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CONSUMER CREDIT IN AMERICA: PAST, PRESENT, AND FUTURE

PAMELA FOOHEY,* JIM HAWKINS,** CREOLA JOHNSON,***
AND NATHALIE MARTIN****

We began organizing this symposium at the start of 2016 with the recognition that consumer credit and financial services were in a state of flux prompted in significant part by the Great Recession.¹ The Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) brought with it the Consumer Financial Protection Bureau (CFPB).² The CFPB's creation marked the most significant moment in modern American consumer law.³ Consumers gained an advocate charged with protecting them through researching, monitoring, and regulating the providers of consumer financial products and services, enforcing federal consumer financial protection laws, and, as importantly, empowering consumers.⁴

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1. The National Bureau of Economic Research dates the Great Recession as between December 2007 and June 2009. Business Cycle Dating Committee (Sept. 20, 2010), <http://www.nber.org/cycles/sept2010.pdf> [<https://perma.cc/3T4Q-CCQP>].

2. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1013(b)(3)(A), 124 Stat. 1376, 1876 (2010) (codified at 12 U.S.C. § 5491 (2010)); see also Christopher L. Peterson, *Consumer Financial Protection Bureau Law Enforcement: An Empirical Review*, 90 TEMP. L. REV. 1057, 1060 (2016) (“While [Dodd-Frank] included many changes, its centerpiece was the creation of the new [CFPB].”).

3. See Adam J. Levitin, *The Politics of Financial Regulation and the Regulation of Financial Politics: A Review Essay*, 127 HARV. L. REV. 1991, 2056 (2014) (“The significance of the regulatory change represented by the CFPB can be seen in the ferocity with which its creation was opposed by the financial services industry.”); Angela Littwin, *Why Process Complaints? Then and Now*, 87 TUL. L. REV. 895, 895 (2015) (“The CFPB is the most important recent development in consumer law.”).

4. See Peterson, *supra* note 2, at 1060–61 (describing the CFPB's mission).

Since its creation, the CFPB has tackled debt collection,⁵ mortgages,⁶ payday loans,⁷ prepaid debit card accounts,⁸ and student loans,⁹ among other products and services.¹⁰ It has processed over a million consumer complaints.¹¹ Its supervisory and enforcement actions routinely make headline news, and, at the five-year mark, have collectively returned more than \$11 billion to consumers.¹²

At the same time, Congress, states, and municipalities have also taken significant action to regulate and police providers of consumer financial products and services. The Credit Card Accountability, Responsibility, and Disclosure (CARD) Act of 2009,¹³ which mandated changes in credit card underwriting, has helped consumers avoid more than \$16 billion in credit card fees since its enactment.¹⁴ Several states have passed legislation aimed at curbing the payday

5. *Consumer Financial Protection Bureau Considers Proposal to Overhaul Debt Collection Market*, CONSUMER FIN. PROT. BUREAU: NEWSROOM (July 28, 2016), <http://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-considers-proposal-overhaul-debt-collection-market/> [https://perma.cc/2XUR-EXUK] (debt collection).

6. *Consumer Financial Protection Bureau Expands Foreclosure Protections*, CONSUMER FIN. PROT. BUREAU: NEWSROOM (Aug. 4, 2016), <http://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-expands-foreclosure-protections/> [https://perma.cc/5BBZ-YSVZ] (mortgages).

7. *Consumer Financial Protection Bureau Proposes Rule to End Payday Debt Traps*, CONSUMER FIN. PROT. BUREAU: NEWSROOM (June 2, 2016), <http://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-proposes-rule-end-payday-debt-traps/> [https://perma.cc/4HLC-2PDY] (payday loans).

8. *CFPB Finalizes Strong Federal Protections for Prepaid Account Consumers*, CONSUMER FIN. PROT. BUREAU: NEWSROOM (Oct. 5, 2016), <http://www.consumerfinance.gov/about-us/newsroom/cfpb-finalizes-strong-federal-protections-prepaid-account-consumers/> [https://perma.cc/L8ZT-6AAU] (prepaid cards).

9. *CFPB Proposes Rule to Oversee Nonbank Student Loan Servicers*, CONSUMER FIN. PROT. BUREAU: NEWSROOM (Mar. 14, 2013), <http://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-proposes-rule-to-oversee-nonbank-student-loan-servicers/> [https://perma.cc/Q77K-TNNH] (student loans).

10. See CONSUMER FIN. PROT. BUREAU, REPORT OF THE CONSUMER FINANCIAL PROTECTION BUREAU PURSUANT TO SECTION 1017(E)(4) OF THE DODD FRANK ACT, 10–11 (Dec. 31, 2016), http://files.consumerfinance.gov/f/201512_cfpb_report_section-1017e4-appropriations.pdf [https://perma.cc/NNZ8-4DZ2] (detailing rules the CFPB proposed in 2016, including rules about arbitration agreements in various financial services contracts).

11. Chris Johnson, *What Happens to You Counts*, CONSUMER FIN. PROT. BUREAU: BLOG (Sept. 27, 2016), <http://www.consumerfinance.gov/about-us/blog/what-happens-you-counts/> [https://perma.cc/KXF4-F7LA].

12. Joe Valenti, *Many Happy Returns for Consumers: The CFPB at 5 Years*, CTR. FOR AM. PROGRESS (July 21, 2016), <https://www.americanprogress.org/issues/economy/news/2016/07/21/141664/many-happy-returns-for-consumers-the-cfpb-at-5-years/> [https://perma.cc/4M7C-KW2C].

13. Credit Card Accountability Responsibility and Disclosure Act of 2009, Pub. L. No. 111-24, 123 Stat. 1734 (codified in scattered sections of 5, 11, 15, 20, and 31 U.S.C. (Supp. IV 2010)).

14. See Oren Bar-Gill & Ryan Bubba, *Credit Card Pricing: The CARD Act and Beyond*, 97 CORNELL L. REV. 967, 969 (2012) (discussing how the credit card issuers' pricing structure motivated the CARD Act's passage); *CFPB Finds CARD Act Helped Consumers Avoid More Than \$16 Billion in Gotcha Credit Card Fees*, CONSUMER FIN. PROT. BUREAU: NEWSROOM (Dec. 3, 2015), <http://www.consumerfinance.gov/about-us/newsroom/cfpb-finds-card-act-helped-consumers-avoid-more-than-16-billion-in-gotcha-credit-card-fees/> [https://perma.cc/4X3Z-LL8U] (detailing how the CARD Act has reduced costs to consumers).

and auto-title lending industries.¹⁵ And when other states failed to enact substantial legislation to reform payday lending, municipalities around the nation stepped up to enact ordinances of their own that limit expansion of these lenders into their borders.¹⁶

Much like the law, the consumer credit business itself is rapidly changing. Technological innovations have fundamentally altered the ways in which people access credit and financial services. Mobile pay and banking are becoming mainstream, leaving more and more banking deserts in the physical world, as opposed to in the virtual one.¹⁷ Even the providers of alternative financial products like payday loans are abandoning the brick and mortar locations that had once filled the voids left by disappearing banks, and increasingly are selling their products online, where studies suggest they can make more money.¹⁸

Other consumer credit profit centers likewise have shifted, and businesses are adjusting their product offerings in accordance. The housing bubble led to a decline in subprime mortgages, only to be replaced with subprime auto loans and fears that these loans are fast creating a new bubble as lenders package them into securities similar to subprime mortgages.¹⁹ Subprime auto loans come with a

15. See Sudeep Reddy, *States to Protect Borrowers Who Turn to Cars for Cash*, WALL ST. J.: BUS. (July 19, 2010), <http://www.wsj.com/articles/SB10001424052748704746804575367250783943906> [<https://perma.cc/9MVU-VXSG>] (highlighting rule changes in Illinois, Virginia, and Wisconsin).

16. See generally KELLY GRIFFITH ET AL., CONTROLLING THE GROWTH OF PAYDAY LENDING THROUGH LOCAL ORDINANCES AND RESOLUTIONS: A GUIDE FOR ADVOCACY GROUPS AND GOVERNMENT OFFICIALS 17–35 (Oct. 2012), <http://www.consumerfed.org/pdfs/Resources.PDL.LocalOrdinanceManual11.13.12.pdf> [<https://perma.cc/9CLZ-VXWS>] (listing payday lending local ordinances); Olivia M. Pena, *Municipal Regulation of Payday & Title Loans in Texas*, 17 J. OF CONSUMER & COM. L. 71 (2014) (overviewing Texas municipalities' ordinances).

17. See Mehra Baradaran, *It's Time for Postal Banking*, 127 HARV. L. REV. F. 165, 167–68 (2014) (discussing the movement of banks out of low-income neighborhoods); Terri Friedline & Mathieu Despard, *Life in a Banking Desert*, THE ATLANTIC (Mar. 13, 2016), <http://www.theatlantic.com/business/archive/2016/03/banking-desert-ny-fed/473436/> [<https://perma.cc/3BQW-NTN4>] (discussing if and how mobile banking can fill the gap left by banking deserts); Carolyn Lowry, Note, *What's in Your Mobile Wallet? An Analysis of Trends in Mobile Payments and Regulation*, 68 FED. COMM'NS L.J. 353, 355–65 (2016) (overviewing the current landscape of mobile pay).

18. See SUSANNA MONTEZEMOLO, CTR. FOR RESPONSIBLE LENDING, PAYDAY LENDING ABUSES AND PREDATORY PRACTICES 9 (2013), <http://www.responsiblelending.org/state-of-lending/reports/10-Payday-Loans.pdf> [<https://perma.cc/CW53-J8UW>] (discussing researching finding a decline in payday loan storefronts from 2007 to 2010 and a concomitant doubling of internet payday loan volume); PEW CHARITABLE TRUSTS, FRAUD AND ABUSE ONLINE: HARMFUL PRACTICES IN INTERNET PAYDAY LENDING 4–5 (2014), <http://www.pewtrusts.org/en/research-and-analysis/collections/2014/12/payday-lending-in-america> [<https://perma.cc/73J7-68ME>] (noting that online payday loans are more expensive than storefront loans); Baradaran, *supra* note 17, at 168 (noting that fringe lenders move into bank deserts).

19. Emily Glazer & Annamaria Andriotis, *J.P. Morgan Chief James Dimon Sounds Alarm on Car Loans*, WALL ST. J.: MKTS. (June 2, 2016), <http://www.wsj.com/articles/j-p-morgan-chief-james-dimon-sounds-alarm-on-car-loans-1464889444> [<https://perma.cc/CCC8-6NM9>]. See also Ken Bensinger, *Investors Place Big Bets on Buy Here Pay Here Used-Car Dealers*, L.A. TIMES (Nov. 1, 2011), <http://articles.latimes.com/2011/nov/01/business/la-fi-buyhere-payhere-20111101> [<https://perma.cc/HTT8-LVDL>] (discussing investments in subprime auto loans).

proliferation of a new take on rent-to-own stores: “Buy Here Pay Here” used-car dealerships.²⁰

Although the potential for exploitation is manifest, technological advances and changing markets also bring the promise of increased access to credit and banking services for underserved populations and others in need of short-term help. With the approach of the decade mark since the beginning of the Great Recession, and all that has occurred since, we felt it was time to assess the state of consumer credit in America—to review and examine its recent history, to consider arguments for and against regulation, and to discuss the potential for future innovation. The articles published in this symposium collectively highlight concerning practices, predict trends, find hope in new practices, and remind us of how far we have come and how far we still need to go to empower consumers.

In *Prosecuting Creditors and Protecting Consumers: Cracking Down on Creditors that Extort via Debt Criminalization Practices*, Creola Johnson documents how creditors use the criminal justice system to coerce debtors into paying their civil debts, argues that these practices constitute prosecutable extortion, and offers solutions to regulate “debt criminalization tactics.”²¹ Lauren Willis’s *Performance-Based Remedies: Ordering Firms to Eradicate Their Own Fraud* details another troubling practice—the ability of companies to use “rapid iterative testing of consumers’ responses to different designs” to confuse customers through advertising and other practices.²² She proposes two remedies—customer confusion injunctions and customer consequences injunctions, both enforced through third-party audits—that will require companies to repurpose the techniques they currently use to confuse customers to instead offer customers products and services more suited to their needs.²³

Jim Hawkins also shows how advertising may confuse consumers in *Exploiting Advertising*.²⁴ He argues that companies can use advertisements to influence people’s purchasing decisions based on the systemic mistakes people make in the face of imperfect information.²⁵ Using reverse mortgages as a case study, he suggests that these lenders mislead consumers—a trend worthy of further study.²⁶ Similarly, in *Addressing the Commercialization of Business Reputation*, David Friedman examines the funding structure of websites such as Yelp and Facebook that disseminate information and therefore influence

20. See Bensinger, *supra* note 19 (noting the expansion of Buy Here Pay Here); Jim Hawkins, *Renting the Good Life*, 49 WM. & MARY L. REV. 2041, 2047–69 (2007) (overviewing rent-to-own).

21. Creola Johnson, *Prosecuting Creditors and Protecting Consumers: Cracking Down on Creditors that Extort via Debt Criminalization Practices*, 80 LAW & CONTEMP. PROBS., no. 3, 2017.

22. Lauren E. Willis, *Performance-Based Remedies: Ordering Firms to Eradicate Their Own Fraud*, 80 LAW & CONTEMP. PROBS., no. 3, 2017 at 7.

23. *Id.* at 8.

24. Jim Hawkins, *Exploiting Advertising*, 80 LAW & CONTEMP. PROBS., no. 3, 2017.

25. *Id.* at 44.

26. *Id.* at 56–71.

people's purchasing decisions, again raising concerns about and highlighting possible marketing trends.²⁷

Not all of the articles in this symposium find reason for concern. Richard Hynes's contribution, "*Maximum Possible Accuracy*" in *Credit Reports*, examines the current regulation regarding errors in credit reports and argues that further regulation would not improve consumer welfare.²⁸ In *Consumer Litigation Funding: Just Another Form of Payday Lending?*, Paige Marta Skiba and Jean Xiao identify that nonrecourse loans to personal injury plaintiffs based on the lawsuits' net proceeds could change the emerging area of consumer litigation funding, possibly for the better.²⁹ Nathalie Martin and Robert Mayer's *What Communities Can Do To Reign In Payday Lending: Strategies for Successful Local Ordinance Campaigns Through a Texas Lens* traces how communities have rallied to convince their local governments to pass payday lending regulations and suggests strategies communities can use to press for meaningful local ordinances going forward.³⁰

Pamela Foohey's *Calling on the CFPB for Help: Telling Stories and Consumer Protection* focuses on the CFPB. Foohey surveys a random sample of public consumers' narratives detailing their complaints about consumer credit and financial service providers, and identifies a subset of complainants who tell often disturbing stories of how their financial problems have impacted their lives and affect their ability to survive.³¹ She offers recommendations for how the CFPB and other agencies with similar narrative functions can use linguistic markers to identify those most in need.³² Her article is an important reminder of how credit intertwines with other aspects of people's lives, especially in light of the time of this issue's publication.

We write this introduction in the spring of 2017, shortly after the presidential election. Its insights are more critical than ever. The futures of Dodd-Frank, the CFPB, and financial regulation generally are unknown.³³ But regardless of the

27. David Adam Friedman, *Addressing the Commercialization of Business Reputation*, 80 LAW & CONTEMP. PROBS., no. 3, 2017.

28. Richard M. Hynes, "*Maximum Possible Accuracy*" in *Credit Reports*, 80 LAW & CONTEMP. PROBS., no. 3, 2017 at 115.

29. Paige Marta Skiba & Jean Xiao, *Consumer Litigation Funding: Just Another Form of Payday Lending?*, 80 LAW & CONTEMP. PROBS., no. 3, 2017 at 137–38.

30. Nathalie Martin & Robert N. Mayer, *What Communities Can Do To Reign In Payday Lending: Strategies for Successful Local Ordinance Campaigns Through a Texas Lens*, 80 LAW & CONTEMP. PROBS., no. 3, 2017.

31. Pamela Foohey, *Calling on the CFPB for Help: Telling Stories and Consumer Protection*, 80 LAW & CONTEMP. PROBS., no. 3, 2017 at 205–07.

32. *Id.* at 207–09.

33. See Stephen J. Lubben, *Trump's Presidency Raises Questions on the Future of Wall St. Regulation*, N.Y. TIMES: IN DEBT (Nov. 14, 2016), <http://www.nytimes.com/2016/11/15/business/dealbook/trumps-presidency-raises-questions-on-the-future-of-wall-st-regulation.html> [https://perma.cc/K3M7-29TP]; Jonnelle Marte, *Americans Could Lose This Important Consumer Watchdog Under Donald Trump*, WASH. POST: GET THERE (Nov. 11, 2016), https://www.washingtonpost.com/news/get-there/wp/2016/11/11/americans-could-lose-this-important-consumer-watchdog-under-donald-trump/?utm_term=.14eaffc138b4 [https://perma.cc/3E8E-GDB9]; Jim Puzzanghera, *Republicans Attack Consumer*

regulatory state, consumer credit will continue to expand and morph in the coming years. If history is any guide, the CFPB will continue to work to protect and empower consumers for as long as possible.³⁴ States, municipalities, consumer advocates, academics, and industry representatives also will advocate for changes in regulations, with differing views on how to make credit and financial products beneficial to consumers. The coming years' debates and tests will strike a new balance among the recurring themes of opportunity, disadvantage, and exploitation that have marked America's history of consumer credit. These articles offer our collective efforts to contribute to those debates.

Financial Watchdog as They Push for His Firing, L.A. TIMES (Apr. 5, 2017), <http://www.latimes.com/business/la-fi-cfpb-cordray-hearing-20170405-story.html> [<https://perma.cc/8VQC-PBSN>].

34. One week after the election, the CFPB announced a request for information regarding access to financial records. *CFPB Launches Inquiry Into Challenges Consumers Face in Using and Securely Sharing Access to Their Digital Financial Records*, CONSUMER FIN. PROT. BUREAU: NEWSROOM (Nov. 17, 2016), <http://www.consumerfinance.gov/about-us/newsroom/cfpb-launches-inquiry-challenges-consumers-face-using-and-securely-sharing-access-their-digital-financial-records/> [<https://perma.cc/282M-LMDH>].