBA's Portland District was invited by Congressman Schrader to testify at the House Small Business Subcommittee on Finance and Tax Hearing.²²² During her testimony, the Director pointed out how even times of economic downfall can hold opportunities for business growth and innovation.²²³ Fortune 500 companies such as Texas Instruments, Hewlett Packard, and 20th Century Fox were started during the Great Depression of the 1930s.²²⁴ Microsoft and Apple began during the oil shock and stock market crash of 1973–1976.²²⁵ The entire biotech and personal computer industries began in a time when the stock market was down fifty percent and inflation was heading into double digits.²²⁶ Tough times hold great opportunity for innovation aided by the need for survival and adaptation. Coupling such a ripe time with economic incentives through American microlending could lead to great things for American small businesses.

²¹⁸ See Richardson, *supra* note 118.

²¹⁹ See generally Citi Microfinance, *supra* note 50.

²²⁰ Bajaj, *supra* note 192, at B4.

²²¹ See generally Burrus, *supra* note 19.

²²² *Exploring Ways for Small Businesses to Access Capital: Hearing Before the Small Bus. H. Subcomm. on Fin. and Tax, 111th Cong. (2009)* (statement of the District Director of the United States Small Business Administration's Portland District).

²²³ *Id.*

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ *Id.*

APPENDIX I: TEXT OF CONGRESSIONAL FINDINGS AND STATEMENT OF
PURPOSE FOR THE COMMUNITY REINVESTMENT ACT

**12 U.S.C.A. § 2901. CONGRESSIONAL FINDINGS AND STATEMENT OF
PURPOSE**

(a) The Congress finds that--

- (1)** regulated financial institutions are required by law to demonstrate that their deposit facilities serve the convenience and needs of the communities in which they are chartered to do business;
- (2)** the convenience and needs of communities include the need for credit services as well as deposit services; and
- (3)** regulated financial institutions have continuing and affirmative obligation to help meet the credit needs of the local communities in which they are chartered.

(b) It is the purpose of this chapter to require each appropriate Federal financial supervisory agency to use its authority when examining financial institutions, to encourage such institutions to help meet the credit needs of the local communities in which they are chartered consistent with the safe and sound operation of such institutions.

