



# The Regulation of Marketplace Lending: A Summary of the Principal Issues

April 2019 Update



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# THE REGULATION OF MARKETPLACE LENDING:

A Summary of the Principal Issues

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April 2019 Update

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## Preface

We are pleased to offer once again our annual survey of the principal regulatory and securities issues applicable to marketplace lending. As in past surveys, we have no shortage of topics to discuss this year as the past 12 months have seen both significant court cases and regulatory initiatives that reflect the industry's growing importance in the financial markets. We discuss the most important developments of the past year in the "*Recent Developments*" section that immediately follows this Preface. The remainder of this white paper then describes in greater detail the status of marketplace lenders under existing consumer protection, securities, and other applicable laws.

At the outset, it may be helpful for us to briefly discuss the scope of this paper and some of the terminology we use. There is no single or universally accepted definition of "marketplace lending." In general, though, marketplace lenders can be viewed as companies engaged in an Internet-based lending business (other than payday lending) which are not banks or savings associations or otherwise regulated as financial institutions. They may offer a wide variety of financial products, including student loans, small business loans, and real estate loans, in addition to the unsecured installment consumer loans on which the industry initially focused. However, "marketplace lenders" may or may not actually be lenders. This term is a generic term to identify participants in marketing, originating, selling, and servicing loans. They also may fund their loans through a variety of means, including equity capital, commercial lines of credit, sales of whole loans to institutional investors, securitizations, and/or pass-through note programs. In this paper, we focus on the consumer lenders since they are the most heavily regulated and have the highest loan volumes. However, much of the discussion herein—outside of matters pertaining directly to consumer lending regulation—will also apply to non-consumer lenders.

Some marketplace lenders solicit borrowers to take loans that are actually made and originated by FDIC-insured financial institutions. For these types of programs, we refer to the bank that serves as the originating lender as the "Funding Bank." The Funding Bank structure (sometimes called the bank partnership model) has generated legal challenges, as discussed in this white paper, particularly where the marketplace lender both solicits and then purchases and services the loans. Other marketplace lenders obtain state licenses in order to make loans directly to borrowers under state laws.

The marketplace lending industry originally attracted widespread public attention through the pass-through notes programs operated by LendingClub Corporation and Prosper Marketplace. These so-called peer-to-peer (or "*P2P*") programs enable retail investors to purchase nonrecourse notes representing fractional interests in specific underlying consumer loans. It was once widely expected that P2P programs would become common. In fact, however, most marketplace lenders do not operate such programs on either a public or private basis, in part because of the availability of funding from other sources, but also in part because of the costs and difficulties of securities law compliance. As marketplace lenders who operate P2P programs therefore face some compliance issues that may not

apply to those who don't, herein we refer to lenders who operate such programs as "Operators" and use the term "marketplace lender" or "lender" to refer to marketplace lenders generally. In some instances, we refer to marketplace lenders as "platforms," since by definition such lenders provide their services through Internet-based platforms.

Of course, regardless of its source of funding, any prospective operator of an Internet lending platform must be careful to plan and operate its business in compliance with applicable laws and regulations. Regulatory costs have proven to be a significant barrier to entry in this industry; such costs will remain a significant expense for those platforms that commence operations, and any failure by a platform operator to comply with applicable laws and regulations can result in civil or criminal penalties, litigation expense, adverse publicity, or, in an extreme situation, the termination of its business. In this regard, we hope that our survey will help lenders and other market participants understand the key regulatory issues facing them.

As a final word, we must caution that this survey is intended only to identify the principal laws and regulations that apply to Internet-based lending and does not provide detailed guidance on the steps required to comply with any particular law or as to the laws that may apply to any particular marketplace lender or program.

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## Recent Developments

Since we last updated this white paper in April 2018, there have been a number of court decisions and federal or state regulatory actions that are of interest to the marketplace lending industry. In this section, we summarize some of the more significant developments of the past year.

### I. TRUE LENDER LITIGATION IN COLORADO

#### A. What Is True Lender Litigation?

Perhaps the most significant legal risk facing many marketplace lenders is “true lender” litigation. The platforms most at risk are those that (i) market loans via the Internet, (ii) arrange for federally insured depository institutions (herein called “*Funding Banks*”) to fund the loans they have marketed, and (iii) purchase the loans from the Funding Bank at or shortly after origination. In a “true lender” action, a borrower or regulator claims that the “true lender” of a loan made by a Funding Bank is the platform—and not the Funding Bank—because the platform marketed the loan, has the predominant economic interest in the loan (insofar as it has purchased the loan or a participation therein) and/or is engaged in other related activities (such as loan servicing).<sup>1</sup> This question of whether the platform or the Funding Bank is the “true lender” is far from a technicality. Under a principle known as federal preemption, banks whose deposits are insured by the Federal Deposit Insurance Corporation (“*FDIC*”) can lend at rates allowable in the state of the bank’s location which can then be exported to borrowers in all other states and preempt conflicting state laws in states where borrowers are located.<sup>2</sup> This principle allows depository institutions to engage in nationwide lending under uniform terms rather than be subject to the rate and fee structure of the individual states where borrowers reside. A marketplace lender that engages a Funding Bank will in turn claim its own exemption from state lender licensing and usury laws on the basis that the Funding Bank (and not the platform itself) is the lender. Claiming these exemptions has obvious benefits for the platform (*e.g.*, a consumer marketplace lender would thereby be able to offer its loans at uniform rates throughout the nation), but at the same time a marketplace lender that extends loans through a Funding Bank can face significant liabilities if the loans don’t comply with state requirements and it loses a true lender case. In fact, the enforceability of some or all of its loans may be called into question.<sup>3</sup> For this reason true lender litigation is closely followed by market participants and adverse rulings can have a significant impact on the marketability

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<sup>1</sup> This type of litigation would not apply to lenders who make loans directly under state licenses at allowable rates and fees.

<sup>2</sup> Federal preemption entitles national banks and FDIC-insured state banks to export the rates and fees of the state in which a bank is located to borrowers in other states and preempts inconsistent state laws in those other states. National banks are afforded preemption under 12 U.S.C. § 85 and state banks under 12 U.S.C. § 1831d. Thus, a Funding Bank may rely on federal preemption to extend loans at a higher interest rate than applicable state law might otherwise allow.

<sup>3</sup> See “*Lending Laws, Licensing and Related Litigation*” below for further discussion of the penalties that may apply to violations of state licensing or usury laws.

of loans extended by particular lenders and/or extended to borrowers in particular states.<sup>4</sup> As discussed below, the most prominent true lender proceedings in the past year have involved the state of Colorado.

True lender litigation results in uncertainty in the market and challenges the doctrine of federal preemption conferred on insured banks by federal law.

## B. Background on the Colorado Litigation

The Colorado Attorney General serves as the Administrator of the state’s Uniform Consumer Credit Code (“UCCC”), the statute that governs extensions of consumer credit to Colorado residents.<sup>5</sup> Colorado’s version of the UCCC contains an “extraterritoriality” provision which purports to apply the UCCC to any consumer credit transaction with a Colorado resident, even those made by out-of-state lenders, and prohibits the parties from choosing any law to govern the transaction other than that of Colorado. The UCCC also limits allowable interest rates and fees that may be charged in consumer credit transactions.

In early 2017, the Administrator brought legal actions against two marketplace lenders that are licensees under the UCCC. In Colorado, licensing is required to take assignment of and service consumer loans. Since both platforms purchased and serviced loans, they became licensed. As licensees, they were subject to examination by the Colorado Administrator. The targeted marketplace lenders were sued when they did not correct deficiencies cited by the Administrator for charging and collecting interest rates and fees to Colorado borrowers above those allowed by the UCCC and not having a Colorado choice-of-law provision governing the loan agreement.<sup>6</sup> At the heart of the complaints were allegations that the marketplace lenders were the “true lenders” on the loans to Colorado residents because of how their arrangements were structured and because they held the predominant economic interest in the loans.<sup>7</sup>

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<sup>4</sup> Many of the true lender cases decided to date have involved payday lenders rather than marketplace lenders. In addition, some of the payday lender decisions have required the court to consider tribal law (which has been the governing law for certain payday loans but would not often be chosen to govern marketplace loans). The analysis of true lender issues undertaken in these cases is nonetheless instructive for marketplace lending structures.

<sup>5</sup> The significance of the Colorado litigation is heightened by the fact that a number of states have enacted similar versions of the UCCC which could be impacted by the decision. Those states include Idaho, Indiana, Iowa, Kansas, Maine, Oklahoma, South Carolina, Utah, Wisconsin and Wyoming.

<sup>6</sup> The actions are *Meade et al. vs. Marlette Funding, LLC et al.*, No. 2017-cv-30376 (Dist. Denver Cty.) and *Meade et al. vs. Avant of Colorado, LLC et al.*, No. 2017-cv-30377 (Dist. Denver Cty.).

<sup>7</sup> As to structuring, the Administrator alleged that the platforms pay implementation fees to start the programs, pay the Funding Banks’ legal fees, bear the costs of marketing the program and evaluating loan applications, are responsible for ensuring compliance with applicable laws and assume responsibility for the servicing and administration of the loans even before they have purchased the loans from the Funding Banks. The Administrator also alleged that the marketplace lenders assume all risk of default and indemnify the Funding Banks for claims arising from the lending programs. Because the bank only holds the loan for a short period of time, the allegations also claim the platforms to be the true lender because they hold the predominant economic interest in the loans. Taken at face value, the predominant economic interest theory would

### C. Procedural Posturing: Removal and Remand

Soon after the Administrator filed the suits in state court in Denver, both platforms removed the cases to federal court, claiming that the actions were completely preempted by federal law, specifically the Federal Deposit Insurance Act, because the loans at issue were made by FDIC-insured banks.<sup>8</sup> The Administrator filed motions to remand (*i.e.*, to send back) both cases to state court.<sup>9</sup> In March 2018, the federal court in Colorado hearing both actions determined that the federal court did not have jurisdiction of the matter and, in fact, remanded both cases back to state court. The basis of the decisions was that the complaints on their face did not raise a federal question despite the claims of the marketplace lenders that the loans were made by a federally insured bank and federal law completely preempted the Administrator's claims. The determination was made in large part because the Administrator made no direct claims against either of the Funding Banks. The decisions to remand are procedural in nature and while the cases will proceed in state court, rather than federal court, the platforms can still pursue their federal preemption arguments in the state court actions.<sup>10</sup>

The Colorado actions have been litigating procedural matters for more than a year, so any resolution will not happen quickly and even then the possible appeals process could be lengthy.

### D. Banks File Declaratory Judgment Actions in Federal Court

The two Funding Banks making the loans that were subject of the Administrator's lawsuits each filed a declaratory judgment action in Colorado federal court.<sup>11</sup> The Funding Banks asked the court to declare that the loans at issue were validly made by a federally insured depository institution and therefore, under the federal preemption doctrine, the permissible rates and fees on any loans made by the banks to Colorado residents were governed by the laws of the Funding Banks' home states and not by the laws of Colorado. Several trade groups filed briefs in these actions.<sup>12</sup> The Funding Banks also

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potentially hold any purchaser of any loan from a bank at risk for these types of claims, impeding the ability of banks to obtain liquidity by selling loans, a practice that most financial institutions have engaged in for decades.

<sup>8</sup> Certain state court actions may be removed to federal court within 30 days under 28 U.S.C. § 1446. In this case, the platforms believed that the action raised a federal question, allowing for removal pursuant to 28 U.S.C. § 1331. In the initial complaint, the Administrator's allegations did not mention the fact that the loans at issue were made by FDIC-insured state banks, possibly in an attempt to avoid removal to federal court.

<sup>9</sup> The procedure for remanding a case back to state court is found in 28 U.S.C. § 1447.

<sup>10</sup> See *Meade v. Avant of Colorado LLC d/b/a Avant and Avant, Inc.*, No. 17-cv-0620, 2018 WL 1101672 (D. Colo. Mar. 1, 2018) and *Meade v. Marlette Funding LLC d/b/a Best Egg*, No. 17-cv-00575, 2018 WL 1417706 (D. Colo. Mar. 12, 2018).

<sup>11</sup> See *WebBank v. Meade*, Civil Action No. 17-cv-00786-PAB-MLC (D. Colo. filed Mar. 28, 2017) (Funding Bank for the Avant platform) and *Cross River Bank v. Meade*, Civil Action No. 17-cv-00832-PAB-KMT (D. Colo. filed Apr. 3, 2017) (Funding Bank for the Marlette/Best Egg platform).

<sup>12</sup> These included the Independent Community Bankers of America, New Jersey Bankers Association, The Clearing House Association L.L.C., American Bankers Association, Loan Syndications and Trading Association and The Marketplace Lending Association.

sought to enjoin the Administrator from taking further action against the two marketplace lenders. The Administrator in each action filed a motion to dismiss claiming that the banks lacked standing to bring the suit. In March of 2018, about a year after the actions were filed, the federal court dismissed both actions based on the legal doctrine of abstention. Under this doctrine, federal courts will not interfere with state court proceedings and must abstain from exercising jurisdiction. One of the cases was appealed to the Tenth Circuit Court of Appeals, but the appeal was subsequently dismissed.

Colorado seeks to implicate investors and securitization trusts in its litigation on true lender theories.

### **E. Recent Happenings**

The two actions are continuing in state court in Colorado. Both marketplace lenders filed motions to dismiss, which the court denied in the summer of 2018. However, both banks were given the right to intervene and participate in the actions, and each bank has joined its respective case.

On November 30, 2018, the Administrator filed a Second Amended Complaint containing allegations similar to those in the prior complaint, but naming as additional defendants the trustees of certain securitization trusts and certain special purpose vehicles that acquired loans originated through the platforms to borrowers who were residents of Colorado at the time of their loan applications.<sup>13</sup> The Administrator claims that the trusts meet the definition of a creditor under the UCCC and are receiving compensation greater than that allowed by the UCCC, and therefore have the predominant economic interest in the loans. The newly named defendants have now filed motions to dismiss on the grounds that the Colorado state court lacks personal jurisdiction over them. On February 20, 2019, the Administrator responded in opposition to the motions. At the time of this writing, the motions have been fully briefed and are awaiting disposition.<sup>14</sup>

### **F. Significance of These Cases**

These two cases are significant for several reasons. First, this is a scenario in which a state regulator is challenging the bank funding model widely used in the marketplace lending industry. If these challenges prove successful, other states could follow. Second, if the actions are successful, the penalties could be severe. Violations of the Colorado UCCC result in voiding of the finance charge, a possible penalty (as determined by the court) of up to three times the finance charge, the recovery of excess charges and a separate penalty equal to the greater of the finance charge or ten times the excess charge plus attorneys' fees.<sup>15</sup> Third, since several states have enacted various forms of the UCCC, a decision

<sup>13</sup> The trustees were sued in their fiduciary capacity as a trustee, and not in their individual capacity.

<sup>14</sup> It is unclear if the motion is denied whether it can be appealed. If not, the case will proceed with discovery and it would be likely that motions for summary judgment would be filed at a later date.

<sup>15</sup> The statute does state, however, that no violation impairs the right to collect the underlying principal amount of the debt.

in favor of the Administrator could spawn actions in those other UCCC states and in other states as well. Fourth, the latest addition of purchasers of loans as defendants is attempting to subject financing vehicles and investors to the ambit of the UCCC and its attendant penalties and could inhibit investment in marketplace loans. The ultimate disposition of these theories could have significant impacts on the financing of loans made through online platforms.<sup>16</sup>

## II. UPDATE ON OTHER SIGNIFICANT LITIGATION

### A. *Madden Case Settled*

While the 2015 *Madden v. Midland Funding* case became infamous in the marketplace lending industry (and beyond) for the landmark Second Circuit decision (discussed below under “*Usury Laws*”), the later proceedings have been largely irrelevant as the remaining aspects of the case related to debt collection, not usury or an assignee’s rights. In fact, it is ironic that the usury claims that were the focus of the appellate decision were later dismissed in 2017 because New York law does not allow a private right of action for criminal usury violations.

On March 1, 2019, a settlement was presented to the federal district court that would end the litigation. The terms of the settlement call for a sharing by class members of either a cash payment of \$550,000 or forgiveness of debt up to \$9.5 million plus payment of attorneys’ fees of \$550,000. The settlement is subject to both preliminary and final court approval.<sup>17</sup>

It should be noted that other than the Colorado litigation mentioned above there has been no rush to bring *Madden*-type claims against non-bank loan assignees nor any decision following the ruling of the widely criticized Second Circuit opinion.

### B. *CashCall California Cases*

The Consumer Financial Protection Bureau (“CFPB”) brought an action in federal court in California against payday lender CashCall. The court found that CashCall was the true lender on loans it had marketed through a Native American tribal entity under documents governed by tribal law. The CFPB requested that the court award almost \$300 million to borrowers, but the court declined the invitation, awarding only about \$10 million. The case is discussed in more detail in “*Lending Laws, Licensing and Related Litigation—Issues Related to the Funding Bank Structure*” below. The case is significant because it shows that even when a true lender claim is successful, loans will not necessarily be voided or reimbursement made to borrowers. However, the CFPB appealed the damages decision to the Ninth Circuit Court of Appeals and CashCall has cross-appealed. The appeal is being briefed and awaiting

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<sup>16</sup> Some lenders, loan purchasers and securitizations have either excluded or limited the amount of Colorado-based loans included in a borrowing base, determination of eligible receivables or securitization loan pool. This has the effect of limiting the amount of credit ultimately available to borrowers in Colorado.

<sup>17</sup> *In re Midland Funding LLC Interest Rate Litigation*, Case No. 7:11-cv-08149 (S.D.N.Y. filed Nov. 10, 2011).

decision.<sup>18</sup> Cases involving entities associated with Native American tribes present different issues than those involving a federally insured depository institution. Tribal cases center on the concept of the tribal entity having sovereign immunity, and therefore not being able to be sued, whereas cases involving banks deal with federal preemption of state law provided under federal statutes.<sup>19</sup>

Cases involving tribal entities involve different considerations than those involving banks but can still provide useful precedent on true lender claims.

Another case involving payday lender Cash Call was decided by the California Supreme Court in August 2018.<sup>20</sup> In a case pending against the lender at the Ninth Circuit Court of Appeals, the federal appellate court asked the California court to answer whether under California law the interest rate on a consumer loan could be considered unconscionable. Under the state law applicable to licensed lenders, there is no interest rate cap, although the rate of interest must be accurate and not exceed that disclosed in the loan contract.<sup>21</sup> However, the state law also provides that if any part of the contract was unconscionable at the time it was made, a court may refuse to enforce the contract or may enforce the parts of the contract that are not unconscionable or limit the offending clause.<sup>22</sup> In this case, CashCall made loans with annual percentage rates up to 135%. The borrowers sued, alleging that the loans were unconscionable. The California Supreme Court held that even where the statute allows for any amount of interest to be charged a loan contract could be unconscionable. While this decision may

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<sup>18</sup> *Consumer Financial Protection Bureau v. CashCall, Inc. et al.*, No. 18-55407 (9th Cir. filed Mar. 28, 2018). CashCall is also challenging the constitutionality of the CFPB. Further challenges to the structure of the CFPB are pending in the Second and Fifth Circuit Courts of Appeal. The CFPB has also sued another online payday lender using a tribal-related entity. *Consumer Financial Protection Bureau v. Think Finance LLC*, Case No. 4:17-cv-00127 (D. Mont.). The CFPB filed suit after Think Finance declared bankruptcy, challenging the use of a tribal entity to make high cost loans that would be illegal under state usury limits and licensing laws. The payday lender filed a motion to dismiss which was denied (although the lender was supported by the State of Oklahoma in an amicus brief). The action is paused pending possible settlement discussions in the bankruptcy proceeding.

<sup>19</sup> *See, e.g., Williams et al. v. Big Pictures, LLC et al.*, Case No. 18-1827 (4th Cir.), appealing an adverse ruling on defendant's motion to dismiss based on the doctrine of sovereign immunity (Case No. 3:17-cv-00461, E.D. Va. Order on Motion to Dismiss July 27, 2018). A coalition of 15 state Attorneys General has filed an amicus brief arguing that the payday lenders are using fraudulent affiliations with Native American tribes as a means of avoiding state laws that would otherwise be applicable.

<sup>20</sup> *De La Torre v. CashCall, Inc.*, S 241434 (Cal. Sup. Ct. Aug. 13, 2018), question from the Ninth Circuit Court of Appeals Case No. 14-17571. Legislation has been proposed in California in response to this decision. AB 539 would set a maximum interest rate of 36% plus the federal funds rate on loans between \$2,501 and \$10,000. The bill would also provide that a California Financing Law loan cannot be found to be unconscionable based on the interest rate alone. This may not be necessary since the court decision indicated that all of the facts and circumstances surrounding the loan must be considered before declaring the rate as unconscionable. Properly read, the decision itself would not allow the loan in and of itself to determine unconscionability.

<sup>21</sup> CAL. FIN. CODE § 22332.

<sup>22</sup> CAL. FIN. CODE § 22302.

only impact lenders licensed under this particular statute, subprime lenders imposing rates of interest higher than marketplace lenders should be aware of this precedent in California.<sup>23</sup>

### C. Cases Involving Arbitration Clauses

Many loan agreements in the online lending space contain an arbitration provision. Recent cases have shown that lenders can use these provisions to redirect court proceedings into an arbitration forum where the case is ultimately settled or dismissed. Such was the situation with a recent class action filed in March 2018 in state court by a retailer against a small business lender and its Funding Bank.<sup>24</sup> The defendants removed the case to federal court. The complaint challenged the platform's program with a Utah bank and alleged that it purposefully evades criminal usury laws. The suit asserted violations of California usury laws and consumer protection laws against false advertising and unfair competition and also alleged violations of federal RICO laws. The defendants' motion to stay the action pending the outcome of arbitration was granted. The case was dismissed in December 2018. The presence of the arbitration agreement not only sent the case to arbitration rather than court, and avoided a class action proceeding, but also resulted in a stipulation of dismissal being filed, thereby ending the case.

Arbitration clauses remain helpful in settling lawsuits and avoiding class actions.

### D. Cases Relating to Electronic Contracting

Given the online world in which we now live, it is no surprise that more litigation is occurring that deals with entering into contracts electronically. Some of the litigation involves whether or not a contract has been formed, and many cases deal with the enforceability of arbitration clauses. Where there is evidence of a valid electronic signature process, arbitration clauses in electronic notes have been routinely upheld.<sup>25</sup> However, often the person claiming the validity of an electronic contract must provide evidence allowing this determination to be made. This was the situation in one recent case in which an online lender's motion to compel arbitration was initially denied. The court required the online lender to show that the borrower had agreed to the arbitration provision. The online lender produced a declaration detailing its process for obtaining consent to electronic contracting and provided screenshots showing how borrowers agree online to loan agreements and how the platform tracks such agreements and any exercise by a borrower of its right (which the lender's documents allowed) to opt out of the arbitration clause.<sup>26</sup> The court then allowed arbitration. Lenders must take

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<sup>23</sup> The California statutes cited do not apply to banks, so arguably loans made by Funding Banks would not be affected by this decision absent true lender challenges. However, California has a separate statute concerning unconscionability that could apply to banks, or at least to banks chartered in or having their location in California.

<sup>24</sup> *Barnabas Clothing, Inc. et al. v. Kabbage, Inc. and Celtic Bank Corporation*, No. 2:18-cv-03414-PSG-SS (C.D. Cal.).

<sup>25</sup> See, e.g., *Delgado v. Ally Fin., Inc.*, 317CV02189BENJMA, 2018 WL 2128661 (S.D. Cal. May 8, 2018).

<sup>26</sup> *Moses v. LendingClub*, 217CV03071JADPAL, 2019 WL 489092 (D. Nev. Feb. 6, 2019), distinguishing *Carlos v. Patenaude & Felix A. P.C.*, 736 Fed. Appx. 656 (9th Cir. June 6, 2018) (failure to produce evidence of electronic agreement as presented to

care in determining how they will provide for the electronic execution of contracts since some courts have ruled against contract formation where a touch screen does not enable the customer to review contract terms (and therefore there is no agreement to those terms)<sup>27</sup> or where terms are hidden, are not called to the customer's attention or are located beneath unrelated prompts.<sup>28</sup>

In another action based on a defaulted loan made by a marketplace lender online, the holder of the note filed a motion to compel arbitration to enforce a promissory note executed online. The note utilized a provision often used in online lending transactions allowing the platform to sign the final form of the note as the borrower's attorney-in-fact. The plaintiffs claimed that they neither signed the promissory note nor authorized the marketplace lender to sign the note on their behalves. They also claimed that the defendants had not demonstrated a proper chain of title so as to be able to enforce the loan. The court concluded that the evidence was not sufficient to rule on the motion and requested additional evidence.<sup>29</sup> Hence, any efforts to compel arbitration will require proof of a valid electronic consent process.<sup>30</sup>

### III. FEDERAL DEVELOPMENTS AFFECTING MARKETPLACE LENDING

Federal consumer protection laws apply to all aspects of consumer credit from the origination of loans to the servicing of loans and attendant matters such as the protection of sensitive borrower data. Federal consumer protection laws are made by Congress and enforced by various regulatory agencies that may seek administrative penalties as well as civil, and in some cases criminal, liability resulting from violations of consumer protection laws. These laws and their corresponding regulations apply to online lending transactions. This section depicts recent federal regulatory supervisory and enforcement actions, highlights policy considerations being undertaken or discussed at the federal level and surveys recent Congressional initiatives affecting marketplace lending.

The FTC has become a potent force in enforcing consumer protection laws with online lenders.

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borrower); ECF No. \_\_\_, Case No. 2:17-cv-03071 (D. Nev.) (underlying allegations deal with improper access of consumer reports in violation of the Fair Credit Reporting Act).

<sup>27</sup> *The National Federation of the Blind v. The Container Store*, 904 F.3d 70 (1st Cir. 2018).

<sup>28</sup> See, e.g., *Starke v. SquareTrade, Inc.*, 2019 WL 149628 (2d Cir. Jan. 10, 2019). *Starke v. SquareTrade, Inc.*, 913 F.3d 279, 281 (2d Cir. 2019).

<sup>29</sup> *Vandehey v. Asset Recovery Sols., LLC*, 18-C-144, 2018 WL 6804806 (E.D. Wis. Dec. 27, 2018) (Prosper marketplace loan).

<sup>30</sup> A loan agreement containing an arbitration clause was upheld in *Ngo v. PMGI Fin., LLC*, 18-CV-05401-JCS, 2018 WL 6618316, (N.D. Cal. Dec. 18, 2018) (recognizing that a checkmark can be an electronic signature and assent is shown where checking a box is required in order to proceed with the transaction).

## A. Federal Trade Commission Actions

The Federal Trade Commission (“FTC”) has broad authority to prevent unfair competition and unfair or deceptive acts and practices affecting commerce.<sup>31</sup> While the federal banking agencies supervise and regulate insured depository institutions, the FTC’s enforcement posture focuses on non-bank entities. Recently, the FTC has prioritized FinTech as an area of priority. We discuss below some of the FTC’s more significant actions dealing with marketplace lenders.

***Lawsuit Against Online Lender on Marketing Practices.*** On April 25, 2018, the FTC filed a complaint in federal court in California against a large marketplace lending platform.<sup>32</sup> The FTC claimed that the platform engaged in various deceptive practices including (1) telling customers that they would receive a loan with “no hidden fees,” (2) telling customers that they were approved for loans when they were not, (3) that funds were withdrawn from customer bank accounts without authorization and (4) the required privacy notices were not provided to borrowers. The FTC further claimed that origination fees were charged without proper disclosure. The complaint seeks injunctive relief and other relief, including rescission or reformation of contracts, restitution, refund of monies paid and disgorgement. The marketplace lender challenged all of the allegations and filed a motion to dismiss the proceeding, which was granted in part and denied in part. On October 22, 2018, the FTC filed an amended complaint to add further details concerning the alleged harm and providing additional examples of the platform’s alleged misconduct. The platform has filed an answer, portions of which the FTC has moved to strike. Subsequently, some of the challenged practices have been stopped and the court has urged the parties to settle the proceeding if appropriate consumer disclosures can be made.<sup>33</sup>

The FTC is taking a more active role in enforcement and is focusing on the marketing practices of online lenders.

***Student Loan Advertising.*** An online student lender settled charges brought by the FTC in connection with the agency’s allegations that the marketplace lender was making false claims about the savings that would accrue in connection with a refinancing of the student loan.<sup>34</sup> The FTC claimed that advertising the lender used to solicit student loan refinancings was misleading because savings calculations were inflated or incorrect. The consent order entered into by the parties prohibits the platform from misrepresenting any savings from refinancings unless backed by proof. The FTC complaint stated that the claims of inflated savings began in April 2016 and appeared in television, print and Internet advertising. The FTC also alleged that when disclosures were made, they were

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<sup>31</sup> Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45.

<sup>32</sup> *Federal Trade Commission v. LendingClub Corp.*, Case No. 3:18-cv-02454 (N. D. Cal. filed Apr. 25, 2018).

<sup>33</sup> The FTC action also precipitated a shareholder suit, *Veal v. LendingClub Corp. et al.*, Case No. 5:18-cv-02599 (N. D. Cal.). A motion to dismiss has been filed by the platform.

<sup>34</sup> *In re Social Finance, Inc. and SOFI Lending Corp.*, Docket C-4673 (Federal Trade Commission Feb. 25, 2019).

buried in the fine print. In its public statement on the settlement, the FTC specified that it is putting other lenders making savings claims similar to those addressed in the proceeding on notice and is recommending that all advertising be reviewed to ensure that false or unsubstantiated statements are not being made.

## B. Consumer Financial Protection Bureau

The CFPB is still prosecuting enforcement actions against online lenders.

After a tumultuous year with controversy ensuing over the leadership of the Consumer Financial Protection Bureau (“CFPB”), a new director was named for the agency. Although actions of the bureau remain provocative, the agency has, by its own admission, moved away from regulation by enforcement to supervision. Nonetheless, the CFPB still undertakes enforcement actions when it deems them warranted, as outlined below.<sup>35</sup>

***Enforcement Action Against Online Foreign Lender.*** In February 2019, the CFPB lodged a complaint and settlement agreement with the Southern District of New York against a non-U.S. online payday lender based in Canada and Malta.<sup>36</sup> The lender and its related entities were cited for making misrepresentations to borrowers, claiming that they had to repay loans even though those loans violated U.S. state laws on lender licensing and usury.<sup>37</sup> The lender also falsely stated that the loans were not subject to U.S. laws and used a foreign governing law provision. In addition, the lender took wage assignments and made misrepresentations about punishments that allegedly would result from nonpayment. The entities were barred from doing business in the United States in any manner, including collection of any outstanding loan made to a U.S. resident. Consumer groups were disappointed that the CFPB action did not require payments to affected customers or any type of restitution. However, this proceeding is a lesson to foreign-based Internet lenders that lending to U.S. citizens requires compliance with U.S. law, including state licensing and usury laws. Nor can the use of a foreign jurisdictional clause circumvent consumer protection laws that are applicable to lending to U.S. residents.

***Enforcement Actions on Electronic Transfers.*** Online lenders often utilize electronic fund transfers to collect the payments due on their loans. Electronic fund transfers are subject to the Electronic Fund

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<sup>35</sup> We note that the Dodd-Frank Act charges the CFPB with writing regulations concerning data collection about borrowers of business loans. These regulations (once adopted) would affect online lenders offering business loans. While the purpose of this provision was to assist regulators in fair lending matters such as examinations, the prohibitions in the Equal Credit Opportunity Act about collecting certain information, including race and gender, make it difficult for the Bureau to promulgate the rules. As a result, the CFPB has not yet promulgated these rules.

<sup>36</sup> *Consumer Financial Protection Bureau v. NDG Financial Corp. et al.*, Case No. 15-cv-05211 (S.D.N.Y. filed Feb. 4, 2019).

<sup>37</sup> Since the CFPB cannot enforce state laws dealing with licensing and usury, the fact that the online lender made loans in violation of those laws provided the basis of the CFPB claims relating to misrepresentation of the applicability of state law to those loans.

Transfer Act and its implementing Regulation E. Generally, the law and regulation require the lender to obtain the consumer's consent before debiting the consumer's deposit account, and special requirements apply to recurring transfers. In January 2019, the CFPB entered into a consent order with an online marketplace lender.<sup>38</sup> The CFPB found that the platform had debited borrowers' bank accounts without proper authorization. While borrowers may have provided an authorization as to one account, the platform was debiting payments from different accounts that had not been authorized for withdrawals. The CFPB also found that the lender failed to honor loan extensions that had been given to borrowers. In addition to prohibiting the debiting of consumer bank accounts without prior authorization, the consent order required payment of a \$3.2 million penalty. It appears that electronic fund transfers are an area of focus by the CFPB. In an unrelated action against a bank, the CFPB settled a complaint for failure to implement stop-payment requests on preauthorized fund transfers and for failure to conduct proper error-resolution investigations. The settlement resulted in \$12 million in restitution and a \$3.5 million civil penalty.<sup>39</sup>

The CFPB is closely watching online lender practices relating to electronic funds transfers from borrower accounts.

**Office of Innovation and Regulatory Sandbox.** The CFPB has to date issued only one no-action letter under its Project Catalyst (which the bureau had designed to promote innovation in financial products and services). In 2018, the CFPB announced that it would be revising its policies and established an Office of Innovation to promote financial innovation. It is proposing to revise its no-action letter policy to increase participation by entities wanting to offer new products in the marketplace. The CFPB plans to streamline its application and review process, focusing on potential benefits to consumers and the control of potential risks. The agency also proposed a "regulatory sandbox" to give companies the opportunity to test new financial products, while receiving relief from certain regulatory requirements. The CFPB also has established a trial disclosure program to encourage the use of alternate disclosures on a trial basis, which the bureau terms a "disclosure sandbox." The Office of Innovation will also coordinate with the Global Financial Innovation Network ("*GFIN*") to work with regulators in other countries with respect to innovation and new ideas on a cooperative basis.

### C. OCC: Status of the Limited Purpose Charter

The Office of the Comptroller of the Currency ("*OCC*") first floated the idea of a special purpose national bank charter for FinTech companies in 2016. This brought two lawsuits against the OCC, one by the Conference of State Bank Supervisors ("*CSBS*") and the other by the New York Department of

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<sup>38</sup> *In re Enova International, Inc.*, CFPB File No. 2019-BCFP-0003 (Jan. 25, 2019).

<sup>39</sup> *In re USAA Fed. Sav. Bank*, CFPB File No. 2019-BCFP-0001 (Jan. 3, 2019).

Financial Services (“NYDFS”).<sup>40</sup> The OCC filed motions to dismiss both actions, and both courts dismissed such actions as premature since the OCC had no applications pending at that time for this type of charter.

In July 2018, the OCC stated that it would accept applications for the special purpose national bank charter.<sup>41</sup> Although FinTech companies can apply for the charter, we note that this is not a “FinTech” charter but a limited purpose national bank charter. It would allow applicants to engage in the business of lending and payments, but they could not take deposits.<sup>42</sup> As a national bank, an institution would be subject to laws and regulations applicable to national banks. While this would allow a marketplace lender to export its rates and fees nationwide and be exempt from any state licensing laws, it also would be subject to capital restrictions and standards related to financial inclusion, among other things. In addition, any change to the business plan of the institution would, for a period of time, require OCC approval. The time and costs of applying for and receiving even a limited purpose charter are also significant.<sup>43</sup>

Given prior history, it is not surprising that both the CSBS and the NYDFS have filed suit against the OCC again, each alleging that the agency does not have authority to grant this charter.<sup>44</sup> The OCC has filed a motion to dismiss each lawsuit, including the factual basis that since there are no applications received for this type of charter, nor any charter issued, the actions remain premature.<sup>45</sup>

The attractiveness of an OCC special purpose charter may be mitigated by pending litigation.

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<sup>40</sup> *Conference of State Bank Supervisors v. Office of the Comptroller of the Currency*, Civ. Act. No. 17-CV-0763 (D.D.C.) dismissed at 313 F. Supp. 3d 285 (D.D.C. 2018), and *Vullo v. Office of the Comptroller of the Currency*, 17 Civ. 3574 (S.D.N.Y. filed May 17, 2017).

<sup>41</sup> NR 2018-74 (July 31, 2018).

<sup>42</sup> Although it is not entirely clear, owners of the applicants should be exempt from being a bank holding company under the Bank Holding Company Act. It is also not clear whether this type of a charter would be eligible to settle payments directly with the Federal Reserve and have access to its discount window.

<sup>43</sup> From start to finish, an application could take up to a year or more. It also requires start-up costs, legal and accounting fees and the need for initial capital.

<sup>44</sup> *Conference of State Bank Supervisors vs. Office of the Comptroller of the Currency*, Case No. 1:18-cv-02449 (D.D.C. filed Oct. 25, 2018). In part, the CSBS argues that the OCC is only authorized to issue charters to an entity that receives deposits and since the special purpose charter would prohibit deposit taking, the OCC does not have the power to confer a charter. In its motion to dismiss, the OCC claims that its interpretation of what constitutes the business of banking should be given deference under federal legal principles. *Vullo v. Office of the Comptroller of the Currency*, Case No. 1:18-cv-08377 (S.D.N.Y. filed Sept. 14, 2018) (original complaint claiming that the proposed charter is “lawless, ill-conceived and destabilizing of financial markets” and “reckless folly”).

<sup>45</sup> It is likely that potential applicants are leery of filing an application for fear of being dragged into this type of litigation or of having the application process delayed or derailed while the litigation is pending, which could take months, if not years, to fully resolve.

It is also possible for a marketplace lender to apply for a full-service OCC charter. This would allow it to provide a full range of banking products and services, including deposits, and avoid any complications related to the special limited purpose charter discussed above.<sup>46</sup> However, it would require full compliance with OCC regulations and the Community Reinvestment Act. This option was recently pursued by a FinTech company, which was approved on a preliminary basis by the OCC, but the application was withdrawn due to issues related to its application for FDIC insurance.<sup>47</sup>

#### **D. Federal Deposit Insurance Corporation: The Industrial Bank Charter**

One potential federal charter option for FinTech companies, including marketplace lenders, is that of an industrial bank. Originally stylized for industrial loan companies or ILCs, this charter has been around since the early 1900s.<sup>48</sup> Typically, these institutions make loans and can accept savings and time deposits, but cannot accept demand deposits such as checking accounts. They are insured by the Federal Deposit Insurance Corporation (“FDIC”), which provides the benefit of federal preemption of usury laws and exemption from state lending licensing laws in most states.<sup>49</sup> Also of importance, they are not banks for purposes of federal law and therefore their owners are not deemed to be bank holding companies that are subject to various restrictions and prohibitions.<sup>50</sup> This means that non-bank companies including commercial entities may own industrial banks without being subject to regulation by the Federal Reserve. Unlike bank holding companies that are restricted to conducting business activities closely related to banking, owners of industrial banks are not so constrained. As a result, ILCs have been a source of continuing interest and controversy.<sup>51</sup>

The industrial bank charter may be a feasible alternative if FDIC insurance can be obtained.

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<sup>46</sup> It has been reported in the press that LendingClub Corporation may be seeking a full purpose national bank charter.

<sup>47</sup> Varo Bank, N.A. applied for a full-fledged OCC charter in 2017. Over a year later, the OCC granted initial approval. OCC Conditional Approval 1205 (Aug. 31, 2018). However, the FDIC raised additional issues and Varo’s application for deposit insurance was withdrawn in September 2018. Varo has indicated that it will refile its application for deposit insurance when it has addressed FDIC considerations.

<sup>48</sup> Seven states have a regulatory regime that allows for industrial banks, but most industrial banks are chartered in Utah. There are about 25 in existence today.

<sup>49</sup> Like a national bank, the institution would be making its own loans under principles of federal preemption rather than through a Funding Bank. The risks and uncertainty of true lender challenges would therefore be avoided.

<sup>50</sup> See Bank Holding Company Act, 12 U.S.C. § 1842(c)(2)(H). In addition to being subject to Federal Reserve supervision and being permitted to engage only in financial activities and activities closely related to banking, bank holding companies are subject to a number of other rules including restrictions on transactions with affiliates and capital requirements.

<sup>51</sup> Utah placed a moratorium on new charters between 1986 and 1997 due to financial difficulties incurred by some institutions. Later, Walmart applied for a charter and the FDIC imposed a moratorium on approving FDIC insurance for industrial banks. In 2010, Congress also implemented a three-year moratorium on the granting of deposit insurance. All of this meant that new charters could not be issued for much of the recent past.

The last industrial bank charter was issued in 2009. No new applications for FDIC insurance for ILC charters were filed until 2017 when a marketplace lender applied for insurance; later, two other applications from FinTech companies were filed. However, all three applications for deposit insurance were withdrawn, although one was recently re-filed.<sup>52</sup> The new director of the FDIC has indicated that the agency is open to *de novo* charter applications and the agency published new guidance on applying for deposit insurance, signaling a “green light” for receiving new applications, including those with different business models.<sup>53</sup> However, the new FDIC director has also stated that with respect to FinTech companies, the FDIC needs to be very careful about allowing non-traditional entities into the banking system. Thus, whether the FDIC will grant deposit insurance to marketplace lender applicants, and under what conditions, is an open issue.<sup>54</sup>

In late 2018, following the leads of the OCC and CFPB, the FDIC also set up an Office of Innovation but with the focus on banks and working to help those regulated institutions innovate and compete with other financial technology companies. The FDIC indicated that it will look at innovation through the use of the ILC charter, regulation of third-party vendor relationships and working with technology companies to obtain better services and efficiencies for banks.

#### **E. Department of the Treasury: Report on Financial Innovation**

In February 2017, President Trump signed Executive Order 13772 outlining core principles for the regulation of the financial system of the United States. The thrust of the order was to simplify and reform laws and regulations inconsistent with the smooth operation of the financial system. In response to President Trump’s administration establishing these principles for a regulatory framework to foster financial growth and stability by making regulation more efficient, the U.S. Department of the Treasury undertook a review of the financial system in an effort to determine what laws and regulations either enhanced or inhibited the provision of financial services. This process generated several reports, including one focusing on FinTech issued in July 2018.<sup>55</sup>

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<sup>52</sup> Social Finance, Square and Nelnet applied for ILC charters. All have withdrawn the applications. Square, along with Varo (discussed above), previously indicated that it would refile its applications once it has revised them. Square in fact re-submitted its application to the FDIC in December 2018. While public comment has provided some support for the application, over 30 community groups have filed letters in opposition to it, in particular as to compliance with the Community Reinvestment Act. The key concern seems to be how to apply that law to an online lender. The groups are also asking for a public hearing on the application. This suggests that there are obstacles for an ILC to obtain federal deposit insurance from the FDIC.

<sup>53</sup> See *FDIC FIL 83-2018*, Handbook and Procedures Manual for Application for Deposit Insurance.

<sup>54</sup> The Independent Community Bankers of America, a trade association representing community banks is lobbying against the ILC charter. It distributed a policy paper calling for a moratorium on providing deposit insurance to industrial loan companies as they are not subject to Federal Reserve supervision. The group may also oppose applications filed for deposit insurance by an ILC.

<sup>55</sup> See U.S. Department of the Treasury, *A Financial System that Creates Economic Opportunities—Nonbank Financials, Fintech and Innovation*, available at <https://home.treasury.gov/sites/default/files/2018-07/A-Financial-System-that-Creates-Economic-Opportunities--Nonbank-Financi....pdf>.

The report contained some 80 recommendations affecting the current regulatory framework relating to non-bank financial entities and innovation. These can be summarized in four general areas as follows: (1) adopting regulatory approaches that support the development of competitive technologies, (2) aligning or harmonizing the existing regulatory framework to combat fragmentation and allow for new business models enabled by financial technology, (3) updating outdated regulations affecting the products and services of non-bank financial institutions and (4) advocating regulation that embraces responsible experimentation and regulatory agility and that promotes American interests abroad while maintaining consumer protections and safeguarding the financial system.

In particular, and relevant to marketplace lending, the study endorsed several concepts including (1) the establishment of a regulatory sandbox to promote innovation, (2) updating the rules affecting partnerships between banks and non-bank firms to accommodate technological advances, (3) codifying the “valid when made” doctrine and the role of a bank as the true lender of loans it makes, (4) providing regulatory clarity for the use of data and algorithms in the underwriting process and (5) supporting the OCC’s special-purpose charter that could be attractive to FinTech companies. The report also recommended that Congress enact a federal data security and breach notification law to protect consumer information and provide notification when a breach occurs.

Since the Treasury Department is not itself a regulator of marketplace lenders or banks, it does not have specific authority to cause its recommendations in this report to be enacted. Whether and how these recommendations will be pursued is unclear.

#### **F. General Accounting Office**

In December 2018, the General Accounting Office (“GAO”) published a report on the use of alternative data by FinTech lenders in order to determine creditworthiness of borrowers. The GAO indicated that while there are potential benefits of using such data—such as greater access to credit—risks also exist from that use, including the potential for fair lending issues such as disparate impact. While the CFPB and other federal financial regulators have monitored the use of alternative data by FinTech companies, the agencies have not provided specific guidance on how such data can be utilized in the underwriting process. The GAO recognized the bank partner model and indicated in the report that clarification of this issue would help those banks manage their relationships with marketplace lenders. The GAO recommended that the federal agencies provide guidance on the appropriate use of alternative data in the underwriting process both to marketplace lenders and Funding Banks.

In January 2019, the GAO published a report on federal oversight of Internet privacy. In part, this study was conducted after several incidents of misuse of consumer personal information derived from the Internet. The GAO recommended that Congress develop comprehensive legislation to deal with Internet privacy with the stated objective of enhancing consumer protections and providing flexibility to address changes in a rapidly evolving space.

In March 2019, the GAO publicly released a report on consumer data protection.<sup>56</sup> The GAO noted there were several FTC and CFPB enforcement actions and called for action by the federal agencies to strengthen oversight of consumer data and consumer reporting agencies. The report recommends that the FTC be given civil penalty authority to enforce the safeguarding of personal information and urged the CFPB to prioritize examinations to address data security at reporting agencies.

### **G. Federal Reserve Study: Online Small Business Lending.**

On June 28, 2018, the Federal Reserve Board and the Federal Reserve Bank of Cleveland released a report concerning online small business lending.<sup>57</sup> The study encompassed only small businesses with fewer than 20 employees and less than \$2 million in annual revenue that had shopped for credit in the last year. The study found that small business owners preferred traditional lenders to online lenders, although they expressed frustration concerning loan approval and underwriting processes and the requirements of those traditional lenders. When considering online lenders, the small businesses preferred platforms that provided more information about their products and pricing prior to beginning the application process. Small businesses found additional and repeated marketing by online lenders to be annoying. On balance, the report showed that more robust disclosure was preferred, particularly related to pricing. Similarly, small business owners were concerned with the lack of full information or the use of undefined terms. The survey respondents were also presented with sample disclosures. Small business owners were overwhelmingly desirous of receiving additional information (similar to what consumers receive on consumer loans) such as loan amount, repayment amount, term and APR.

Two other studies provided a more favorable perspective of marketplace lenders. In a study by the New York Federal Reserve Bank, it was found that online lenders reduced mortgage processing time by 20% and online loans experienced lower levels of overall delinquency. In a study of LendingClub loans by the Philadelphia and Chicago Federal Reserve Banks, it was determined that these marketplace loans penetrated areas that had lost bank branches and were in highly concentrated markets. The study indicated that these borrowers were on average more risky than traditional borrowers with similar characteristics, such as FICO scores, and that online lenders were providing additional access to credit based on the use of alternative underwriting standards and data.

### **H. Congress—The Old and the New**

After the November 2018 elections, the landscape of Congress changed. While Republicans increased their majority in the U.S. Senate, the control of the House of Representatives shifted to the Democrats.

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<sup>56</sup> GAO-19-469T (published March 26, 2019).

<sup>57</sup> “Browsing to Borrow: ‘Mom and Pop’ Small Business Perspectives on Online Lenders” available at [www.federalreserve.gov/publications/default.htm](http://www.federalreserve.gov/publications/default.htm).

As a result, committees in the House will be controlled by the Democrats. With a divided Congress, there is likely to be little legislative movement unless there is bipartisan support.

Little federal legislation is anticipated unless bipartisan support can be obtained.

**Madden Fix Dies.** In the last Congress, legislation was introduced that would have had the effect of invalidating the *Madden v. Midland Funding* decision rendered by the U.S. Second Circuit Court of Appeals in 2015.<sup>58</sup> This was known as the “Madden Fix” legislation,<sup>59</sup> which would have codified by statute the “valid-when-made” doctrine that has been court precedent for decades for loans. That doctrine provides that a loan validly made at inception does not become invalid when it changes hands by virtue of sale or assignment. However, the legislation did not progress past one house of Congress and therefore was never enacted. Given the new makeup of Congress, it is unlikely that this type of legislation will be enacted.<sup>60</sup>

**Focus on CFPB.** House Democrats have already held hearings with the new director of the CFPB and resoundingly criticized the rollback of enforcement at the agency and raised other concerns such as the need to supervise compliance with the Military Lending Act, which the CFPB states is not one of the statutes it was directed to enforce. House Democrats have also proposed legislation that would prohibit arbitration agreements in consumer financial services.<sup>61</sup> Given the divided Congress, it is unlikely that many of these criticisms or proposals will find their way into law.

**FinTech Act of 2019.** FinTech is fast becoming a focus of Congressional action. In March 2019, two Congressmen introduced the FinTech Act of 2019, designed to harmonize, coordinate and eliminate duplication between federal regulators that would regulate FinTech.<sup>62</sup> The co-sponsors of this legislation are also co-chairs of the Congressional FinTech and Payments Caucus, which provides a forum to discuss financial innovation among members of Congress. The House Committee on Financial Services is also establishing a Taskforce on Financial Technology and Innovation.

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<sup>58</sup> As discussed later in this paper, the court decision found that a non-bank assignee of a loan could not enforce the terms of the loan made by a bank, the prior owner of the loan, where the term to be enforced violated state law as applied to the borrower, and the originator of the loan no longer had any interest in the loan.

<sup>59</sup> The provision was contained in H.R. 10, the Financial CHOICE Act of 2017, which passed the U.S. House of Representatives on June 8, 2017, but never reached a vote in the Senate. On February 14, 2018, the House of Representatives passed H.R. 3299, titled Protecting Consumers’ Access to Credit Act, which, on a stand-alone basis, would have codified the valid-when-made doctrine for loans made under various federal laws by regulated financial institutions. This bill also never came to a vote in the Senate in part because consumer groups claimed it would advance predatory lending. In June, 2018 some 21 state Attorneys General wrote a letter to Congress opposing this legislation.

<sup>60</sup> In light of this, it is hoped that banking regulators offer guidance on this issue, which could provide the basis for courts to strike down *Madden*-type claims based on deference to federal agencies that supervise institutions.

<sup>61</sup> Forced Arbitration Injustice Repeal (FAIR) Act (H.R. 1423—116th Congress 2019-2020).

<sup>62</sup> H.R. 1491, introduced on March 4, 2019, by co-sponsors Rep. David Scott (D-Ga.) and Rep. Barry Loudermilk (R-Ga.). The stated intent of the legislation is to provide regulatory clarity for start-ups, including the establishment of a FinTech body which would be the point of entry for a start-up that would direct it to the proper regulator.

In the Senate, the Banking Committee has indicated that it will seek to ensure that the regulatory landscape welcomes innovation.

#### IV. STATE DEVELOPMENTS AFFECTING MARKETPLACE LENDING

##### A. Conference of State Banking Supervisors

On February 14, 2019, the Conference of State Banking Supervisors (“CSBS”) adopted several recommendations from its FinTech Industry Advisory Panel. These include development of a model law for all states to license money services businesses, creation of a standardized call report for consumer finance businesses and providing an online database of state licensing and FinTech guidance. The CSBS agreed to develop an examination system to simplify examinations of state-licensed entities operating in multiple jurisdictions. The CSBS would also expand the use of the Nationwide Multistate Licensing System to all state regulators and entities supervised at the state level.

##### B. Vermont Licensing Exemption for Business Lending

Vermont has enacted a broad law pertaining to loan solicitation which requires licensing of any loan solicitation or lead generation activity.<sup>63</sup> The law also allows the Commissioner of the Department of Financial Regulation to exempt from licensing certain categories of loans or service providers.<sup>64</sup> In September 2018, the Commissioner entered an order exempting from the statutory licensing requirements loan solicitation companies that partner with an FDIC-insured bank in making commercial loans.<sup>65</sup>

The state regulator noted that when loan solicitation activities are conducted online and in conjunction with an FDIC-insured bank, the loan solicitation company and activities are subject to supervision, oversight, regulation and examination by the bank’s state and federal regulators.<sup>66</sup> As a result, the loan solicitation activities are monitored and managed by the bank, including regulatory guidance on third-party providers, and therefore sufficient protection is provided for commercial borrowers. Accordingly, the Commissioner exempted from licensing companies that partner with FDIC-insured banks to solicit commercial borrowers and where the bank extends the loan. However, the order noted that an exemption for consumer loans might not be appropriate due to greater restrictions and protections afforded to consumers.

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<sup>63</sup> 8 VT. STAT. ANN. § 2200(14). This law requires that persons who provide any assistance to lenders in connection with the making of loans (including through the Internet) obtain a loan solicitation license. Marketplace lending platforms would therefore be required to obtain a license in order to provide services to a Funding Bank for loans made to Vermont residents. In addition, the statute requires licensing for lead generation activities including the referral of Vermont borrowers to others for loans.

<sup>64</sup> 8 VT. STAT. ANN. § 2200(17)(B)(vi).

<sup>65</sup> Order of State of Vermont Department of Financial Regulation, *In Re: Licensing Exemption for Loan Solicitation Companies that Partner with FDIC Insured Banks to Extend Commercial Loans*, Docket No. 18-041-B (Sept. 18, 2018).

<sup>66</sup> Citing, among others, the Bank Service Company Act, 12 U.S.C. § 1867(c).

### C. More Sandboxes—Arizona, Wyoming and DC

In March 2018, Arizona became the first state in the country to enact legislation to establish a regulatory “sandbox” designed to help FinTech companies test innovative products and services in a limited manner without total compliance with licensing or other applicable requirements.<sup>67</sup> Arizona has publicly announced that it is taking applications for this program.

On February 19, 2019, the Governor of Wyoming signed into law an act creating a financial technology sandbox for financial products and services in the state.<sup>68</sup> Upon application and receipt of a bond, specified statutes or rules may be waived to provide for the testing of new products and services. The program is limited to new innovations that cannot be made under current law.

On January 23, 2019, the District of Columbia established a Financial Services Regulatory Sandbox and Innovation Council. The body will issue a report within six months concerning the feasibility of having a regulatory sandbox in the District of Columbia for financial products and services. The scope of the report includes blockchain and smart contract technology as well as financial, insurance and regulatory technology products and businesses.

### D. California Disclosure Law on Small Business Lending

California imposes disclosure requirements on commercial loans including online platforms using a Funding Bank arrangement.

In 2018 California enacted Senate Bill 1235, which amended the California Financing Law.<sup>69</sup> This legislation imposes new and expansive disclosure requirements on commercial loans.<sup>70</sup> The disclosure needs to be signed by the prospective borrower prior to consummating a transaction. The disclosure requirements affect loans, leases and merchant cash advances. While the requirements do not apply to banks, they do apply to a “nondepository institution which enters into a written agreement with a depository institution to arrange for the extension of commercial financing by the depository institution to a recipient via an online lending platform administered by the nondepository institution.”<sup>71</sup> Therefore, a marketplace lender helping to originate loans for a Funding Bank over the

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<sup>67</sup> House Bill 2434, codified at ARIZ. REV. STAT. § 41-5601—5612.

<sup>68</sup> H.B. 57 (Financial Technology Sandbox Act), effective Jan. 1, 2020.

<sup>69</sup> The major amendments dealing with commercial financing disclosures will be found at Cal. Fin. Code § 22800 *et seq.*

<sup>70</sup> Until January 1, 2024, these disclosures include the total amount of funds provided; the total dollar cost of the financing; the term or estimated term; the method, frequency and amount of payments; a description of prepayment policies; and the total cost of the financing expressed as an annualized rate.

<sup>71</sup> CAL. FIN. CODE § 22800(m).

Internet will be subject to these disclosure requirements.<sup>72</sup> Although the law became effective on January 1, 2019, compliance is not required until final regulations have been adopted and become effective.<sup>73</sup>

### **E. Attorneys General**

Although several state attorneys general indicated that they would fill the gap if the CFPB slowed down its enforcement posture, making good on that pledge has not been obvious. Only a few states, including Pennsylvania and New Jersey, have announced plans to establish “mini-CFPBs” to focus on consumer protection issues. Maryland has created a Financial Consumer Protection Commission. Virginia has created a special unit targeting predatory lenders and has been active in enforcement, including actions against online unlicensed lenders.<sup>74</sup> Massachusetts is investigating the advertising and disclosure practices of a marketplace lender.<sup>75</sup>

### **F. New York—Online Lending Report**

In July 2018, the New York Department of Financial Services (“NYDFS”) issued its report on online lending, based in part on responses that the NYDFS received from questions it had posed to participants in the online lending industry. The report takes the position that the state’s consumer protection laws and regulations should apply to all consumer and small business lending. This would mean that small business lending would be subject to consumer disclosure standards and other consumer-oriented laws. The report also took the position that the state’s usury limits should apply to all lending in New York. The NYDFS stated that a borrower deserves to get the benefit of New York’s protections whether they borrow from a bank, a credit union or an online lender. This appears to be a challenge to the federal preemption and rate exportations that many banks and marketplace lenders use for their programs. In fact, the NYDFS suggested that the usury rate be reduced from the current 16% to 7%, which would require more entities to become licensed (*i.e.*, loans at rates in excess of 7% would still be permitted, but only by licensed lenders). The NYDFS took aim at online lenders, asserting

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<sup>72</sup> In addition, if the entity is a California Financing Law licensee, its annual report must now include information about loans made through third-party financial institutions in connection with a contractual agreement with the licensee. Cal. Fin. Code § 22159(a)(1).

<sup>73</sup> CAL. FIN. CODE § 22804(c). As of this writing, the Department of Business Oversight has not promulgated the regulations to effect this legislation.

<sup>74</sup> See, e.g., *Commonwealth of Virginia v. NC Fin. Solutions of Utah, LLC*, (Cir. Ct. Fairfax Co.) Civil Action No. 2018-06258 (filed Apr. 23, 2018) (action against out-of-state online lender not licensed in Virginia and using a Utah choice of law with no Utah connection).

<sup>75</sup> In a regulatory filing, LendingClub Corp. disclosed that it had received a civil investigative demand in June 2018 from the Massachusetts Attorney General and is cooperating with the investigation.

that the licensing of online lenders is needed, which would allow for the state to supervise and provide oversight as to safety and soundness and consumer compliance of those entities.<sup>76</sup>

### **G. California Targets Lead Generators**

The activities of lead generators are becoming subject to more scrutiny by regulators.

The California Department of Business Oversight has been aggressive in targeting lead generators for operating in the state without obtaining a broker license under the California Financing Law. That law requires a license to broker loans to a lender who is also licensed under the California Financing Law.<sup>77</sup> As of late, the state regulator has taken the position that websites offering loans that are sourced to California licensees or taking application information either directly or from other websites and relaying it on to other lenders for a fee should be required to obtain a broker license under that California statute.<sup>78</sup> The state specifically declared that collecting consumer loan applications or application data and forwarding it to a licensed lender for the purposes of making a loan is acting as a broker. Furthermore, under the California Financing Law, it is unlawful for a licensed lender to pay a fee to an unlicensed person for broker services. The state regulator has also brought actions against licensed lenders for paying unlicensed lead generators for leads and referrals.<sup>79</sup> A lender was cited for referring its declined applicants to other lenders for a fee if a loan was made without being licensed as a broker. It is anticipated that California will continue to monitor the activities of lead generators and licensees relative to online websites and loans for compliance with the licensing requirements under the California Financing Law.

## **V. OTHER ISSUES OF SIGNIFICANCE**

### **A. Privacy**

After the massive data breach at a national credit bureau, it has been anticipated that additional privacy restrictions would come into place for all lenders, including marketplace lenders. As stated previously, the U.S. Treasury report recommended that Congress enact a comprehensive data privacy and data

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<sup>76</sup> The NYDFS Superintendent, in an October 2018 interview, indicated that the NYDFS was considering whether to impose new licensing requirements for online lenders operating through bank partnerships. That superintendent has subsequently left the NYDFS.

<sup>77</sup> CAL. FIN. CODE § 22100.

<sup>78</sup> See, e.g., *Desist and Refrain Order* (Zero Parallel, LLC Dec. 7, 2018) (selling of borrower data to lenders by means of a “ping tree”).

<sup>79</sup> See, e.g., *The Commissioner of Business Oversight v. Avant of California, LLC*, Consent Order, CFL File No. 603-K-124 (Jan. 31, 2019).

breach law. Some legislation has been introduced in Congress to this effect, but the issue of federal preemption of state laws looms as a deterrent to enacting any legislation at the federal level.<sup>80</sup>

Meanwhile, some states are moving forward on these issues. California, for example, passed privacy legislation in June 2018 that takes effect in 2020. In Vermont, data brokers must disclose information they collect and allow consumers to opt out. Colorado has also enacted law to protect personal identifying information. Additional state legislation on this front is expected to continue creating a patchwork of laws relating to data security, privacy and breach notifications.

## **B. Fair Lending**

An online lender entered into a settlement with the Department of Housing and Urban Development in connection with alleged violations of the Fair Housing Act.<sup>81</sup> The lender was accused of failing to make loans because the real properties at issue were located on Indian reservations and therefore constituted discrimination under fair lending laws based on race. The online lender paid a penalty of \$240,000 and agreed to revise policies and practices concerning doing business with property located on Indian reservations.

## **C. Licensing**

Marketplace lenders must assess their business model in order to adhere to applicable state licensing requirements.

The issue of licensing is always relevant to marketplace lenders. As discussed later, licensing may be required of marketplace lenders in order to market, service or take assignment of loans. These licensing requirements are imposed regardless of whether the marketplace lender is acting on its own or on behalf of a Funding Bank. Although licensing is based on the laws of the individual states, some recent cases have addressed licensing issues.

One question that often arises in marketplace lending is whether loan purchasers, investors or securitization trusts need to be licensed under state law. This issue arose in Maryland, where the question was raised whether securitization trusts needed to be licensed as state collection agencies. In August 2018, the Maryland Court of Appeals determined that the state collection agency law does not require a statutory trust acting as a securitization vehicle to obtain a license as a debt collection agency, overturning contrary decisions of the lower courts.<sup>82</sup>

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<sup>80</sup> The FTC on March 5, 2019, published notices of proposed rulemaking to make extensive changes to the existing standards for the safeguarding of consumer information (12 CFR Part 314) and the GLBA Privacy Rule affecting privacy of consumer financial information (16 CFR Part 313).

<sup>81</sup> “Conciliation Agreement” in FHEO Title VIII Case Nos. 08-17-5267-8 and 08-18-6949-8.

<sup>82</sup> *Blackstone v. Sharma; Shanahan v. Marvastian; O’Sullivan v. Altenburg and Goldberg v. Neviasser*, Case No. 040, September Term 2017 (Md. Ct. App. Aug. 9, 2018) (consolidated cases dealing with mortgage servicing).

Conversely, a debt collector who purchased defaulted loans moved to dismiss a complaint claiming that it needed to be licensed as a consumer lender under New Jersey law. The New Jersey statute contains language stating that one who directly or indirectly engages in the business of buying notes must be licensed as a consumer lender. On that basis, the action was not subject to dismissal.<sup>83</sup>

In yet another action against CashCall, New Hampshire issued a cease and desist order for lending without a license. CashCall filed a motion to dismiss which was denied and appealed to the New Hampshire Supreme Court. The state court found that the Department of Banking had jurisdiction over CashCall. The Department denied a motion to transfer the action to state court and is proceeding against the payday lender for failure to hold a license.<sup>84</sup>

#### D. Lending on Cryptocurrency Collateral

Cryptocurrency lending requires compliance with applicable laws.

Recently, some cryptocurrency businesses, many of which operate primarily or solely online, have desired, attempted or engaged in lending to their cryptocurrency customers, typically on a secured basis, at some percentage of their cryptocurrency account balance, and secured by the cryptocurrency as collateral.

We note that programs related to lending, even if secured by underlying cryptocurrency accounts, remain subject to all applicable lending laws and regulations. In the consumer realm, such programs are subject to the licensing, usury and consumer protection law requirements described in this white paper.

Other new and innovative programs are likely to emerge that will raise novel legal issues or require the application of existing law to those new activities.<sup>85</sup>

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As the foregoing discussion demonstrates, marketplace lenders and Funding Banks continue to face significant legal, compliance and regulatory issues. In addition, market growth is being attended by

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<sup>83</sup> *Tompkins v. Selip & Stylianou LLP et al.*, Case No. 2:18-cv-12524 (D.N.J. Feb. 11, 2019). See also, *Barbato v. Greystone Alliance, LLC, et al.*, No. 18-1042 (3rd Cir. Feb. 22, 2019). There the court found that a debt buyer who outsources collection activities to a third party is still a debt collector under federal law. Although not dealing with online lending per se, this case stands for the proposition that one who meets the definition of a debt collector may need to be licensed under state law even if it outsources collection activities to a third party.

<sup>84</sup> *In re State of New Hampshire Banking Dep't v. Cashcall, Inc., et al.*, 2018 WL 3570104 (N.H. Banking Dept. Case No. 12-308 June 14, 2018).

<sup>85</sup> For example, a FinTech startup claimed that it would offer savings and checking accounts that would be federally insured by the Securities Investor Protection Corp. This was not true as SIPC covers only brokerage accounts and not savings or checking accounts. The program was abandoned as a result.

additional scrutiny from regulators and lawsuits from private litigants. All industry participants should keep up to date on legal and regulatory developments and initiatives and consult counsel as appropriate.

Please refer to later sections of this publication for additional information and insights on legal issues related to marketplace lending.

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# Regulatory Issues

## I. REGULATORY MATTERS

Given either the true lender challenges facing marketplace lenders that work with Funding Banks or the licensing and compliance burden of being a multi-state licensed lender, it is no surprise that these entities are looking at the possibility of banking type charters as a business model. Options include the emerging OCC special purpose national bank charter or an industrial bank state charter. In addition, full service bank charters are an option, albeit one that would encompass compliance with all regulatory requirements that come with a full purpose charter. These options and their history as related to marketplace lending are discussed below.

### A. Charters for Marketplace Lenders

#### 1. *OCC Proposes Special-Purpose Charter for Fintech Firms.*

On December 2, 2016, the OCC announced that it was considering issuing special-purpose bank charters to qualified FinTech companies.<sup>86</sup> In its press release, the OCC took the position that applying a bank regulatory framework to FinTech companies will (i) benefit customers, businesses, and communities and will help ensure that these companies operate in a safe and sound manner; (ii) result in the OCC's uniform supervision of FinTech companies, promoting consistency in the application of laws and ensuring that consumers are treated fairly; and (iii) make the federal banking system stronger by including these companies. Many within the industry viewed the OCC's announcement as a victory for FinTech companies that have argued for a national charter so that they can establish a uniform national program and avoid obtaining various state licenses and facing different laws and restrictions in each state.

In conjunction with this announcement, the OCC issued a white paper titled "Exploring Special Purpose National Bank Charters for Fintech Companies," detailing many issues that must be resolved by the OCC before it will grant a special-purpose bank charter to a FinTech company. The white paper was not a proposed rule requesting a response to substantive proposals by the OCC; rather, it was a request for information from the industry and the public. This was another step in the direction of identifying the requirements that will be applied by the OCC to a FinTech company seeking a national bank charter; and it points out agency concerns, but not how these concerns will be resolved.

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<sup>86</sup> This development came almost simultaneously with the OCC promulgating a final rule addressing the receivership of banks not insured by the FDIC, which would presumably apply to FinTech companies that obtain a national bank charter but are not insured by the FDIC. In September 2016, the OCC also revised the "Charters" booklet of its Licensing Manual, which describes the process of applying for and obtaining a national bank charter, presumably with revisions contemplating the limited-purpose aspects of a charter applicable to FinTech companies. Almost immediately, some state regulators both questioned and opposed the ability of the OCC to grant a limited-purpose charter.

The white paper solicited perspectives on several questions concerning the benefits and risks associated with approving FinTech companies for a national bank charter and specific areas such as capital and liquidity requirements, commitments to financial inclusion and protecting small businesses in light of both safety and soundness considerations, and a proper regulatory scheme for technological companies.

**Key Consideration:** We note that the OCC has not said that there will be a “FinTech charter.” Rather, the OCC will consider granting a special-purpose national bank charter to FinTech companies engaging in non-deposit taking banking activities: lending or payments.<sup>87</sup>

The obvious benefits of a national bank charter include preemption of state usury laws, exemption from state licensing requirements, operationally being able to maintain a uniform national program, and autonomy and control by the marketplace lender, a feature not present in a Funding Bank arrangement as the regulated institution needs to control the loan program.<sup>88</sup> Since all national banks are members of the Federal Reserve System, there is also access to the Fed’s payment system. Conversely, obtaining a national bank charter is complex, costly, and often subject to regulatory conditions. The chartering process usually takes at least several months and often a year or more. Public comment and field investigations are part of the process. Charter applicants must submit a three-year business plan and cannot deviate from it without OCC approval. This may inhibit the nimbleness that FinTech companies utilize as a competitive advantage. Often the OCC will require a minimum level of capital and the ratio of capital to total assets must always be eight percent (8%) or greater.

It is not known how the OCC might impose financial inclusion requirements on marketplace lenders seeking a charter, whether retention of some portion of loans will be required, or how off-balance sheet items such as loan sales will be treated for capital purposes. Federal law also limits transactions with affiliated companies and absent a change in law, and depending on how the interplay of regulators comes out, a parent company might become a bank holding company, subject to not only additional regulation but also a restriction on being engaged in activities constituting banking or being closely related to banking.<sup>89</sup>

It remains to be seen whether a special-purpose bank charter will be an appealing alternative for FinTech companies and what conditions the OCC may impose on granting such a charter.<sup>90</sup> All but the

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<sup>87</sup> Whether and when the OCC might issue the first such charter is unknown.

<sup>88</sup> One possible alternative is an industrial bank or industrial loan charter. This charter is discussed both above in the “Recent Developments” section and immediately below and provides many of the same benefits as would an OCC charter.

<sup>89</sup> If however, the special purpose national bank is not required to accept deposits (and not be FDIC insured), it may not meet the definition of a bank under the Bank Holding Company Act and the parent would not be a bank holding company.

<sup>90</sup> Others, including LendingClub Corporation, have been rumored to be interested in a full purpose national bank charter.

largest marketplace lenders may find certain of the requirements, such as the capital and compliance risk management requirements, sufficiently burdensome to outweigh the benefits of obtaining a national bank charter. It is also a long-term business strategy, not one that can be deployed in a short time frame. The availability of a national bank charter to qualified marketplace lenders could also have an impact on the competitive balance of the industry if investors come to view chartered lenders as “safer” or “more sound” than those that do not obtain charters, and the latter companies, as a result, are put at a competitive disadvantage in raising lending capital.

***FinTech Charter Proposal Brings Lawsuits.*** The OCC’s announcement that it will explore the possibility of a special purpose charter led to two lawsuits being filed against the agency. In May 2017, the New York Department of Financial Services (“NYDFS”) brought an action claiming that granting such special purpose charters would exceed the authority of the OCC.<sup>91</sup> The OCC sought to dismiss the suit on the grounds that the NYDFS’s claim was not “ripe” because the OCC had not yet made a final determination about whether to grant such charters. On December 12, 2017, the court granted the OCC’s motion to dismiss. The Conference of State Bank Supervisors (“CSBS”) had filed a similar action in April 2017, arguing that the OCC did not have the authority to grant a limited-purpose bank charter to a non-bank entity.<sup>92</sup> The OCC also sought to dismiss this action as premature since the OCC had not taken any formal action with respect to such a charter. The motion to dismiss was granted by the court on April 30, 2018. The “Recent Developments” section details additional information about the current status of the proposed charter and the renewed litigation filed by the CSBS and NYDFS and currently pending against the OCC.

## 2. ***Federal Deposit Insurance Corporation.***

***Industrial Bank Charters.*** Attention has been given to the possibility that FinTech companies could apply for industrial bank charters (also called industrial loan companies or ILCs) under state law.<sup>93</sup> There are some 25 ILCs in existence, most of them chartered under Utah law.

Industrial loan companies must also apply for FDIC insurance. While they can take savings or time deposits, the implementing laws do not allow them to take demand deposits. The allure of an ILC is that they can provide most types of financial products and services except for demand deposit accounts, obtain the benefits of federal preemption from state usury laws as an FDIC insured institution, and they may be owned by nonbank companies. ILCs, even though insured by the FDIC, are exempt from the definition of “bank” under the federal Bank Holding Company Act, and therefore an ILC may be owned by a commercial company without becoming subject to that law’s extensive

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<sup>91</sup> *Vullo v. Office of the Comptroller of the Currency*, 17 Civ. 3574 (S. D. N.Y. filed May 17, 2017).

<sup>92</sup> *Conference of State Bank Supervisors v. Office of the Comptroller of the Currency*, Civ. Act. No. 17-CV-0763 (D.D.C.).

<sup>93</sup> Utah, California and Nevada are the only states that currently have industrial banks, with the majority in Utah. Although other states have a statutory framework that allow for industrial bank charters, they are not currently active according to the National Association of Industrial Banks (“NAIB”) <http://industrialbankers.org/>.

regulations and supervision by the Federal Reserve of bank holding companies.<sup>94</sup> Utah requires an ILC and its management to have an in-state presence and the FDIC requires a level of capital commensurate with the ILC's assets and the risks posed by its business plan. ILCs are subject to regulation and examination by their state chartering authority and the FDIC.

No company has received an ILC charter since 2009, in part because of a federal moratorium on granting deposit insurance, but this could change.<sup>95</sup> The FDIC has indicated a willingness to consider new deposit insurance applications, a development which could pave the way for marketplace lenders and other FinTech companies to apply for an ILC charter with FDIC insurance. In June 2017, Social Finance, Inc. (SoFi) applied for an industrial loan company charter in Utah, but later withdrew its application due to issues and changes in the top management of the company.<sup>96</sup> In addition, payment processor Square, Inc. filed an application to become a Utah ILC to offer small business additional financial products and services, as did FinTech company, Nelnet. Both withdrew their applications, although Square has refiled its application for deposit insurance with the FDIC.

**Worth Noting:** A marketplace lender chartered as an ILC could undertake a uniform national lending program since as an FDIC-insured state bank, it would qualify for federal preemption of state interest rate caps and exemption from most state licensing requirements. As a trade-off, the marketplace lender would be subject to direct (and potentially greater) supervision by the state regulator that grants its charter and the FDIC. If this comes to fruition, the ILC charter could become a preferred way for marketplace participants to offer Internet-based products and services.<sup>97</sup>

## B. Other Regulatory Promulgations

For several years, the federal banking regulators did not make many public comments about marketplace lending. Perhaps this was because banks play a variety of roles in this space and the regulators primarily are in the business of regulating what banks do. Banks can be competitors to online

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<sup>94</sup> The Bank Holding Company Act requires a bank holding company limit its commercial activities to banking and activities that are closely related to banking. The Act also limits the nature and amount of transactions of the holding company with its bank affiliates, imposes capital requirements and subjects the holding company to regulation and examination by the Federal Reserve. Since an ILC is not a bank, these limitations do not apply. Many ILCs are owned by commercial companies as a means of conducting their financial activities. When Walmart attempted to acquire an ILC however, it resulted in a moratorium on the granting of ILC charters.

<sup>95</sup> President Trump nominated and the Senate confirmed Jelena McWilliams, Fifth Third Bancorp's chief legal officer, to lead the FDIC. She made positive remarks about granting deposit insurance at confirmation hearings. However, her public remarks have been contradictory. While she has indicated that the FDIC is open for business as to new charters and will consider each application including those with new business models, she has also indicated that the FDIC must be careful in letting non-traditional entities into the banking system.

<sup>96</sup> Clozel, Lalita, "SoFi Withdraws Bank Application in Wake of Scandal," American Banker, Oct. 13, 2017.

<sup>97</sup> Marketplace lenders holding an industrial bank charter would be making their own loans under that authority rather than through a Funding Bank, so the risks and uncertainty of true lender challenges would likely be avoided.

lenders and potential purchasers of them. Banks are lenders to platforms and are also investors in marketplace loans. Banks can serve as trustees in securitization transactions of marketplace loans and have entered into “white label” programs where bank customers are referred to marketplace lenders for loans. Some banks are offering bank loans directly through an online platform as an alternative to partnering with a marketplace lender. Bank regulators have supervised and examined banks that serve as Funding Banks for online lending programs for some time, but largely without any public comment.<sup>98</sup>

However, this has changed dramatically as the marketplace lending industry and the involvement of banks in this space continue to expand and grow. In the last few years, banking regulators have made some significant pronouncements, both directly and indirectly, regarding marketplace lending, some of which are described below.<sup>99</sup>

**Looking Ahead:** These regulatory promulgations illustrate how marketplace lending programs have garnered the increasing attention of federal regulators. Regulation of marketplace lending is taking center stage with more acts to follow, which makes attention to compliance of critical importance for all market participants.

*1. Office of the Comptroller of the Currency.*

*OCC Exam Procedures.* On January 24, 2017, the OCC issued new Exam Procedures that supplement the OCC’s Third Party Guidance. The Exam Procedures specifically reference bank relationships with marketplace lenders, identifying certain aspects of these relationships that should be evaluated as part of a regulatory examination. These aspects include:

- Whether the bank has sufficient support systems, personnel, and controls to adequately support the volume of planned loan origination, servicing, or collections activities;
- Whether the marketplace lender uses underwriting methods that are new, nontraditional, or different from the bank’s underwriting standards;
- Whether the bank is subject to any recourse or participation arrangements as part of originating marketplace loans; and
- Whether the bank buys bonds, loans, or notes from marketplace lenders and, if so, whether the bank has performed a robust credit risk analysis of that lender, determined that the loans meet the

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<sup>98</sup> However, see the section below related to the FDIC for discussion of an enforcement action taken by the FDIC against a bank that funded loans (not marketplace loans) originated by a third-party service provider.

<sup>99</sup> In response, the marketplace lending industry is forming groups to study and advocate regulatory issues. In April 2016, the Marketplace Lending Association was formed as a lobbying group. The Online Lending Policy Institute was also formed and conducted summits in 2016, 2017 and 2018 related to policy matters in the industry.

bank's underwriting standards, and determined whether the arrangement meets the OCC's regulatory investment and lending limits.

The Exam Procedures emphasize that a bank must maintain its own procedures and systems to ensure that the bank's core compliance and risk management responsibilities are not being outsourced to the marketplace lender.

*OCC FinTech White Paper.* On March 31, 2016, the OCC published a white paper on the FinTech industry. While the paper is generally supportive of innovation and the improvements it brings, the OCC cautions that it must be accomplished in a safe and sound manner, consistent with principles of consumer protection. The OCC also announced that it had created a working group within the agency to monitor developments related to marketplace lending. On October 16, 2016, the OCC announced its decision to establish an Office of Innovation and to implement a regulatory framework supporting "responsible innovation." The Office of Innovation became operational in 2017. This is similar to the CFPB's Project Catalyst to allow development of financial FinTech in tandem with compliance with consumer protection laws.<sup>100</sup> This is indicative of the overall general interest of regulators in the space.<sup>101</sup>

## 2. *Federal Deposit Insurance Corporation.*

*FDIC Draft Guidance Concerning Purchased Loans, Third-Party Lending Relationships.* In November 2015, the Federal Deposit Insurance Corporation ("FDIC") issued a Financial Institutions Letter ("FIL") dealing with effective risk management practices for purchased loans and participations.<sup>102</sup> While this advisory is general in nature and applies to all forms of loan purchases and participations, the timing of its issuance suggested that one of the focal points was marketplace lending. The letter addressed the need for effective management of third-party risk where loans are purchased from non-bank entities or third-party arrangements. Financial institutions are encouraged to perform extensive due diligence and monitoring of third parties, especially in out-of-market loans. Banks should also assess the ability of third parties to meet obligations to the institution and review and monitor compliance with laws

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<sup>100</sup> The CFPB recently announced changes that would promote innovation and expressed an appetite to allow a regulatory "sandbox" to allow market participants to experiment broadly as has occurred in the UK. See the "Recent Developments" section.

<sup>101</sup> We note that a group of Republican congressman indicated in the Spring of 2016 that they would introduce an "innovation initiative." Led by Congressman Patrick McHenry, the "Financial Services Innovation Act of 2016" (H.R. 6118) was introduced in Congress in September 2016 and subsequently referred to committee. The legislation is an attempt to create a FinTech regulatory sandbox in the United States, a concept that already exists in the UK and Hong Kong. Specifically, the bill mandates the creation of a Financial Services Innovation Office ("FSIO") within each of the federal banking and financial services regulators. Individuals who want to offer a financial innovation product or service could petition the affected agency's FSIO for regulatory relief in the form of an enforceable compliance agreement modifying or waiving applicability of the regulation or statute implicated. A petition must propose an alternative compliance strategy and demonstrate that the financial innovation product or service: (i) would serve the public interest, (ii) improves access to financial products and services, (iii) would not present systemic risk to the U.S. financial system, and (iv) promotes consumer protection. While this legislation was not enacted, additional legislation is being introduced. See the "Recent Developments" section.

<sup>102</sup> FIL-49-2015 (November 6, 2015).

and regulations such as consumer protection and anti-money laundering requirements. Although nothing in the guidance is either new or startling, its timing may affect marketplace programs with banks by encouraging banks to undertake a more extensive due diligence and monitoring process.

On February 1, 2016, the FDIC issued FIL 9-2016 announcing the publication of the Winter 2015 issue of “Supervisory Insights.”<sup>103</sup> Part of this publication is devoted to the specific topic of bank relationships with marketplace lenders. It is clear that the FDIC understands that banks do participate in products and programs of this nature and that the FDIC understands the way the market operates whether through a direct funding model or a bank partnership model. The FDIC considers such arrangements as a third-party vendor relationship and expects banks, however they become involved in the industry, to follow third-party vendor management principles. This entails a determination that the bank’s role is consistent with the overall strategy of the bank, assessment of the potential risks involved, and mitigation and management of those risks. It requires due diligence of the third party involved and appropriate contract protections for the bank. It also involves monitoring and oversight of the third party and correction of issues that are identified as problems or risks. The FDIC will evaluate the bank’s role as part of its supervisory process.

Then, on July 29, 2016, the FDIC published FIL-50-2016, seeking comment on its proposed Guidance for Third-Party Lending applicable to FDIC-supervised institutions lending through a business relationship with a third party, including loan originator activities.<sup>104</sup> The guidance focuses on identification and assessment of risk commensurate with the third-party lending relationship. It would require due diligence, appropriate contract protections, ongoing monitoring, and remediation. Institutions with significant third-party lending relationships may be subject to increased supervisory attention and examination and review of the third parties.

These FDIC issuances offer a pragmatic approach to the current state of affairs. The FDIC treats a bank’s involvement in marketplace lending like any other product or service the bank offers, consistent with its historical approach of not approving or disapproving of particular bank programs. Therefore, there is nothing inherently amiss when banks participate with non-bank companies. But before banks enter into such an arrangement, they need to identify, assess, and mitigate risks; satisfy themselves that the third party (and the bank) is in compliance with applicable federal and state laws and regulations; and have a program for ongoing oversight and remediation. While some have assailed this pronouncement as yet another regulatory roadblock focusing the microscope on marketplace lending, in reality this practical approach of the FDIC, the most experienced federal banking regulator in this space, seems positive in that it reaffirms the position that banks can play a role so long as it is performed prudently, and the FDIC is putting banks on notice of the rules they must follow to be a participant.

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103 The FDIC’s Winter 2015 edition of Supervisory Insights can be found at the following link: [https://www.fdic.gov/regulations/examinations/supervisory/insights/siwin15/SI\\_Winter2015.pdf](https://www.fdic.gov/regulations/examinations/supervisory/insights/siwin15/SI_Winter2015.pdf).

104 FDIC FIL-50-2016, “FDIC Seeking Comment on Proposed Guidance for Third-Party Lending” (July 29, 2016).

**FDIC Enforcement Action Against Funding Bank, Third-Party Service Provider.** On March 28, 2018, the FDIC entered into two related settlements, one with a Funding Bank and the other with a third-party marketer/servicer of one of the Funding Bank’s loan products, with facts analogous to many marketplace lending programs.<sup>105</sup> The loan product at issue was a debt consolidation loan where the service provider negotiated debt settlements on the borrower’s behalf for a fee. The FDIC found that the Funding Bank and its third-party service provider had engaged in unfair and deceptive practices related to the marketing and origination of the loans and had violated the Electronic Funds Transfer Act by requiring borrowers to pay by preauthorized ACH.<sup>106</sup> In addition, the FDIC determined that the loan disclosures violated the Truth in Lending Act because they failed to clearly and conspicuously state the terms of the loans by using estimates which were significantly different than the actual loan terms. The FDIC also found that the Funding Bank had failed to provide adequate oversight of its third-party service provider and did not have an adequate compliance management system to manage these relationships, including engaging in appropriate due diligence prior to entering into a relationship with a third-party service provider.

The FDIC exercised jurisdiction over the third-party service provider as an “institution-affiliated party” of the Funding Bank under the Federal Deposit Insurance Act.<sup>107</sup> Because the service provider was the primary actor in the program, the FDIC required restitution and required the service provider to deposit \$20 million in a segregated account for consumer reimbursement purposes.<sup>108</sup> The service provider was also tagged with a civil money penalty close to \$500,000.<sup>109</sup>

**Key Point:** Marketplace lenders should remember that they too are subject to the jurisdiction of federal banking regulators when they partner with a Funding Bank and need to be vigilant in complying with the consumer protection laws applicable to their programs.

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<sup>105</sup> *In the Matter of Cross River Bank*, FDIC -17-0123b, FDIC-17-0121b and FDIC-17-0122k and *In the Matter of Freedom Financial Asset Management, LLC*, FDIC-17-0126b, FDIC-17-0125b and FDIC-17-0124k (both titled “Consent Order, Order for Restitution and Order to Pay Civil Money Penalty”), March 28, 2018.

<sup>106</sup> See the later discussion of EFTA and Regulation E under “*Electronic Commerce Laws*.” Lenders cannot compel borrowers to pay loans by electronic means and whether authorizations for pre-authorized transfers meet this requirement or are valid has been the subject of litigation. In this case, the bank is being required to clearly and conspicuously explain that preauthorized electronic payments are optional and that a loan cannot be conditioned on the borrower repaying the loan in this manner.

<sup>107</sup> 12 U.S.C. §§ 1813(q) and 1813(u).

<sup>108</sup> The FDIC orders require the service provider to pay all reimbursement amounts due to consumers, even if they exceed the deposited amount. In addition, the bank is also responsible for restitution if the service provider fails to make payments to borrowers. Even if reimbursed, consumers retain any rights they may have against the bank and the service provider. Therefore both the bank and the service provider could be subject to additional actions.

<sup>109</sup> In November 2017, the CFPB filed suit against the service provider’s affiliate debt relief company for the same actions. See *CFPB v. Freedom Debt Relief, LLC et al*, Case No. 3:17-cv-064843 (N.D.Cal.). The parties are engaged in settlement discussions.

There are at least three important takeaways from this FDIC enforcement action for Funding Banks that have relationships with marketplace lenders: (1) federal regulators will hold the bank responsible for the products and services it originates, including those originated through a third-party relationship, and may impose civil money penalties for compliance deficiencies,<sup>110</sup> (2) banks are expected to have robust third-party risk management programs as required by federal regulatory guidance including appropriate risk assessment, initial and ongoing due diligence and oversight and correction of deficiencies, and (3) banks must maintain a strong compliance program to manage third-party risk including adequate policies, training, monitoring and audits of consumer protection laws as well as a consumer complaints process that timely identifies, reviews, investigates, responds to and resolves consumer complaints.<sup>111</sup>

### 3. *Department of the Treasury.*

*Treasury White Paper.* On May 10, 2016, the U.S. Department of the Treasury (the “*Department*”) published a white paper entitled “Opportunities and Challenges in Online Marketplace Lending” (the “*White Paper*”).<sup>112</sup> The White Paper states that marketplace lending can provide both consumer and small business borrowers with expanded access to credit but may also create risks that existing regulatory structures do not adequately address.

The White Paper follows the “Request for Information” (the “*RFI*”) which the Department published in July 2015 to solicit public input on various topics concerning marketplace lending. The Department received approximately 100 responses from marketplace lenders, trade associations, consumer and small business advocates, academics, investors, and financial institutions. Building on the RFI comments and its own market research, the Department makes a number of recommendations in the White Paper for regulatory and/or industry actions. The Department stated that its recommendations are intended to facilitate the safe growth of marketplace lending while fostering affordable access to credit for consumers and businesses. The Department’s recommendations include the following:

- *Enhanced Protection for Small Business Borrowers.* The Department stated that more effective regulatory oversight could enable greater transparency in small business marketplace lending and lead to better outcomes for borrowers—particularly for small business loans under \$100,000, which share common characteristics with consumer loans but are not entitled to the same consumer law protections.

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<sup>110</sup> In this case, the FDIC imposed a penalty of \$641,750 and stated that the bank is prohibited from being indemnified for that penalty.

<sup>111</sup> This strong action by the FDIC is in contrast to statements made by regulators from the Federal Reserve, OCC and CFPB at a banking conference in early 2018 that they would be more “flexible” in applying third-party risk management guidance to partnerships between banks and FinTech firms. Interestingly, the FDIC did not make such a statement. The FDIC is the primary regulator of Funding Banks engaged in marketplace lending programs.

<sup>112</sup> The White Paper is available at <https://www.treasury.gov/connect/blog/Pages/Opportunities-and-Challenges-in-Online-Marketplace-Lending.aspx>.

- *Protecting the Borrower Experience.* The Department stated that all marketplace lenders should exercise prudence when engaging with borrowers in financial distress and should have in place comprehensive arrangements (including backup servicing plans) to provide for the continued servicing and collection of loans in the event the platform fails.
- *Promoting a Transparent Marketplace.* Certain RFI commenters stated that to improve its access to the capital markets, the industry will need to develop a wider investor base, an active and stable secondary market, and transparent securitization activity. The Department therefore recommended that the industry adopt (i) standardized representations, warranties, and enforcement mechanisms, (ii) consistent reporting standards for loan origination data and ongoing portfolio performance, (iii) loan securitization performance transparency, and (iv) consistent market-driven pricing methodology standards. The Department further recommended the creation of a private sector registry that is available to the public for tracking data on transactions, including the issuance of notes and securitizations, and loan-level performance.
- *Expanding Access to Credit for Underserved Borrowers.* The Department stated that for the industry to truly expand access to underserved markets, more must be done to serve borrowers who may be creditworthy but may not be scorable under traditional credit scoring models. The Department recommended that marketplace lenders consider partnering with Community Development Financial Institutions (“CDFIs”), which could be mutually beneficial as it would allow CDFIs to use the marketplace lender’s technology and back-end operations to lower their costs and the marketplace lender would gain access to the CDFIs’ knowledge of local credit markets.
- *Working Group for Interagency Cooperation.* Various aspects of marketplace lending and related financing activities by lenders are subject to regulation by a number of different federal and state agencies. The Department therefore recommended that regulators organize an interagency working group consisting of representatives of the Department, the CFPB, the FTC, the SEC, the Federal Deposit Insurance Corporation, the Board of Governors of the Federal Reserve System, the Office of the Comptroller of the Currency, the Small Business Administration, and a representative of a state banking regulator, to consider the applicability of existing regulations to marketplace lenders, whether there are any gaps in the current regulatory structure, and the impact of nontraditional data on credit scoring models.

**U. S. Treasury Report on FinTech.** On February 3, 2017, President Trump signed Executive Order 13772 which outlined core principles for regulation of the United States financial system. The thrust of the order was to identify laws and regulations inconsistent with the smooth operation of the financial system and to seek to streamline and reform those laws and regulations. The Department of the Treasury, tasked with this endeavor, has issued reports covering capital markets and asset management. In July 2018 it issued its report related to nonbank financial and FinTech companies generally supportive of establishing a more flexible regulatory framework that promotes innovation. This Report is more fully discussed in the “Recent Developments” section.

#### 4. *Consumer Financial Protection Bureau.*

The last several months have brought many changes to the CFPB. The most significant actions that may impact marketplace lending programs are discussed below and in the “*Recent Developments*” section.

***Arbitration Rule Thwarted.*** After years of study, receiving comments and holding hearings, on July 10, 2017, the CFPB promulgated its Arbitration Agreements Rule (the “*Arbitration Rule*”), which prohibited the inclusion of class action waivers in arbitration clauses in agreements for consumer financial products and services and imposed related disclosure and reporting requirements.<sup>113</sup> Compliance with the Arbitration Rule would have been required by March 19, 2018. However, a joint resolution was passed by both houses of Congress overturning the Arbitration Rule pursuant to the Congressional Review Act.<sup>114</sup> On November 1, 2017, President Trump signed the joint resolution, effectively nullifying the Arbitration Rule and preventing the CFPB from issuing any similar rule in the future. Many lenders, including marketplace loan programs, utilize arbitration agreements or clauses in their loan agreements, and this action has been viewed as a victory that will allow these lenders to retain the ability to use and enforce arbitration agreements and potentially avoid class action litigation.<sup>115</sup>

***Project Catalyst Issues First No-Action Letter.*** On September 14, 2017, the CFPB issued its first “no-action” letter to a marketplace lender.<sup>116</sup> The letter was part of the CFPB’s Project Catalyst, which reviews requests from companies seeking to develop consumer-friendly innovations or products in areas where there is regulatory uncertainty. The marketplace lender who requested the letter was using alternative data such as education and employment history in its credit underwriting and pricing decision models, and sought the CFPB’s agreement that it would not take supervisory or enforcement action under the Equal Credit Opportunity Act in connection with the marketplace lender’s use of such data.<sup>117</sup> The CFPB agreed, recognizing that the use of alternative data could potentially make credit more accessible and affordable to some segments of the population. The CFPB did, however, require the marketplace lender to agree to ongoing reporting to the CFPB concerning its practices to allow the Bureau to understand the impact of alternative data on credit decision-making and to mitigate risk to

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<sup>113</sup> Prior to issuing the Arbitration Rule, the CFPB conducted an arbitration study and published a lengthy report of its findings in March 2015. Then on May 5, 2016 the CFPB issued its proposed arbitration rule for public notice and comment. The CFPB received nearly 13,000 comments on the proposed rule, with one of the main criticisms being that the proposed rule was not justified based on the CFPB’s own arbitration study.

<sup>114</sup> The vote in the United States Senate was 50-50 for and against disapproval, requiring Vice President Pence to cast the tie-breaking vote for disapproval.

<sup>115</sup> The new Democratic majority in the House of Representatives in the current Congress has indicated that it will introduce legislation to prohibit mandatory arbitration agreements in consumer financial products and services.

<sup>116</sup> The letter was issued to Upstart Network, Inc. on September 14, 2017. The letter is available at: [http://files.consumerfinance.gov/f/documents/201709\\_cfpb\\_upstart-no-action-letter.pdf](http://files.consumerfinance.gov/f/documents/201709_cfpb_upstart-no-action-letter.pdf).

<sup>117</sup> The use of alternative data in credit underwriting is discussed further below under “*Consumer Protection Laws—Fair Lending and Related Laws.*”

consumers.<sup>118</sup> We note that the no-action letter is specific to the facts and circumstances of this particular company and should not be viewed as permission to utilize alternative data in other lending models without an appropriate evaluation of fair lending risks or a similar determination being made by the CFPB. This no-action letter nonetheless shows the willingness of the CFPB to consider emerging technologies in a manner favorable to their development while providing a degree of regulatory certainty for technological innovations in the the financial services industry. It also opens the door to the further consideration of machine learning capabilities in a regulatory context.<sup>119</sup>

***PHH and Constitutional Challenges to the CFPB Structure—2016 Decision.*** The much-anticipated decision in *PHH Corp. v. Consumer Financial Protection Bureau* was handed down by the U.S. Court of Appeals for the D.C. Circuit, *en banc*, on January 31, 2018. This case originated in 2014 with an administrative enforcement action brought by the CFPB against PHH, a New Jersey-based mortgage lender, alleging violations of the Real Estate Settlement Procedures Act (“RESPA”). The CFPB alleged that despite relying on prior regulatory guidance, which was widespread industry practice, PHH violated Section 8 of RESPA by referring customers to mortgage insurers, who in turn bought reinsurance from one of PHH’s affiliates. In the initial administrative enforcement action, the CFPB imposed a \$6.4 million penalty for PHH’s RESPA violations. PHH appealed the decision to the CFPB’s director, Richard Cordray, who increased the penalty to \$109 million (primarily related to extending relief beyond RESPA’s statute of limitations period). PHH then appealed directly to the Court of Appeals for the D.C. Circuit.

The court’s 2016 decision<sup>120</sup> analyzed three questions and ruled against the CFPB on each one: (1) whether the CFPB’s structure is constitutional, (2) whether the CFPB properly applied RESPA in finding a violation, and (3) whether the statute of limitations in RESPA applies in administrative actions as well as court proceedings. As expected, following the court’s decision the CFPB petitioned for a rehearing *en banc* by the full D.C. Circuit and the court granted the Bureau’s request, effectively vacating its 2016 decision.

***CFPB Structure Found Constitutional by Appeals Court.*** The decision in *PHH Corporation v. Consumer Financial Protection Bureau* was issued on January 31, 2018,<sup>121</sup> almost a year after the CFPB petitioned for a rehearing by the Court of Appeals for the D.C. Circuit, *en banc*. The court issued a 250-page opinion finding that the single-director structure of the CFPB was constitutional and that its director could only

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<sup>118</sup> The legal concern is that use of alternative data, newly-derived algorithms and automated machine decision making can have the effect of circumventing fair lending laws and unintentionally result in discrimination against persons protected by the ECOA and other similar laws. The data which the CFPB will receive from the marketplace lender in connection with the no-action letter will help the Bureau evaluate whether new modeling techniques potentially result in discrimination.

<sup>119</sup> As described in the “Recent Developments” section, the CFPB is revamping its processes to encourage further experimentation with innovation in disclosures and other matters. The U.S. Treasury Report of July 2018 supports clarifying and establishing a federal regulatory approach to the use of alternative data.

<sup>120</sup> *PHH Corp. v. Consumer Fin. Prot. Bureau*, 839 F.3d 1 (D.C. Cir. 2016).

<sup>121</sup> *PHH Corporation v. Consumer Financial Protection Bureau*, 881 F.3d 75 (D.C. Cir. 2018).

be fired for inefficiency, neglect of duty or malfeasance in office, and not at the will of the President of the United States. This, the court stated, allowed the CFPB to remain one step removed from political winds and the President's will. The court also threw out the \$109 million penalty previously awarded against PHH, returning the case to the CFPB for further consideration. The court found that this penalty, which was calculated based on the CFPB's retroactive application of certain federal laws beyond the statute of limitations, violated PHH's due process rights—thus confirming that the CFPB is subject to the statutes of limitation prescribed by federal law in its enforcement actions.<sup>122</sup> The CFPB dismissed the case against PHH. However, there are other lawsuits pending that challenge the constitutionality of the CFPB which could require the U.S. Supreme Court to ultimately decide the issue.<sup>123</sup>

***Leadership Changes at CFPB Brings Lawsuit, New Focus.*** On November 24, 2017, CFPB Director Richard Cordray resigned to run for Governor of Ohio, an election he subsequently lost. Cordray had aggressively led the CFPB as its first director and critics assailed him for engaging in “regulation by enforcement,” i.e., using enforcement actions as a means to circumvent the administrative process of issuing regulations. Cordray left on a contentious note, appointing Deputy Director Leandra English as acting director of the agency. Meanwhile, President Trump named his own interim director of the agency, Mick Mulvaney, who was serving as Director of the Office of Management and Budget and had been a harsh critic of the CFPB.

This jockeying for position led to English filing a lawsuit asking that she be declared the CFPB Director pursuant to the provision of the Dodd-Frank Act that states that the Deputy Director serves as Acting Director in the absence or unavailability of the Director.<sup>124</sup> The Trump administration defended the lawsuit, arguing that the President has the right to fill executive positions, including the CFPB directorship, under the Federal Vacancies Reform Act.<sup>125</sup> On November 28, 2017, the court denied English's request for a temporary restraining order to keep Mulvaney from exercising power as CFPB Director. The court also denied English's request for a preliminary injunction, which was appealed to the Court of Appeals for the D.C. Circuit. The case was dismissed after a new director of the CFPB, Kathy Kraninger, was confirmed by the U.S. Senate.<sup>126</sup>

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<sup>122</sup> By law, the CFPB cannot appeal the decision, and PHH did not appeal the decision. The CFPB subsequently dismissed the action.

<sup>123</sup> In a case pending at the Second Circuit Court of Appeals, the structure of the CFPB was found to be unconstitutional by the lower court. It is on appeal to the Second Circuit. *CFPB v. RD Legal Funding LLC*, Case No. 18-2743 (2nd Cir.) Other cases have raised this issue in the Fifth (*CFPB v. All American Check Cashing*, Case No. 18-60302) and Ninth Circuits (*CFPB v. Seila Law*, Case No. 17-56324), and it is included as an issue to be decided in the *CFPB v. CashCall* case in California discussed in the “Recent Developments” section and below. The constitutional issue is being raised by defendants in enforcement actions.

<sup>124</sup> *English v. Trump and Mulvaney*, C.A. No. 1:17-cv-02534 (D.D.C 2017).

<sup>125</sup> In addition, a federal credit union sought to block Mulvaney's appointment by filing suit in federal court in New York. *Lower East Side People's Federal Credit Union v. Trump, et al.*, No. 17-09536 (S.D.N.Y. Feb. 1, 2018). The court dismissed this case because it found that the credit union lacked authority to bring it.

<sup>126</sup> Kraninger was confirmed on December 6, 2018. Legislation had been introduced during the prior Congress in the U.S. House of Representatives with bipartisan support to put the CFPB under a five member commission rather than a single

In the interim, Acting Director Mulvaney effected a significant restructuring of the CFPB. In the CFPB's semi-annual report to Congress issued April 2, 2018, Mulvaney recommended statutory changes to the Dodd-Frank Act including legislative approval of major CFPB rules. He indicated that the enforcement activities of the Bureau will be curtailed, leaving enforcement to the federal banking agencies or the states, while rulemaking will take a higher priority.<sup>127</sup> The CFPB's fair lending office has been relegated to an administrative function rather than an enforcement one.<sup>128</sup> Under Mulvaney, the CFPB issued a series of Requests for Information ("RFIs") seeking industry and public input on a variety of subjects including its civil investigative demands, consumer complaint portal and how to improve the rulemaking process.<sup>129</sup> The CFPB has yet to promulgate regulations with respect to data gathering for business lending under Section 1071 of the Dodd-Frank Act, as discussed further below under "*Consumer Protection Laws—Fair Lending and Related Laws*," which may be less of a priority for the CFPB under its current leadership.

***Enforcement Action Against Lead Aggregator.*** On September 6, 2017, the CFPB issued a Consent Order against an online lead aggregator imposing a \$100,000 penalty for selling leads to lenders where the resulting loan was either made by an unlicensed lender, imposed interest rates in excess of applicable usury limits, or was void.<sup>130</sup> The CFPB cited these activities as an abusive practice and required the lead aggregator to engage in efforts to ensure that its leads do not result in void loans and monitor the lenders to whom it sells leads and obtain copies of their lending licenses. The use of lead generation and aggregation is coming under increasing regulatory scrutiny, including with respect to state licensing, unfair or deceptive practices claims, and sharing of consumer information.

***CFPB on Marketplace Lenders.*** On March 7, 2016, the Consumer Financial Protection Bureau announced that it was accepting consumer complaints about online marketplace lenders, giving consumers "a greater voice in these markets and a place to turn to when they encounter problems." The CFPB also issued a bulletin to provide consumers with information on marketplace lending, including guidance on shopping for a loan. Significantly, the CFPB noted in its bulletin that while

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director. H.R. 5266—Financial Product Safety Commission Act of 2018. However, it was not acted upon and died with the end of the 115th Congress in January 2019.

<sup>127</sup> In a January 24, 2018 staff memo, Mulvaney stated: "On regulation, it seems that the people we regulate should have the right to know what the rules are before being charged with breaking them. This means more formal rule making and less regulation by enforcement."

<sup>128</sup> The Office of Fair Lending was created by Section 1013 of the Dodd-Frank Act. Mulvaney's action stripped the Office of its supervisory responsibilities and replaced them with advocacy and education efforts.

<sup>129</sup> These RFIs are characterized on the CFPB website as "Calls for Evidence" that the CFPB is fulfilling its proper function. See <https://www.consumerfinance.gov/policy-compliance/notice-opportunities-comment/open-notices/call-for-evidence/>.

<sup>130</sup> The full text of the CFPB's consent order entered against Zero Parallel, LLC is available at: [http://files.consumerfinance.gov/f/documents/201709\\_cfpb\\_zero-parallel-llc\\_consent-order.pdf](http://files.consumerfinance.gov/f/documents/201709_cfpb_zero-parallel-llc_consent-order.pdf). In a related action, the CFPB proposed to fine the owner of Zero Parallel \$250,000 for similar illegal actions. See [https://files.consumerfinance.gov/f/documents/201709\\_cfpb\\_gasparyan\\_proposed-stipulated-final-judgment.pdf](https://files.consumerfinance.gov/f/documents/201709_cfpb_gasparyan_proposed-stipulated-final-judgment.pdf).

marketplace lending is relatively new, marketplace lenders are subject to the same state and federal laws as other lenders.

Although consumers have been able to file complaints regarding marketplace lenders with the CFPB since July 2011, it seems the CFPB issued this press release to raise awareness in the industry and among consumers that the Bureau might seek to expand its oversight in this area like the federal banking regulators. The CFPB has used complaint data to identify areas that require additional regulatory guidance and rulemaking and to direct its investigations and enforcement actions. Marketplace lending has not generated an inordinate amount of complaints. However, with the change in leadership at the agency, it seems likely that the CFPB may be less focused on using complaint data in this manner, particularly since the CFPB issued Requests for Information on the efficiency and effectiveness of its consumer complaint reporting and enforcement processes.<sup>131</sup>

#### 5. *FTC FinTech Forum.*

In June 2016, the Federal Trade Commission (“FTC”) held a FinTech Forum addressing marketplace lending.<sup>132</sup> The forum focused on consumers and consumer protection. The FTC’s Director of Consumer Protection, who has since left the agency, identified several areas that concern the FTC, including preauthorized transfers to repay loans, transparency of loan terms, privacy and data security, and potential discrimination arising from using nontraditional data to make credit decisions.

#### 6. *Federal Reserve.*

The Federal Reserve has recently conducted studies and issued reports that are supportive of marketplace lending.<sup>133</sup> In March 2018, the Federal Reserve Bank of Philadelphia published a research study using live lending data from LendingClub, titled “Do Fintech Lenders Penetrate Areas that are Underserved by Traditional Banks?”<sup>134</sup> The study concluded that FinTech lending has expanded consumer access to credit, penetrated areas that have lost traditional bank branches, and allowed consumers to obtain credit at lower rates than through a bank-issued credit card. In addition, the paper found that the use of alternative credit data has enhanced financial inclusion.

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<sup>131</sup> *Request for Information Regarding Bureau Public Reporting Practices of Consumer Complaint Information*, 83 Fed. Reg. 9499 (Mar. 6, 2018); *Request for Information Regarding Bureau Enforcement Processes*, 83 Fed. Reg. 5999 (Feb. 12, 2018).

<sup>132</sup> This was the first such forum. A second forum was held in October 2016 on crowdfunding and peer-to-peer payments and a third was held in March 2017 on blockchain technology and artificial intelligence.

<sup>133</sup> We note, however, that in November 2017 the Federal Reserve Bank of Cleveland published a study of peer-to-peer lending that claimed the perceived benefits of that type of lending were overrated and that it resembled predatory lending. The study was widely discredited as using flawed methodology and within days of its posting, the Reserve Bank removed the study from its website.

<sup>134</sup> Jagtiani, Julapa and Lemieux, Catherine: “Do FinTech Lenders Penetrate Areas that are Underserved by Traditional Banks?” Fed. Res. Bank of Philadelphia (3/18/18).

A staff report issued in February 2018 by the Federal Reserve Bank of New York concluded that the technological innovations implemented by FinTech mortgage lenders have been beneficial to consumers and have improved the efficiency of the mortgage lending market.<sup>135</sup> This study looked at mortgage lending in particular, finding that FinTech mortgage lenders provided more timely processing and quicker responses to fluctuations in demand as compared to traditional mortgage lenders.

#### **7. U.S. Congress FinTech Hearing.**

On January 30, 2018, the Financial Institutions and Consumer Credit Subcommittee of the United States House of Representatives held a hearing entitled “Examining Opportunities and Challenges in the Financial Technology (“FinTech”) Marketplace.”<sup>136</sup> Five witnesses submitted written testimony and responded to questions asked by members of Congress. Industry as well as consumer proponents participated in the proceeding. While some questions were raised, there was positive commentary on FinTech and bank partnerships as well as the benefits of innovation and the work being done to enhance consumer protection and regulatory compliance.

#### **8. Basel Committee on Banking Supervision.**

On February 19, 2018, the Basel Committee on Banking Supervision released a report entitled “Sound Practices: Implications of Fintech Developments for Banks and Bank Supervisors.”<sup>137</sup> This report focused on how technology-driven innovation may affect the banking industry as well as the activities of banking supervisors. The study suggests that banks will find it increasingly difficult to maintain their current operating models given technological change and customer expectations and will undertake more third-party relationships and outsourcing to unaffiliated service providers. In addition, FinTech has the potential to lower barriers of entry to financial services, and elevating the role of data will drive the emergence of new business models, presenting both opportunities and risks for banks and the banking system. Likely issues cited in the report include safeguarding data, privacy, cybersecurity, consumer protection, competition and AML compliance. As traditional banking business models change, the report concludes that bank supervisors will need to improve supervisory efficiency and effectiveness, including through the use of technology. The report also stresses the need for bank supervisors to promote interaction with each other and with innovative financial participants.

#### **9. March 2018 GAO Study Released on FinTech.**

On March 22, 2018, the Government Accountability Office (“GAO”) issued a report titled “Financial Technology: Additional Steps by Regulators Could Better Protect Consumers and Aid Regulatory

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<sup>135</sup> Fuster, Andreas; Plosser, Matthew; Schnabl, Philipp; and Vickery, James, “*The Role of Technology in Mortgage Lending*” Fed. Res. Bank of New York Staff Report No. 836, February 2018.

<sup>136</sup> Committee Memorandum available at: [https://financialservices.house.gov/uploadedfiles/013018\\_fi\\_memo.pdf](https://financialservices.house.gov/uploadedfiles/013018_fi_memo.pdf).

<sup>137</sup> The report is available at: <https://www.bis.org/bcbs/publ/d431.pdf>.

Oversight.”<sup>138</sup> The report states that FinTech provides benefits to consumers and poses similar risks to traditional products. It further states that while the extent to which FinTech is subject to federal oversight varies, consumer harm appears to be limited. The GAO acknowledges that the U.S. regulatory structure poses challenges to FinTech firms and that such firms have expressed that it can be difficult for them to identify the applicable laws and ascertain how their activities will be regulated. The report also emphasizes that complying with fragmented state requirements is costly and time consuming. The report recommends that federal regulators engage in more collaboration and coordination, develop offices of innovation (to the extent they have not already done so) and engage in knowledge building initiatives including consideration of what is being done in other countries such as regulatory sandboxes. These recommendations are consistent with the GAO’s framework calling for regulatory systems to be flexible and forward-looking, which will help regulators adapt to market innovations.

## II. LENDING LAWS, LICENSING AND RELATED LITIGATION

The extension of consumer credit in the United States is heavily regulated at both the federal and state levels.<sup>139</sup> A marketplace lender that conducts a nationwide business therefore may be subject to regulation under various laws and, potentially, by multiple jurisdictions. Generally, an Internet-based consumer lending program will utilize a Funding Bank because a lender who makes loans directly and does not use a Funding Bank will need to obtain applicable state lending licenses. The Funding Bank will be subject to both federal and state regulation as well, but may in certain instances be able to rely upon federal law to preempt state laws that would otherwise apply. As discussed further below, federal preemption is particularly important to the Funding Bank in connection with state usury

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<sup>138</sup> GAO-18-254 (March 22, 2018). The 132 page report was issued as a “Response to Congressional Requestors” and addresses FinTech payment, lending, wealth management and other products. Many of the report’s recommendations deal with the issue of account aggregation data.

<sup>139</sup> The extension of commercial credit, while less regulated than consumer credit, is still subject to some federal and state laws including usury limitations and licensing requirements in some states, most notably in California, and in New York for loans less than \$50,000 to sole proprietors. Several other states also have licensing requirements that might be applicable to some forms of business lending. Business lenders also rely on choice of law provisions in their loan agreements. Such provisions are generally enforceable in commercial transactions so long as the state whose laws are stated to apply has a reasonable relationship to the transaction. Governing law provisions may not supersede licensing and usury laws in some states. Also, some state laws limit how business borrowers can complain about alleged usury violations. *See, e.g. Klein v. OnDeck Capital, Inc.*, No. 62996-2014 (S. Ct. N.Y. 2015). OnDeck, an online business marketplace lender made a business loan at an almost 37% interest rate to a New York corporate borrower based on Virginia law where OnDeck is located. The Court upheld OnDeck’s position that Virginia and not New York law governed the agreement and that the loan was not usurious under the law of Virginia. The court also stated that even if New York law applied, corporations only have a defense to payment based on usury and cannot bring an action for usury offensively. The borrower alleged that the loan was for consumer purposes, but the court found otherwise based on the loan documents stating that the loan was for business purposes.

laws.<sup>140</sup> Lenders who facilitate loans made through Funding Banks will typically purchase each loan from the Funding Bank at the time or soon after the loan is made.<sup>141</sup>

Non-bank lenders making loans directly to borrowers will not be subject to direct supervision by federal banking or financial institution prudential regulators such as the FDIC, the OCC or the Federal Reserve Board.<sup>142</sup> However, they may be subject to state licensing and regulation as well as oversight and regulation by the FTC and/or the CFPB. Each Funding Bank involved in an Internet lending program will remain obligated to comply with applicable laws in originating and funding the Borrower Loans. Marketplace lenders working with Funding Banks are also subject to supervision and oversight by the Funding Bank's regulators.<sup>143</sup>

**Worth Remembering:** Due to the amount of attention that marketplace lending is receiving from state regulators and the federal banking regulators and continued litigation challenging the structure whereby a Funding Bank is used, the use of Funding Banks creates some degree of uncertainty and potential regulatory and litigation risk and requires that particular attention be paid to the structuring of the program.

A full discussion of the financial institution regulations that will affect Internet lending businesses and the extent to which specific regulations will apply to specific persons is beyond the scope of this white paper. In this Part II, we briefly discuss some of the main banking or lending regulations, state licensing requirements, and consumer protection laws that may apply to the marketplace lender and/or the Funding Bank as well as relevant litigation in this space.<sup>144</sup>

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140 It cannot be assumed that federal laws governing consumer lending activities will preempt all state laws that impose additional or different requirements. The analysis of the application of the federal preemption doctrine to any particular market participant, transaction, or contract must be fact-specific and careful attention must be paid to the identities of the parties involved, the terms of the applicable statutes, and any relevant regulatory or judicial interpretations.

141 Other purchase arrangements can also occur. Sometimes loans may be sold to investors or into trusts, for example.

142 We note that there is a difference between being subject to direct supervision and examination by regulatory authorities and the need to comply with the applicable regulations of those authorities.

143 Marketplace lenders that provide services to banks may be subject to examination and regulation by federal banking regulators under the Bank Service Company Act (12 U.S.C. § 1867(c)).

144 This survey is not intended to (and does not) identify all such laws and regulations that will be applicable to the lender and/or the Funding Bank in connection with their operations nor does it discuss all of the obligations that will be imposed by those laws and regulations that are identified. Prospective marketplace lenders are advised to consult with counsel for a more complete statement of the applicable requirements.

## A. Usury Laws

Most states limit by statute the maximum rate of interest that lenders may charge on consumer loans.<sup>145</sup> The maximum permitted interest rate can vary substantially between states.<sup>146</sup> Some states impose a fixed maximum rate of interest while others link the maximum rate to a floating rate index. Absent an exemption, these laws would be binding on the lender making the Borrower Loans (whether making loans directly under a state license or utilizing a Funding Bank) and would have to be observed in setting the interest rate for each loan. Given the nature of an Internet platform, it could be difficult for a marketplace lender conducting business in multiple states to set different maximum rates for the Borrower Loans based on the borrower's state of residence. Doing so would prevent the lender from conducting its business on a uniform basis across jurisdictions. State laws may also prohibit or limit the amount of fees that can be charged to consumers for delinquency or returned payments, presenting another compliance burden for lenders who conduct a multistate business. Violations of usury laws can result in various penalties from state to state, including voiding the entire loan in some states.<sup>147</sup>

In addition, the lender may want the ability to set interest rates that exceed the maximum rate that the applicable state usury laws would permit. One of the stated goals of Internet-based lending is to provide broader access to credit to certain borrowers who are unable to obtain bank loans. Although the lender may require each borrower to have a specified minimum credit score (and may set the minimum score at a relatively high level), many of these borrowers—despite having acceptable credit scores—may have other attributes indicating that they are less creditworthy than their credit scores, considered alone, would suggest. In order to make loans to these individuals, the lender will need to set interest rates high enough to offset expected losses.

A potential solution to these difficulties is provided by the so-called “rate exportation rules” that may be utilized by FDIC-insured financial institutions. These are a set of federal laws, interpretative letters, and court decisions that remove most state usury law restrictions for the benefit of certain categories of lenders. The Depository Institutions Deregulation and Monetary Control Act of 1980 (“DIDA”)

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145 State usury laws also may limit or restrict other loan terms and the duration of loans. Usury is a complicated subject and can be affected by the type of entity making the loan, the type of loan or borrower, or the amount of the loan.

146 The application of state usury laws to commercial loans also varies from state to state but, as a general matter, state usury laws have less application to commercial loans than to consumer loans, as commercial rates are often deregulated. Lenders may also use choice-of-law provisions in a commercial lending context, particularly in states where no licensing requirements exist as the basis for usury purposes. Choice of law is often given effect in a commercial lending context where the jurisdiction has a reasonable relationship to the parties or the transaction.

147 For consumer loans, it should be noted that a governing law provision may not be upheld with respect to questions of usury. For example, a consumer loan agreement specifying that the loan will be governed by the laws of State X for a loan made to a consumer in another state will not generally allow the usury laws of State X to supersede the usury laws of the borrower's state. State regulators take the position that consumer loans made over the Internet to residents in their state must follow the usury and licensing requirements of that state. In Minnesota, a court decision upheld an \$8 million judgment against an online lender located in Delaware making loans to Minnesota residents over the Internet using a Delaware choice-of-law provision. The court found that the lender had to comply with both Minnesota licensing laws and its interest rate restrictions. See *a State ex rel. Swanson v. Integrity Advance, LLC*, 846 N.W.2d 435, 444 (Minn. Ct. App. 2014), *aff'd sub nom. Swanson v. Integrity Advance, LLC*, 870 N.W.2d 90 (Minn. 2015).

permits federally insured state-chartered banks to charge loan interest at rates not exceeding the higher of (i) the maximum rate allowed by the state in which the loan is made, and (ii) the maximum rate allowed by the bank's home state.<sup>148</sup> For example, the Funding Bank engaged by both LendingClub and Prosper is WebBank, an FDIC-insured, Utah-chartered industrial bank. Utah law does not currently limit the interest rates that lenders may charge on loans that are subject to a written agreement. As a result, WebBank relies on DIDA to fund Borrower Loans for both LendingClub and Prosper at interest rates that are not limited by the state usury laws of other states.<sup>149</sup> It should be noted, however, that DIDA permits a state to opt out of the federal rate exportation rules insofar as such rules apply for the benefit of state-chartered institutions.<sup>150</sup>

**Relevant Litigation—*Madden v. Midland Funding, LLC*.** The May 2015 decision of the Second Circuit in *Madden v. Midland Funding, LLC*<sup>151</sup> sent shockwaves through the marketplace lending industry, and nearly three years later many of the questions generated by this case remain unanswered. Midland Funding's request for rehearing by the full Second Circuit and subsequent petition for review by the U.S. Supreme Court were both denied, and the February 2017 remand decision by the district court seems to have further muddied the waters.

**Summary.** In *Madden*, the Second Circuit held that a non-bank assignee of loans originated by a national bank was not entitled to the federal preemption afforded to the bank under the National Bank Act ("NBA") with respect to claims of usury. Under the NBA, national banks can make loans at the rates

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148 National banks rely on 12 U.S.C. § 85 in order to export the interest rate allowed by the laws of the state, territory, or district where such bank is located. Until the passage of the Dodd-Frank Act, an operating subsidiary of a national bank could also utilize rate exportation in reliance on OCC Chief Counsel interpretative opinions. However, those subsidiaries may no longer take advantage of such federal preemption of state law. The corresponding provision applicable to state banks is Section 27 of the Federal Deposit Insurance Act, 12 U.S.C. § 1831d. The provisions are nearly identical. The United States Supreme Court has upheld the rate exportation theory in a case involving a national bank. See, *Marquette Nat'l Bank of Minneapolis v. First of Omaha Service Corp.*, 439 U.S. 299 (1978). *Accord*, as to state banks, *Greenwood Trust Co. v. Massachusetts*, 971 F.2d 818 (1st Cir. 1992), *cert. denied*, 506 U.S. 1052(1993). Codified for national banks at 12 C.F.R. 7.4001(a) and for state banks in FDIC General Counsel Opinion No. 10.

149 Prospective marketplace lenders evaluating potential Funding Banks should be aware of the potential application of the so-called "most favored lender" doctrine. This doctrine, if applicable, permits a depository institution to fix as its interest rate ceiling for any category of loans the highest interest rate that the relevant state permits to any lender for such category. As an example, if a particular state permits finance companies to make consumer loans at a higher interest rate than it permits to banks, a national or state bank making loans in that state could rely upon the most favored lender doctrine to make loans at the higher rate permitted to finance companies. The so-called state "parity" laws also may be of use in Internet lending. These laws, where available and in relevant part, may permit banks chartered in a particular state to extend credit in that state on the same terms as are permitted to national banks. The most favored lender doctrine and the state parity laws, when applied in conjunction with the rate exportation rules, may permit Funding Banks to fix the interest rates for Borrower Loans at rates significantly higher than the usury laws would otherwise permit. In any case, reliance on the most favored lender doctrine and state parity laws should not be necessary where the Funding Bank is FDIC-insured and located in a state that does not cap the interest rate that banks may charge on consumer loans.

150 Loans made by state-chartered institutions in states that opt out of the federal rate exportation rules will remain subject to the state's usury laws. At this time, only Iowa and Puerto Rico have opted out of the federal rate exportation rules for state-chartered depositories. An election by any state to opt out under DIDA will be effective as to loans "made" in that state, although it may not be entirely clear in which state the loan should be deemed to be "made" when the borrower and lender are located in different states. Proper structuring can influence where the loan is "made."

151 786 F.3d 246 (2d Cir. 2015), *cert. denied*, 136 S. Ct. 2505 (2016).

and fees allowed in the state where the bank is located and “export” them nationwide without being limited by the usury laws of individual states where the bank’s borrowers may reside. The court held that preemption of state usury laws does not apply to non-bank loan purchasers where the bank has no continuing interest in the transaction unless the state law would “significantly interfere” with the bank’s exercise of its banking powers under the NBA. The court found that failing to extend federal preemption to non-bank loan purchasers would have no such impact on the bank. As a result, the court ruled that Midland, the debt collector and non-bank purchaser of a credit card account issued by a national bank to a New York resident, was required to adhere to New York usury limits.

**Key Consideration:** *Madden* did not involve a marketplace lender or loan, but if the *Madden* holding were applied to a marketplace lender as a non-bank purchaser of an existing bank loan, the marketplace lender might be unable to enforce the loans in accordance with their terms or may be subject to claims of damages for charging excess interest.<sup>152</sup> *Madden* therefore has raised significant questions for the marketplace lending industry.

**Procedural History.** In 2005, Saliha Madden, a New York resident, opened a credit card account with a national bank which was governed by Delaware law. Madden defaulted on the account and after it was charged off by the bank, it was sold to Midland Funding, a debt collector. A Midland affiliate sent Madden a letter calculating interest at 27 percent per annum. Madden filed a class action lawsuit in the Southern District of New York alleging that this rate violated New York’s usury limitations. Midland constructed its defense on the principles of federal preemption based on the bank’s contract and its ability to charge this rate under the NBA. Since the loans purchased were lawfully made, Midland argued that as an assignee of the loan, it was exempt from compliance with the New York usury law. The federal district court agreed with Midland, and Madden appealed to the Second Circuit.

The Second Circuit reversed the decision of the lower court, finding that preemption worked for the benefit of non-banks only when application of state law would significantly interfere with the bank’s exercise of its powers under the NBA. The Second Circuit also remanded the case to the lower court to determine if New York or Delaware law governed the contractual relationship of the parties. The account agreement specified Delaware law as the governing law, and Delaware authorizes creditors to charge any interest rate approved by the borrower in a written contract. Accordingly, the 27 percent rate that Midland sought to enforce would arguably be valid if Delaware law controlled.

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152 Depending on the state, if a marketplace lender were found to have breached the applicable usury cap, it could render the related loans unenforceable in whole or in part and/or subject the lender to monetary or other regulatory penalties.

**Scope of Decision:** Although *Madden* is binding only in the states included in the Second Circuit (Connecticut, New York, and Vermont), there remains the risk that other jurisdictions will adopt the Second Circuit’s analysis.<sup>153</sup> Some marketplace lenders and their Funding Banks have revised their business relationship to address *Madden* concerns.<sup>154</sup> In addition, some purchases and/or securitizations of marketplace loans have limited eligibility criteria to loans that comply with applicable usury rates in the states located in the Second Circuit.

*Requests for Review.* Following the Second Circuit’s decision, Midland requested that the entire Second Circuit Court of Appeals rehear the case, but this petition was denied. In November 2015, Midland asked the U.S. Supreme Court to grant certiorari to hear the case. In its brief to the Supreme Court, Midland argued that the Second Circuit’s decision violates the long-standing doctrine that loans are “valid when made” and do not change character or become invalid when they are sold or transferred.<sup>155</sup> In March 2016, the Supreme Court requested the views of the Solicitor General of the United States on whether the Supreme Court should hear the case.<sup>156</sup>

In its brief to the Supreme Court, the Solicitor General strongly criticized the Second Circuit’s analysis and called its holding incorrect.<sup>157</sup> The Solicitor General said that the “valid when made” doctrine was

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153 There are many good legal arguments why *Madden* is either distinguishable from marketplace lending programs or altogether wrong. For one, the debt involved in *Madden* was charged-off, defaulted debt. Also, failing to extend preemption to non-bank purchasers could prevent the bank from selling certain loans, or at least reduce the price at which the loans can be sold, and thereby significantly interferes with a bank’s powers to make and sell loans. The *Madden* court also failed to apply long-standing precedents from other courts holding that an assignee steps into the shoes of the assignor and is entitled to enforce the loan upon the same terms as the assignor. These cases are consistent with the long-standing common-law principle that a loan which is valid when made does not become invalid when transferred. Since the *Madden* decision, some marketplace lenders have restructured their loan marketing programs to provide the Funding Bank with both a continuing relationship with the borrowers and a continuing financial interest in loan performance, including restructured compensation arrangements under which the bank’s compensation is partly based upon the payments actually made by the borrowers over the life of the loans.

154 For example, in February 2016, WebBank, the bank which is the lender for loans solicited through the LendingClub website, revised its borrower account agreement to specify that the bank maintains the account relationship with the borrower for the life of each and all LendingClub loans. In addition, WebBank and LendingClub modified their compensation arrangements so that WebBank’s compensation is no longer front-loaded as a fixed origination fee calculated against the principal amount of each loan but instead is tied in part to the performance over time of the loans originated through the LendingClub platform. The revised borrower account agreement and compensation arrangements are intended to provide WebBank with an ongoing interest in each loan sufficient to protect the funding arrangements from a *Madden*-type challenge. Other marketplace lenders have engaged in similar restructuring. There have been no cases decided interpreting the validity of these arrangements.

155 See *FDIC v. Lattimore Land Corp.*, 656 F.2d 139 (5th Cir. 1981) (the identity of the original creditor is dispositive and the “non-usurious character of a note should not change when the note changes hands”); *Olvera v. Blitt & Gaines, P.C.*, 431 F.3d 285 (7th Cir. 2005) (assignments allow assignees to collect interest at the rate allowed to the originating creditor); *Munoz v. Pipestone Fin., LLC*, 513 F. Supp. 2d 1076 (D. Minn. 2007) (state law claims for excessive interest charged by an assignee of a loan are preempted).

156 This request shows that the Supreme Court was interested in the potential effect of this case on the financial services industry and capital markets.

157 Brief Amicus Curiae of United States at p. 6, *Midland Funding, LLC v. Madden*, 136 S. Ct. 2505, 195 L. Ed. 2d 839 (2016) (No. 15-610).

incorporated into Section 85 of the NBA, which provides banks with their preemptive powers. The brief also stated that the Second Circuit failed to consider the effect of its decision on the marketability of loans. The Solicitor General's brief is of particular significance because it was joined by the OCC, the federal regulator of national banks. However, the Solicitor General ultimately recommended that the Supreme Court *deny* certiorari for three reasons: (1) there was no circuit split on the question raised, (2) the parties did not present significant aspects of the preemption analysis to the lower courts, and (3) there was a possibility that Midland Funding could still prevail on remand.<sup>158</sup> In June 2016, after considering all of the briefing, the Supreme Court declined to hear the case.<sup>159</sup>

**Remand Decision.** On Monday, February 27, 2017, the U.S. District Court for the Southern District of New York issued its remand decision. The district court held that applying Delaware law per the account agreement would violate a fundamental public policy of New York—namely, its criminal usury statute, which limits interest to 25% per year.<sup>160</sup> Broadly interpreted, this decision could prevent the enforcement of choice of law provisions in credit agreements against New York consumers when the interest rate exceeds 25%, as is the case for many credit cards and other consumer loans.

The district court also found that although the New York criminal usury law does not provide a private right of action, Midland Funding's violation of the usury limit could serve as a predicate for Madden's Fair Debt Collection Practices Act ("FDCPA") and state unfair and deceptive acts and practices ("UDAP") claims, which the court allowed to proceed on a class basis. Ironically, the usury claims that were the focus of the Second Circuit's opinion were dismissed by the district court.

**Thoughts.** The district court's holding compounds the uncertainty created by the Second Circuit's decision in *Madden* by further undermining common law principles that are routinely relied upon by creditors and their assignees. While the Second Circuit's decision undercuts the doctrine that loans are "valid when made" and do not become invalid when they are assigned to a third party, the district court called into question the enforceability of a choice of law provision in a credit contract against New York consumers where the interest rate exceeds the state law usury limits. However, the court did not directly address what happens when federal preemption and state public policy conflict. How similar cases in the Second Circuit (New York, Vermont and Connecticut) will be decided remains to be seen. Interestingly, a New York district court found the *Madden* analysis not applicable in a case involving state law claims brought by a consumer against a non-bank service provider to a national bank.<sup>161</sup>

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158 *Id.*

159 *Midland Funding, LLC v. Madden*, 136 S. Ct. 2505, 195 L. Ed. 2d 839 (2016) (cert. denied). Interestingly, Madden's brief explicitly stated that this case is limited to the sale of defaulted debt and does not apply to marketplace lending.

160 Courts will not necessarily apply the governing law stated in a consumer loan agreement if doing so is viewed as contravening public policy in the borrower's state of residence. The *Madden* court noted that courts which have considered this issue under New York law in similar cases have reached differing results.

161 *See Edwards v. Macy's, Inc.*, 2016 U.S. Dist. LEXIS 31097 (S.D.N.Y. Mar. 9, 2016), where the court rejected a theory relying on *Madden* against a bank and its non-bank partner, finding that the non-bank partner was acting on behalf of the bank in

*Illinois Court Cites Madden*. In March 2017, an Illinois federal court denied a motion to dismiss state usury claims against a non-bank assignee of loans originated by a national bank on the basis of federal law preemption, determining that it was not clear which entity had made the loans.<sup>162</sup> In its decision, the court made the assertion in dicta (without any briefing) that *Madden* was the only appellate court decision addressing the issue of federal preemption as it applies to assignees.<sup>163</sup> Although it is not a finding on the merits of the *Madden* position taken with respect to assignees, this is at least one court outside the Second Circuit that has referenced the *Madden* decision approvingly and *Madden*-type claims will remain an area to watch. This case has subsequently settled on other grounds.

*Madden “Fix” Legislation*. Various proposals referred to as *Madden* “fix” legislation have been made to invalidate the Second Circuit’s decision in *Madden* and codify in federal statutes the “valid when made” doctrine that has served as court precedent for decades. The valid when made doctrine provides that a loan which is valid when originally made does not become invalid when it changes hands to an assignee. Specifically, the *Madden* “fix” legislation would invalidate the Second Circuit’s decision in *Madden* finding that a non-bank loan assignee cannot enforce the terms of a loan made by a bank where (i) the term to be enforced violates applicable state law, and (ii) the bank no longer has any interest in the loan.<sup>164</sup> The *Madden* “fix” was contained in the CHOICE Act,<sup>165</sup> which was passed by the U.S. House of Representatives on June 8, 2017 but stalled in the Senate. On February 14, 2018, the House of Representatives passed H.R. 3299,<sup>166</sup> a stand-alone bill that would codify the valid when made doctrine for loans made under various federal laws by regulated financial institutions. However, this bill died in the Senate, which never took a vote on the measure. While there was bipartisan support for the bill, consumer groups rallied in opposition claiming that this legislation would advance predatory payday lending. Therefore, uncertainty around the assignment of loans in the Second Circuit states of New York, Connecticut, and Vermont still remains.<sup>167</sup>

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carrying on the bank’s business in originating and servicing loans and that state law claims were therefore preempted. The case was appealed to the Second Circuit but has been voluntarily dismissed.

<sup>162</sup> See, *Euls v. Transworld Systems, Inc.*, 15 C 7755, 2017 WL 1178537 (N. D. Ill. Mar. 30, 2017). This case is in the process of settlement.

<sup>163</sup> This statement is incorrect, as many of the cases cited in the *Madden* litigation have addressed the issue of loan assignees being able to take assignment based on the terms of the original loan made by the assignor.

<sup>164</sup> There is some expectation that either the OCC or FDIC will issue regulatory guidance that would have the effect of overruling *Madden* to the extent that a court would give deference to the federal agency’s interpretation.

<sup>165</sup> H.R. 10, Financial CHOICE Act of 2017.

<sup>166</sup> H.R. 3299, Protecting Consumers’ Access to Credit Act of 2017.

<sup>167</sup> The *Madden* decision has had both practical and operational consequences for marketplace lending programs and the broader financial markets. Some marketplace lenders have ceased to do business in the three affected states, while others only make loans in those states up to the applicable state’s usury limit. Investors have shunned and securitizations have excluded loans from those states in an effort to reduce risk, and studies have indicated that *Madden* has to some extent limited access to credit in the Second Circuit region. See Honigsberg, Colleen, Jackson, Robert J., and Squire, Richard, *How Does Legal Enforceability Affect Consumer Lending? Evidence from a Natural Experiment*, J. OF L. AND ECON. (August 2, 2017), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2780215](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2780215).

## B. Issues Related to the Funding Bank Structure

As described above, it is often desirable for marketplace lenders to utilize the services of a Funding Bank in order to operate a consumer loan platform, in particular, to establish preemption of various state usury laws. However, the use of a Funding Bank raises several issues including availability, regulatory concerns including vendor management requirements and “rent-a-bank” criticism, and the potential of litigation based on who is the “true lender” for the program, which is on the rise.

*Availability.* Although the marketplace lending industry has grown exponentially in the last few years, only a handful of FDIC-insured banks are currently operating as Funding Banks. Most of them are smaller institutions. Trade publications indicate that these banks are receiving scores of inquiries related to serving as a Funding Bank for marketplace lenders. This demand is likely to increase the fees charged by Funding Banks to provide origination and funding for Borrower Loans. Some Funding Banks may also limit the number of marketplace lenders they work with. In addition, the rapid growth of these programs and increased scrutiny by their regulators has led to increased due diligence and compliance requirements for their marketplace lender partners.<sup>168</sup> As might be expected, some banks are emulating marketplace lenders by offering bank loans through an online platform, often branded differently from the bank’s main website. This eliminates the third-party service provider aspect of the relationship and makes the bank directly responsible for the program. Direct lending by banks also alleviates the risk of litigation under “true lender” theories.

*Bank Vendor Management Requirements.* In recent years, federally insured institutions have been subject to new and expanded guidance on programs they have with third-party service providers.<sup>169</sup> In short, this guidance requires banks to conduct due diligence on proposed third-party arrangements, enter into agreements that protect the bank from risk (or effectively manage or mitigate identified risks), and monitor the third-party service provider, and it mandates that the service provider take corrective action where gaps or deficiencies occur. This guidance is in addition to the existing legal framework provided by the Bank Service Company Act,<sup>170</sup> which requires service providers to comply with laws and regulations applicable to the bank and subjects them to supervision and examination by the bank’s primary federal banking regulator.<sup>171</sup> Banks that enter into arrangements with marketplace lenders will be subject to these rules for their programs. This means that a marketplace lender will undergo scrutiny from its Funding Bank, and start-up companies or other entities without a track

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<sup>168</sup> Funding Banks will require their third-party service providers to have extensive policies and procedures to promote compliance with applicable laws and regulations. Funding Banks may also require ongoing audits of those service providers in areas such as Bank Secrecy/Anti-Money Laundering, compliance management systems, technology systems/information security and complaint resolution processes.

<sup>169</sup> See, e.g., OCC Bulletin 2013-29, FDIC FIL-44-2008, and CFPB Bulletin 2012-03.

<sup>170</sup> 12 U.S.C. §§ 1861—1867.

<sup>171</sup> 12 U.S.C. § 1867. The institution must also provide notice to its federal banking regulator of the third-party arrangement and provider.

record may not meet the Funding Bank’s standards or may have to agree to additional burdens or restrictions in order for the bank to justify the third-party relationship.

In response to the increased regulatory scrutiny on third-party arrangements, some Funding Banks are tightening their due diligence requirements and demanding up-front policies and procedures from marketplace lenders with respect to legal and regulatory compliance. Funding Banks are likely to seek contractual and other protections in structuring their third-party relationships to minimize risk of loss. Funding Banks will also be required to monitor the activities of their service providers and subject them to audit, and bind their service providers to strict compliance and information security requirements.<sup>172</sup>

**Key Consideration:** As a result, marketplace lending arrangements with Funding Banks are likely to become more complex and costly. Practically speaking, a marketplace lender will have to give up some degree of control over its lending program in order to accommodate the regulatory regime applicable to its Funding Bank.

*“Rent-A-Bank” Criticism.* Funding arrangements where a bank contracts with a third party to provide origination services to bank customers have sometimes been criticized as “renting-a-bank charter,” particularly in the context of payday loan marketers.<sup>173</sup> The perceived improper use of a bank charter by these entities has been challenged by both governmental authorities and private litigants, in part because of the high rates and fees charged to consumers in those payday lending programs which are fundamentally different from marketplace loans that are lower rate, longer term and do not renew. Bank regulators have even required banks to exit third-party programs that the regulators determined involved unsafe and unsound practices. However, most of these programs have involved high-rate payday loans.

More recently, some banks may seek a competitive advantage by contracting with marketplace lenders to enhance the bank’s product offerings, extend the area in which it makes loans and diversify assets. For example, some small community banks have entered into arrangements with Prosper and

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<sup>172</sup> Funding Banks also usually seek to have control over all aspects of the loan program including setting the underwriting criteria for the program, approval of all consumer facing and marketing material, and adherence to bank’s collection policies. The program will require regular reporting to the Funding Bank by the marketplace lender. Often the marketplace lender is required to pay for the Funding Bank’s costs of compliance and audit. Typically the marketplace lender will fully indemnify the Funding Bank as well.

<sup>173</sup> As used in this survey, payday loans are small-dollar (e.g., \$500), short-term (e.g., two weeks), unsecured loans that borrowers promise to repay out of their next paycheck or regular income payment. In addition to charging borrowers a stated rate of interest, payday loans are usually priced with a fixed-dollar fee (e.g., \$3 for every \$25 borrowed), which represents the finance charge to the borrower. Because payday loans generally have a short term to maturity, the total cost of borrowing, expressed as an annual percentage rate, can typically be in excess of 400 percent.

LendingClub to originate consumer loans with their customers.<sup>174</sup> These programs offer Funding Banks additional fee income generally at acceptable levels of risk, which arguably enhances the safety and soundness of the institution. However, regulators may become concerned if a bank concentrates too much of its portfolio in one area. Thus, it is possible that regulators could limit the number or size of these third-party marketplace lending programs based on safety and soundness concerns.

**Worth Remembering:** To ensure its own compliance with applicable laws, the Funding Bank will likely require the marketplace lender to implement policies and procedures demonstrating regulatory compliance and agree by contract to comply with laws that are binding on banks but may not be directly applicable to the lender.<sup>175</sup> The Funding Bank may also require the lender to submit to compliance protocols or audits and to take corrective action if deficiencies are found. Accordingly, financial institution laws and regulations—in addition to the consumer protection laws discussed below—will have a significant impact on the platform structure and operations where a Funding Bank is involved.

**True Lender Litigation.** Litigation continues to arise challenging third-party programs, particularly where banks fund high-rate payday loans.<sup>176</sup> However, true lender litigation has also begun to expand further into the marketplace lending sector. The claims made in these cases assert that the payday loan marketers or marketplace lenders are actually the “true lenders,” and that they are using bank lenders solely to evade compliance with state usury limitations, licensing regimes, and consumer protection laws imposed by the states where such payday loan marketers or marketplace lenders do business. We have described the most recent true lender cases in the “Recent Developments” section above. Several earlier cases are summarized below.

**CashCall Decision—West Virginia.** One of the first recent “true lender” cases is a 2014 decision from West Virginia where the Attorney General sued CashCall, Inc., the operator of an Internet loan program that used a South Dakota bank to fund consumer loans. CashCall was not licensed under West Virginia law and the loans made by the bank were made at interest rates in excess of the usury rate in West Virginia.<sup>177</sup> The state’s position was that CashCall was the “true lender” under this arrangement

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174 On the commercial side, it was announced in 2015 that JP Morgan Chase has entered into a relationship with OnDeck, an online commercial marketplace lender, to refer small business customers to OnDeck. OnDeck also works with PNC Bank. Similar arrangements exist with others in the marketplace, including an arrangement between Kabbage and Santander Bank. Avant works with HSBC.

175 As discussed herein, marketplace lenders may also be considered to be vendors of the bank and subject to the Bank Service Company Act and vendor management requirements. This makes the marketplace lender, as a service provider to the bank, responsible for complying with applicable laws and regulations and subject to examination by the regulators of the bank.

176 Unrelated to litigation, we note that some websites such as Google now ban ads for loans with annual percentage rates of 36 percent or more.

177 CashCall was also sued by the State for debt collection practices. Interestingly, CashCall made inquiry to the State as to whether it needed to be licensed there and was told it did not need to be licensed. At trial, the State claimed that this response was based on CashCall’s failure to adequately describe the program. The program worked like most third-party

because it had the predominant economic interest in the loans, and therefore CashCall should have followed applicable restrictions of West Virginia law, including its usury rate. The court ruled in favor of the state, finding that CashCall was the de facto lender under this program. The court enjoined CashCall from making new loans in the state, voided the existing loans (thereby cancelling the debt of the borrowers), and awarded \$1.5 million in civil penalties and \$10 million in punitive damages against CashCall, in addition to attorneys' fees and costs. On appeal, the West Virginia Supreme Court upheld the decision.<sup>178</sup> CashCall sought review by the U.S. Supreme Court, but it declined to review this decision.<sup>179</sup> The decision in *CashCall* created some degree of uncertainty in the industry and spawned additional litigation surrounding the use of Funding Banks, which are costly to defend.<sup>180</sup>

***Utah Case Supports Funding Bank as True Lender.*** In contrast to the *CashCall* decision, a federal court in Utah dismissed a consumer class action against an online payment processor, Bill Me Later, Inc., alleging that the originating bank was not the true lender in that arrangement.<sup>181</sup> The court stated in its decision that even accepting as true the allegation that the loans were designed to circumvent state usury laws more protective than Utah's, the case had to be dismissed because the claims were preempted by federal law.

The court based its decision in part on the fact that Bill Me Later, Inc. was a service provider to the bank. Under the provisions of the Bank Service Company Act, when a bank contracts with a third-party service provider for services, the performance of those services is "subject to examination and regulation" by the bank's regulator "to the same extent as if such services were being performed by the depository institution itself on its own premises."<sup>182</sup>

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arrangements, with a marketing agreement in place where the bank kept origination fees and accrued interest on the loans until sold to CashCall soon after they were made. CashCall indemnified the bank, and its owners provided personal guarantees.

178 See *CashCall v. Morrissey*, No. 12-1274, 2014 WL 2404300 (W. Va. May 30, 2014). Although some see this case as an aberration primarily because of the excessive interest rates being charged, the legal principles involved are the same whether the rates are 1 percent or 100 percent above the applicable usury rate.

179 Typically, the Supreme Court hears less than 1 percent of those cases appealed.

180 A January 2016 federal court decision in *Commonwealth of Pennsylvania v. Think Finance, Inc.*, Case No. 14-cv-7139 (E.D. Pa. Jan. 14, 2016), demonstrates this point. A high-rate Internet payday lender utilized a Delaware state bank to make loans and then purchased the loans. The court denied a motion to dismiss on the basis of federal preemption, instead allowing the claims against the Internet payday lender to proceed on true lender theories.

181 *Sawyer v. Bill Me Later, Inc.*, 23 F. Supp. 3d 1359 (D. Utah 2014). Since WebBank is located in Utah, this case may have particular precedential value.

182 Bank Service Company Act, 12 U.S.C. § 1867(c)(1). Based on coverage by this statute, the court found that loans serviced through contracts with third parties are included within applicable federal preemption and did not make the non-bank service provider the lender instead of the bank.

**Worth Remembering:** The Bank Service Company Act provides a potent defense to true lender allegations because it subjects bank service providers to regulatory scrutiny and accountability, providing both regulation and consumer protection. The court's opinion in *Bill Me Later* also provided some guidance for the proper structuring of lending arrangements between banks and third-party service providers, including that the bank (not the service provider) was the party to the loan agreement, the bank funded the loans and owned the accounts and held them for at least two days, and the bank received interest on the loans until they were sold.<sup>183</sup> Sale of a participation interest rather than the sale of a whole loan may also be beneficial. Some marketplace lenders using a Funding Bank have sought to replicate this structure to combat potential "true lender" claims.

**CashCall Decision—California.** CashCall was again embroiled in litigation even after a change in strategy following the West Virginia litigation. In March 2014, the CFPB filed a lawsuit against CashCall in California.<sup>184</sup> The complaint alleged that CashCall ran a loan program using a "tribal model" whereby the loans were made by Western Sky, a Cheyenne River Sioux Tribe entity. All loans issued under this model were governed by tribal law, such that no state usury laws would apply. The CFPB alleged that this was an abusive practice where CashCall was the true lender, not Western Sky, and that the laws of the borrowers' home states should determine what usury law applies, despite the tribal choice-of-law provision contained in the loan documents.<sup>185</sup> The court ultimately sided with the CFPB, finding CashCall to be the "true lender" and holding that courts should look to the substance and not the form of the loan transaction. The court further noted that there was no substantial relationship between the loans and the Cheyenne River Sioux Tribe. As such, tribal law did not govern these loans.

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183 *Sawyer v. Bill Me Later, Inc.*, 23 F. Supp. 3d 1359 (D. Utah 2014). In an earlier case, a court similarly placed greater emphasis on the bank's role as the named loan originator and held that preemption applied even though the website operator marketed and serviced the loans and had the predominant economic interest in the loans. *Hudson v. ACE Cash Express, Inc.*, No. IP 01-1336-C H/S, 2002 WL 1205060 (S.D. Ind. May 30, 2002). In that case, the court accepted as true the claims that a state-chartered bank played an insignificant role in a lending program that a non-bank had "designed for the sole purpose of circumventing Indiana usury law." But the court held that the bank was still the true lender based on federal law principles, noting that "concerns about protection of state usury laws present questions of legislative policy better addressed by Congress." In the *Hudson* case, the bank retained a 5% participation interest in the loan, while selling a 95% participation interest. The court determined that a participation does not destroy the debtor-creditor relationship and does not create privity between the loan participant and the borrower. Participations in loan have been common place for decades, although they have been related primarily to commercial loans. The legal principles related to participations are fairly well established as set forth in the *Hudson* case. As a result, one way to potentially avoid true lender claims is to have the Funding Bank sell participation interest in the loan, rather than sell the whole loan. The bank would retain the status of the creditor and also be able to thwart *Madden* claims as well since there is no assignee. However, not having the entire loan could present potential issues in further selling or securitizing the asset.

184 *Consumer Fin. Prot. Bureau v. CashCall, Inc. et al.*, Case No. 15-cv-07522 (C.D. Cal. Aug. 31, 2016).

185 Additionally, the CFPB alleged that the debt-collection arm of the enterprise, Delbert Services, violated the law by collecting on accounts that did not have amounts due and owing. There are, of course, obvious differences between this case utilizing tribal law and marketplace loans. However, the case may help to define the parameters of a true lender analysis.

In December 2016, CashCall asked that the decision be certified for interlocutory appeal to the Ninth Circuit and in early January 2017, the court granted CashCall's request. One of the questions identified for review was whether the proper test for determining the true lender under a loan agreement allows the court to look past the documentation and its parties to investigate related transactions. Many in the industry were hopeful that the Ninth Circuit would hear the case because the decision could provide an important precedent in true lender litigation; however, the Ninth Circuit ultimately declined to hear the appeal.

Although the court found that CashCall was the true lender of certain loans it had marketed even though the loans were made by a Native American tribal entity and the loan agreements between the tribal entity and the borrower specified tribal law as the governing law. Those issues are different and distinguishable from those related to an FDIC insured Funding Bank, where there is statutory authorization for exportation of interest rates and preemption of federal loans.

The CFPB requested that the court void the CashCall loans and order restitution in the amount of almost \$300 million to the borrowers, but in January 2018 the court denied the CFPB's request and levied a fine of only \$10 million against CashCall.<sup>186</sup> The CFPB had argued that restitution should be required because under various state laws, the loans were either void or carried excessive fees and/or interest. In denying the CFPB's request, the court found that the borrowers were not misled about the amounts they were required to pay for the loans and had received the loan funds and the benefit of their bargain.<sup>187</sup> The court's decision that the loans remained enforceable because their terms had been fully disclosed is significant because it shows that even when a true lender claim succeeds, the loans at issue will not necessarily be voided and reimbursement to borrowers may not be required depending on the facts. The CFPB is appealing the decision on damages to the Ninth Circuit Court of Appeals.

***California Case Finds that Funding Bank Is the True Lender.*** Shortly after the California decision finding that CashCall was the true lender under its tribal model loan program, a judge in the same district issued a decision supporting the Funding Bank as the true lender for certain student loans.<sup>188</sup> In this case, class action plaintiffs that had obtained private student loans made by a national bank alleged that the "actual lenders" in the transactions were the companies that ended up buying and servicing the loans, in part because the national bank was required to sell all the student loans it made during the course of the program to these companies.

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<sup>186</sup> *Consumer Financial Protection Bureau v. CashCall, Inc., et al.*, Case No. 2:15-cv-07522 (C. D. Cal. 1/26/2018).

<sup>187</sup> *Id.* The court noted, "Defendants plainly and clearly disclosed the material terms of the loans to consumers—including fees and interest rates—before the loans were funded. Accordingly, the court cannot conclude that the defendants acted in bad faith, resorted to trickery or deception or have been guilty of fraud in connection with the origination of the loans that are at issue in this case."

<sup>188</sup> *Beechum et al. v. Navient Solutions, Inc. et al.*, No 15-cv-8239-JGB-KKx (C.D. Cal. Sept. 20, 2016).

**Noteworthy:** The plaintiffs argued that the court should review the substance of the transaction rather than the form and find that these companies were not authorized to charge rates in excess of the California usury limit. The court declined to do so, explaining that while there are cases where courts have considered the substance of a transaction when assessing whether it satisfies the elements of usury or falls under a common-law exemption to the usury prohibition, that analysis does not apply when a transaction falls under a constitutional or statutory exemption to the usury limit.<sup>189</sup>

Interestingly, and perhaps the more salient point made, the court also took into account public policy considerations, noting that there are broader economic consequences in making it difficult for banks to assign or sell loans into the secondary market.

***LendingClub True Lender Class Action Settled in Arbitration.*** In April 2016, LendingClub was sued by borrowers in a class action for alleged violations of usury laws, RICO, and New York state consumer protection laws.<sup>190</sup> LendingClub originated loans through a state-chartered bank; the borrowers alleged that the loan program was a “pretext and a sham” and that the company was trying to avoid state usury laws by structuring its loan transactions through the bank. The plaintiffs relied on both *Madden* and true lender theories. Instead of answering the complaint, LendingClub moved to compel arbitration and stay the district court case pending that arbitration. On January 30, 2017, the court ruled in favor of LendingClub, granting the motion to compel arbitration.

The decision is significant because it finds that the arbitrator determines the question of whether the case is subject to arbitration or not. Under the Federal Arbitration Act, the decision is subject to immediate appeal to the Second Circuit. The decision is also significant because it compelled the arbitration on an individual—and not class—basis, potentially reducing the impact of any adverse decision. The court’s ruling on LendingClub’s motion to compel arbitration also provides support for the use of arbitration clauses in consumer loan agreements. Ultimately, the case was settled with a small settlement payment and no admission of liability or wrongdoing by LendingClub.<sup>191</sup>

### C. Other Cases

***Small Business Marketplace Lender Sued in Massachusetts.*** In October 2017, a small business owner filed suit against a small business marketplace lender and its Funding Bank in federal court in Massachusetts.<sup>192</sup> As in other true lender cases, the main allegation was that the marketplace lender

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<sup>189</sup> The ruling was based on a California statute limited to in-state banks and national banks. As such, the ruling may be narrow in scope. Had this action been against a non-national bank located out of state, a different result may have occurred.

<sup>190</sup> *Bethune v. LendingClub Corporation*, No. 1:16-cv-02578 (S.D.N.Y. Apr. 6, 2016).

<sup>191</sup> Confidential Settlement Agreement and General Release, *Bethune v. LendingClub Corporation*, No. 1:16-cv-02578 (filed March 2, 2018).

<sup>192</sup> *NRO Boston, LLC and Alice Indelicato v. Kabbage, Inc. and Celtic Bank Corporation*, Case 1:17-cv-11976 (D. Mass., Filed Oct. 12, 2017).

used the Funding Bank’s charter to originate loans that were usurious under state law and that the marketplace lender was the true lender because it bore the risk of loss for the loans. However, this Massachusetts case is noteworthy for several additional reasons. First, it was brought against a small business marketplace lender rather than a consumer lender. Second, the suit also named the Funding Bank as a defendant rather than omitting the Funding Bank like the Colorado Administrator in the cases described above. And third, it alleged violations of federal marketing and racketeering laws. Specifically, the plaintiff asserted causes of action under the Lanham Act<sup>193</sup> for false advertising and under the federal Racketeer Influenced and Corrupt Organizations Act (“RICO”)<sup>194</sup> for conspiring to violate usury and consumer protection laws. The RICO cause of action is attractive for plaintiff lawyers as it provides for treble damages and the potential recovery of attorney’s fees and costs.

The marketplace lender’s loan agreement contained an arbitration provision and the defendants filed a motion to compel arbitration, which was opposed. However, on March 16, 2018 the court entered an order staying the proceedings pending the outcome of arbitration. As we’ve seen in other cases,<sup>195</sup> the fact that the loan agreement contained an arbitration clause proved helpful in sending the case to arbitration rather than proceeding in court.

***Pennsylvania Think Finance Litigation—Investors Sued.*** The *Think Finance* litigation started in 2014 when the Pennsylvania Attorney General brought an action against an Internet payday lender who first used a Funding Bank, and then later a Native American tribe, to extend loans to Pennsylvania residents.<sup>196</sup> Think Finance initially sought to have the case dismissed on the basis of federal preemption, but in January 2016, the court denied this motion and allowed the Attorney General’s claims to proceed on a true lender theory. Subsequently, Think Finance filed for bankruptcy protection. The Attorney General then filed an amended complaint, adding as defendants certain investors who were providing funding to Think Finance. The investors filed a motion to dismiss the claims as they related to Think Finance’s Funding Bank program. On January 26, 2018, the court dismissed the claims made against the investors under Pennsylvania’s Corrupt Organizations Act (a state statute similar to the federal RICO laws), finding that an investor who merely funds an alleged unlawful enterprise would not have liability under that Act absent allegations that the investor had knowledge of being a part of an unlawful activity, which the Attorney General had not pled. However, the investors remain subject to claims for their participation in Think Finance’s tribal lending program.

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<sup>193</sup> 15 U.S.C. 1125(a).

<sup>194</sup> 18 U.S.C. 1962.

<sup>195</sup> See, e.g., *Bethune v. LendingClub Corporation*, No. 16-cv-02578 (S.D.N.Y. Apr. 6, 2016), which is discussed further below under “Issues Related to the Funding Bank Structure.”

<sup>196</sup> *Commonwealth of Pennsylvania v. Think Finance, Inc., et al.*, Civil Action No. 14-cv-7139 (E.D. Pa).

**Caution:** This case suggests that investors should proceed with some caution when dealing with higher-risk programs such as those involving high rate payday loans or tribal law, particularly if the investors are involved in decisions affecting the operations of the loan program.

*Action in North Carolina.* In another action involving the Think Finance tribal lending program, a lawsuit has been filed in federal court in North Carolina.<sup>197</sup> Similar to the approach taken by the Pennsylvania Attorney General after Think Finance filed for bankruptcy, the plaintiffs in this case brought claims against various persons associated with the tribal lending program, including lenders, investors and even banks which processed ACH transactions for the program, since (because of the Think Finance bankruptcy) it was unable to sue Think Finance itself. Interestingly, the complaint states that the rates charged under the tribal lending program actually violated usury provisions of the tribal law that purportedly governed the program. The complaint also alleges violations of the Electronic Funds Transfer Act, the Federal Trade Commission Act and RICO. Specifically, it was alleged that collection of an unlawful debt alone violates RICO. The remedies sought include voiding of the loans including the governing law, forum selection and arbitration provisions of the loan agreements, disgorgement of profits, treble damages, an injunction and attorney's fees and costs. The case is stayed pending settlement.

**"True Lender" Takeaways:** Two points can be taken from these true lender cases. First, it appears that claims under RICO are becoming more common, likely due to the potential for treble damage recovery. Second, while most of these cases are still being brought against payday lenders and tribal lending programs, the range of defendants is being expanded to include Funding Banks, investors, marketplace lenders and, as in the North Carolina case, banks providing services to the program such as ACH processing.<sup>198</sup> It appears likely that true lender litigation will continue to create uncertainty and risk in the marketplace lending space.

*Colorado Regulator Takes on Marketplace Lenders.* The most significant recent true lender challenge has come from a state regulator. The Colorado Attorney General also serves as Administrator of the state's Uniform Consumer Credit Code (the "UCCC"), the law which governs extensions of consumer

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<sup>197</sup> *Granger et al. v. Great Plains Lending LLC et al.*, No: 1:18-cv-00112 (M.D.N.C.).

<sup>198</sup> Cases involving payday lenders and/or tribal programs will often raise different issues and considerations than would apply to claims brought against marketplace lenders, assuming that the marketplace lenders extend their loans at interest rates significantly lower than payday rates and partner with Funding Banks under arrangements intended to ensure that federal preemption applies. As part of their defense against true lender claims, marketplace lenders should also be able to assert reliance upon common law "valid when made" and assignment principles, although these principles have been called into question by the *Madden* decision as discussed further in this paper under "Usury Law."

credit to Colorado residents.<sup>199</sup> Colorado's version of the UCCC contains an extraterritoriality provision which purports to apply the UCCC to any consumer credit transaction with a Colorado resident, even those made by out-of-state lenders, and prohibits the parties from choosing any law to govern the transaction other than Colorado law. Like other state consumer protection laws, the UCCC also limits the interest rates and fees that can be charged in consumer credit transactions.

In early 2017, the Administrator brought legal actions against two marketplace lenders licensed under the UCCC.<sup>200</sup> Although the loans originated by these marketplace lenders were made by FDIC-insured state-chartered banks, the Administrator's allegations ignored that fact and did not name the Funding Banks in the actions in a deliberate attempt to avoid motions for removal to federal court based on federal preemption principles. The Administrator claimed that the marketplace lenders made loans to Colorado residents in excess of the state's interest rate limitation, charged fees in excess of those allowed by the UCCC, and used a governing law provision other than Colorado in their loan agreements.<sup>201</sup> At the heart of the Administrator's claims were allegations that the marketplace lenders were the true lenders on the loans to Colorado residents because the marketplace lenders held the predominant economic interest in the loans.<sup>202</sup>

**Worth Noting:** Because this is an action brought by a state regulator on a true lender theory, the outcome could affect the Funding Bank model used by many marketplace lenders or spawn litigation of a similar nature in other jurisdictions, particularly in those states which have adopted a version of the UCCC.<sup>203</sup>

Soon after the Administrator filed suit, the marketplace lenders removed the cases to federal court, claiming that the actions were completely preempted by federal law, specifically the Federal Deposit Insurance Act, because the loans at issue were made by FDIC-insured banks. Separately, the two Funding Banks involved filed declaratory judgment actions in federal court asking the court to declare

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<sup>199</sup> A number of other states have also enacted versions of the UCCC, including Idaho, Indiana, Iowa, Kansas, Maine, Oklahoma, South Carolina, Utah, Wisconsin, and Wyoming.

<sup>200</sup> The Colorado UCCC requires licensing in order to take assignment of and service consumer loans, thus a license is required for many marketplace lenders including those targeted in this action, Avant and Marlette Funding d/b/a/ Best Egg. Being licensed gave the Colorado regulator the ability to examine and exercise jurisdiction over these marketplace lenders.

<sup>201</sup> These allegations are problematic because any non-bank assignee of a bank loan that failed to comply with Colorado law would be subject to suit under the Administrator's theory.

<sup>202</sup> The Administrator alleged that the marketplace lenders pay implementation fees to start the programs, pay the Funding Banks' legal fees, bear the costs of marketing the program and evaluating loan applications, are responsible for ensuring compliance with applicable laws and assume responsibility for the servicing and administration of the loans even before they have purchased the loans from the Funding Banks. The Administrator also alleged that the marketplace lenders assume all risk of default and indemnify the Funding Banks for claims arising from the lending programs.

<sup>203</sup> Since other states have enacted a form of the UCCC, the decisions ultimately rendered in the Colorado cases will be of interest to regulators and potential litigants in those jurisdictions. If the Administrator prevails, state regulators and private litigants in other UCCC jurisdictions (and possibly elsewhere) might consider whether they have grounds to pursue true lender claims against marketplace lenders that utilize Funding Banks.

that the loans were validly made by a federally-insured depository institution and, therefore, that the rates and fees on the loans are subject to federal preemption applicable to the Funding Banks, and not subject to state law. The Funding Banks were also seeking to enjoin the Administrator from taking further action against the marketplace lenders.<sup>204</sup> In response, the Administrator filed motions to dismiss both of the Funding Bank-initiated actions, which motions were granted by the Court.

In March 2018, the federal court hearing the actions against the marketplace lenders determined that it had no federal question jurisdiction and remanded both cases back to state court. These remand decisions are of a procedural nature only and are not decisions on the merits.<sup>205</sup> As a result, these actions will proceed in state rather than federal court, although the marketplace lenders can still pursue their federal preemption arguments in the state court actions.<sup>206</sup> As stated earlier, the state has also sued the trustees of various securitization trusts on similar theories.<sup>207</sup> The trusts have filed motions to dismiss. These will remain cases to watch because the outcome could set significant precedent for other state regulators challenging the marketplace lending bank partnership model.

***Final Thoughts.*** So long as litigation and uncertainty surround the use of a Funding Bank for marketplace lending programs, when structuring arrangements with Funding Banks, lenders should use care to establish facts and factors that promote a sound foundation for finding that the Funding Bank is the true lender of the Borrower Loans.<sup>208</sup> Possible criteria to be considered include whether the Funding Bank shares or relinquishes control and risk to the marketplace lender, operational aspects and payment of costs with respect to the program, whether the Funding Bank has loss exposure, protections provided to the Funding Bank, the Funding Bank's right to deny credit or refuse to sell loans to the marketplace lender, the length of time that the Funding Bank holds the loans prior to selling them to the lender, and the compliance requirements imposed by the Funding Bank on the lender. Funding Banks need to exercise control over the program including credit criteria and underwriting and program fees. The Funding Banks also need to have oversight over the services provided by the marketplace lenders. Collateral arrangements should also be undertaken with care so as not to appear to mitigate economic risk to the Funding Bank. Courts have looked to loan documentation and other

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<sup>204</sup> The actions were brought by WebBank (the Funding Bank for the Avant website) and Cross River Bank (the Funding Bank for the Best Egg platform).

<sup>205</sup> The federal court determined that it had no authority to hear the cases because the complaints filed by the Administrator did not on their face raise a federal question. The marketplace lenders had claimed that because an FDIC-insured bank made the loans, federal law had completely preempted the Administrator's claims. But the court determined otherwise, in large part because the Administrator made no claims against either of the Funding Banks.

<sup>206</sup> *Meade v. Avant of Colorado, LLC d/b/a/Avant and Avant, Inc.*, No. 17-cv-0620, 2018 WL1101672 (D. Colo. March 1, 2018); *Meade v. Marlette Funding LLC d/b/a Best Egg*, No. 17-cv-00575-PAB-MJW, 2018 WL 1417706 (D. Colo. March 12, 2018). The court stated in one action that "[N]othing prevents Avant (or any other similarly-situated assignee of bank-originated debt) from asserting those arguments and maintaining that preemption defense in the state courts."

<sup>207</sup> See the "Recent Developments" section.

<sup>208</sup> For example, the parties should ensure that the bank has substantive duties and/or an economic interest in the program or loans. Banks should also take care to fulfill their obligations under applicable federal banking guidance to monitor and supervise the Internet marketer's performance of its duties as a bank service provider.

communications with borrowers to determine the intent of the parties and also whether the Funding Bank is the true lender. Due to the complex issues involved, experienced counsel should be consulted to assist in the development of an appropriate strategy and drafting of arrangements between marketplace participants and Funding Banks.

**Takeaway:** Any finding by a court that a marketplace lender that utilizes a Funding Bank is the “true lender” of the loans originated through the platform could have serious consequences both for the marketplace lender and for investors in its loans, as the marketplace lender could be subject to sanctions for violations of state usury, licensing, or consumer protection laws and the loans themselves (depending upon the states involved) could be declared unenforceable in whole or in part or subject to repayment of excess charges or other penalties.

Prospective marketplace lenders should also note that third-party relationships entered into by financial institutions are in any case subject to increased regulatory scrutiny. A marketplace lender can expect some challenges in finding Funding Banks willing to take on the regulatory risk of third-party relationships, and should be prepared for extensive due diligence and for the Funding Bank to take an active role in establishing, approving, and monitoring the program since the bank remains responsible for its credit policies, loan forms, and compliance with applicable law. Accordingly, lenders are advised to take note of this issue and to consult with counsel when appropriate concerning third-party programs with financial institutions as well as regarding potential changes in regulatory attitudes.

#### **D. State Licensing Requirements**

Depending on how a program or platform is structured, various state licensing requirements could potentially apply. Even when a Funding Bank is utilized, participants may need state licenses in order to perform certain functions in the origination, funding, purchasing or servicing of loans.

**Keep in Mind:** The federal laws that permit banks to “export” interest rates apply only to the rates and some related fees charged by the lender, and do not preempt state licensing laws or most other state consumer credit regulations and protections. Accordingly, the states will retain significant jurisdiction to regulate a marketplace lender in connection with loan origination and servicing activities even where a Funding Bank is utilized, and marketplace lenders are likely to be subject to licensing requirements.

The role and functions that an entity performs will determine whether licenses are required or not, and what licenses may be required. The general types of state licenses are described below. In some instances, more than one state license may be required.

**State Licensing Generally.** Licenses are granted on a state-by-state basis and the requirements vary on that basis. In some states, the licensing process is fairly simple and straightforward; in other states, it is quite complex. Similarly, in some states licenses can be obtained fairly quickly while in other states (e.g., California and New York) the process can take several months. In addition to filing fees, license applicants may be subject to background checks and fingerprinting and may be required to submit business plans and financial statements. A marketplace lender subject to state licensing requirements must also comply with any associated recordkeeping, financial reporting, disclosure, minimum net worth, surety bond, or similar requirements imposed by state law; must observe any limitations that applicable state laws impose on the business activities or practices of licensed entities (including any limits imposed on permitted rates or fees); and will be subject to examination by the applicable state regulators.<sup>209</sup> Some states have subscribed to a national licensing registration service that allows use of submitted information in multiple jurisdictions for licensing purposes. At least one state, Nevada, has a requirement of an in-state office. Accordingly, state licensing requirements may create significant compliance burdens and the need for a compliance infrastructure. This multistate compliance burden generally impedes having a uniform national program, which is one reason why the Funding Bank approach has been utilized for marketplace lending programs.

State licensing authorities are taking an increased interest in marketplace lending as the sector grows. The California Department of Business Oversight (the “DBO”) launched an inquiry into online programs in December 2015 with the objective of determining whether market participants are fully complying with the state lending and securities laws. The DBO sent an online inquiry to fourteen consumer and business lenders including merchant cash advance businesses, requesting five years of data about each such company’s loans and investors. Responses from those entities were due March 9, 2016, and the DBO published a summary report of the aggregate transaction data on April 8, 2016. It is still not known whether the DBO intends to propose any changes in California law. More recently, the New York Department of Financial Services (“NYDFS”) circulated a similar survey to online lenders to gather information for a report issued in 2018 suggesting that additional licensing requirements should be considered for online lenders. In general, though, state regulators are starting to focus more attention on marketplace lending and the need for licensing depending upon how such businesses are conducted.<sup>210</sup>

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209 Loan broker and collection agent registration and licensing requirements as well as other requirements imposed on loan brokers and collection agents vary from state to state. Careful consideration of applicable laws is required before arranging or servicing loans in any given state.

210 However, a recent DBO enforcement action decision appears to expand entities that need to be licensed under the California Financing Law. The decision upheld a cease and desist order against an entity that did not fund loans to borrowers but solicited borrowers, evaluated the credit, proposed loan terms, and made or participated in credit advances. The DBO rejected the argument that a license was needed only if the entity made loans. Lending-related activities may also require licensing. *In the Matter of the Desist and Refrain Order Against Financial Services Enterprises dba Pioneer Capital*, OAH No. 2016040551 (Nov. 29, 2016). California has taken a more aggressive posture on licensing enforcement actions.

Below is a brief description of the different types of state licensing requirements that could apply to a marketplace lending program.

**Broker Licenses.** Certain states require the registration or licensing of persons who assist in the loan marketing and origination process under “loan broker” or “credit service organization” statutes. Some states, such as Arizona and Connecticut, require licensing for persons who solicit loans for others. Other statutes may define a “loan broker” to include any entity that, for compensation, arranges for the extension of credit for others.<sup>211</sup> Any participant hosting a website or soliciting loans for a Funding Bank may fall within one or more of these broad definitions and, absent an exemption, will need to comply with any associated licensing requirements imposed by those applicable states for loan brokers, marketers, or originators.<sup>212</sup> Even lead generators and aggregators may be subject to these laws.

**Lending and Assignee Licenses.** Consumer marketplace lenders that do not utilize a Funding Bank are subject to lending license requirements in virtually all states. State regulators take the position that Internet lenders must be licensed by the state to make loans to residents of that state.<sup>213</sup> Persons who “arrange” loans for others are also covered by the lending license statute in some states.<sup>214</sup> In some

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211 Each statute is potentially different and needs to be reviewed for applicability. Compensation, for example, could be general such that any compensation received in a transaction gives rise to licensing, while in other jurisdictions compensation may be required from a borrower.

212 Some states have enacted credit service organization laws that have potential application depending upon how the statute is drafted. These laws could impose licensing or other restrictions on marketplace lenders. Some impose disclosure requirements that are inappropriate to marketplace lenders. In some states, money transmitter licenses could be a consideration.

213 See, e.g., *Cash America Net of Nevada, LLC v. Commonwealth of Pennsylvania*, 2010 Pa. LEXIS 2386 (Pa. Oct. 19, 2010), holding that an Internet lender making loans to Pennsylvania residents over the Internet from its location in Nevada required licensing under the state’s Consumer Discount Company Act even if it had no offices or employees in the state. In October 2016, the Georgia Supreme Court ruled that out-of-state Internet lenders are subject to the state’s payday lending law, which prohibits making loans of \$3,000 or less without a license. *Western Sky Financial, LLC v. State of Georgia*, No. S16A1011 (Oct. 31, 2016).

214 For example, the Regulated Lender statute in Texas contains this type of language and the regulator there has indicated that Internet platforms sourcing loans for a bank located in another state need to be licensed under this law. In addition, in late 2016 the California regulator took action against a company that arranged commercial loans, finding that a license was required under the California Finance Lenders Law (as of October 2017, the California Financing Law) because the company was engaged in the business of making commercial loans even though it did not actually lend money or take security. We note that merchant cash advance businesses conduct business over the Internet. A discussion of the laws applicable to that arena are beyond the scope of this publication, however, if structured correctly, such advances are in the nature of receivables purchases or factoring and not loans and should fall outside of typical lending requirements. However, litigation has occurred over this issue, most prevalently in California, and some merchant cash advance businesses obtain licenses.

cases, a purchaser or assignee of a Borrower Loan may become subject to licensing requirements.<sup>215</sup> Some states require licensing of commercial lenders.<sup>216</sup>

**Collection/Servicing Licenses.** States may also require marketplace lenders who undertake collection activities for others to be licensed as “collection agents.” Servicers including marketplace lenders who are administering and servicing Borrower Loans for others may also be subject to servicing and/or state debt collection licensing. Even if a marketplace lender outsources collection activities to a licensed third party, in some states, it too may be subject to collection licensing requirements.<sup>217</sup> This could apply to an entity that sells loans to a third party and retains servicing of the loans. Additional state-level requirements that may be applicable to lenders that service Borrower Loans are described in “*Debt Collection Practices*” below.

**Credit Services Organizations Licenses—Maryland Decision.** A recent decision of the Maryland Court of Appeals demonstrates the need for marketplace lenders to review state licensing requirements carefully since non-uniform requirements can prove a trap for the unwary. On June 23, 2016, the court filed a decision in *CashCall, Inc., et al. v. Maryland Commissioner of Financial Regulation*, upholding the \$5.6 million in sanctions imposed by the Commissioner against CashCall.

In this case, CashCall was utilizing the Internet to market loans to Maryland residents that were made by two federally chartered banks not located in Maryland, at rates up to four times greater than the maximum rate allowed under Maryland’s usury laws. Soon after the banks made the loans, CashCall purchased the loans and serviced and collected them. The regulator in Maryland cited CashCall for failure to obtain a license under the Maryland Credit Services Business Act (the “CSBA”). In addition to requiring a license for any credit services business, the CSBA contains a provision that prohibits a person from arranging loans for banks that would be in excess of allowable Maryland rates. The regulator claimed CashCall was a credit services business and fined it \$1,000 for each loan it arranged for the banks with Maryland residents that exceeded Maryland’s applicable usury rate.

CashCall argued on appeal that it was not engaged in a “credit services business” and therefore had not violated the CSBA. The CSBA defines a “credit services business” as one in which a person obtains or assists a consumer in obtaining an extension of credit “in return for the payment of money or other

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215 Any loan assignee (even a passive investor) is subject to licensing in Kansas (Supervised Lender License required with respect to loans over 12 percent; see KAN. STAT. § 16a-2-301(1)(6)) and South Dakota (Money Lender License, S.D. STAT. § 54-4-52). Assignees who also service and collect consumer loans are potentially subject to licensing in several states including Colorado, Connecticut, Idaho, Iowa, Louisiana, Maine, Oklahoma, South Carolina, Utah (notification), and Wyoming. In addition, certain types of loans may be subject to restrictions on assignment. Loans made under the Illinois Consumer Installment Loan Act may only be sold to regulated financial institutions or other licensees. Loans made under the Massachusetts Small Loan Act may only be assigned to other licensees or exempt entities. The same is true for Ohio Small Loans (loans under \$5,000).

216 Some seventeen states potentially have licensing requirements applicable to commercial lenders. Some are based upon type of entity (e.g., sole proprietor lending requires licensing in some states) or rates in excess of certain amounts.

217 *Barbato v. Greystone Alliance, LLC*, Case No. 18-1042 (3rd Cir. Feb. 22, 2019).

valuable consideration.”<sup>218</sup> In an earlier decision the Court of Appeals had held that under the quoted language, a business is a “credit services business” only if the payment it receives for arranging an extension of credit comes “*directly from the consumer.*”<sup>219</sup> CashCall argued that it received no compensation from borrowers, but only royalty fees paid by the Funding Banks; thus, it had not received any payments “directly from the consumer” and was not subject to the CSBA. The court rejected CashCall’s argument, clarifying that the direct payment requirement only applies to companies that are primarily engaged in providing goods or services to consumers other than arranging extensions of credit, and does not extend to a company that is exclusively engaged in assisting Maryland consumers in obtaining loans. The court further stated that the Maryland legislature had intended the CSBA to prohibit payday lenders from partnering with non-Maryland banks to extend loans at rates exceeding the Maryland usury caps, and that it would undercut the purpose of the legislation to limit its application to loan marketers who receive direct payments from the borrowers beyond the payments made on the loan. In fact, the court said that CashCall’s activities were exactly what the Maryland legislature had intended the CSBA to prohibit.

The court did, however, acknowledge that the CSBA only applies to loan marketers who provide their services “in return for the payment of money or other valuable consideration.” In this regard, the court held that CashCall’s right to receive principal, interest, and fees on the loans it purchased from the Funding Banks constituted adequate “consideration” for purposes of the statute. In fact, said the court, the overall arrangements between CashCall and the Funding Banks (under which the latter retained no economic interest in the loans) appeared to constitute a “rent-a-bank scheme” that “rendered CashCall the *de facto* lender.” This latter statement is interesting to the extent it suggests that the Maryland courts may be willing, at least in some circumstances, to apply the “true lender” doctrine to loan marketers if the originating bank has no continuing economic interest in the loans.<sup>220</sup>

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218 MD. COM. LAW § 14-1901(e).

219 *Gomez v. Jackson Hewitt, Inc.*, 427 Md. 128, 154 (2012) (emphasis added).

220 The practical reality is that a marketplace lender may not be able to solicit loans for a Funding Bank in excess of Maryland usury rates. The penalties may not affect the enforceability of the loan, but could impose the statutory penalties on the marketplace lender.

**Takeaway:** The court’s decision potentially creates significant issues for marketplace lenders who partner with non-Maryland banks to offer consumer loans to Maryland consumers. First, the decision impacts licensing as it could require non-bank marketplace lenders to obtain credit services business licenses to market loans originated by a financial institution. The decision may also indicate that marketplace lenders need to adhere to the substantive provisions of the CSBA, including the prohibition on soliciting Maryland residents for loans at interest rates exceeding the applicable usury caps permitted under Maryland law (24 percent). Accordingly, the decision has implications for unlicensed entities that are marketing loans and/or for entities who solicit loans for others in excess of Maryland permissible rates.<sup>221</sup>

**Massachusetts—License Violations Yield \$2 Million Penalty and Customer Reimbursement.** On March 12, 2018, the Massachusetts Division of Banks entered a Consent Order against LendingClub and its subsidiary Springstone Financial, LLC based on failure to be properly licensed. The state regulator alleged that the marketplace lender was engaging in the business of being a third-party loan servicer and arranger of small loans for a fee without holding a servicer registration or small loan license.<sup>222</sup> As part of the Consent Order, LendingClub paid an administrative penalty of \$2 million and agreed not to engage in licensable activities without having the necessary license.<sup>223</sup> In addition, LendingClub was required to reimburse consumers for any interest or fees on small loans arranged or serviced by LendingClub since August 1, 2011 that were in excess of the amount permitted under the state’s small loan law. Some marketplace lenders only engage in activities related to loans greater than \$6,000 in Massachusetts to avoid the small loan licensing requirement.

**Caution:** This enforcement action is a reminder that marketplace lending participants may be subject to various state licensing regimes and failure to obtain necessary licenses can result in fines and penalties and even, as in this case, customer reimbursement.

**New Hampshire—License Violations.** Similar to the Massachusetts state regulator action above, the New Hampshire Department of Banking has recently entered into a number of consent orders with marketplace lenders for their failure to have a small loan license.<sup>224</sup> Under New Hampshire law, the

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221 The decision could also have ramifications in other states with credit services organization licensing laws where ostensibly payment is required directly from the consumer.

222 A small loan license is required under M.G.L. Ch. 140 Sect. 96 to arrange, negotiate, aid or assist a borrower or lender in procuring or making loans of \$6,000 or less at a rate greater than 12% APR. Persons must register prior to acting as a third-party loan servicer in Massachusetts pursuant to M.G.L. Ch. 93 Sect. 24A.

223 As part of the proceeding, the marketplace lender obtained both a Massachusetts third-party loan servicer registration and small loan license.

224 See, e.g., N.H. Banking Department Consent Orders against Klarna Inc. d/b/a/ Klarna Credit (Nov. 8, 2017), Career Bridge Inc. d/b/a Career Bridge (Dec. 27, 2017).

definition of a small loan lender includes any person acting as a finder or agent for a lender or a borrower who assists in the arranging, finding or procurement of a loan.<sup>225</sup> The state regulator takes the position that making a website available to New Hampshire residents for the purpose of finding a loan implicates the licensing requirement. The consent orders have required marketplace lenders to either become licensed or cease and desist from small lending activity in the state, and imposed fines and penalties for violations.

***Activist Attorney General in Virginia.*** The Attorney General in Virginia has been active in pursuing online lenders, although most of this activity has been focused on predatory lending tactics. For example, in October 2017 the Attorney General reached a settlement with an online lender that advertised on its website that it was licensed by the state of Virginia and its Bureau of Financial Institutions, when it was not so licensed.<sup>226</sup> In addition to this misrepresentation, the lender was charging borrowers rates in excess of Virginia’s general usury limit of 12%, which applies to unlicensed lenders. In November 2017, the Attorney General reached a settlement with a high-rate online payday lender charging triple-digit interest rates, imposing a \$3 million penalty.<sup>227</sup> In February 2018, the State recovered \$2.7 million from another online lender that claimed it was licensed by the state when it was not and was charging unlawful fees.<sup>228</sup> Also in February, a six-figure settlement was reached with eight affiliated online lenders and debt collectors regarding an open-end credit program.<sup>229</sup>

***Legislation Affecting Lead Generators—Vermont.*** In what could become a growing trend, Vermont enacted a law requiring various entities to obtain a loan solicitation license, including lead generators and others who engage in online marketing, loan comparison and making referrals to others.<sup>230</sup> It appears that the law applies to both consumer and commercial loans. The license is obtained through Vermont’s Department of Financial Regulation. In addition to licensing, the law requires loan solicitors to make certain disclosures including that they are not the lender and that consumer information will be shared with others.<sup>231</sup> Many states’ broker licensing laws are unclear as to whether technology firms such as lead aggregators or loan comparison websites must be licensed, however Vermont has taken action to clarify its position with this new law, which took effect May 4, 2017.

***Enforcement Actions Target Lead Generators.*** Lead generators have also been subject to scrutiny in some of the largest states. In California, the Department of Business Oversight (“DBO”) recently

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<sup>225</sup> N.H. R.S.A. 399-A-1. Small loans are loans of \$10,000 or less with an APR of more than 10%.

<sup>226</sup> Commonwealth of Virginia v. Mr. Amazing Loans, Assurance of Voluntary Compliance (Oct. 13, 2017).

<sup>227</sup> Commonwealth of Virginia v. Opportunity Financial, LLC, Assurance of Voluntary Compliance (Nov. 30, 2017).

<sup>228</sup> Commonwealth of Virginia v. MoneyLion of Virginia LLC, Assurance of Voluntary Compliance (Feb. 5, 2018).

<sup>229</sup> Commonwealth of Virginia v. Field Asset Service Team, LLC, et al, Assurance of Voluntary Compliance (Feb. 5, 2018).

<sup>230</sup> H.182 (Act 22).

<sup>231</sup> 8 V.S.A. § 2220a.

brought a number of actions against licensees under the California Financing Law<sup>232</sup> for paying unlicensed lead generators for referrals in violation of California regulations.<sup>233</sup> These actions have resulted in penalties and customer refunds. In one case, the DBO revoked a company's license for paying unlicensed entities for leads and loan referrals.<sup>234</sup> In the past, New York has also sanctioned lead generators.<sup>235</sup> Penalties and customer reimbursement were ordered by the NYDFS for misrepresentations concerning the safety of personal information and for knowingly advertising and soliciting for loans in violation of New York's usury limits.

This remains an area to watch, particularly due to the increased state scrutiny over online lending programs seen in the last year.

### III. CONSUMER PROTECTION LAWS

Internet platforms must comply with a number of different federal and state consumer protection laws. Generally, these laws (i) require lenders to provide consumers with specified disclosures regarding the terms of the loans and/or impose substantive restrictions on the terms on which loans are made, (ii) prohibit lenders from discriminating against consumers on the basis of certain protected classes, and (iii) restrict the actions that a lender or debt collector can take to realize on delinquent or defaulted loans. In addition, the Dodd-Frank Act significantly changed the regulation of the consumer credit market by establishing the Consumer Financial Protection Bureau, which can bring enforcement actions for unfair, deceptive, or abusive acts or practices. Since marketplace lending is Internet-based, special consideration must be given to legal requirements that allow for electronic contracting and consent to receive disclosures electronically and requirements related to customer authorization for making payments electronically from their bank accounts. This section discusses some of the principal consumer protection laws that marketplace lenders will need to consider for program regulatory compliance purposes.

#### A. Truth in Lending Act

The federal Truth in Lending Act ("TILA") and its implementing Regulation Z<sup>236</sup> require lenders to provide borrowers with standardized and understandable information concerning certain terms and conditions of their loans and certain changes in the terms of the loans.<sup>237</sup> The TILA disclosure

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<sup>232</sup> Legislation effective October 4, 2017 changed the name of California's licensing law from the California Finance Lender's Law to the California Financing Law.

<sup>233</sup> CAL. CODE OF REG'S, Title 10 Section 1451(c).

<sup>234</sup> *The Commissioner of Business Oversight v. Wheels Financial Group, LLC et al* Settlement Agreement (February 22, 2017).

<sup>235</sup> See, e.g., *In re Blue Global, LLC et al.*, 2016 WL 1146396.

<sup>236</sup> 15 U.S.C. § 1601 *et seq.* and 12 C.F.R. pt. 1026.

<sup>237</sup> Different disclosures are required for closed-end (installment) loans than for open-end (revolving) loans. Disclosures for closed-end loans include the amount financed (*i.e.*, the amount that the borrower will actually have use of—but not necessarily the amount of the loan), the applicable annual rate of interest expressed as an annual percentage rate or "APR," certain other fees and charges that may be applied, and the repayment terms such as the dollar amount of each payment

requirements will apply to the Funding Bank or licensed entity that is the named lender of each Borrower Loan. In addition, borrowers are generally permitted to assert claims for TILA violations against any assignee of a loan, which could result in the assignee (in an Internet situation, the marketplace lender or investors as subsequent purchasers) becoming liable for TILA violations.<sup>238</sup> As described above, the predominant consumer Internet platform structures provide that the marketplace lender will purchase and take assignment of each Borrower Loan from the Funding Bank using funds received from the issuance of the related Platform Notes or from outside investors. Each lender and its Funding Bank therefore will need to ensure that the disclosures made to borrowers contain the information and are made in the format that TILA requires.

TILA and Regulation Z impose certain substantive restrictions and significant disclosure requirements in relation to certain other categories of loans.<sup>239</sup> TILA also applies to advertising of loans. Most websites are likely to be considered advertising. Thus, marketplace lenders must comply with TILA advertising requirements regardless of whether a Funding Bank is involved or not. Most important, if certain “triggering” terms are used (such as the term of a loan or interest rate), other disclosures must be made. Many Borrower Loans are installment or closed end loans. The disclosure and other requirements applicable to closed end loans are different from those that apply to revolving or open end loans. Special rules apply to private student loans, home equity loans and lines of credit and credit card products under Truth in Lending. Based on the type of loan involved, the disclosure and other requirements may differ.<sup>240</sup>

#### **B. FTC Act, UDAP Laws, and the CFPB’s UDAAP Authority**

Marketplace lenders must comply with Section 5 of the Federal Trade Commission Act (“*FTC Act*”),<sup>241</sup> which declares as unlawful any unfair or deceptive act or practice in or affecting commerce. The FTC has traditionally undertaken enforcement actions related to advertising and marketing practices. In addition, of particular importance is the Credit Practices Rule that the FTC has adopted thereunder to

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and the number of payments. Loans secured by real estate are subject to additional disclosure requirements and consumer protections which are beyond the scope of this white paper.

238 Generally, for TILA violations to accrue to assignees, the violations must be apparent on the face of the documents; but in the case of some higher-priced loans, the liability can be broader.

239 For example, subpart F of Regulation Z mandates special disclosure requirements for loans the proceeds of which will be used to pay for postsecondary educational expenses (a “*Private Education Loan*”). Furthermore, once a Private Education Loan is offered and its terms have been adequately disclosed, the lender must allow the borrower 30 calendar days to decide whether to accept such loan. Unless a marketplace lender is establishing a lending platform specifically targeted at the student loan market and is prepared to comply with the additional disclosure requirements and to allow the borrower a 30-day window in which to accept any proffered funding, the lender should require each borrower to represent that he or she will not use his or her loan to pay for tuition, fees, required equipment or supplies, or room and board at a college, university, or vocational school.

240 A full discussion of the Truth in Lending Act is beyond the scope of this white paper. However, all online lending programs will be subject to this law and care should be taken to ensure compliance since even technical violations can lead to the imposition of statutory damages, actual damages, attorneys fees and costs.

241 15 U.S.C. § 45.

protect consumers against abusive terms and conditions in credit contracts. Among other requirements, the Credit Practices Rule prohibits loan agreements from including terms that:

- require the borrower to generally waive the right to notice and an opportunity to be heard in the event of a lawsuit (confession of judgment clauses);
- require the borrower to waive the benefit of any laws that protect the consumer's real or personal property from seizure or sale to satisfy a debt (waiver of exemption);<sup>242</sup>
- assign to the creditor the borrower's wages or earnings unless (a) the borrower may revoke the assignment at any time, (b) the assignment is a preauthorized payment plan established at the time the debt is incurred, or (c) the assignment applies only to wages or earnings already earned at the time of the assignment; or
- pyramid late charges (*i.e.*, impose multiple late charges based on a single late payment).

Marketplace lenders will need to confirm that the loan agreements used to document the Borrower Loans conform to the applicable requirements of the Credit Practices Rule.

**Caution:** A variety of marketing or servicing practices could be found to be unfair and deceptive based on the facts and circumstances of the situation. For example, placing important provisions (such as an arbitration provision, an E-Sign or EFTA consent, or a power of attorney authorizing the lender to sign documents on behalf of the borrower) in long documents without calling attention to them—instead of placing them in separate, clear and conspicuous formats—could be subject to challenge as an unfair or deceptive practice. Not providing opt-outs or failing to make them clear and conspicuous could also be subject to challenge under the FTC Act.

Marketplace lenders, Funding Banks, and loan servicers may also be required to comply with certain state laws that prohibit unfair and deceptive acts and practices ("*UDAP Laws*"). Some provisions of UDAP Laws that may be applicable to marketplace lenders include specific disclosure requirements related to the terms of loans, prohibitions on excessive prepayment penalties, and the availability to borrowers of certain causes of action and remedies.<sup>243</sup>

The Dodd-Frank Act mandated the establishment of the Consumer Financial Protection Bureau and authorized the CFPB to adopt rules prohibiting unfair, deceptive, and abusive acts or practices

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242 A contractual waiver is not prohibited if it is restricted to property pledged as collateral for the debt.

243 The Dodd-Frank Act provides that state consumer financial laws shall be deemed preempted for national banks only if the applicable state law (i) discriminates against national banks in comparison to its effect on banks chartered in that state, (ii) is preempted by a federal law other than the Dodd-Frank Act, or (iii) "prevents or significantly interferes with the exercise by a national bank of its powers." The standard may make it difficult for national banks to challenge UDAP Laws on the basis of federal preemption unless a federal statute provides for preemption. In this regard, each of TILA, ECOA, and EFTA includes its own standard for preemption of state laws.

("UDAAP") within the consumer finance market under (amongst other laws) TILA, ECOA, FCRA, FDCPA, and EFTA (each as defined below). The CFPB has not issued regulations regarding unfair, deceptive, or abusive practices, but it has articulated certain standards to assist entities in identifying whether an act or practice is unfair, deceptive, or abusive.<sup>244</sup> In addition, the CFPB has used enforcement actions to articulate its UDAAP standards and define the scope of that authority. However, with a changing of the guard at the CFPB, the enforcement posture and emphasis placed on UDAAP practices is being de-emphasized, with more emphasis being placed on supervision.

**Case in Point.** In May 2015, the CFPB filed a complaint and consent order in the U.S. district court in Maryland against PayPal, Inc., and its subsidiary, Bill Me Later, Inc., related to unfair and deceptive practices in the financing of Internet-based purchases.<sup>245</sup> One of the practices the CFPB complained of was the prefilling of drop-down boxes by the companies. The use of such prefilled drop-down boxes resulted in customers being signed up for financing or payments that they did not want or intend. This CFPB enforcement action served as guidance that in documents, forms, and disclosures on a website or Internet platform, boxes should not be prefilled or pre-checked but should rather allow the borrower to make an informed and independent choice after full disclosure of the options.

### C. Fair Lending and Related Laws

**Equal Credit Opportunity Act.** The Equal Credit Opportunity Act ("ECOA")<sup>246</sup> prohibits lenders from taking any action related to any aspect of a credit transaction, including making any credit determination, on the basis of the applicant's race, color, sex, age (except in limited circumstances), religion, national origin, or marital status; the fact that all or part of the applicant's income derives from any public assistance program; or the fact that the applicant has in good faith exercised any right under the federal Consumer Credit Protection Act or any applicable state law ("*Prohibited Bases*").<sup>247</sup> The ECOA applies during all aspects of the credit transaction, including advertising, the application and approval process, and servicing and collection activities. For example, a lender's credit scoring systems must not be discriminatory. When determining whether to approve or deny a loan application, a

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<sup>244</sup> The CFPB has indicated that an act or practice is unfair if: (1) it causes or is likely to cause substantial injury to consumers, (2) the injury is not reasonably avoidable by consumers, and (3) the injury is not outweighed by countervailing benefits to consumers or to competition. A representation, omission, act, or practice is deceptive if: (1) the representation, omission, act or practice misleads or is likely to mislead the consumer; (2) the consumer's interpretation of the representation, omission, act, or practice is reasonable under the circumstances; and (3) the misleading representation, omission, act, or practice is material. An abusive act or practice: (1) materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service, or (2) takes unreasonable advantage of (i) a lack of understanding on the part of the consumer of the material risks, costs, or conditions of the product or service; (ii) the inability of the consumer to protect its interests in selecting or using a consumer financial product or service; or (iii) the reasonable reliance by the consumer on a party to act in the interests of the consumer.

<sup>245</sup> Among other things, the complaint alleged that the firms illegally signed up customers for their online credit products, engaged in misleading advertising, signed up customers without their permission, and in some cases made customers use their service rather than their preferred method of payment. The action resulted in \$25 million in penalties.

<sup>246</sup> 15 U.S.C. § 1691. Regulation B implementing the ECOA is found at 12 C.F.R. pt. 1002.

<sup>247</sup> Various state laws may also provide for additional categories of protected classes that may not be used as a basis for determining whether to grant or refuse credit.

creditor may use either an empirically derived and demonstrably and statistically sound credit scoring system, a judgmental system, or a combination of the two. The lender must validate and periodically revalidate its credit scoring system to ensure that it does not have a disparate impact on protected classes. In addition, if an applicant is denied credit or the cost of credit is increased, the ECOA requires that the lender provide an adverse action notification.

Since marketplace lenders are very much involved in many aspects of the credit transaction, they must structure and operate their lending platforms in compliance with the ECOA and applicable state law counterparts.<sup>248</sup> In addition, the criteria used to determine creditworthiness must not have a disparate impact on the basis of any Prohibited Basis.<sup>249</sup> Notably, the ECOA applies to commercial as well as consumer lending.

**Fair Lending—Loan Purchasers.** Although not an action involving marketplace lending, a recent Fifth Circuit decision may have positive implications for purchasers of marketplace loans.<sup>250</sup> Discrimination claims under the Equal Credit Opportunity Act (“ECOA”) were brought against Wells Fargo as a purchaser of loans made by AmeriPro Funding, Inc. Wells Fargo would not purchase loans that were made to borrowers receiving public assistance as income, and the plaintiffs alleged that this practice violated the ECOA. The CFPB participated in the case and advocated that the ECOA covers secondary market players such as loan purchasers. However, the Fifth Circuit disagreed. While the plaintiffs could sue AmeriPro Funding as the creditor, the court ruled that they could not bring ECOA claims against a loan purchaser based on an arms-length transaction in the secondary market. The U.S. Supreme Court declined to hear an appeal of the case. This decision protects secondary market loan purchasers from claims asserted under the ECOA.

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248 As an example, the ECOA and Regulation B thereunder generally will prohibit marketplace lenders from requesting certain types of information from borrowers including the borrower’s race, color, religion, national original, or sex (“*Prohibited Information*”). To reduce the risk of violations of the ECOA (or similar state laws), lenders should prohibit prospective borrowers from posting Prohibited Information in their loan requests and should require lenders to represent that they will not base any funding decisions on Prohibited Bases. Lenders similarly should adopt internal policies intended to ensure that they do not assign proprietary credit scores, make loan servicing decisions, or take any other actions affecting lenders or borrowers on the basis of Prohibited Bases.

249 The ECOA is not limited to consumer loans but also applies to commercial loans, including whether a guarantor on a commercial loan is acceptable if required to approve that loan. The one area where the CFPB has jurisdiction over commercial lenders is in the enforcement of the ECOA. The CFPB stated that one of its goals for 2017 was to enforce fair lending in the small business lending sector. Under Section 1071 of the Dodd-Frank Act, the CFPB is also charged with writing rules on data collection on small business loans. This is potentially similar to the data collection for consumer loans under the Home Mortgage Disclosure Act, ostensibly to identify whether there is discrimination in lending to women and minorities and on any other Prohibited Basis. The CFPB changed consumer rules to enlarge the amount of data collection required under that law. For commercial lenders, including marketplace lenders, the potential impact is at least twofold. First, systems will need to be developed and implemented to collect the data the CFPB will require. Second, as with the consumer data, such data will be publicly available, and in the case of consumer lending such publicly available data has led to litigation. Since the ECOA is designed to be neutral, the collection of data is potentially in conflict with the law. To alleviate this concern, the persons collecting the data must be separate from anyone involved in the underwriting or credit decision process. This rule will undoubtedly pose many compliance challenges for commercial lenders.

250 *Alexander v. AmeriPro Funding, Inc.*, No. 15-20710 (5th Cir. 2017), *cert. denied*, U.S. No. 16-cv-01395 (Nov. 6, 2017).

***Fair Credit Reporting Act.*** When reviewing a loan application, a marketplace lender will typically rely on a “consumer report” as defined in the federal Fair Credit Reporting Act (“FCRA”).<sup>251</sup> Often, this will be a credit report or score from a credit reporting agency or credit bureau. The FCRA specifically applies to users of consumer reports; thus, if a lender uses consumer reports, the FCRA will be applicable. FCRA requirements include certain restrictions on obtaining and/or using consumer reports, specific notice requirements if the terms of a loan are less favorable than the terms provided to other borrowers (risk-based pricing notice), restrictions on sharing customer information with affiliates and third parties, and implementation of an identity theft prevention program. Similar to the ECOA, the FCRA requires a lender who rejects a borrower’s loan application for any reason to send the borrower an adverse action notice that discloses specified information. In addition, the FCRA imposes certain requirements that lenders must observe in reporting loan delinquencies or defaults to credit reporting agencies. Lenders must review the FCRA requirements and should consult legal counsel regarding their obligations under the FCRA to ensure that their program is in compliance.

***Case in Point—“Hard” vs. “Soft” Credit Inquiries.*** In August 2016, a California federal judge approved a \$2.4 million settlement in a class action lawsuit against Social Finance Inc., an online lender.<sup>252</sup> The complaint alleged that the lender claimed only soft credit inquiries (which generally do not affect a credit score) would be made on the applicants, when in fact hard inquiries were made (which negatively affect credit scores). The action was based on the FCRA and similar California laws.

***Use of Alternative Data for Credit Underwriting.*** Looking beyond more traditional sources of information like consumer reports, the Internet provides access to new sources and types of information on credit applicants, including through social media channels. It has been widely reported that some lenders are using information obtained from social media to determine the creditworthiness of loan applicants.<sup>253</sup>

Incorporating the use of social media data into a lender’s underwriting criteria raises fair lending compliance issues. A lender that desires to use social media data in its credit scoring system must establish that the data used is predictive of an applicant’s creditworthiness. If social media data is used as a basis to deny an application, the adverse action notification needs to reflect that. Lenders need to ascertain whether the information obtained from social media channels is accurate and reliable since such channels are not consumer reporting agencies subject to FCRA requirements, and confirm that their use of social media data in credit decisions will not result in an unfair, deceptive, or abusive act or practice. Further, lenders should ensure that unfair treatment does not occur for applicants who do

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251 15 U.S.C. § 1681; 12 C.F.R. pt. 1022.

252 *Heaton v. Social Finance, Inc.*, Case No. 14-cv-05191-TEH (N.D. Cal. 2016).

253 The CFPB has not issued guidance on the use of social media in the context of access to credit but has stated that creditors must “ensure that their scoring models do not have an unjustified disparate impact on a prohibited basis.”

not use social media.<sup>254</sup> Finally, a lender that uses social media data may obtain information about an applicant that it is prohibited from acquiring and using as part of its credit decision under the ECOA, thereby impacting its fair lending compliance.

***Spokeo, Standing and Actual Harm.*** In 2016, the U.S. Supreme Court ruled in the *Spokeo* case that in order to have standing to sue, a plaintiff must have suffered a concrete, particularized injury from the alleged statutory violation.<sup>255</sup> The Supreme Court remanded to the Ninth Circuit to determine if the plaintiff, whose claims were based on violations of the Fair Credit Reporting Act (“FCRA”), had suffered such an injury so as to confer standing to sue. In August of 2017, the Ninth Circuit on remand found that the mere placement of incorrect information about a person in a consumer database did in fact constitute a concrete injury and violated the FCRA.<sup>256</sup> *Spokeo* appealed the Ninth Circuit’s decision to the Supreme Court, but the Supreme Court denied the petition without comment.

**Why It Matters:** The issue of standing is important in the context of consumer protection statutes because many are technical in nature, and clarifying what is required in order to demonstrate a concrete injury could have the effect of limiting the claims that plaintiffs may bring against lenders and other providers of consumer financial products and services.

The doctrine of standing as espoused by the *Spokeo* decisions has been litigated in numerous consumer protection statute cases, even with virtually the same facts resulting in conflicting decisions.<sup>257</sup> The amount of litigation related to standing is staggering and appears in many, if not most, consumer finance cases.<sup>258</sup> Following the Ninth Circuit’s remand decision, plaintiffs will continue to assert that a technical statutory violation is injury enough to allow the bringing of the lawsuit. Defendants will

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254 The ECOA issues presented by social media should be addressed in credit policies and procedures to ensure that use of social media data is consistent and verifiable, that exceptions are managed, that underwriting is both predictive and fair to customers without a social media presence, and that adverse action notifications correctly reflect social media usage.

255 *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016), *as revised* (May 24, 2016).

256 *Robins v. Spokeo, Inc.*, 867 F.3d 1108 (9th Cir. 2017), *cert. denied*, 138 S.Ct. 931 (Jan. 22, 2018).

257 Employers will often ask prospective employees to provide a credit authorization to obtain a credit report. The FCRA requires that such a provision be contained in a separate, stand-alone document. In a situation where an employer provided the authorization along with other information, a technical violation of the FCRA, one circuit court has found the practice permissible and that the technical violation would not convey standing to sue. *See, Groshek v. Time Warner Cable*, 685 F.3d 864 (7th Cir. 2017). Meanwhile, another circuit on virtually identical facts has found that the statutory violation will result in injury and standing. *See, Syed v. M-I, LLC*, 846 F.3d 1034 (9th Cir. 2017). Note: As employers, marketplace lenders should review the FCRA to ensure that the practices they employ to obtain credit authorizations from prospective employees comply with the statute.

258 Standing is often an issue when there has been a data breach, potentially resulting in the compromise of personally identifiable non-public information. Again, there are conflicting court opinions. One federal circuit holds that the breach itself results in injury because there is a risk of being subject to identity theft, which is sufficient to bring a claim. *See, In re Horizon Healthcare*, 2017 WL 242554 (3d Cir. 2017). Another circuit has found that there must be allegations or proof that the data is in fact at risk, i.e., the breach itself is not enough to convey standing. *See, Gubala v. Time Warner Cable, Inc.*, 2017 WL 243343 (7th Cir. 2017). Given recent large data breaches, these issues can be of material importance to the companies involved.

continue to claim that something more, i.e., an actual injury to the plaintiff, is required to create standing to sue. The saga will undoubtedly continue until the Supreme Court decides to take up the question of standing.

***Servicemembers Civil Relief Act.*** Another fair lending consideration is the potential application of the Servicemembers Civil Relief Act (“SCRA”).<sup>259</sup> The SCRA limits the interest rate that may be charged on loans made to borrowers on active military duty and may require a rate adjustment on loans that were made to borrowers prior to the borrowers entering active military duty.<sup>260</sup> In the loan servicing context, it is important to have procedures to ensure SCRA compliance so that servicemember benefit requests are properly handled and monitored on an ongoing basis. Regulatory agencies, including the CFPB, continue to enforce the SCRA.

***Military Lending Act.*** The Department of Defense (“DOD”) issued a final rule imposing new requirements under the Military Lending Act, which took effect in October 2016 (the “MLA Rule”).<sup>261</sup> The MLA Rule is not specific to marketplace lending, but it applies to most non-mortgage consumer credit transactions and therefore implicates the practices and procedures of many marketplace lenders.

A “covered borrower” for purposes of the MLA Rule is any servicemember and his or her dependents, which includes a servicemember’s spouse, children under 21, and parents or parents-in-law that live in the servicemember’s home. The MLA Rule establishes a safe harbor for determining whether someone is a covered borrower by using information obtained from the DOD’s MLA database or a nationwide consumer reporting agency. The covered borrower determination may also be made using other methods, such as a covered borrower self-identification statement, but there is no safe harbor in this case.

Among other things, the MLA Rule establishes a maximum “military annual percentage rate” (“MAPR”) of 36 percent for credit extended to servicemembers and their dependents. The MAPR includes certain fees that are not counted as finance charges for purposes of calculating the annual percentage rate under the Truth in Lending Act (“TILA”) and Regulation Z; thus, a separate calculation is necessary to determine whether an extension of credit is within this limit. With respect to covered borrowers, the MLA Rule also imposes certain disclosure requirements (including some that must be provided orally), prohibits the imposition of a prepayment penalty, and prohibits mandating arbitration in the event of a dispute. As a result, a marketplace loan will need to include a provision in its loan documents giving the required disclosure and lenders must have in place a toll-free number for covered borrowers to call for the oral disclosure. Marketplace lenders should ensure that appropriate procedures are in place to identify covered borrowers and to comply with these additional requirements when applicable.

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259 50 U.S.C. § 501 *et seq.*

260 The CFPB has been aggressive in enforcing violations of the SCRA in servicing situations.

261 80 FR 43560 (Jul. 22, 2015).

**CFPB Expanded Oversight of Small Business Lending.** On May 15, 2017, the CFPB published a Request for Information on the small business lending market.<sup>262</sup> Many had speculated that the CFPB would make moves to expand its jurisdiction to small business lending, as then-Director Richard Cordray had publicly commented that his preference would be for the CFPB to protect both consumers and small businesses since both operate similarly in the marketplace.<sup>263</sup> The CFPB has the ability to exercise jurisdiction over small business lenders through the data collection provision mandated by Dodd-Frank, which amended the Equal Credit Opportunity Act by adding a requirement for lenders to collect and maintain loan data for women-owned, minority-owned and small business credit applicants.<sup>264</sup> The CFPB is the sole agency responsible for overseeing this requirement for all financial institutions regardless of their size or primary regulator,<sup>265</sup> thus permitting CFPB oversight of smaller lenders including certain marketplace lenders that would otherwise be excluded from its ECOA enforcement authority.

The CFPB could use this data collection requirement as a means to pursue fair lending actions against small business lenders since the data will enable the agency to analyze potential disparate impacts and redlining practices. The CFPB could also use the data to influence the lending practices among small business lenders, similar to its actions in the auto finance market. However, with the change in leadership it seems unlikely that the CFPB will make a push to expand its reach in the small business lending area in the near future.

#### **D. Debt Collection Practices**

Any third-party collection agents or servicers that a marketplace lender employs, and any marketplace lender who collects debts on behalf of others, must comply with the federal Fair Debt Collection Practices Act (“*FDCPA*”)<sup>266</sup> and similar laws in the applicable state when attempting to collect overdue payments from delinquent borrowers. Such laws govern how servicers and collection agents can collect overdue amounts and generally prohibit abusive, unfair and harassing debt collection practices, limit certain communications with third parties, and impose notice and debt validation requirements. For example, a servicer communicating with anyone other than the borrower in trying to ascertain the borrower’s location must identify themselves (including their employer, if requested), state that they are seeking location information, and not disclose that the borrower owes a debt. Once a consumer debtor is represented by counsel, all collections communications must be with their attorney rather than with the consumer directly. Collection activities must be limited to reasonable times; the *FDCPA*

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<sup>262</sup> *Request for Information Regarding the Small Business Lending Market*, 82 Fed. Reg. 22318 (May 15, 2017).

<sup>263</sup> The Semi-Annual Report of the Bureau of Consumer Financial Protection: Hearing Before the House Committee on Financial Services, 114th Cong. (2016) (testimony of Richard Cordray, Director, Consumer Financial Protection Bureau).

<sup>264</sup> Section 1071 of the Dodd-Frank Act, codified at 15 U.S.C. § 1691c-2.

<sup>265</sup> Financial institution is defined broadly as “any partnership, company, corporation, association (incorporated or unincorporated), trust, estate, cooperative organization or other entity that engages in any financial activity.” 15 U.S.C. § 1691c-2(h)(1). The definition covers both banks and non-banks, including online lenders that lend to applicable businesses.

<sup>266</sup> 15 U.S.C. § 1692.

specifies between 8:00 a.m. and 9:00 p.m. absent actual knowledge of inconvenient times. The FDCPA also requires servicers to cease further collections communications upon the debtor's request, except in very limited circumstances.

Debt collection laws are a compliance complexity and can lead to litigation. Violations of the FDCPA can lead to awards of actual damages, statutory damages of up to \$1,000 in an individual action and up to \$500,000 or 1% of the defendant's net worth in a class action, plus attorney's fees and costs. Regulatory agencies can also enforce the law. As a result, marketplace lenders acting as servicers or utilizing third-party servicers need to understand and comply with the applicable debt collection laws for Borrower Loans.

A lender that acts as its own collection agent for any Borrower Loans will not be directly subject to the FDCPA but as a matter of prudence should comply with its substantive provisions and will be subject to mandatory compliance with similar laws in certain states. The lender will be directly subject to the FDCPA if it acts as a collection agent for an affiliated issuer, purchasers of the Borrower Loans, or funds. In the event a borrower files for bankruptcy, becomes the subject of an involuntary bankruptcy petition, or otherwise seeks protection under federal bankruptcy law or similar laws, a marketplace lender and its third-party collection agents must comply with the Bankruptcy Code automatic stay and immediately cease any collection efforts. See Part V, "*Bankruptcy Considerations*," below. Finally, marketplace lenders must consider provisions of the SCRA that permit courts to stay proceedings and the execution of judgments against servicemembers and reservists who are on active duty.

It should be noted that the CFPB has adopted rules setting forth its authority to supervise non-bank debt collectors that generate annual revenue in excess of \$10 million from consumer debt collection activities. Even lenders whose revenues from collection activities are not sufficient to make them subject to direct CFPB supervision should consider voluntary compliance with the standards that the CFPB has established for debt collectors regulated by it.

***Debt Buyer is Not a Debt Collector.*** Resolving a split of opinion between several circuits, the U.S. Supreme Court ruled that an entity that buys defaulted debts is not a debt collector under the Fair Debt Collection Practices Act ("*FDCPA*") and therefore, not subject to compliance with that statute.<sup>267</sup> In newly-appointed Justice Gorsuch's first written opinion expressing the views of a unanimous court, he stated that debt buyers do not meet the FDCPA statutory definition of collecting or attempting to collect debts "owed or due to another."<sup>268</sup> Rather, a debt buyer is collecting on its own behalf because it owns the debt. It is possible, however, that debt buyers may still be subject to the FDCPA under other definitions.

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<sup>267</sup> *Henson v. Santander Consumer USA, Inc.*, 137 S. Ct. 1718 (2017).

<sup>268</sup> 15 U.S.C. 1692a(6).

## E. Privacy Laws

Because of the personal and sensitive nature of the information that is collected from prospective borrowers, it is imperative that marketplace lenders comply with applicable laws and regulations governing the security of nonpublic personal information.<sup>269</sup> In particular, the federal Gramm-Leach-Bliley Act (“GLBA”) limits the disclosure by a financial institution<sup>270</sup> of nonpublic personal information about a consumer to nonaffiliated third parties and requires financial institutions to disclose certain privacy policies and practices, including with respect to the sharing of such information with both affiliates and /or nonaffiliated third parties. A privacy notification or policy must be provided at the time an account is opened and on an annual basis. If a financial institution chooses to share information with nonaffiliated third parties, borrowers must be given the right to opt out of such information sharing. States also have enacted privacy laws that may be applicable to marketplace lenders. Lenders are advised to consult with legal counsel to determine which, if any, state privacy laws may be applicable.

GLBA also requires financial institutions to establish an information security program to ensure the security and confidentiality of customer records and information, protect against anticipated threats or hazards to the security or integrity of those records, and protect against unauthorized access to or use of those records or information. In order to assist financial institutions in developing an appropriate information security program, the related federal agencies published the Interagency Guidelines Establishing Standards for Safeguarding Customer Information (“*Security Guidelines*”).<sup>271</sup> Due to the inherent risks associated with maintaining information that is accessible over the Internet, a marketplace lender should review the Security Guidelines in connection with the development of its information security program.<sup>272</sup>

Finally, GLBA requires financial institutions to develop and implement a response program designed to address incidents of unauthorized access to customer information maintained by the institution or its service provider. The related federal agencies have also published Interagency Guidance on Response Programs for Unauthorized Access to Customer Information and Customer Notice. In addition, most states have laws that would require a marketplace lender to notify customers of a breach of security in which personal information is reasonably believed to have been acquired or accessed by an unauthorized person. For example, the NYDFS cybersecurity rule imposes requirements that are

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269 See the previous section on the FCRA which also contains requirements with respect to privacy and information sharing.

270 The GLBA governs “financial institutions,” which is defined to mean any institution the business of which is engaging in financial activities as described in section 4(k) of the Bank Holding Company Act of 1956 (which includes the lending of money). Marketplace lenders will most likely be deemed “financial institutions” for these purposes. The GLBA is codified at 15 U.S.C. § 6801-3809 and regulations are found at 12 C.F.R. pt. 1016.

271 Interagency Guidelines Establishing Standards for Safeguarding Customer Information (15 U.S.C. § 6801 *et seq.*) and FTC Safeguards Rule (16 C.F.R. pt. 314). The FDIC Regulation is at 12 C.F.R. pt. 364 App. B.

272 In March 2019, the FTC issued notices of proposed rulemaking to amend the GLBA privacy rules and rules related to safeguarding personal information.

more stringent than those imposed under GLBA. As these laws vary from state to state in their applicability, the type of information that is covered, and the notification requirements, lenders are advised to consult legal counsel to determine the appropriate course of action should a data breach occur.

## F. Electronic Commerce Laws

*E-Sign Act and UETA.* It goes without saying that Internet loan platforms execute borrower/lender registration agreements and process credit transactions in electronic form and that virtually all payments are processed through the Automated Clearing House (“ACH”) electronic network. Accordingly, marketplace lenders need to comply with the federal Electronic Signatures in Global and National Commerce Act (“E-Sign Act”)<sup>273</sup> and similar state laws (particularly the Uniform Electronic Transactions Act (“UETA”)),<sup>274</sup> both of which authorize the creation of legally binding and enforceable agreements utilizing electronic records and electronic signatures and set forth certain disclosure and consent requirements.<sup>275</sup>

Federal consumer protection and disclosure laws allow consumers to receive legally required disclosures electronically if they consent to electronic disclosure prior to receiving the disclosure.<sup>276</sup> Specifically, the E-Sign Act and regulatory guidelines provide that a borrower can consent to receive electronic records only if the consent is provided electronically in a manner that reasonably demonstrates that the borrower can access the information in the electronic form that will be used to provide the information. In addition, any information required by law to be provided in writing can be made available electronically to a borrower only if the borrower affirmatively consents to receive the information electronically and the lender clearly and conspicuously discloses certain required information to the borrower prior to obtaining his or her consent.

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<sup>273</sup> 15 U.S.C. § 7001 *et seq.*

<sup>274</sup> Forty-seven states and the District of Columbia have adopted UETA in substantially the form promulgated by the National Conference of Commissioners on Uniform State Laws in 1999. California has adopted UETA, but made significant variations to the model text. *See*, Uniform Electronic Transactions Act: Cal. Civ. Code § 1633.1 *et seq.* Illinois has adopted the Electronic Commerce Security Act: IL ST Ch. 5, ACT 175, New York has adopted Rules and Regs. Electronic Signatures and Records Act: N.Y. State Tech. Law § App § 540.1 *et seq.* (hereinafter “ESRA”), and Washington has adopted the Washington Electronic Authentication Act: Wash. Rev. Code Ann. tit. 19, Ch. 19.34. This white paper assumes that either UETA or the E-Sign Act (which preempts state electronic signature and records laws to the extent inconsistent with UETA) will apply to the electronic transactions discussed herein. Lenders should consult legal counsel if California, Illinois, New York, or Washington law applies to their electronic transactions.

<sup>275</sup> However, security interests governed by Article 9 of the Uniform Commercial Code (the “UCC”) are not subject to the E-Sign Act or UETA. *See* 15 U.S.C § 7003(a)(3) and UETA § 3 (exempting certain transactions governed by the UCC, including Article 9 security interests, from coverage under the E-Sign Act and UETA, respectively). Also see “*Bankruptcy Considerations—Security Interests in Electronic Collateral*” below for a discussion of related UCC issues.

<sup>276</sup> It is suggested that applicants and borrowers be required to click through any legally required disclosures and terms and conditions of agreements to show that they have read the disclosures and agreements. Use of links to disclosures or legal documents poses additional risk, particularly if a link does not indicate the significance of the link. If it cannot be shown that the link was accessed, there may not be a legal basis to assert that the customer has received and read the disclosure or agreement. E-Sign requirements are also applicable to commercial lending arrangements.

**Worth Remembering:** Having a proper form of E-Sign Act authorization and consent to receive disclosures electronically is crucial to the successful operation of an Internet lending platform.<sup>277</sup> As a result, the timing and placement of the customer’s consent to electronic disclosures and contracting is important. It is a best practice to put the E-Sign consent first in a transaction as it must be obtained prior to the time that any disclosures are received or any contract is entered into. The consent should not be buried in a longer document but preferably presented as a standalone document requiring an affirmative act to show assent.

Courts are paying attention to these types of matters. For example, the Seventh Circuit held that an arbitration clause in an online terms of use, eight pages into a ten-page agreement, was not sufficient to give proper notice of the arbitration agreement.<sup>278</sup> In another case also dealing with an arbitration agreement, a federal court held that checking a box to confirm reading of an agreement was not enough to bind the borrower where the online lender held all of the electronic records.<sup>279</sup> These recent cases demonstrate that courts are scrutinizing online programs and documentation in light of consumer protection considerations. This suggests that marketplace lenders need to provide disclosures clearly and obtain a consumer’s agreement to important documents such as electronic contracts and arbitration agreements by affirmative action to effectively demonstrate their consent.

**Electronic Funds Transfers.** With respect to electronic payments, since marketplace lenders are not typically organized as banks, they must rely on eligible financial institutions (such as FDIC-insured banks) both to fund the Borrower Loans and to receive payments over the ACH network. The Electronic Funds Transfer Act (“EFTA”) and its implementing Regulation E<sup>280</sup> establish the rights, responsibilities, and liability of consumers who use electronic fund transfers and of financial institutions and certain other parties that offer these services. These laws contain disclosure and dispute resolution requirements and require a party that wishes to automatically debit a consumer account for a payment to obtain written authorization from the consumer for such automatic transfers.<sup>281</sup>

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277 In an Internet context, additional legal concerns can be created if more than one individual is involved in the process. For example, joint applicants or guarantors raise the issues of appropriate customer identification, E-Sign consent, and authorizations. Legal counsel should be consulted on these matters. Special issues also arise with respect to lending secured by real or personal property.

278 *Sgouros. TransUnion Corp. et al.*, Case No. 15-1371 (7th Cir. Mar. 25, 2016). The “I Agree” button appeared below a notice that the consumer was agreeing to have its personal information viewed and that said nothing of arbitration. The court said that the site did not sufficiently notify customers that they were signing the agreement and consenting to arbitration. The court also stated that where terms are not displayed but must be brought up via hyperlink, there should be a clear prompt directing the user to read such terms. Contract law requires that a website provide a user reasonable notice that use of the site or clicking on a button constitutes assent to an agreement.

279 *Dillon v. BMO Harris Bank N.A.*, 2016 BL 89102 (M.D.N.C. Mar. 25, 2016).

280 15 U.S.C. § 1693 *et seq.*; 12 C.F.R. pt. 1005.

281 The law and regulation impose certain requirements upon these authorizations. The authorization may be in a set amount (*e.g.*, the monthly payment amount) or a range (which could provide for the inclusion of late payment or other fees).

**Key Considerations:** Under the EFTA, a lender cannot require a borrower to make payments by electronic means. However, a lender may provide an incentive for making payments electronically.<sup>282</sup> Thus, an appropriate customer authorization for automatic debits and compliance with Regulation E are essential to Internet lending programs.<sup>283</sup> The authorization must be in writing and signed by the borrower, and a copy of the authorization must be provided to the borrower. As suggested by the recent cases, placing such an authorization within another document may not be sufficient to show proper consent to the electronic transfer of funds as is required by the EFTA. As a result, it is a best practice to have a separate authorization for a preauthorized transfer from a borrower's account for payment of a loan.

Two courts have considered the practice of requiring the borrower to sign an electronic funds transfer (“EFT”) authorization for loan payments but allowing the customer to cancel at any time, even before the first loan payment is made. Both courts found this practice to be a violation of Regulation E and the EFTA. In *De La Torre v. CashCall, Inc.*, the lender used a promissory note containing an EFT authorization which included language allowing cancellation of the authorization at any time.<sup>284</sup> In order to comply with the signed writing requirement, the lender required the borrower to check a box indicating its authorization for EFTs. If the borrower did not check the box, it could not obtain a loan. Once the loan was funded, the borrower could cancel the authorization at any time, including prior to the first loan payment date. The court found that this practice violated the EFTA and Regulation E, which prohibit conditioning an extension of credit on repayment via EFT. The court reasoned that the violation occurs at the time the lender requires the authorization to receive the loan, notwithstanding any later ability to revoke or use another means of payment. This case was decided on a motion for summary judgment, so it was a ruling on the merits and the court ordered a hearing to determine damages on the claim. The court also found that this practice violated the California Unfair Competition Law.

Another court reached the same conclusion on similar facts. In *FTC v. Payday Financial, LLC*, the lender had an EFT authorization in its loan agreement and required borrowers to sign it in order to obtain a

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However, the customer is entitled under the law to receive notice of any amounts varying from the specified transfer amount or range. The customer must also have the right to terminate the automatic payments.

282 Although it might seem proper to provide an interest rate reduction for making payments electronically, a disincentive could violate the EFTA. For example, charging a fee for paying by check could violate both the EFTA and state laws that may prohibit such fees. Litigation is pending on this subject. Care should also be taken with respect to how payment options are presented. Prefilled boxes are likely to be viewed as a potential unfair practice.

283 It should be noted that payday lenders have been subjected to regulatory scrutiny for electronic payments. The New York banking regulator instructed financial institutions not to make ACH transfers to high-rate lenders. Similarly, the Department of Justice has been criticized for “Operation Choke Point,” aimed at cutting off high-rate Internet lenders from the ACH and payments systems. Several subpoenas were issued under this program and at least one bank has entered into a settlement with the DOJ for processing payments for a high-rate Internet lender. Access to the payment systems for Internet lenders continues to be an evolving issue, particularly for high-rate or payday lenders.

284 56 F. Supp. 3d 1073 (E.D. Cal. 2014).

loan.<sup>285</sup> As in *De La Torre*, the borrower had the ability to revoke its authorization prior to the first loan payment. However, since the borrower had no choice but to authorize the EFT to obtain a loan, the court found that the lender had violated the EFTA and Regulation E.

**Takeaways:** Based on these cases, there is a significant risk of violation of law and regulation, and the potential for UDAP/UDAAP-type claims as a result of such a practice. Our experience is that lenders are now providing choices for payment and making loans regardless of what payment option is chosen. Accordingly, any practice that does not provide a choice or payment or that prevents a borrower from obtaining a loan if it does not sign an EFT authorization under current precedent would likely be subject to challenge, litigation, and a finding of a violation.<sup>286</sup>

### G. Other Relevant Laws

**Bank Secrecy Act Regulations.** The federal Bank Secrecy Act<sup>287</sup> and related laws require any bank making a loan, and therefore the Funding Bank in the case of Internet loans and, in some cases, the marketplace lender, to adopt policies and procedures to monitor and enforce the following:

- Establish a customer identification program to verify the true identities of borrowers before an account is opened and provide a notice regarding its use of personal information to confirm a customer’s identity;
- Determine whether borrowers are on any list of known or suspected terrorists or terrorist organizations issued by federal agencies such as the Office of Foreign Assets Control (“OFAC”) and reject any borrower whose name appears on such list;<sup>288</sup>
- Report suspicious account activity that meets the thresholds for submitting a Suspicious Activity Report (“SAR”); and
- Implement an anti-money laundering and information sharing program.

The marketplace lender will need to cooperate with the Funding Bank in the implementation of these policies and procedures and also adopt internal procedures to establish compliance with those regulations to which it is directly subject.

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<sup>285</sup> 989 F. Supp. 2d 799 (Dist. S.D. 2013).

<sup>286</sup> It is our understanding that the CFPB analyzes the EFT practices of creditors for compliance with the EFTA, has issued civil investigative demands (CIDs), and considers enforcement actions related to compliance with EFTA.

<sup>287</sup> 12 U.S.C. §§ 1829, 1951—1959; 31 U.S.C. §§ 5311—5314, 5316—5332; 12 U.S.C. § 1786(9); 31 C.F.R. pt. 103; and 12 C.F.R. § 326.8 (FDIC Regulation).

<sup>288</sup> This topic surfaced in December 2015 when it was reported that one of the shooters in the San Bernardino, California killing of 14 people had obtained a loan from a marketplace lender just weeks prior to the attack. However, the individual had passed both identification checks and an OFAC screening. Thus, any lender would not have been able to make a determination that this individual should not have received a loan.

**Telephone Consumer Protection Act.**<sup>289</sup> The TCPA requires that an entity obtain prior written consent before contacting consumers on their mobile phones via an automatic telephone dialing system and /or using an artificial or prerecorded message. Most marketing messages to any phone are also covered.

**Worth Remembering:** It is recommended as a best practice that appropriate TCPA consent be obtained where the consumer’s phone number is requested. If consumers are asked to provide phone numbers as part of a loan application, and in particular if mobile numbers are specifically requested, the TCPA disclosure should be provided and consent obtained. Consumers must also have the ability to revoke their consent to be called under the TCPA.

The TCPA poses compliance challenges and has been a hotbed for litigation in recent years. Damages are \$500 per call for negligent violations and \$1,500 per call for willful violations. Over 2,000 lawsuits are pending due to the potential windfall from such damages, which are unlimited under the TCPA. As a result, most TCPA actions are filed as class actions.

The Federal Trade Commission also manages the National Do Not Call Registry that prohibits telemarketing sales calls to individuals who have signed up on the registry. In addition, some 40 states have laws restricting telemarketing. The state laws are not uniform. Care should be taken in any telephone marketing situation and where autodialers, prerecorded messages, or calls to cell phones are being made.

Calls to cell phones have prompted large amounts of litigation—much of it in the form of class actions—against marketers, lenders, and servicers. These claims are being made under the Telephone Consumer Protection Act (“TCPA”).<sup>290</sup> Plaintiffs’ lawyers find TCPA litigation advantageous since violations result in automatic damages of \$500 per call, which is tripled to \$1,500 if the conduct is willful. Huge damage awards warrant a further discussion of the law and its implications.

**Case in Point—Shifting Interpretations of TCPA and the 2015 Order.** The TCPA was enacted in 1991 to stem the costs and nuisance of unwanted telemarketing by prohibiting calls using an Automated Telephone Dialing System, commonly referred to as an “autodialer,” to call certain types of phones without prior consent. As part of the TCPA, prior consent (and in the case of telemarketers, prior *written* consent) is required when a company makes a call using an autodialer or uses a prerecorded message in a call to a cell phone.<sup>291</sup> Prior consent is also required for some landline telemarketing calls when the call uses a prerecorded message.<sup>292</sup>

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289 47 U.S.C. § 227 *et seq.* and 47 C.F.R. § 64.1200 *et seq.* The Telemarketing and Consumer Fraud and Abuse Prevention Act and the Federal Telemarketing Sales Rule are found at 15 U.S.C. § 6101-6108 and 16 C.F.R. pt. 310.

290 47 U.S.C. § 227.

291 47 U.S.C. § 227(b)(1)(A)(iii).

292 47 U.S.C. § 227(b)(1)(B); 47 C.F.R. § 64.1200.

Much has changed in technology, in business, and in the way that cell phones are billed since the TCPA was enacted that undermines or creates gray areas with respect to the law's definitions and scope. Over the years the Federal Communications Commission ("FCC"), the regulator that has rulemaking and enforcement authority for the TCPA, has issued several Rules and Orders that attempt to interpret the law's requirements, particularly with respect to non-telemarketing companies that use autodialers for debt collection purposes.<sup>293</sup> A Declaratory Ruling and Order issued in July 2015 (the "2015 Order")<sup>294</sup> is the most recent of these interpretive efforts. The 2015 Order set forth an expansive interpretation of various TCPA concepts in a manner that is detrimental to those subject to its requirements, including financial companies.

Several entities petitioned courts for review of the 2015 Order. These cases were ultimately consolidated and the U.S. Panel on Multidistrict Litigation randomly selected the U.S. Court of Appeals for the D.C. Circuit to hear the matters.<sup>295</sup> The petitions all argue that the FCC in its 2015 Order exceeded its authority and made it very difficult for companies to comply with the TCPA.<sup>296</sup> In October 2016, the U.S. Court of Appeals for the D.C. Circuit heard oral argument in the consolidated case.<sup>297</sup>

Under the 2015 Order, any system that has the present *or future* capacity to be an autodialer counts as one for the purposes of the TCPA.<sup>298</sup> This is contrary to the definition of "capacity" in the TCPA, which refers only to an instrument's present capacity. In oral argument, counsel for the petitioners argued that devices like smartphones, with the ability to install and use certain applications, could therefore be included under the definition of autodialer. Indeed, it is hard to imagine a device that would not fall under this broad definition besides a rotary phone. The parties disputed what types of devices should qualify as an autodialer in oral argument, with the petitioners arguing for a narrower scope than that provided in the 2015 Order.

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293 See, e.g., *In re Rules & Regs. Implementing the TCPA of 1991*, 7 FCC Rcd. 8752, 8769 (Oct. 16, 1992); *In re Rules & Regs. Implementing the TCPA of 1991*, 27 FCC Rcd. 1830, 1838 (Feb. 15, 2012).

294 See *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Declaratory Ruling and Order*, CG Docket No. 02-278, FCC 15-72, at ¶ 49, 52 (July 10, 2015).

295 The first was *ACA Int'l v. FCC*, No. 15-1211 (D.C. Cir. filed July 10, 2015). Next was *Sirius XM Radio, Inc. v. FCC*, No. 15-1218 (D.C. Cir. filed July 14, 2015), and then *Professional Association for Customer Engagement, Inc. v. FCC*, No. 15-2489 (7th Cir. filed July 14, 2015). These cases, along with others, were consolidated since filing and the U.S. Panel on Multidistrict Litigation randomly selected the U.S. Court of Appeals for the D.C. Circuit to hear the matters.

296 *ACA International, et al. v. Federal Communications Commission*, Case No. 15—1211, at ECF No. 1599016 (D.C. Cir. Feb. 16, 2015). The petition focuses on four issues: (1) the FCC's interpretations of the TCPA are inconsistent, unclear, and ambiguous; (2) the FCC's interpretation of what constitutes an autodialer is overly broad and inconsistent with other language in the statute; (3) the definition of "called party" under the TCPA is ambiguous due to the frequency of "ported" numbers; and (4) the revocation of consent rules is impractical and unjustified

297 The "one-call safe harbor" introduced by the FCC in its 2015 Order was another issue raised in oral argument. Many phone lines that used to be associated with a residential landline have now been "ported" to ring on a cell phone, and the safe harbor would give a company that is calling what it thinks is a landline one chance to ascertain if the number has changed to a cell phone, since the compliance requirements for cellular phones are much more stringent than those for landlines. The petitioners argued that the safe harbor is not effective and does not help companies comply with the TCPA.

298 See *Rules and Regs. Implementing the Telephone Consumer Protection Act of 1991, Declaratory Ruling and Order*, CG Docket No. 02-278, FCC 15-72, at ¶ 16 (July 10, 2015).

In addition, under the 2015 Order, consent to be called, one of the main defenses to TCPA litigation, has become easier to revoke. Some courts had previously held that because the TCPA was silent regarding revocation, it was impossible to revoke consent to be called.<sup>299</sup> Others disagreed and pointed to the Fair Debt Collection Practices Act requirement that requests to cease and desist calling be in writing.<sup>300</sup> The 2015 Order, however, allows consent to be revoked by “any reasonable means.”<sup>301</sup> Thus, a very difficult burden is placed on companies who now have to make a decision and create new policies on whether an attempted revocation is “reasonable,” and can no longer require that revocation be in writing. Petitioners made this point in oral argument and argued that standardized methods of revocation should be codified.

The D.C. Circuit issued its long-awaited decision in March 2018, setting aside the FCC’s expansive definition of an autodialer and rescinding the rules related to calling reassigned mobile numbers but retaining consumers’ ability to revoke consent in any reasonable manner.

***Consumer Ability to Revoke TCPA Consent.*** The issue of how a consumer can revoke consent to receive autodialed calls continues to be a hotbed of litigation, with potentially conflicting decisions. In the Second Circuit, dealing with an auto loan, the court held that the consumer borrowers cannot revoke their TCPA consent if that consent was part of the bargained for consideration for the loan, i.e., a part of the loan contract.<sup>302</sup> But in the Eleventh Circuit, the court found that a consumer can revoke TCPA consent on a limited basis such as revoking the consent from 8 a.m. to 5 p.m. on business days.<sup>303</sup>

***Online Warning—Location of the TCPA Consent Matters.*** At least two recent decisions highlight the importance of the placement of the TCPA consent on a website.<sup>304</sup> One of these cases was brought against a lender by a consumer who had completed an online quote request form on the lender’s website. The request form required the consumer to provide personal information including a phone number, followed by a “Get your free quote” click button. Below the click button and outside the box containing the request form, there was additional language stating that the consumer consented to receive telephone calls and text messages from the lender. The consumer started receiving phone calls and filed a class action suit alleging a TCPA violation. The lender moved to dismiss the case, claiming that written consent had been provided by the consumer. The court thought otherwise. The court held that the small font used for the TCPA disclosure and its placement below the click button made it unlikely that the consumer knew that by clicking the button, they were agreeing to receive autodialed

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299 See *Gager v. Dell Fin. Services, LLC*, 727 F.3d 265, 270 (3d Cir. 2013) for discussion of previous court interpretations of consent.

300 *Id.*

301 See *Rules and Regs. Implementing the Telephone Consumer Protection Act of 1991, Declaratory Ruling and Order*, CG Docket No. 02-278, FCC 15-72, at ¶ 54\5 (July 10, 2015).

302 *Reyes v. Lincoln Automotive Fin. Serv.*, 2017 WL 2675363 (June 22, 2017).

303 *Schweitzer v. Comenity Bank*, 866 F.3d 1273 (11th Cir. Aug. 10, 2017).

304 *Barrera v. Guaranteed Rate, Inc.*, 2017 WL 4837597 (Oct. 23, 2017); *Sullivan v. All WebLead, Inc.* 2017 WL 2378079 (June 1, 2017).

calls from the lender. The second case also involved a TCPA consent disclosure that appeared below a submit button and in smaller print.

**Compliance Tip:** For marketplace lending participants using websites or giving online disclosures, the clear message from these cases is that TCPA consent language must be placed in a logical location with conspicuous print and call attention to the significance of the language so as to put consumers on notice that they are giving their consent by clicking an “I agree” or similar button.

**TCPA Violations Alleged Against Business Lender.** A business filed a class action lawsuit in federal court in Illinois against an online business lender and its funding bank for violations of the TCPA and the Illinois Consumer Fraud Act.<sup>305</sup> The complaint alleges that the plaintiff class members received unsolicited faxes marketing loan products and services from the defendants resulting in a “loss of paper, toner, ink, use of facsimile machines and employee time.” Most recently, the court granted a motion to strike the class claims, but gave the plaintiff the chance to amend the complaint to correct deficiencies. Even business lenders are not immune from suit based on consumer types of claims and must defend such actions.

**ADA and Website Accessibility for the Disabled.** In 2010, the Department of Justice indicated that it would propose rules under the Americans with Disabilities Act (“ADA”) with respect to making websites accessible to individuals with disabilities. However, in 2017 the agency indicated that rulemaking on this subject was on its “inactive” regulatory agenda. It is not known if or when any regulations will be promulgated. However, in the interim, a wave of litigation has ensued, primarily against online retailers alleging that their websites fail to accommodate the visually impaired and seek to have software technology imposed that would allow access by the disabled. In June 2017, in the first case to go to trial on the issue, a federal judge ruled that the lack of accessibility of a supermarket chain’s website violated a blind man’s rights under the ADA.<sup>306</sup> Although we are not aware of any cases pending on this issue against marketplace lenders, without a clear regulatory standard, there is a risk of federal litigation if a website cannot accommodate consumers with disabilities.

**CAN-SPAM.**<sup>307</sup> The CAN-SPAM Act establishes requirements for anyone who sends commercial or transactional messages by email and gives recipients of commercial emails the right to ask to be placed on an opt-out list. A commercial email is one whose primary purpose is promoting or advertising a commercial product or service, while a transactional email is one that facilitates an agreed-upon transaction or updates a customer in an existing business relationship. A commercial email is subject

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<sup>305</sup> *A Custom Heating & Air Conditioning, Inc. v. Kabbage, Inc., Celtic Bank, et al.*, No. 16-CV-2513 (N.D. Ill. filed Feb. 3, 16).

<sup>306</sup> *Gil v. Winn-Dixie Stores Inc.*, 242 F.Supp.3d 1315 (S. D. Fla. June 13, 2017). The case is on appeal to the 11th Circuit Court of Appeals (Case No. 17-13467).

<sup>307</sup> The Controlling Assault of Non-Solicited Pornography and Marketing Act of 2003, 15 U.S.C. § 7701 *et seq.*

to more restrictions than a transactional one, for example, restrictions on sender information and subject line, identification as an advertisement, and provision of an opt-out method. However, a transactional email cannot contain false or misleading routing information. The CAN-SPAM Act applies to emails sent to both consumers and business entities.

The law provides penalties for noncompliance for both the company that sends the email and the company whose products are advertised in a commercial email. The sender is subject to a penalty of up to \$16,000 for each unlawful email. Due to the potential for damages, care should be exercised if email messages are utilized as part of a marketplace lending program.

**Further Thoughts on *Spokeo*, Standing and Actual Harm under Consumer Protection Statutes.** A recent Supreme Court decision on the sufficiency of standing in cases alleging violations of federal consumer protection statutes made ripples in the industry—though the ripples were not as large as some may have hoped. As highlighted earlier, in May 2016, the Supreme Court handed down a much-anticipated ruling in *Spokeo, Inc. v. Robins*.<sup>308</sup> The central issue in *Spokeo* was whether the plaintiff had standing for a claim under the Fair Credit Reporting Act (“FCRA”) if he could not show that any actual harm arose from the alleged statutory violation. While the Supreme Court ultimately answered this question in the negative, its holding was narrow and thus unlikely to have the effect of limiting potential claims under a variety of consumer protection statutes—particularly those that are often the basis of class actions.<sup>309</sup>

The plaintiff alleged that Spokeo, a data aggregator that operates a people-search engine, reported false and inaccurate information about him—specifically, that he was better educated and more highly paid than was in fact true—and thereby violated the FCRA. The district court dismissed the plaintiff’s putative class action case on the ground that he lacked standing because he could not show any actual harm that arose from the alleged FCRA violation. The Ninth Circuit reinstated the case, which ultimately made its way to the Supreme Court. In its decision, the Supreme Court explained that to have standing, a plaintiff must show (among other things) an “injury in fact” from the particular allegation. The Court emphasized that the injury must be both “concrete and particularized,” though it need not be tangible. With this ruling, the Court sent the case back to the Ninth Circuit to determine if the plaintiff had actually alleged the kind of injury that would allow his suit to proceed. This means that the victory for the defendant was very narrow, and it is possible that the plaintiff could eventually win, or that the case could even return to the Supreme Court.

Because *Spokeo* did not create any new law and simply restated the requirements for standing, it has not been able to be applied in the way many companies had hoped. Courts have been inconsistent in applying *Spokeo* to a number of federal consumer protection statutes. For example, while in some

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308 136 S. Ct. 1540, 194 L. Ed. 2d 635 (2016), *as revised* (May 24, 2016).

309 Many of these statutes affect marketplace lenders, including the Truth in Lending Act, the Electronic Funds Transfer Act, the Fair Credit Reporting Act, and the Telephone Consumer Protection Act.

instances TCPA cases have been dismissed on *Spokeo* grounds, many other courts have found sufficient injury based on invasion of privacy, or even *de minimis* costs, like the amount it costs to charge a cell phone battery drained by receiving unwanted telephone calls, or time spent answering unwanted phone calls.<sup>310</sup> Similarly, courts have been split when reviewing Fair Debt Collection Practices Act (“FDCPA”) claims, where some courts have asserted that a bare FDCPA violation alone constitutes a violation of a right that Congress sought to raise to the level of a concrete injury.<sup>311</sup> However, many others have disagreed, requiring an additional showing of some injury.<sup>312</sup> The trend continues with courts reviewing TILA claims.<sup>313</sup> In short, it is likely that this issue will remain unsettled until further litigation resolves the question. However, the decision provides a potential defense to claims brought under consumer financial protection laws.

The Ninth Circuit heard oral arguments in December 2016 on whether the plaintiff had actually alleged the kind of injury that would allow his suit to proceed. In August 2017, the Ninth Circuit issued its decision, finding that the mere placement of wrong information about a person in a consumer database constituted a concrete injury and violated the FCRA. As a result, *Spokeo* ultimately did not bring much clarity to the question of standing in consumer protection statute cases and this issue will likely remain unsettled until further litigation resolves it. Many cases have brought both claims and defenses based on this case and it continues to be a legal issue in many consumer protection-type cases.

## H. State Developments

**NYDFS Cybersecurity Rule.** On February 16, 2017, the New York Department of Financial Services (“NYDFS”) announced that its final cybersecurity rule for financial institutions would take effect beginning on March 1, 2017. The NYDFS had issued a revised version of the proposed rule on December 28, 2016 after receiving more than 150 comments in response to its initial proposed rule.<sup>314</sup> The NYDFS cybersecurity rule imposes broad requirements that are more stringent than the federal requirements under the Gramm-Leach-Bliley Act Safeguards Rule. It requires banks, insurance companies, and other financial services institutions regulated by the NYDFS to establish and maintain

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310 *Mey v. Got Warranty, Inc.*, No. 5:15-CV-101, 2016 WL 3645195, at \*3 (N.D.W. Va. June 30, 2016).

311 *Church v. Accretive Health, Inc.*, No. 15-15708, 2016 U.S. App. LEXIS 12414 (11th Cir. July 6, 2016).

312 *Nokchan v. Lyft, Inc.*, No. 15-cv-03008, 2016 U.S. Dist. LEXIS 138582 (N.D. Cal. Oct. 5, 2016) (“not follow[ing] *Church*”); *Macy v. GC Servs. L.P.*, No. 3:15-cv-819, 2016 U.S. Dist. LEXIS 134421, at \*8 n.3 (W.D. Ky. Sept. 29, 2016) (finding that it “does not share the *Church* panel’s expansive reading of *Spokeo*”); *Dolan v. Select Portfolio Servicing*, No. 03-CV-3285, 2016 U.S. Dist. LEXIS 101201, at \*20 n.7 (E.D.N.Y. Aug. 2, 2016) (“respectfully disagree[ing] with *Church*” and “reject[ing] the view that *Spokeo* established the proposition that every statutory violation of an ‘informational’ right ‘automatically’ gives rise to standing”).

313 *See Jamison v. Bank of Am., N.A.*, Case No. 2:16-cv-00422-KJM-AC, 2016 WL 3653456 (E.D. Cal. July 7, 2016) (finding bare procedural TILA violation insufficient to provide standing where omitted information from payoff was provided elsewhere); *but see McQuinn v. Bank of Am., N.A.*, Case No. 14-56038, 2016 WL 3947831 (9th Cir. July 22, 2016) (noting that there is some question as to whether a violation of TILA’s notice requirement under 15 U.S.C. § 1641(g), without more, creates an injury that is sufficiently concrete to confer standing, but finding sufficient concrete injury in this case).

314 NYDFS Press Release, February 16, 2017, *available at*: <https://www.governor.ny.gov/news/governor-cuomo-announces-first-nation-cybersecurity-regulation-protecting-consumers-and-proposed-23-NYCRR-500>.

a cybersecurity program designed to protect consumers and ensure the safety and soundness of the New York financial services industry.

Specifically, the NYDFS cybersecurity rule requires covered entities to encrypt certain nonpublic data both in transit and at rest; limit the retention and ensure the timely destruction of nonpublic information, essentially mandating a record retention policy; conduct vulnerability assessments at least quarterly; and conduct penetration testing and written risk assessments of their information system at least annually, among other requirements. Although the 2016 revisions to the rule included longer timeframes for compliance and more flexibility for covered entities in satisfying its requirements than the original proposed rule, the NYDFS cybersecurity rule remains substantially different from the federal regulatory approach, and may pose challenges and require significant time and resources for covered entities to comply.

There is a two-year transitional period and separate compliance dates for different portions of the NYDFS cybersecurity rule, with full compliance required for all covered entities by March 1, 2019.

**California Enforcement Action.** A 2016 California Department of Business Oversight (the “DBO”) action decision appears to expand entities that need to be licensed under the California Financing Law.<sup>315</sup> The decision upheld a cease and desist order against an entity that did not fund loans to borrowers but solicited borrowers, evaluated the credit, proposed loan terms, and made or participated in credit advances. The DBO rejected the argument that a license was needed only if the entity actually made loans, instead concluding that lending-related activities may also require licensing. It remains to be seen if this could be the DBO’s way of reaching marketplace lenders to require licensing.

**State Legislation.** Some states are contemplating additional licensing for marketplace lenders. For example, in New York, Governor Cuomo’s proposed budget for fiscal year 2018 contained a change to existing law regarding financial services licenses.<sup>316</sup> While current law requires a license to make loans above 16 percent to consumers (up to \$25,000) and to businesses (up to \$50,000), the proposal, if enacted, would require licensing for anyone making loans at any rate and would ensnare many marketplace lending participants, as it would include entities soliciting and purchasing or acquiring consumer and business loans and those who arrange or facilitate the funding of loans.<sup>317</sup>

In mid-2016, a bill was introduced in the Illinois legislature that would impose licensing for online commercial lenders and for loan purchases, regulate commercial lending practices, and require significant loan disclosures and ability to repay assessments. While the legislation was never

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315 *In the Matter of the Desist and Refrain Order Against Financial Services Enterprises dba Pioneer Capital*, OAH No. 2016040551 (11/29/16).

316 N.Y. BANKING L. § 340.

317 The legislation potentially covers merchant cash advances and factoring.

considered in 2016, it could be re-introduced in the future and shows an interest in regulating small business lending in addition to consumer loans.

**Keep in Mind:** If regulatory activity at the federal level diminishes, it is likely that some of the void will be taken up by state regulators and Attorneys General. Case in point—on December 12, 2017 following President Trump’s appointment of Mick Mulvaney as CFPB Director, a group of 17 state Attorneys General announced their commitment to enforcing consumer protection laws.<sup>318</sup>

**State Regulators Promote Innovation.** In January 2018, the Conference of State Bank Supervisors (“CSBS”) promulgated Vision 2020, an effort to modernize state regulation of nonbank companies, including FinTech companies. The goal of this project is to provide an integrated 50-state licensing and supervisory structure by leveraging technology and cooperation among the states, which indicates the CSBS’s support for innovation on a national scale.<sup>319</sup> In one of its first actions toward this end, the CSBS appointed an advisory panel consisting of industry participants to advise the state regulators on how to better supervise nonbank FinTech companies. Further to these efforts, on February 6, 2018, seven states entered into a compact to coordinate the licensing of money services businesses.<sup>320</sup> This pilot program is the first step toward the integrated multi-state approach to licensing and supervision.

Meanwhile, on March 22, 2018, Arizona became the first state to pass legislation allowing financial companies to experiment with innovative products and services directly with consumers in a true regulatory sandbox, which will be administered by the Arizona Attorney General’s office. This will allow financial companies to bypass state licensing requirements and offer their products and services to up to 10,000 consumers for a period of two years. The expressed goal of the program is to attract innovators to the State, although the legislation was met with opposition from consumer groups. Modeled after similar experiences in the United Kingdom, Arizona now holds the distinction for being the first state in the U.S. to legitimize the regulatory sandbox concept.

#### IV. SECURITIES LAWS

##### A. Background

Two of the largest consumer marketplace lenders—LendingClub Corporation (“*LendingClub*”) and Prosper Marketplace, Inc. (“*Prosper*”)—have been the market leaders in using the Internet to sell pass-

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<sup>318</sup> Led by New York Attorney General Eric Schneiderman, the letter, *available at* [https://ag.ny.gov/sites/default/files/sign\\_on\\_letter\\_re\\_cfpb.pdf](https://ag.ny.gov/sites/default/files/sign_on_letter_re_cfpb.pdf), was joined by the Attorneys General of California, Connecticut, District of Columbia, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Mexico, North Carolina, Oregon, Vermont, Virginia and Washington.

<sup>319</sup> However, as described above, the CSBS has brought litigation against the OCC to prevent it from moving forward with issuing a national bank charter for FinTech companies.

<sup>320</sup> The states are Georgia, Illinois, Kansas, Massachusetts, Tennessee, Texas and Washington.

through notes representing fractional interests in individual loans to retail investors (so called “peer-to-peer,” or “P2P,” programs). These programs have made new investment opportunities available to the public by enabling investors to purchase indirect interests in specific consumer loans. Although most marketplace lenders now fund themselves principally from other sources, P2P note programs continue to fund a significant amount of loan originations. Certainly, these programs have attracted and continue to attract a great deal of media attention and public interest. The remainder of this subsection therefore describes the structure of consumer-oriented P2P platforms, as a prelude to the discussion that follows of related securities law issues, but readers are cautioned that most lenders do not operate such platforms and that, of those who do, most exclude retail investors from the notes offering in order to simplify securities law compliance.<sup>321</sup>

The goal of any P2P platform operator (hereinafter, an “Operator”) is to create a user-friendly Internet-based platform that permits an efficient matching of investors having capital to deploy with consumers seeking credit.<sup>322</sup> To that end, the Operator will establish and manage a website that permits investors to register as prospective lenders and individuals to register as prospective borrowers. Each registered borrower that satisfies certain criteria fixed by the Operator may from time to time request the Operator to post loan requests on the website for viewing by prospective lenders.<sup>323</sup> Each borrower must disclose or make available to the Operator, and through the Operator to prospective lenders, certain financial and other information including, among other items, the borrower’s credit score (as determined by a credit reporting agency), self-reported income range, debt-to-income ratio, employment status, homeownership status, number of existing credit lines, intended use of funds, and number and/or amount of recent payment defaults and delinquencies. Borrowers may not, however, disclose their identities to prospective lenders or post information that would permit their identities to be determined. The identities of lenders similarly are not disclosed to borrowers. The Operator will use the information reported by each borrower to assign a proprietary credit rating to the requested loan and to fix the interest rate for the loan. The Operator will include in the website posting for each loan request the relevant borrower-reported information, the Operator’s proprietary credit rating of the borrower, and the yield to lenders (*i.e.*, the fixed interest rate on the loan net of the Operator’s servicing fees). Prospective lenders may view the posted information for each loan request and determine whether they wish to fund the loan or any portion of it. No borrower may request a loan in excess of a

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321 Most marketplace lenders are not currently offering to sell pass-through notes to retail investors but are funding themselves principally through lines of credit, whole-loan sales to institutional investors, securitizations, and/or other arrangements that do not entail an Internet-based securities offering. Much of the discussion that follows in this “Securities Laws” section will therefore not be relevant to most marketplace lenders. At the same time, even marketplace lenders who do not issue pass-through notes may finance themselves through other types of transactions—such as securitizations—that will be subject to certain of the securities laws discussed below.

322 The remainder of this section summarizes the structures employed by LendingClub and Prosper. The discussion is not, however, intended to provide a complete description of the LendingClub and Prosper structures or to identify all of the differences that may exist between them. It also does not describe all of the lending businesses in which LendingClub and/or Prosper is currently engaged.

323 The Operator may, for example, choose to arrange loans only for borrowers having credit scores that exceed a specified minimum and/or debt-to-income ratios that are lower than a specified maximum.

specified maximum (e.g., \$35,000) or have outstanding multiple loans that, in the aggregate, exceed the maximum. A lender who chooses to invest in a loan may offer to fund any portion of the loan that equals or exceeds a specified minimum (e.g., \$25). In order to minimize credit risk through diversification, it is in fact typical for lenders (other than certain institutional investors) to fund only a small portion of each loan in which they invest and to acquire over time investment portfolios comprised of partial interests in many different loans.<sup>324</sup> A loan will fund if before the funding deadline stated in the loan request lenders subscribe for the full amount of the loan or, if the borrower has indicated that he or she will accept less than full funding, lenders subscribe for not less than the minimum amount of funding set forth in the loan request. The funding deadline for each loan request will be fixed according to the rules of the platform (e.g., 14 days after the request is posted) rather than by the borrower. The platform similarly will prohibit loans from funding at any level less than a specified percentage (e.g., 70 percent) of the requested principal amount. Each loan will have a fixed term (typically, two, three, or five years) and will amortize through equal monthly payments to its maturity date.

The Operator will maintain with a bank (the “*Deposit Bank*”) a segregated deposit account on behalf of the lenders (the “*Funding Account*”). Each lender must have deposited in the Funding Account, at the time it offers to fund any loan, an amount that is both sufficient to provide that funding and is not committed to the funding of any other loan. The lender will be required to maintain this amount on deposit in the Funding Account until either the relevant loan is funded or the related loan request is withdrawn (e.g., because lenders did not commit to fund the loan at a level equal to or exceeding the minimum funding amount). The principal amount of each funded loan (hereinafter, a “*Borrower Loan*”) will be advanced by a bank (the “*Funding Bank*”) not affiliated with the Operator. The Funding Bank and the Deposit Bank may be different institutions. The Funding Bank will deduct an origination fee from the funds it provides to the borrower and will pay a portion of that fee to the Operator as its transaction fee. The amount deducted may vary with the credit rating assigned to the Borrower Loan by the Operator. Shortly after the funding of the Borrower Loan by the Funding Bank, the Operator will (i) purchase the Borrower Loan from the Funding Bank at par using funds of the applicable lenders on deposit in the Funding Account, and (ii) issue to each such lender at par a note of the Operator (or an affiliate of the Operator) (a “*Platform Note*”) representing the right to receive the lender’s proportionate share of all principal and interest payments received by the Operator from the borrower

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324 Marketplace lenders have increasingly come to rely upon institutional rather than retail investors to finance their lending operations and most lenders (excluding LendingClub and Prosper) do not solicit retail funding. These institutional investors may include investment funds organized to acquire P2P loans. It is not efficient for institutional investors to purchase fractional interests in individual consumer loans, and in response most lenders have established “whole-loan” programs through which institutional investors may acquire the entire beneficial interest in individual loans. In certain programs the institutional investor will be able to select the specific loans it purchases; in others the marketplace lender will allocate whole loans to participating institutional investors with reference to category-wide loan eligibility approved by the investor. These programs have greatly facilitated the growth of the industry by accommodating institutional demand, but they also may reduce the opportunities for small investors to purchase interests in certain loans. Increased reliance on whole-loan programs and the securitization market is, to some extent, inconsistent with the argument that has often been made that P2P lending can level the playing field between institutional and individual investors and provide the latter with attractive investment opportunities previously denied to them.

on the applicable Borrower Loan (net of the Operator's servicing fees). The Platform Notes will be nonrecourse obligations of the Operator (except to the extent that the Operator actually receives payments from the borrower on the applicable Borrower Loan). Accordingly, lenders assume all of the credit risk on the applicable Borrower Loan and will not be entitled to recover any deficiency of principal or interest from the Operator if the borrower defaults. The Operator will service the Borrower Loans on behalf of the lenders and may refer any delinquent loan to a collection agency. The relatively low principal amounts of the Borrower Loans, however, generally will make it impracticable for the Operator to commence legal proceedings against defaulting borrowers. The Operator will maintain a segregated deposit account (the "*Collections Account*") at the Deposit Bank into which it will deposit all payments it receives on the Borrower Loans. The Operator will deduct its servicing fee from each Borrower Loan payment it receives before forwarding the net amount to the applicable lenders as payments on their Platform Notes.<sup>325</sup>

As might be expected in connection with an Internet-based lending system, both the notes evidencing the Borrower Loans and the Platform Notes are executed electronically, and physical Borrower Loan notes and Platform Notes are not delivered. The Platform Notes are not listed on any securities exchange but may be transferable through an electronic trading system operated by a broker-dealer not affiliated with the Operator. The Operator provides no assurances as to the liquidity or value of the Platform Notes. Notwithstanding the associated credit and liquidity risk, potential investors may find P2P lending attractive, as the available performance data indicate that a well-diversified portfolio of Platform Notes can produce attractive risk-adjusted rates of return. At the same time, Operators who fund themselves through Platform Notes will face the challenge of securities law compliance.<sup>326</sup> The P2P platforms are subject on a continuing basis to a number of separate federal and state securities laws. As discussed below, these laws are complex and compliance entails substantial costs.

## **B. Securities Act**

The Securities Act of 1933 (the "*Securities Act*") requires any issuer engaged in a public offering of its securities to register the securities with the SEC unless an exemption from registration applies. The registration exemptions in the Securities Act are rather narrow in scope and none of them will be

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<sup>325</sup> The servicing fee deducted from each Borrower Loan payment is typically in the area of 1 percent of the payment amount.

<sup>326</sup> Although certain categories of "notes" are not treated as "securities" under the Securities Act, the SEC determined in an enforcement proceeding in 2008 that Platform Notes don't fall within those categories but instead create an "investment contract" and are subject to regulation as "securities." Among other factors that it deemed relevant to this determination, the SEC noted that P2P lenders and borrowers would not connect but for the Internet platform; that the lenders would rely entirely upon the Operator to service the loans and manage all aspects of the repayment process; that a "reasonable investor" would likely believe that Platform Notes are "investments"; and that lenders would not be protected under any alternative regulatory scheme if the Platform Notes were deemed not to be "securities." The SEC ruling leaves no doubt that the Securities Act will apply to Platform Note offerings.

available for a public offering of Platform Notes.<sup>327</sup> An Operator therefore must register its Platform Notes with the SEC before commencing public sales of its securities.<sup>328</sup>

The SEC registration process is not simple. The Securities Act requires each issuer engaged in an offering of registered securities (or the dealer or underwriter selling the securities) to deliver to the investors a prospectus that sets forth specified information concerning the issuer and the securities. Among other matters, the prospectus will need to include a detailed description of the Operator and the Platform Notes, an analysis by the Operator's management of the Operator's financial condition and its recent results of operations, specified financial information, a discussion of the applicable risk factors, certain information concerning the issuer's directors and executive officers, and descriptions of the Operator's material contacts, any material transactions between the issuer and its directors, officers, and/or affiliates, any material legal proceedings affecting the Operator, and the plan for distributing the securities. The SEC developed its disclosure guidelines long before Internet-based lending became a possibility and accordingly certain of them are not an exact fit for P2P companies. Although each of LendingClub and Prosper has successfully registered its Platform Notes with the SEC, and although LendingClub's and Prosper's prospectuses may provide some guidance regarding the disclosure formats and level of disclosure that the SEC will approve, prospective Operators should allow at least several months (and probably more) to complete the SEC registration process and should expect to incur substantial related expenses. The timeline for obtaining approval will largely be driven by the number and significance of the comments submitted by the SEC staff on the applicant's filings—a variable that the applicant can affect but not control through careful preparation of its documents.

At the same time, newly formed Operators are likely to qualify for certain advantages that the Jumpstart Our Business Startups Act (the "*JOBS Act*") provides to "emerging growth companies." The *JOBS Act* defines an "emerging growth company" as an issuer that had total annual gross revenues of less than \$1 billion during its most recently completed fiscal year and that, as of December 8, 2011, had not sold any of its equity securities under a Securities Act registration statement. Among other matters, an emerging growth company is permitted to (i) reduce the scale of certain financial disclosures that would otherwise be required in its prospectus, (ii) not provide an auditor attestation of its internal controls over financial reporting procedures (as would otherwise be required by the Sarbanes-Oxley Act), and (iii) choose to implement new or revised accounting procedures (when promulgated by

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327 As used in this survey, the term "Platform Notes" includes loan pass-through obligations issued by any Operator and is not limited to obligations issued by LendingClub or Prosper.

328 Operators that do not issue Platform Notes but rather simply sell whole loans (or participations in such loans) are advised to consider whether such loans (or participations therein) are in fact "securities" under the Securities Act. Among the factors relevant to this determination are whether the loan purchaser is a regulated lender or an investor not principally engaged in lending as a business, the plan of distribution of the loans (*i.e.*, whether the loans will be marketed to many unrelated investors in small denominations in a manner more typical for securities distributions than for lending arrangements), the reasonable expectations of the investors, and whether the program will be subject to an alternative regulatory scheme (such as banking and consumer lending laws) that could make the application of the securities laws unnecessary for the protection of investors. The analysis of whether a marketplace loan (or certain commitments by the Operator to investors) is a "security" can also be affected by the composition of the investor base for the loans. *See* footnote 343 below.

FASB) under the extended transition period available to nonpublic companies. An emerging growth company (unlike other issuers) also is permitted to submit its initial registration statement to the SEC on a confidential basis so that the issuer can consider and address initial SEC staff comments before any filings become public. An issuer's status as an emerging growth company does not continue indefinitely but will terminate on specified dates. Of particular relevance to Operators, an issuer will lose its emerging growth company status once it has issued more than \$1 billion in nonconvertible debt securities in the prior three years.

An Operator that registers its securities will need to rely on Securities Act Rule 415. This rule permits issuers to file "shelf" registration statements under which they register a specified amount of a generic category of securities (*e.g.*, "notes" or "debt securities") but don't specify the maturity dates, interest rates, or other negotiated financial terms that will apply to individual securities. When the issuer (or its underwriter) reaches agreement with an investor for an issuance of specific securities, the issuer will take the requisite amount of securities off the "shelf" by delivering to the investor and filing with the SEC a prospectus supplement that specifies the amount of securities sold and the applicable negotiated terms. The alternative approach—under which the issuer files a separate registration statement for each security that it sells—would not work for Operators because of the sheer volume of securities they will sell. Stated differently, if Rule 415 were not available, each Platform Note—because its underlying borrower, maturity date, and interest rate won't in combination match those of any other Platform Note—would constitute a distinct series of securities and would have to be separately registered. The cost of filing multiple registration statements would be prohibitive. Rule 415 therefore makes registered offerings of Platform Notes possible but, at the same time, the Rule was not specifically designed to accommodate P2P lending. In particular, Operators remain subject to the requirement to file with the SEC separate preliminary or final prospectus supplements for each security offered or sold under the shelf registration. Unlike corporate issuers that utilize Rule 415, and that ordinarily will sell debt securities off their shelf registrations only on an occasional basis, Operators will expect to offer and sell multiple series of Platform Notes to multiple investors every day. An Operator therefore will be required to prepare and file with the SEC each year numerous prospectus supplements or "listing reports," which briefly summarize the terms of each Borrower Loan underlying a Platform Note. An Operator can significantly reduce the burden of this filing requirement by automating the preparation and filing of the supplements. The filing nonetheless seems to impose an unnecessary expense on Operators (except, of course, to the extent that it enables them to remain in technical compliance with the Securities Act) since P2P investors almost universally will rely upon the platform website and not on SEC filings to access the terms of their Platform Notes.<sup>329</sup>

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<sup>329</sup> The SEC is not unaware of the need for securities regulation to evolve in tandem with changes in financial technology. In October 2018 the SEC announced the launch of its "Strategic Hub for Innovation and Financial Technology" ("*FinHub*"). Among other goals, the SEC intends *FinHub* to provide a forum through which industry and the public can directly engage with the SEC on innovative ideas and technological developments. See <https://www.sec.gov/finhub>.

**Planning Tip:** The SEC registration process is complex, time-consuming and expensive. Operators who choose to register their Platform Notes for sale to the general public must be prepared to devote substantial resources to the effort.

Regulation AB under the Securities Act sets forth the disclosure requirements that apply to registered offerings of asset-backed securities and to certain periodic reports that the issuers of registered asset-backed securities must file. Operators have not structured their disclosures to Platform Note investors to satisfy Regulation AB requirements and in view of the effort and expense involved may prefer not to do so. Although Platform Notes could, in one sense, be characterized as “asset-backed” obligations since each Platform Note is backed by the cash flow from a specific Borrower Loan, the SEC has not treated Platform Notes as “asset-backed securities” for purposes of Regulation AB, nor should it have done so. Regulation AB defines an “asset-backed security” as a security that is “primarily serviced by the cash flows of a discrete *pool* of receivables or other financial assets” (emphasis supplied). As each Platform Note is backed by only a single Borrower Loan and not by a “pool” of financial assets, Platform Notes are not covered by the Regulation AB definition.<sup>330</sup> In addition, Regulation AB limits the concept of “asset-backed security” to securities of an issuer that limits its activities to “passively owning or holding the pool of assets, issuing the asset-backed securities ... and other activities reasonably incidental thereto.” An Operator, however, will not limit its activities to “passively owning or holding” the Borrower Loans and issuing the related Platform Notes but will instead be actively engaged in structuring, promoting, and operating its proprietary Internet-based lending system. The Operator, in other words, should be considered an operating company that is fundamentally different from the securitization trusts and other special purpose issuers that historically have been subject to Regulation AB. However, the fact that Platform Notes are not “asset-backed securities” under Regulation AB does not necessarily mean that they are not “asset-backed securities” under certain other federal securities laws. See “*Risk Retention Requirements*” below.

Another issue that prospective Operators should consider is the potential for liability to investors for inaccurate disclosures. The Securities Act provides investors with recourse against issuers who sell securities through offering materials that contain an untrue statement of a material fact or omit to state a material fact (the standard of liability can vary in certain respects between registered and

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<sup>330</sup> It is true that Regulation AB can apply to certain issuers that hold only a single cash-generating asset. For example, single-property commercial mortgage-backed securities (“CMBS”) may be viewed as asset-backed securities even though the securities are backed by a single asset (a mortgage loan on the underlying real estate). Such CMBS are not backed by a “pool” of separate mortgage loans but still will have two features that are commonly associated with asset-backed securities: (i) the CMBS will create credit tranches (*i.e.*, the securities will be issued in multiple senior and subordinate classes), and (ii) the CMBS issuer will make payments on each class of its securities from the cash flow paid by a number of different underlying obligors (*e.g.*, the lessees holding separate leaseholds at the mortgaged property). Neither of these features applies to Platform Notes. In other cases, the issuer will hold no material assets other than a single security representing an indirect interest in a pool of financial assets (*e.g.*, the issuer in a credit card securitization may invest in an underlying credit card master trust that holds the credit card receivables). It’s reasonable to conclude that such issuers are issuing “asset-backed securities” since they are indirectly investing in a broad group of self-liquidating financial assets and will use the cash flow generated by those assets to make the payments on their securities. This is not the case for Platform Notes since each Platform Note is backed by only one Borrower Loan.

unregistered offerings). All issuers therefore face potential liabilities to investors if their offering materials are inaccurate. Most issuers, however, are in a position to verify the accuracy of the information they disclose to investors since the information concerns or derives from the issuer itself. In contrast, Operators may also have liability for inaccurate information submitted to them by prospective borrowers and disclosed to prospective lenders through the platform website. Operators may verify some of the information submitted to them by prospective borrowers but almost certainly will not have the time or resources to verify all such information. The information so disclosed will be considered part of the Operator's prospectus for Securities Act purposes, and some of the information (e.g., the borrower's self-reported income range or intended use of proceeds) may be deemed material by investors who fund the related loans. Accordingly, investors who lose money on their Platform Notes and can identify borrower misstatements in the related loan postings possibly could bring claims against the Operator under the federal securities laws. However, it is far from certain that any such claims would succeed. The Operator will have disclosed in its prospectus that not all borrower-reported information is verified by the Operator and that investors must assume the risk that such information is inaccurate. A court might well decide that the Operator satisfied its Securities Act disclosure obligations by disclosing this risk. In addition, as most Platform Notes have relatively low principal amounts it generally will be impractical—unless there are grounds for class certification—for investors to initiate legal proceedings against an Operator. The scope of Operator liability for inaccurate borrower information nonetheless has not yet been considered by any court. Prospective Operators should be aware that, in a worst-case scenario, they could face liability under the federal securities laws for inaccurate borrower information (including intentional borrower misstatements).

As discussed above, registration of Platform Notes with the SEC is an expensive and time-consuming process. An Operator therefore might choose not to register its securities but to offer them in a private placement exempt from registration pursuant to Section 4(a)(2) of the Securities Act. The SEC has adopted Rule 506 of Regulation D under the Securities Act to provide a "safe harbor" that issuers may follow to ensure that their offerings will be exempted by Section 4(a)(2). Under the original version of Rule 506, it would have been difficult for an Operator to conduct a valid private placement because the exemption was not available to issuers that offered their securities through "general advertising" or "general solicitation." A securities offering made over the Internet—even if sales of the securities were limited to the institutions and high net worth/income individuals that qualify as "accredited investors" under Regulation D—might be deemed by the SEC to involve "general advertising" or "general solicitation" and thus would not qualify for the exemption. In the JOBS Act, however, Congress directed the SEC to revise Regulation D so that the issuers of offerings made pursuant to Rule 506 of Regulation D are not prohibited from using general advertising or general solicitation if the securities are sold only to "accredited investors." The SEC approved implementing rules that became effective in September 2013. Under these rules, Operators are able to sell Platform Notes over the Internet to "accredited investors" without incurring the substantial time, expense, and paperwork that would be required to register the securities with the SEC. The following section of this survey provides details on Rule 506 offering procedures.

### C. The Private Placement Rules

The freedom that Operators enjoy under amended Rule 506 to engage in general solicitations of accredited investors without registering their Platform Notes with the SEC has made the path of many start-up companies much easier. Most marketplace lenders who issue Platform Notes, including various companies engaged in consumer, small business, and real estate lending, in fact accept investments only from accredited investors. A prospective Operator must nonetheless consider whether restricting the sale of its Platform Notes to accredited investors will unduly limit its investor base. In relevant part, the term “accredited investor” includes most institutional investors and individuals who (i) individually, or with their spouse, have a net worth exceeding \$1 million exclusive of the value of the person’s primary residence (and subject to certain adjustments for “underwater” mortgages), or (ii) individually had an income in excess of \$200,000 in each of the two preceding years, or had a joint income with spouse in excess of \$300,000 in each of those years, and have a reasonable expectation of reaching the same income level in the current year.<sup>331</sup> An Operator that intends to sell Platform Notes to individuals may not use Rule 506 unless it excludes nonaccredited investors.<sup>332</sup> Operators whose business plans require a broader investor base should continue to register their Platform Notes with the SEC or, possibly, consider using Regulation A+ (discussed below). The strong

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331 The Dodd-Frank Wall Street Reform and Consumer Protection Act (the “*Dodd-Frank Act*”) requires the SEC to reexamine the definition of “accredited investor” every four years to determine whether the definition should be revised to enhance investor protection and/or to reflect prevailing economic conditions. Pursuant to this mandate, in December 2015 the SEC staff published a report outlining possible changes that could be made to the definition. The staff noted that because the financial tests for individual accredited investors have not been changed since they were approved in 1982, inflation has over time greatly increased the percentage of U.S. households who qualify as accredited investors. The staff therefore recommended that the SEC consider changes to the financial tests that would better match them to their original purpose—*i.e.*, to identify individuals who can reasonably be presumed to have the financial sophistication and resources needed to protect their own interests in securities transactions—while at the same time cautioning that defining “accredited investor” too narrowly could have an adverse impact on capital formation. The staff also discussed alternative approaches under which certain individuals could qualify as “accredited investors” by reason of their professional qualifications or investing experience whether or not they satisfy specific financial criteria. As an example, the SEC could choose to treat as “accredited investors” any individuals, regardless of their personal financial circumstances, who have passed certain securities industry examinations administered by the Financial Industry Regulatory Authority. The staff ultimately did not recommend any single course of action to the SEC. More recently, in August 2018 the SEC chairman stated that it may be appropriate for “accredited investor” status to be based upon the sophistication of the investor and/or the amount of the investment rather than solely upon the investor’s financial condition; however, it remains uncertain whether or when the SEC will propose any related rule changes to the “accredited investor” definition. In a separate development, in February 2016, December 2016 and again in July 2018 the U.S. House of Representatives passed a bill which, if enacted into law, would expand the definition of “accredited investor” to include any natural person who (i) is registered as a broker or investment adviser with the SEC or any state securities commission, or (ii) is determined under an SEC regulation to have demonstrable education or job experience that qualifies such person to invest in the particular offering. The U.S. Department of the Treasury also has stated its support for broadening the “accredited investor” definition, stating, as part of a broader report on U.S. financial market regulation, that the concept could be expanded to include both financial market professionals and persons who are advised by fiduciaries such as federally or state-registered investment advisers. See U.S. DEPARTMENT OF THE TREASURY, “*A Financial System that Creates Economic Opportunities—Capital Markets*” (Oct. 2017), <https://www.treasury.gov/press-center/press-releases/Documents/A%20Financial%20System.pdf>, at p. 44.

332 An issuer technically may sell its securities to not more than 35 nonaccredited investors and continue to rely upon Rule 506. If, however, the issuer makes any such sales the offering will become subject to certain disclosure requirements. Accordingly, as a practical matter Rule 506 issuers almost always sell the securities only to accredited investors.

interest of institutional investors in marketplace loans as an asset class, however, may well reduce the pressure for prospective Operators to register their notes for public sale.

The Rule 506 amendments that made general solicitation possible also added two important conditions to the Rule 506 exemption. First, the Operator is required to take “reasonable steps to verify” that each purchaser of the Platform Notes is, in fact, an accredited investor. Congress and the SEC have imposed the verification requirement to reduce the risk that general solicitation by Rule 506 issuers will result in sales of securities to nonaccredited investors. This concern applies with particular force when sales are made to natural persons. The SEC has not required that issuers employ any specific procedures to confirm that their investors are accredited but, to facilitate compliance, it has listed in the Rule certain nonexclusive procedures that it will deem sufficient to verify a natural person’s status. If, for example, the Operator proposes to sell Notes to a natural person who represents that he or she satisfies the income test, the Operator could verify the prospective purchaser’s status by (i) reviewing copies of any Internal Revenue Service form that documents such person’s income for the two most recent years (*e.g.*, Form W-2 or 1040), and (ii) obtaining a written representation from such person that he or she has a reasonable expectation of having an income during the current year that is sufficient to satisfy the test. Alternatively, if the prospective purchaser represents that he or she satisfies the net worth test, the Operator could (among other possible approaches) verify the purchaser’s status as an accredited investor by reviewing copies of personal brokerage or bank account statements (to confirm assets) and a consumer report from at least one nationwide consumer reporting agency (to confirm liabilities). It will be important for the Operator (or any third party that it engages for the purpose) to perform the verification review diligently as the Operator must have a “reasonable belief” that each of its investors is accredited to qualify for the exemption.<sup>333</sup> It’s also important to remember that each investor must be accredited whenever he or she purchases a Note (and not only on the date of the investor’s first purchase). The Operator therefore must take care to obtain and review updated financial information for each of the investors on a periodic basis. Finally, the Operator will need to consider whether any verification procedures that require natural persons to deliver personal financial information to the Operator will impair the marketability of the Platform Notes.

Second, Rule 506 contains disqualification provisions that make the exemption unavailable if the issuer or any of various persons associated with it or the offering (including, among others, its directors, executive officers, other officers participating in the offering, 20 percent equity holders, and any placement agent) has been convicted of specified felonies or misdemeanors or is subject to specified court or regulatory orders (collectively, “*Disqualifying Events*”). The list of Disqualifying Events

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333 Private placements that use general solicitation will be made pursuant to Rule 506(c) of Regulation D. Alternatively, it remains possible for issuers to undertake Regulation D private placements without using general solicitation pursuant to Rule 506(b). In such event, the issuer still must have a “reasonable belief” that each accredited investor is, in fact, accredited, but in the absence of general solicitation the issuer is not required to take additional actions to verify the investor’s status as described herein. An Operator that offers its Platform Notes over the Internet to accredited investors with whom it does not have a preexisting relationship would likely be deemed to be engaged in “general solicitation” and therefore subject to the verification requirement.

includes a broad range of criminal, regulatory, and administrative proceedings. As examples, an Operator will be unable to rely upon Rule 506 if it, or any of its relevant associated persons, has within the past ten years (or five years, in the case of the Operator itself) been convicted of any felony or misdemeanor in connection with the purchase or sale of any security; is subject to any court order or judgment entered within the past five years that enjoins the Operator or such person from engaging in any practice arising out of the business of an underwriter, broker, dealer, or investment adviser; or is subject to a final order of any state securities, banking, or insurance commission that bars such person from engaging in the business of securities, banking, or insurance. It should not be difficult for an Operator to monitor its own status under the disqualification provisions but, if it engages any placement agent to assist it in the sale of the Platform Notes or of other securities offered under Rule 506, it must also confirm (and monitor on an ongoing basis) that the placement agent and its associated persons are not subject to any Disqualifying Event.

**Takeaway:** Operators who don't need unrestricted access to a retail investor base will often find it quicker and cheaper to sell their Platform Notes only to "accredited investors" in a private placement exempt from SEC registration.

A final point to consider in relation to Rule 506 offerings is the potential application of broker-dealer registration requirements. Any company that makes direct offers of securities through an Internet platform (rather than through a broker-dealer registered with the SEC and in the applicable states) potentially is subject to registration as a broker-dealer at both the federal and state levels. To address this issue Congress included in the JOBS Act (codified as Section 4(b) of the Securities Act) an exemption from broker-dealer registration for persons who maintain a platform or mechanism (which may include a website) to offer securities if (i) the securities are offered only under Rule 506, and (ii) certain other conditions are satisfied. Among such other conditions, neither that person nor any person associated with it may receive any compensation in connection with the sale of the securities. The SEC interprets the term "compensation" broadly and the Section 4(b) exemption narrowly. The SEC would likely view the origination fees payable to the Operator in connection with new Borrower Loans as "compensation" for these purposes. The SEC has in fact stated that "the prohibition on compensation makes it unlikely that a person outside the venture capital area would be able to rely upon the [Section 4(b)] exemption." Other elements of Section 4(b) also indicate that the exemption is meant for platforms through which third-party issuers undertake Rule 506 offerings rather than for issuers engaged in offering their own securities. Accordingly, although at first glance Section 4(b) appears to be helpful to Operators that undertake Rule 506 offerings, such Operators will in fact need to look elsewhere for exemptions from broker-dealer registration. See "*Securities Exchange Act*" below.

#### **D. Regulation A+**

The SEC some years ago adopted Regulation A under the Securities Act to provide an exemption from registration for certain relatively small offerings. Regulation A permitted an issuer to offer its securities

publicly but imposed a number of conditions that are not applicable to Rule 506 private placements, including specified disclosure and presale filing requirements. In addition, an issuer could not use Regulation A to sell more than \$5 million of securities in any 12-month period. These provisions made Regulation A less flexible than Rule 506, and issuers did not often use it. Having concluded that Regulation A was too narrow and that it could promote capital formation by allowing small issuers a broader exemption from Securities Act registration, Congress directed the SEC in the JOBS Act to adopt regulations that would permit certain issuers to publicly offer and sell up to \$50 million of their securities in any 12-month period. On March 25, 2015, the SEC responded to this mandate by heavily amending Regulation A. The revised version of Regulation A (so-called “*Regulation A+*”) is proving useful to many privately held operating companies that are seeking to raise equity capital from both accredited and nonaccredited investors. Unfortunately, Regulation A+ includes a number of restrictions and requirements that will likely make it unsuitable for most public offerings of Platform Notes.

Regulation A+ is divided into two tiers: Tier 1, for securities offerings of up to \$20 million, and Tier 2, for offerings of up to \$50 million.<sup>334</sup> Both Tier 1 and Tier 2 issuers will be required to make certain specified disclosures to investors, file an offering statement with the SEC, and obtain SEC clearance before commencing sales. Each issuer must also provide investors with certain financial statements including, in the case of Tier 2 issuers, audited statements. The disclosure requirements are broader for Tier 2 issuers than for Tier 1 issuers and in many respects, resemble those that would apply in a registered public offering by the same company. In addition, Tier 2 issuers will be subject to ongoing reporting requirements pursuant to which they must file annual, semiannual, and current event reports with the SEC similar to (though less comprehensive than) the periodic reports that registered issuers must file under the Securities Exchange Act of 1934 (the “*Exchange Act*”). See “*Securities Exchange Act*” below. The issuer also would be required to file a pricing supplement with the SEC in connection with the sale of each Platform Note similar to the prospectus supplements that are filed for individual sales of registered Platform Notes. Tier 1 issuers will be required to register their securities under the Blue Sky laws of the states in which they are sold (or qualify for an exemption from such registration), whereas Tier 2 securities will be exempt from state registration requirements.<sup>335</sup> Regulation A+ will not be available if the issuer or certain other transaction participants are subject to a Disqualifying Event (as described under “*The Private Placement Rules*” above). In addition, Tier 2 issuers may not sell

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334 Regulation A+ cannot be used to offer “asset-backed securities” as defined in Regulation AB under the Securities Act. As previously discussed, Platform Notes should not constitute “asset-backed securities” for this purpose. See “*Securities Act*” above.

335 The Securities Act authorizes the SEC to define classes of “qualified purchasers” to whom securities may be sold without Blue Sky registration. Pursuant to this authority, the SEC has exempted all Tier 2 securities from Blue Sky registration by adopting a rule that defines “qualified purchaser” to include all purchasers of Tier 2 securities. The states of Massachusetts and Montana sued the SEC in federal court to invalidate this rule. These states contended that Congress intended the SEC to restrict its definition of “qualified purchaser” to narrowly defined classes of sophisticated and/or wealthy individuals who could reasonably be presumed to have the capacity to protect their own interests, and that the SEC exceeded its authority in granting a blanket exemption for all sales to Tier 2 purchasers. In June 2016, the U.S. Court of Appeals for the District of Columbia ruled in favor of the SEC and upheld the rule. *Linden v. SEC*, 825 F.3d 646 (D.C. Cir. 2016).

their securities to any purchaser (other than accredited investors) in an amount exceeding 10 percent of the greater of the purchaser's (i) annual income or net worth (in the case of natural persons), or (ii) annual revenue or net assets at fiscal year-end (in the case of non-natural persons).

Securities issued under Regulation A+ will not constitute "restricted securities" under the federal securities laws. Holders of the securities (other than issuer affiliates) therefore may resell them free from any Securities Act restrictions as to the amount or timing of sales. In contrast, securities sold under Rule 506 do constitute "restricted securities" and are subject to resale restrictions. See "*Secondary Trading*" below.

The principal difficulty posed by Regulation A+ for offerings of Platform Notes remains the cap on the permitted offering amount. The respective Tier 1 and Tier 2 caps refer to the amount of securities sold by the issuer in reliance upon the exemption in any 12-month period. The increase in the offering cap relative to prior Regulation A will permit many privately held operating companies to raise substantial amounts of capital, but an Operator engaged in a continuous offering of Platform Notes is unlikely to achieve long-term success if it cannot sell more than \$20 million principal amount of Platform Notes (in the case of a Tier 1 offering) or \$50 million (in the case of Tier 2) in any 12 months.<sup>336</sup> An Operator could consider selling Platform Notes under Regulation A+ as it ramps up operations and then registering its Platform Notes under the Securities Act (at which point the Operator could sell Platform Notes to the public in amounts not exceeding the amount registered with the SEC). However, since we expect that most new Operators will choose not to register their Platform Notes with the SEC because of the costs involved, and since an Operator can sell unlimited amounts of its Platform Notes to accredited investors under Rule 506 without becoming subject to the filing, disclosure, and reporting requirements that apply under Regulation A+ (which are particularly burdensome in Tier 2 offerings), it seems that Operators will have an incentive to use Regulation A+ rather than Rule 506 only if they can accept the offering cap and want to (i) sell a limited amount of Platform Notes to nonaccredited investors, and/or (ii) exempt their Platform Notes from Securities Act resale restrictions.<sup>337</sup>

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336 A study of the Regulation A+ offerings that have been undertaken through December 2016 found that over 85 percent of Regulation A+ issuers have used the Regulation to sell equity rather than debt securities. A. Knyazeva, "Regulation A+: What Do We Know So Far," available at [https://www.sec.gov/dera/staff-papers/white-papers/Knyazeva\\_RegulationA-.pdf](https://www.sec.gov/dera/staff-papers/white-papers/Knyazeva_RegulationA-.pdf). This finding is consistent with our expectation that Regulation A+ will likely be more useful to marketplace lenders seeking to raise limited amounts of equity capital than to those hoping to issue Platform Notes to retail investors.

337 An Operator might be able to undertake simultaneous Rule 506(c) and Regulation A+ offerings pursuant to which it could sell unlimited amounts of Platform Notes to accredited investors and not more than \$50 million of Platform Notes in any 12 months to nonaccredited investors. The Operator would remain subject to the Regulation's ongoing filing and reporting requirements. An important question is whether the SEC would "integrate" the Regulation A+ and Rule 506(c) offerings (*i.e.*, treat the two offerings as a single combined offering for Securities Act purposes). Although the SEC has indicated that it will not integrate Regulation A+ offerings with other exempt offerings if certain safeguards are observed, the Operator and its counsel would need to consider the question carefully because integration, if applied, could result in the loss of both the Regulation A+ and the Rule 506(c) exemptions.

**Takeaway:** Regulation A+ may sometimes be helpful to Operators seeking to raise limited amounts of capital (particularly equity capital), but is unlikely to provide an attractive framework on which to base a Platform Notes program.

#### E. Blue Sky Laws

In addition to registering its securities under the Securities Act, an issuer must register its securities in every state in which the securities are offered for sale to the public unless an exemption from registration applies. Platform Notes generally will not qualify for any exemption from registration under the state securities laws (the so-called “*Blue Sky*” laws) other than an exemption available in every state for the sale of securities to specified classes of institutional investors (the categories of exempt institutions vary between the states but typically include banks, insurance companies, investment companies, pension funds, and similar institutions). Accordingly, any Operator that intends to engage in a broad public offering of Platform Notes must register its securities in multiple states and pay the associated filing fees.

In many states, the state securities commission has authority to apply “merit” regulation and to deny registration to any securities it deems unsuitable for sale. A limited number of states—often citing the novel nature of Platform Notes and/or the Operator’s failure to provide lenders with fully verified borrower information—have in fact refused to permit the sale of Platform Notes to retail investors. Alternatively, a state may agree to register the Platform Notes but only subject to suitability criteria that will limit the scope of the offering therein. A state could, for example, limit sales of Platform Notes to investors whose annual income and/or net worth exceeds specified amounts or limit the dollar amount of Platform Notes that any single retail investor may purchase. The Operator must observe these restrictions in the applicable state even though the SEC has not imposed any equivalent restrictions at the federal level. In addition, prospective Operators should note that the Blue Sky laws contain provisions that may impose civil liability on the Operator for (i) disclosure violations (in much the same manner as previously discussed in relation to the Securities Act), or (ii) any failure to maintain required registrations in effect. In particular, the Blue Sky laws generally permit investors to rescind their investments and recover the full purchase price from the issuer (plus interest) if the issuer sold them unregistered, nonexempt securities. In view of the fact that most Blue Sky registrations must be renewed annually, it will be very important for Operators to monitor their Blue Sky filings and timely renew each registration before it expires.

**Take Care:** When structuring a securities offering, issuers sometimes focus on the Securities Act and the SEC and pay insufficient attention to the Blue Sky laws. This can be a very costly mistake given the civil, administrative and criminal penalties that can result from Blue Sky violations.

The Securities Act does preempt the right of the states to require the registration of certain categories of securities offerings. In particular, the states are not permitted to require the registration under the Blue Sky laws of any securities that are offered in a private placement pursuant to Rule 506 of Regulation D (although the states may require the issuer to submit certain notice filings and pay associated filing fees). Accordingly, an Operator that offers Platform Notes solely to accredited investors in a Rule 506 private placement (as described above) will be entitled to offer the securities in all of the states, and the states may not impose suitability criteria or otherwise restrict the categories of eligible investors. As previously mentioned, the Securities Act also preempts Blue Sky registration requirements in relation to securities sold under Tier 2 of Regulation A+.

The Securities Act also prohibits the states from requiring the registration of any securities listed on the New York Stock Exchange or the Nasdaq National Market System (“*Listed Securities*”) or of any securities of a listed issuer that are senior or equal in rank to the Listed Securities. Some commentators have stated that an Operator that lists its common stock will thereby be exempted from Blue Sky restrictions because its Platform Notes will be “senior” securities. However, that statement might not be correct. The Blue Sky laws historically have included exemptions for the securities of listed companies because such companies (i) must satisfy stock exchange listing standards (which can, to some degree, be used as a proxy to identify “quality” companies), and (ii) are subject to ongoing regulation under both stock exchange and SEC rules.<sup>338</sup> The exemption nonetheless does not extend to any subordinate securities of a listed issuer (*i.e.*, securities of the issuer that would be subordinate to its listed common stock in the event of an issuer insolvency) as these securities, by definition, entail a higher degree of risk than the Listed Securities. It follows that the Platform Notes of a listed Operator will be exempt from Blue Sky registration requirements only if, in the event of the Operator’s insolvency, the Operator’s assets would be applied to pay the Platform Notes before any distributions are made to the common stockholders (or, at a minimum, if the assets would be distributed between the noteholders and the stockholders on a *pari passu* and *pro rata* basis). Platform Notes generally do not satisfy that requirement since they are not full-recourse obligations. Specifically, the noteholders would have at most a claim, in any insolvency proceeding, only to the proceeds of the specific Borrower Loans allocated to their notes and could not make a claim against other Operator assets that might remain available for distribution to the common stockholders. Some states therefore may take the view

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<sup>338</sup> The Blue Sky laws in most states for many years included exemptions for listed securities. In 1996 Congress effectively codified these exemptions, on a nationwide basis, by amending the Securities Act to preempt the application of state securities registration requirements to all listed securities and all securities of the same issuer of equal or senior rank.

that Platform Notes are not “senior-to-list” or “equal-to-list” securities and that Blue Sky filings must continue to be made notwithstanding the Operator’s status as a public company.<sup>339</sup>

LendingClub completed its initial public offering in December 2014 and listed its common stock on the New York Stock Exchange. LendingClub to date has chosen not to claim Blue Sky preemption for its Platform Notes but has continued to register them under state securities laws. In view of the significant civil and even criminal liabilities that could result from a failed claim of preemption, this appears to be a prudent decision.

## F. Secondary Trading

Our discussion of securities law issues has to this point focused on the federal and state securities registration requirements that apply when Operators sell their Platform Notes to investors. A complete analysis of the registration requirements, however, must also consider their application to secondary market transactions. Investors in Platform Notes are not necessarily free under the securities laws to resell their notes whenever or wherever they choose. The scope of the applicable resale restrictions will depend significantly upon the manner in which the Operator originally placed the Platform Notes.

If the Operator sold the Platform Notes in a registered public offering, holders of the notes will be permitted to resell them without restriction under the Securities Act. The registration statement filed by the Operator with the SEC, as a practical matter, covers both the initial placement of the notes and subsequent resales, and no further filings with the SEC by either the Operator or the selling holders will be required. The Blue Sky laws, however, may nonetheless impose significant restrictions on resales. An important point—and one that is sometimes overlooked—is that the Blue Sky laws apply not only to an issuer’s sale of its securities but also to all secondary market sales. A holder of Platform Notes that have been registered under the Securities Act therefore will be entitled to resell the notes in those states in which they have been registered but may *not* resell them in the remaining states except pursuant to an exemption from registration. The Blue Sky laws do in fact contain various exemptions for “nonissuer” transactions that may be available to Platform Note investors. It therefore will often be possible for holders of outstanding securities to resell into a state securities that have not been registered in that state. Any such holder—and any securities broker acting for the holder—still should confirm the availability of a registration exemption in the applicable state before making such sale.<sup>340</sup>

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<sup>339</sup> It would not be possible for an Operator to obtain Blue Sky exemptions for the Platform Notes by listing the notes on the New York Stock Exchange since, among other issues, the principal amount of each note will be far too small to satisfy the listing criteria. Also, as discussed under “*Bankruptcy Considerations*” below, an Operator may elect to isolate its noteholders from Operator insolvency risk by issuing the Platform Notes through a wholly-owned subsidiary. Under this structure, the issuers of the Listed Securities (*i.e.*, the Operator) and of the Platform Notes (*i.e.*, the subsidiary) will be different companies and Blue Sky preemption definitely will not apply.

<sup>340</sup> The Securities Act preempts the application of Blue Sky securities registration requirements to certain nonissuer transactions in the securities of “reporting companies” (*i.e.*, issuers who file periodic reports under the Exchange Act). As discussed in “*Securities Exchange Act*” below, any Operator engaged in a continuous offering of registered Platform Notes will be subject to these reporting requirements. When preemption applies, investors will be permitted to resell their Platform Notes in all states without regard to the terms of the individual state securities laws. Although federal preemption

If the Operator sold the Platform Notes under Regulation A+, holders of the securities (other than the issuer affiliates) may freely resell them without restriction under the Securities Act. In this respect, Regulation A+ securities have the same Securities Act status as registered securities. In addition, the Securities Act and Regulation A+ preempt the application of Blue Sky registration requirements to all securities sales made under Tier 2 of Regulation A+ (but not Tier 1). The preemption of Blue Sky requirements extends, however, only to the initial placement of the Tier 2 securities and not to any resales; any such resales therefore must comply with applicable Blue Sky laws.

If the Operator sold the Platform Notes in a Rule 506 private placement, the Platform Notes will constitute “restricted securities” for purposes of the Securities Act. A holder of restricted Platform Notes may not resell them unless the holder (i) registers the notes under the Securities Act, or (ii) sells them in an exempt transaction. The first of these options is not practical because of the expense that registration would entail. In contrast, several exemptions from registration are available for resales but each such exemption is subject to significant restrictions. The SEC has imposed these restrictions to help implement one of the Securities Act’s fundamental policies: that issuers must register their securities with the SEC (or satisfy Regulation A+) before offering them publicly. Stated differently, if the SEC permitted holders of Rule 506 securities to resell them without restriction, secondary market transactions could result in the securities being distributed broadly to the public in much the same manner as if the issuer had originally registered them for public sale.

**Worth Remembering:** The fact that an Operator has lawfully sold its Platform Notes to an investor does not necessarily mean that the investor can freely resell the Platform Notes to others. In all resales, the Platform Notes must either be registered or resold under an available exemption from registration.

There are three principal exemptions that may be available for resales of privately placed Platform Notes: Rules 144 and 144A under the Securities Act and Section 4(a)(7) of the Securities Act.

**Rule 144.** Rule 144 permits a holder of unregistered securities (other than an affiliate of the issuer) to resell the securities without registration under the Securities Act if the holder has held the securities for at least (i) six months, if the issuer is a reporting company under the Exchange Act, or (ii) one year, if the issuer is not a reporting company. There is no limit on the amount of securities that may be sold

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therefore appears to exempt secondary trading in SEC-registered Platform Notes from all Blue Sky registration requirements, preemption in fact applies only if the seller is not acting as an “underwriter” of the securities. The Securities Act defines “underwriter” broadly and the term could extend to any holder who resells its Platform Notes prior to the expiration of certain waiting periods calculated from the notes’ original issuance dates. Federal preemption therefore will sometimes be helpful in creating Blue Sky exemptions for resales of SEC-registered Platform Notes but does not provide a basis for unrestricted trading in all such Platform Notes without regard to the circumstances of the resale.

in reliance upon the exemption or the types of persons to whom the sales may be made.<sup>341</sup> Rule 144 therefore provides a very useful and straightforward exemption for holders of restricted Platform Notes who have satisfied the applicable holding period (which generally will be one year since Operators who have not registered their Platform Notes under the Securities Act are unlikely to be reporting companies under the Exchange Act). The very fact that the holding period applies, however, will prevent broker-dealers from using the Rule to develop a broad trading market for unregistered Platform Notes.

**Rule 144A.** Rule 144A exempts from registration any sale of securities made by a nonissuer to a “qualified institutional buyer” (“QIB”) if certain conditions are satisfied. Among other matters, each holder and prospective purchaser of the securities must have the right to obtain upon request certain basic information concerning the issuer and specified issuer financial statements. Rule 144A imposes no holding period and, like Rule 144, does not limit the amount of securities that the investor may sell. However, no sales to individual investors may be made under Rule 144A and, with limited exceptions, an institution must hold at least \$100 million in securities investments to qualify as a QIB. Rule 144A is designed to facilitate secondary trading of unregistered securities between large institutional investors and therefore also is unsuited to the development of a broad trading market for privately placed Platform Notes.

**Section 4(a)(7).** Section 4(a)(7) of the Securities Act permits the holders of privately placed securities, including securities originally sold under Rule 506, to resell the securities to accredited investors subject to certain conditions. Among other requirements, the seller cannot use the exemption if it is subject to certain disqualifying events (including those discussed above in relation to Rule 506) and may not offer the securities through general solicitation or general advertising. The seller must make available to the purchaser substantially the same issuer information and financial statements as would be required under Rule 144A. Although Section 4(a)(7) does not impose any holding period, the securities being sold must be part of a class of securities that has been authorized and outstanding for at least 90 days. As discussed below, Section 4(a)(7) could enable accredited investors to trade unregistered Platform Notes that have been outstanding for the requisite period.

Any secondary market seller must also consider Blue Sky compliance. As previously discussed, the Securities Act preempts state securities registration requirements in all Rule 506 offerings. The preemption, however, applies only to the issuer’s initial sale of the securities and not to any resales made by the purchasers. Accordingly, each holder of Rule 506 securities will need to identify and comply with an available Blue Sky exemption—or identify a basis for federal preemption other than Rule 506—in connection with any resale it makes. Along these lines, Section 4(a)(7) resale transactions qualify for federal preemption in the same manner as Rule 506 offerings. It follows that both an issuer’s

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<sup>341</sup> The discussion of Rule 144 in this paragraph is limited to transactions by non-affiliates of the issuer. Rule 144 imposes a number of additional important restrictions, including limits on the volume of securities that may be sold, on transactions by affiliates.

initial sale of Platform Notes under Rule 506 and any resales of the notes made by the purchasers to other accredited investors will be exempt from Blue Sky registration (subject to the issuer's duty to submit state notice filings (in the case of the initial placement) and the seller's compliance with the specific terms of Section 4(a)(7) (in the case of resales)). Any resales of notes made by investors to QIBs under Rule 144A also generally will be exempt from state registration under exemptions the Blue Sky laws provide for sales to institutional purchasers. In contrast, Rule 144 transactions don't qualify for federal preemption and, depending upon the states involved, such transactions may not be exempt from state registration when the purchaser is not an exempt institution.

It's quite clear that Platform Notes will be more attractive as an investment if they are freely tradable. As discussed above, the Securities Act will not restrict trading in Platform Notes originally issued in a registered public offering or under Regulation A+. In addition, Securities Act registration will not be required for any resales of privately placed Platform Notes made to accredited investors under Section 4(a)(7). An Operator might therefore choose to facilitate secondary trading by establishing an electronic marketplace on which outstanding Platform Notes may be resold. The marketplace could be made available to all investors if the Platform Notes were originally sold in a registered offering or pursuant to Regulation A+ (subject to compliance with applicable Blue Sky laws in connection with each such resale) and to any accredited investor if the Platform Notes were sold in a Rule 506 private placement (subject to a determination that the seller's action in listing its securities for sale on an electronic marketplace does not constitute "general solicitation" or "general advertising"). Any such marketplace must be operated by a registered broker-dealer and will likely have to be registered with the SEC under the Exchange Act as an "alternative trading system." In this regard, LendingClub has arranged for a registered broker-dealer, FOLIO*fn*, to operate an alternative trading system on which its outstanding Platform Notes may be traded.<sup>342</sup>

Some market participants also have expressed interest in developing an electronic platform for the trading of consumer loans originated by Internet-based consumer lenders. If the loans (in contrast to Platform Notes) are not "securities," they could be actively traded by investors without being registered under federal or state securities laws (or complying with Regulation A+ disclosure and reporting requirements) and without being subject to the restrictions that would otherwise apply under nonissuer resale exemptions such as Rules 144 and 144A. The Supreme Court has stated that notes evidencing consumer loans ordinarily will not constitute "securities" under the Securities Act. In addition, banks and other institutional investors routinely trade very substantial volumes of commercial loans (or participations therein) between themselves without deeming the loans or participations to be "securities." These facts could provide some basis for arguing that the securities laws should not restrict trading in consumer loans originated by Internet-based lenders. Unfortunately, both the SEC and state securities regulators are very unlikely to accept that argument, at least in relation to any trading platform that permits participation by nonaccredited investors. Case law has made it

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<sup>342</sup> Prosper previously sponsored a similar FOLIO*fn* trading system for its Platform Notes but terminated it in October 2016 due to low trading volumes.

quite clear that instruments that are not “securities” when originated—such as notes evidencing consumer loans—can become “securities” (or can be deemed to entail the offering of an associated “investment contract”) because of the manner in which they are marketed or the types of investors to which they are sold. Both the factors the courts have deemed relevant in those cases and the SEC’s analysis in the enforcement proceeding in which it held that Platform Notes are “securities” would strongly support a decision by the regulators to treat consumer loans as “securities” to the extent they are made available for trading by the general public on an electronic platform.<sup>343</sup>

### G. Securities Exchange Act

Any issuer that sells securities under a registration statement declared effective under the Securities Act automatically becomes subject to certain ongoing reporting requirements pursuant to Section 15(d) of the Exchange Act. Any Operator that sells registered Platform Notes therefore will be required to file various reports with the SEC, including Annual Reports on Form 10-K and Quarterly Reports on Form 10-Q. These reports must contain such information concerning the Operator (including financial statements) as the SEC shall specify by rule. The preparation of these reports—particularly the Form 10-K—will require significant effort.

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343 The SEC’s readiness to treat certain marketplace loan sales as securities offerings is evident in comments made by the SEC staff in 2016 when it approved the registration of two closed-end investment companies organized to invest in marketplace loans. See “- Closed-End Investment Companies” below. In the course of the registration process, each Fund was advised by the SEC staff that “it is the view of the SEC that the purchase of whole loans through alternative lending platforms involves the purchase of ‘securities’ under the Securities Act of 1933 ... issued by the originating platforms.” These statements by the SEC staff are not necessarily inconsistent with the general view that unsecured consumer loans, taken by themselves, are not “securities” because (i) the definition of “security” in the Securities Act also includes any “investment contract”, and (ii) it is possible for an investment that is not a “security” to be coupled with an “investment contract” and sold as a single financial product. In other words, the SEC could deem marketplace lenders who sell loans to retail investors also to be offering an associated “investment contract” consisting of the investment-related services that the lender provides to loan purchasers. In this connection, it is significant that the SEC staff stated that it viewed the issuer of the marketplace loan “security” as the originating lender (and not as the borrower under the loan). The relevant lender-provided services may consist of (i) loan servicing, (ii) the platform’s assignment of credit ratings to the loans, (iii) representations by the platform that each borrower satisfies specified criteria, (iv) the platform’s undertaking to handle all related cash flows (including the application of purchase prices paid by the investors), (v) undertakings to maintain a secondary market or trading platform for the loans, (vi) any general solicitation of borrowers and/or investors by the platform to assemble the mass of participants needed to make the investment scheme possible, and/or (vii) other similar activities. The manner in which the program is marketed to investors (e.g., if it is presented as an alternative to lower-yielding debt investments such as CDs) also can be relevant. It follows that a marketplace lender that sells whole loans to retail investors could reduce the risk that it will be deemed to be offering “securities” by limiting the number of investment-related services it provides to investors. For example, the platform could require each investor to engage its own servicer. However, certain of the foregoing services are integral to any marketplace lending program and could not easily be withdrawn. It further could be difficult in connection with a retail offering to reduce the services provided to a level at which the SEC (and state regulators) would concur that no investment contract exists. It would be reasonable for the SEC to be concerned that individual marketplace loans can be risky and should not be marketed to unsophisticated individual investors without securities law compliance. The SEC therefore is likely to take an expansive view of its jurisdiction in connection with any such offerings. All this being said, an important factor in determining whether “securities” have been offered in connection with a loan sale remains the relative degree of sophistication, bargaining power and financial capacity of the investor, and, unless the SEC clearly states to the contrary, market participants will probably continue to take the position that institutional whole-loan sale programs do not entail a securities offering (although loan sellers may, as a precautionary measure, nonetheless require each purchaser to represent that it is an accredited investor and/or a QIB for Securities Act purposes).

The Exchange Act also requires “brokers” and “dealers” to register with the SEC. The term “broker” means “any person engaged in the business of effecting transactions in securities for the account of others.” The term “dealer” means “any person engaged in the business of buying and selling securities for such person’s own account.” An issuer selling its own securities is not required, solely by reason of such sales, to register as either a broker or a dealer. The exemption does not necessarily extend, however, to employees of the issuer who represent the issuer in effecting the securities sales, particularly if the employees receive transaction-based compensation. An Operator that sells its Platform Notes directly to investors (rather than through a registered broker-dealer) therefore should observe the terms of a safe harbor that the SEC has adopted under the Exchange Act to provide an exemption from “broker” registration for issuer employees and, in particular, should not pay its own employees compensation that is directly tied to the number or principal amount of Platform Notes that are sold.

The need for broker registration must also be carefully considered if the Operator does not itself issue the Platform Notes but instead (i) organizes an affiliate to issue the Platform Notes (an option that the Operator could consider to address certain issues discussed under “*Bankruptcy Considerations*” below) and, as the affiliate’s manager, supervises or otherwise participates in its sale of the Platform Notes, or (ii) organizes an investment fund to invest in Borrower Loans and, as the fund’s general partner or managing member, places interests in the fund with unaffiliated investors. In these situations, the Operator potentially could be viewed as a “broker” that is placing securities on behalf of an issuer other than itself. At the same time, any person or company is much less likely to be deemed a “broker” if it does not receive transaction-based compensation. An Operator therefore will greatly strengthen its argument that SEC registration is not required for either it or its employees if, to the extent that the Operator has organized an affiliated issuer or investment fund, it does not take transaction-based fees from such issuer or fund and does not pay transaction-based compensation to its own employees.

Finally, each Operator should also consider the potential application of state broker-dealer registration requirements. In contrast to Blue Sky securities registration requirements, state laws requiring the registration of broker-dealers and/or sales personnel are not preempted by federal law in offerings by listed companies or in any Regulation A+ or Rule 506 offerings.<sup>344</sup> A breach of the requirements will expose the Operator to civil and/or criminal penalties and may entitle each purchaser of Platform Notes in the relevant state to rescind its investment. Most states exempt issuers from registration as broker-dealers, but a small number do not.

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344 In June 2013 the Ohio Division of Securities initiated enforcement proceedings against an online platform that was facilitating small business lending for multiple alleged violations of the Ohio Securities Act, including the platform’s failure to register itself as a dealer under the Ohio Securities Act.

## H. Investment Company Act

The Investment Company Act of 1940 (the “*Investment Company Act*”) requires “investment companies” to register with the SEC before selling any of their securities to the public.<sup>345</sup> The Act defines an “investment company” (in relevant part) as any person engaged in the business of investing in or holding “securities” and that (subject to certain adjustments) owns “securities” having a value exceeding 40 percent of the value of its total assets. Although the Borrower Loans funded through an Internet-based platform will not constitute “securities” for purposes of certain of the federal securities laws, the Investment Company Act definition of “securities” is very broad and will include the loans. The value of the Borrower Loans held by an Operator typically will greatly exceed 40 percent of the value of its total assets. Accordingly, absent an exemption, the Operator could be subject to registration as an investment company. As a practical matter, however, Operators cannot register as investment companies—even if they were otherwise prepared to do so—because the Investment Company Act imposes certain restrictions on registered investment companies (including restrictions on affiliated party transactions and permitted levels of aggregate indebtedness) that would make it impossible for the Operator to conduct its business. An exemption from registration therefore is needed.<sup>346</sup>

**Key Consideration:** An Operator should not sell any Platform Notes unless it has identified an exemption from Investment Company Act registration and it strictly complies with the terms of the exemption.

Operators may in fact qualify for several different exemptions. Section 3(b)(1) of the Investment Company Act, for example, exempts from registration as an “investment company” any issuer primarily engaged in a business or businesses other than that of investing in, holding, or trading securities. An Operator could reasonably take the position that its primary business (even if the Borrower Loans are “securities”) is not investing in or holding loans but is, instead, the operation of an Internet-based financing platform intended to match borrowers needing credit with third-party lenders. In this regard, it is significant that the Operator, unlike a traditional investment company, does not purchase assets with a view to earning investment returns in the form of interest payments or capital gains but instead is compensated for its services through the onetime origination fees paid by borrowers and the servicing fees paid by lenders. Certain Operators might also claim exemption under Section 3(c)(4) of the Investment Company Act, which exempts from registration any person “substantially all of whose business is confined to making small loans.” The SEC deems the term “small

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<sup>345</sup> The registration requirement applies to the investment company itself, rather than to its securities, and the investment company remains obligated also to register the securities under the Securities Act. In practice, the investment company will be able to file a single registration statement with the SEC that covers both investment company and securities registration.

<sup>346</sup> An Operator that offers or sells Notes in violation of the Investment Company Act will face very serious consequences. In addition to the risks of SEC enforcement proceedings and/or civil claims by investors, Section 47 of the Investment Company Act provides that any contract executed by an unregistered, non-exempt investment company “is unenforceable by either party... unless a court finds that under the circumstances enforcement would produce a more equitable result than non-enforcement.” In other words, all of the Operator’s contracts and Notes would potentially be void.

loans” to include only consumer loans made to individuals for consumption (and not business) purposes. The availability of Section 3(c)(4) to consumer-oriented platforms that utilize Funding Banks is, however, not entirely clear because such platforms technically do not “make” loans to consumers but instead purchase bank loans that indirectly are funded by the third-party lenders.

A separate exemption may be available for commercial lenders under Section 3(c)(5) of the Investment Company Act. Specifically, Section 3(c)(5) exempts companies primarily engaged in one or more of the following businesses: (A) purchasing or otherwise acquiring notes, loans, accounts receivables, and other obligations representing part or all of the sales price of merchandise, insurance, and services; (B) making loans to manufacturers, wholesalers, and retailers of, and to prospective purchasers of, specified merchandise, insurance, and services; and (C) purchasing or otherwise acquiring mortgages and other liens on and interests in real estate. Although Section 3(c)(5) is broad in scope, it is important to note that it does not extend to all commercial loans and that, in particular, unrestricted working capital loans will not qualify under Section 3(c)(5)(B) because such loans are not made to fund the purchase of “specified” merchandise, insurance, or service. Any small business lender that relies upon Section 3(c)(5)(B) therefore will need to impose certain restrictions on its borrowers’ use of the loan proceeds to ensure that the platform is engaged “primarily” in making eligible loans. In addition, any such lender should require each of its borrowers to provide specific information on the merchandise, service or insurance which the borrower will purchase with the loan proceeds as general representations from the borrower that it will apply the proceeds to an eligible use may not be sufficient under SEC staff interpretations of Section 3(c)(5)(B).<sup>347</sup>

A further exemption may be available to Operators that issue their securities in a private placement pursuant to Rule 506 of Regulation D (as discussed above). Section 3(c)(7) of the Investment Company Act exempts from registration any issuer whose securities are held only by “qualified purchasers” and that does not make a public offering of its securities. As previously discussed, private placements made pursuant to Rule 506(c) of Regulation D are not deemed “public offerings” for Securities Act purposes. The SEC has stated that it similarly will not deem Rule 506(c) offerings to constitute “public offerings” under Section 3(c)(7). Accordingly, Operators who sell Platform Notes only to investors who are both “accredited investors” and “qualified purchasers” should be able to claim the Section 3(c)(7) exemption. As a practical matter, however, Section 3(c)(7) will be useful only to Operators who intend to solicit only large institutional investors and high net worth individuals. In particular, individuals generally will qualify as “qualified purchasers” only if they beneficially own at least \$5 million in “investments” (as defined by the SEC).

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<sup>347</sup> The Investment Company Act does not specify the percentage of a lender’s loan portfolio that must consist of eligible loans in order for the lender to satisfy the “primarily engaged” standard. In the case of lenders making commercial loans other than real estate loans (Sections 3(c)(5)(A) and (B)), some SEC no-action letters suggest that a lender can qualify for the exemption if at least 55 percent of its assets consist of eligible loans. These letters do not provide a definitive interpretation of the statute, however, and to help ensure compliance most platforms will choose to operate under a higher minimum. In the case of real estate lenders (Section 3(c)(5)(C)), the SEC has stated that the lender must invest at least 55 percent of its assets in mortgages and other liens on and interests in real estate and an additional 25 percent in real estate-related assets.

Another private placement exemption under the Investment Company Act, Section 3(c)(1), may be useful to Operators who organize investment funds to invest in Borrower Loans (as discussed below). Specifically, Section 3(c)(1) provides an exemption for issuers not engaged in a public offering of securities and that have fewer than 100 security holders (subject to certain exceptions not relevant here). An investment fund that invests in Borrower Loans may qualify for this exemption if it appropriately limits the number of its investors. The Operator itself, however, will not be able to use Section 3(c)(1) to issue Platform Notes because it will expect, at any one time, to have substantially more than 100 holders of its Platform Notes.

The SEC to date has not required Operators to register as investment companies. A prospective Operator nonetheless should carefully consider the Investment Company Act implications of any changes it proposes to make, relative to established programs, in the securities that it offers, the manner in which it offers the securities, or the classes of assets that it finances.<sup>348</sup>

## I. Investment Advisers Act

The Investment Advisers Act of 1940 (the “*Advisers Act*”) requires “investment advisers” to register with the SEC unless an exemption applies. The Advisers Act defines an “investment adviser” as any person who for compensation engages in the business of advising others as to the value of securities, or as to the advisability of investing in, purchasing, or selling securities, or who issues reports or analyses concerning securities as part of a regular business.<sup>349</sup> Registered investment advisers are subject to a detailed regulatory regime that governs, among other matters, fiduciary duties owed to clients, required disclosures to clients, procedures for handling client assets, recordkeeping and reporting requirements, and the content of investment adviser advertisements. Although the related initial and ongoing compliance expenses would not be insignificant, and material changes to its business practices could be required, an Operator required to register as an investment adviser likely could comply with most of the applicable regulations. At the same time, investment advisers, as fiduciaries to their clients, are required at all times to act in the client’s best interests, subject to any advisory contract that the client agrees to after full and fair disclosure. As discussed below, an Operator that manages an investment fund formed to invest in Borrower Loans will be deemed an investment adviser and, as such, will need to manage and adequately disclose the conflicts that may exist between its fiduciary duty to the fund and its duties to other purchasers of Platform Notes.

As previously mentioned, a number of consumer and small business marketplace lenders assign proprietary credit ratings to borrowers of loans they originate. These ratings may reflect the lender’s internal assessment of a borrower’s relative creditworthiness and the probability that the

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<sup>348</sup> The fact that Operators engaged in issuing Platform Notes may be exempt from investment company registration has no bearing on the Investment Company Act status of funds that are organized expressly to enable retail investors to invest in pools of marketplace loans. Any such fund almost certainly will be an investment company and, if its shares are publicly offered, it will need to register with the SEC. See “*Closed-End Investment Companies*” below.

<sup>349</sup> 15 U.S.C. § 80b-2(a)(11).

borrower may default on a loan. As an example, a lender might assign each borrower a credit rating of “A”, “B”, “C” or “D”, with A-rated borrowers deemed to have the lowest relative probability of default and D-rated borrowers the highest. The ratings do not constitute a statement by the lender of the actual probability that any borrower will default or of the expected loss on any loan given default. The lenders disclose these ratings to investors who may consider them in choosing which loans to purchase. The lenders also may use the ratings in connection with automated investment programs pursuant to which participating investors may direct the lender to allocate their available investment funds (or specified percentages of their available funds) to purchase loans to borrowers having specific credit ratings or loans to borrowers that fall within a specified range of credit ratings.

It could be argued that in posting these ratings the Operator is acting as an investment adviser under the Advisers Act and therefore required to register with the SEC. Registration is generally required if an Operator is considered to be (i) in the business (ii) of providing advice, or issuing reports or analyses, regarding securities (iii) for compensation. In the past, the SEC staff has raised whether an Operator should register as an investment adviser due to its construction of model portfolios that correspond to certain risk levels and estimated returns of loans,<sup>350</sup> and the SEC could raise similar concerns with respect to an Operator’s proprietary ratings.

While the analysis inevitably depends on the facts and circumstances of each Operator, ratings that reflect the Operator’s view of a borrower’s creditworthiness may resemble ratings issued by traditional credit rating agencies, which the SEC staff suggests should not be interpreted as investment advice or viewed as a recommendation to buy or sell any securities.<sup>351</sup> Moreover, ratings are generally impersonal in nature, meaning they do not purport to meet the objectives or needs of specific lenders. Therefore, assuming lenders are already given adequate disclosure of an Operator’s business and any applicable conflicts of interest, requiring an Operator to register as an investment adviser with the SEC would seem to offer limited benefits to lenders who use ratings as a tool to invest in loans. Since there is no existing authority from the SEC on the issue, an Operator should take care when using ratings in its business, including making clear disclosures to lenders that the ratings do not constitute investment advice and should not be viewed by lenders as a recommendation to purchase any Borrower Loans.

The investment adviser analysis is different, however, for Operators (or their affiliates) who manage investment funds. As discussed under “*Bankruptcy Considerations*” below, an Operator may choose to organize an investment fund that will use investor capital to invest in Borrower Loans generated by the platform. As investment manager, the Operator (or, if applicable, an affiliate thereof formed to be the general partner/manager of the fund) will determine the specific Borrower Loans the fund will purchase and will receive related management and/or performance fees. The status of consumer loans

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<sup>350</sup> See Letter from Prosper Marketplace, Inc. to the Division of Corporation Finance, at \*6 (Nov. 24, 2009), <https://www.sec.gov/Archives/edgar/data/1416265/000141626509000266/filename1.htm>.

<sup>351</sup> See SEC Updated Investor Bulletin: The ABCs of Credit Ratings (Oct. 12, 2017), [https://www.sec.gov/oiea/investor-alerts-and-bulletins/ib\\_creditratings](https://www.sec.gov/oiea/investor-alerts-and-bulletins/ib_creditratings).

as “securities” under the Advisers Act is not entirely clear, but an Operator should assume that the Advisers Act applies given that the investors’ interests in the fund are likely securities. It follows that, in receiving any compensation, including reimbursement of expenses, for managing the fund’s investments, the Operator will be acting as an “investment adviser.”

**No Free Rides:** The fact that an Operator and any fund it manages are exempt from Investment Company Act registration does not mean that the Operator is exempt from investment adviser registration. The Operator’s status under the Advisers Act and the investment adviser provisions of any applicable Blue Sky laws must still be considered.

It is important to note that not all Operators who act as investment advisers will be required, or are indeed eligible, to register with the SEC. The Advisers Act establishes a bifurcated regulatory scheme under which larger investment advisers register with the SEC and smaller advisers (unless an exemption applies) register with the states in which they provide advice. In general, an investment adviser may not register with the SEC unless it has at least \$100 million of assets under management. An Operator that manages investment fund(s) and /or managed accounts that invest in Borrower Loans but does not satisfy the \$100 million threshold should consider the possible application of state registration requirements. If the Operator is not required to register with its state securities regulator, for example, if a state law exemption applies, then the Operator may be required to register with the SEC as an exempt reporting adviser. An Operator generally will be permitted to treat each of its managed funds as a single client and will not be deemed, for purposes of most state requirements, to be providing advice in each state in which fund investors are located. It should also be noted that the Operator will be deemed a “private fund adviser” for purposes of the Advisers Act if it only manages funds that rely upon Section 3(c)(1) or 3(c)(7) of the Investment Company Act (i.e., the Operator does not accept any separately managed accounts). Investment advisers who only advise such private funds are exempt from registering with the SEC if they have less than \$150 million in assets under management (including any uncalled commitments and leverage).

As previously noted, investment advisers must act as fiduciaries to their clients. An Operator that manages an investment fund therefore must endeavor in selecting the fund’s investments to act solely in the fund’s best interests. To the extent, however, that the investment fund and self-directed investors who purchase Platform Notes directly through the platform are competing to fund a limited supply of desirable loans, the Operator will face a clear conflict of interest between its duty to select for the fund the best possible investments (determined in view of the fund’s stated investment strategy) and its obligation to treat the direct investors fairly. As the Operator will enjoy certain advantages over the direct investors in any such competition (it will, for example, have more information than the direct investors concerning the borrowers, the loans, and the total amount of lender funds available for investment and generally will be more financially sophisticated), this conflict will not be easily resolved if the Operator is allowed complete discretion to select specific loans for the fund. It therefore likely

will be necessary to employ a random loan allocation procedure and/or require the investment fund to purchase loans only under a predefined investment strategy that restricts both the amount of fund capital that may be employed at any one time and the total amount that may be invested in specific ratings categories of loans. The goal will be to develop parameters that will permit the fund to attract investors but will also provide direct investors with continued access to the most attractive loans. The investment fund must of course fully disclose these parameters in its offering materials along with any conflicts of interest.

## J. Risk Retention Requirements

Much of the blame for the “Great Recession” has been placed on the “originate-to-distribute” model of asset securitization. Certainly, it’s reasonable to believe that asset originators who transfer all of the credit risk on the securitized assets may have incentives that won’t necessarily advance investor protection. Accordingly, the Dodd-Frank Act required the SEC, the Board of Governors of the Federal Reserve System (the “*Federal Reserve Board*”), the Federal Deposit Insurance Corporation (the “*FDIC*”), the Federal Housing Finance Agency (“*FHFA*”), and the Office of the Comptroller of the Currency (the “*OCC*” and, together with the SEC, the FDIC, the Federal Reserve Board, and FHFA, the “*Agencies*”) jointly to prescribe regulations that (i) require a securitizer to retain not less than 5 percent of the credit risk for any asset that the securitizer, through the issuance of an asset-backed security, transfers, sells, or conveys to a third party, and (ii) prohibit a securitizer from directly or indirectly hedging or otherwise transferring the credit risk that it is required to retain.<sup>352</sup> The risk retention requirement is intended to create economic incentives for securitizers to structure transactions carefully and to monitor the quality of the securitized assets. The ultimate goal is to help align the interests of securitizers with those of investors.

Final regulations implementing the risk retention requirement became effective in December 2016 (the “*Retention Rules*”).<sup>353</sup> The requirements apply to both public and private offerings of asset-backed securities and securitizers therefore cannot avoid the requirements by selling their securities only in private placements exempt from Securities Act registration. Marketplace lenders need to consider two questions under the Retention Rules. First, does the risk retention requirement apply to Platform Notes? And second, in securitizations of marketplace loans (to which the Retention Rules unquestionably apply), who will be deemed the “sponsor” required to retain the credit risk?<sup>354</sup>

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352 The Dodd-Frank Act required the Agencies to exempt securitizations of certain assets (most significantly, “qualified residential mortgages”) from the risk retention requirement. Marketplace loans will not qualify for any of these exemptions.

353 The Retention Rules became effective in December 2015 for residential mortgage securitizations that are not otherwise exempted.

354 Although numerous securitizations of marketplace loans have been completed, to date there have been no securitizations of Platform Notes. Securitizing Platform Notes (as opposed to marketplace loans) offers no advantages to either the sponsor or investors and would create additional expense and complexity.

As to the first of these questions, technical arguments can be made that Platform Notes constitute “asset-backed securities” to which the retention requirement applies.<sup>355</sup> If that were the case, the Funding Bank would likely be deemed the party required to retain the risk.<sup>356</sup> At the same time, technical arguments also can be made that the Retention Rules do not extend to Platform Notes.<sup>357</sup> It is unnecessary for us to debate the relative merits of these opposing arguments as the Agencies (although they have made no formal pronouncement) have not applied risk retention to Platform Notes nor have they indicated any intention to do so. In this regard, the industry may consider itself fortunate since, if risk retention did apply, the economic and regulatory capital costs that Funding Banks incur in funding Borrower Loans would increase significantly.

The second question noted above—identifying the party subject to the retention requirement in actual marketplace loan securitizations—sometimes has an easy answer. The Retention Rules apply the risk

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355 As previously discussed, Platform Notes do not constitute “asset-backed securities” for purposes of Regulation AB under the Securities Act because (i) each Platform Note is backed by a single Borrower Loan and does not represent an investment in a “pool” of assets, and (ii) the Operator is not a “passive” issuer as contemplated by Regulation AB. The risk retention requirements therefore would not apply to Platform Notes if Congress had incorporated the Regulation AB definition of “asset-backed security” in the Dodd-Frank Act. In fact, however, the Dodd-Frank Act amended the Exchange Act to include a new (and broader) definition of “asset-backed security” that will govern the retention requirements. Under this definition, an “asset-backed security” will include any “fixed-income ... security collateralized by any type of self-liquidating asset (including a loan ... or other secured or unsecured receivable) that allows the holder of the security to receive payments that depend primarily on cash flow from the asset.” It follows that a Platform Note will constitute an “asset-backed security” for purposes of the risk retention requirements if (i) it is “collateralized” by a loan, and (ii) the holder’s right to receive payments depends primarily on the cash flow from such loan. Platform Notes appear to satisfy both clauses of this test. In regard to the first clause, the Retention Rules state that an asset “collateralizes” a security (whether or not the issuer grants the investors a security interest over the asset) if the asset provides the cash flow that the issuer will use to make payments on the securities. The Borrower Loans do of course provide the cash flow that the Operator will use to make payments on the Platform Notes. In regard to the second clause, payments on the Platform Notes will depend not only “primarily” but in fact solely on such Borrower Loan cash flow. In contrast to Regulation AB, the Exchange Act definition does not require the “asset-backed security” to be backed by the cash flow from a “pool” of financial assets.

356 If Platform Notes are “asset-backed securities” subject to risk retention, the Funding Bank arguably is the “sponsor” subject to the retention requirement since it transfers assets (*i.e.*, the Borrower Loans) to the issuing entity. If this is the case, the Funding Bank would be required to retain credit risk and would not be permitted to transfer 100 percent of the credit risk on any Borrower Loan to the Operator. Regulators might also be inclined to deem the Operator to be a “sponsor” (whether in addition to, or in place of, the Funding Bank) since the Operator manages the overall program and helps to select the “securitized” assets by determining the loan underwriting criteria in conjunction with the Funding Bank. However, a court decision strongly suggests that the regulators do not have authority under the Retention Rules to treat the Operator as a “sponsor” in this situation because the Operator, assuming that it does not acquire the Borrower Loans from the Funding Bank and then transfer them to a special purpose company that issues the Platform Notes, has not transferred any Borrower Loans to the issuing entity (*i.e.*, to itself). *See* footnote 371 below.

357 Under the Retention Rules the retention requirement applies only if assets are transferred to an “issuing entity” and the asset-backed securities are issued in a “securitization transaction” (which similarly requires that the asset-backed securities be issued by an “issuing entity”). Although the Operator (or an Affiliated Issuer or a Trust, as further discussed under “*Bankruptcy Considerations*” below) unquestionably is the issuer of the Platform Notes, it may not be an “issuing entity.” The Retention Rules define “issuing entity” as the entity that (i) owns or holds the *pool* of assets to be securitized, and (ii) issues the asset-backed securities in its name (emphasis supplied). Each Platform Note is backed not by a *pool* of underlying assets but by a single Borrower Loan. It therefore may be reasonable to conclude that, although Platform Notes are “asset-backed securities” for purposes of the Retention Rules, they are not issued by an “issuing entity” in a “securitization transaction” and therefore are not subject to risk retention requirements. Although in certain circumstances the SEC has deemed pass-through securities backed by a single asset to constitute “asset-backed securities” within the meaning of Regulation AB (notwithstanding the pooling requirement in Regulation AB), there are reasons to differentiate those securities from Platform Notes and to view them as not controlling. *See* footnote 330 above.

retention requirement to “sponsors” and define “sponsor,” in relevant part, as “a person who organizes and initiates a securitization transaction by selling or transferring assets, either directly or indirectly, ... to the issuing entity.” If a balance sheet lender securitizes loans that it originated and holds on its balance sheet, the lender unquestionably will be the “sponsor” since it is both “organizing” and “initiating” the securitization and selling assets to the securitization issuer. At the same time, in many marketplace loan securitizations the loan seller is not the originator but rather a commercial bank, investment fund, or other loan aggregator (each, an “*Aggregator*”) which has acquired a pool of loans that it intends to refinance. In this latter situation, should the sponsor be deemed the Funding Bank, the marketplace lender, or the Aggregator? Each of these entities has been the loan seller in one of the series of transactions through which the securitized loans are transferred to the securitization issuer. The Funding Bank and the marketplace lender both know that the loans they are originating and/or selling may subsequently be securitized, and the marketplace lender has very likely agreed to provide specified assistance to the Aggregator in connection with future securitizations.<sup>358</sup> It therefore could be argued that each of the Funding Bank, the marketplace lender, and the Aggregator is a “sponsor” for purposes of the Retention Rules.<sup>359</sup> However, the Aggregator will make no commitment to the Funding Bank or the marketplace lender to securitize the purchased loans but instead will have complete discretion to retain, securitize, or resell them (outside of a securitization). It follows that the Funding Bank and the marketplace lender cannot require the Aggregator to securitize the purchased loans and do not control the timing, amount, structure, or collateral selection in any securitizations which it does undertake. Under these circumstances there is a strong argument that only the Aggregator should be viewed as the “sponsor” of any securitizations of the purchased loans.<sup>360</sup>

**Don’t Forget:** In every securitization of marketplace loans (including private placements) there must be at least one “sponsor” who retains not less than five percent of the credit risk on the securitized loans.

A sponsor may satisfy its retention obligation by holding an “eligible horizontal residual interest,” an “eligible vertical interest,” or a combination of eligible horizontal and vertical interests, or by posting

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358 Among other matters, the marketplace lender may agree to review and/or provide indemnities in regard to certain disclosures in the securitization offering memorandum and to allow the securitization issuer to exercise any rights that the Aggregator has to require the marketplace lender to repurchase loans that failed to satisfy specified eligibility criteria and / or to pay indemnities in respect of such loans. See “—*Securitization*” below.

359 It is possible under the Retention Rules for a securitization to have multiple sponsors. In this situation, it is sufficient that at least one of the sponsors retains 5 percent credit risk. The remaining sponsors are not required to retain credit risk (though they may do so voluntarily) but are obligated to ensure that at least one of their members is satisfying the retention requirement.

360 The Agencies have indicated that an entity will not be a “sponsor” for purposes of the Retention Rules unless it has “actively participated” in the “underwriting and selection of the securitized assets.” See Credit Risk Retention, 79 Federal Register 77609 (Dec. 24, 2014). The marketplace lender and the Funding Bank should not be deemed “sponsors” under this test so long as they are not actively involved in selecting the assets the Aggregator chooses to securitize.

cash collateral in an “eligible horizontal cash reserve account.”<sup>361</sup> In all cases, however, the interest retained by the sponsor must represent not less than 5 percent of the credit risk on the securitized assets. The sponsor may hold the retained interest directly or through a “majority-owned affiliate.” The latter term includes any entity that owns a majority of the sponsor’s equity, in which the sponsor holds a majority of the equity, or which is under common majority control with the sponsor. The option to hold the risk position through a majority-owned affiliate enables sponsors to reduce the economic cost of risk retention by arranging for third parties to provide part of funding for the risk position. Although the third-party investor will require appropriate compensation for the risk it assumes, marketplace lenders who choose to securitize their loans but face capital constraints in funding their risk positions may be able to increase their securitization volumes by holding the positions through majority-owned affiliates organized with outside investors. Alternatively, or in addition, the Retention Rules also permit a securitization sponsor to finance its retained interest and to pledge it as collateral under a loan, repurchase, or other financing agreement so long as the lender has full recourse against the sponsor.<sup>362</sup>

#### K. Securitization

The volume of marketplace loan securitizations continues to grow rapidly.<sup>363</sup> Securitization entails the creation of asset-backed securities (“ABS”) that represent the right to receive the cash flow from a pool of segregated financial assets. The goal in the securitization is to create ABS whose credit risk derives solely from the credit quality and payment characteristics of the asset pool and is not tied to the credit standing of the asset originator. Asset classes that have long been securitized include trade receivables, commercial and residential mortgages, credit card receivables, student loans, and auto loans and leases. Although the first marketplace loan securitizations were completed little more than five years ago, marketplace loans have already become an important part of the securitization market and will likely someday represent a significant portion of overall consumer ABS. Securitization has already become an important funding source for certain lenders, and expanded access to the ABS markets will be important to the industry’s growth.

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<sup>361</sup> An “eligible horizontal residual interest” refers to a subordinate class of securities in the securitization structure to which losses will be allocated before any losses are allocated to other ABS interests. An “eligible horizontal cash reserve account” refers to a cash account funded by the sponsor in the required amount to provide credit support for the ABS interests issued in the securitization. An “eligible vertical interest” refers to the purchase by the sponsor of an equal proportionate interest (but not less than 5 percent) of all classes of ABS interests issued in the securitization.

<sup>362</sup> The European Union (“EU”) also imposes certain risk retention requirements in securitizations. Sponsors who wish to market their ABS to European investors will need to comply with the applicable EU regulations. A discussion of the EU risk retention regulations is outside the scope of this white paper.

<sup>363</sup> Approximately \$8.7 billion of ABS consumer marketplace ABS was issued in 2018. This represents a year-over-year increase of 11.5% compared to the \$7.8 billion issued in 2017. The 2017 total in turn represented a year-over-year increase of 71% compared to the \$4.6 billion issued in 2016. Kroll Bond Rating Agency, *2018 Consumer Loan Marketplace Lending Year in Review and 2019 Outlook*, [https://www.krollbondratings.com/show\\_report/15894](https://www.krollbondratings.com/show_report/15894), and *2017 Consumer Loan Marketplace Lending Year in Review and 2018 Outlook*, [https://www.krollbondratings.com/show\\_report/8492](https://www.krollbondratings.com/show_report/8492).

**Look to the Future:** Marketplace loan securitizations are getting high credit ratings and gaining broader investor acceptance. Continued rapid growth is likely.

The first step in the securitization process is to establish a special purpose issuer. A “special purpose” issuer is an entity (an “SPE”) formed specifically for the purpose of issuing ABS. The SPE will not engage in any business other than issuing ABS to finance its purchase of the financial assets to be securitized. Its organizational documents and contracts will contain operating restrictions and covenants intended to make it very unlikely that it will ever become subject to bankruptcy proceedings. The SPE may be organized as a limited liability company, as a statutory trust, or, particularly if it is organized in an offshore tax haven jurisdiction, as a corporation. In all cases, however, the SPE must be completely isolated from the potential insolvency of any associated companies including, in particular, the originator and/or seller of the securitized financial assets (who is sometimes referred to as the “sponsor” of the securitization). If the securitization is structured properly, the credit risk on the securitized assets is segregated from the sponsor’s own credit risk. Securitizations thus allow investors to evaluate the credit risk associated with the underlying financial assets independently of the sponsor’s overall business.

The sponsor’s sale of financial assets to an SPE doesn’t eliminate the need for someone to continue to service the assets. Accordingly, in most marketplace loan securitizations the SPE will appoint the marketplace lender as the loan servicer and the lender will continue to collect payments on the loans, pursue delinquent borrowers, and otherwise interact with borrowers in much the same manner as if the securitization had not occurred. Appointing the marketplace lender as the servicer, however, could leave investors exposed to lender credit risk since the lender’s ability to perform its duties as servicer will, to a large extent, depend upon its continuing solvency. A properly structured securitization therefore will include robust backup servicing arrangements under which a preapproved backup servicer will assume the servicing function should the lender become insolvent or otherwise unable to service the marketplace loans. The market will ultimately dictate the backup servicing requirements for marketplace loan securitizations but “hot” backup servicing arrangements—in which the backup servicer stands ready to assume the servicing duties on short notice—will often be required, especially with respect to securitizations of loans originated by a marketplace lender with a short operating history.

Another key concept in securitizations is credit enhancement, which can be achieved through a number of means. Most typically, the SPE will issue multiple classes of ABS with different levels of seniority. The more senior classes will be entitled to receive payment before the subordinate classes if the cash flow generated by the underlying assets is not sufficient to allow the SPE to make payments on all of the classes of ABS. Naturally, the senior classes of ABS will carry higher credit ratings whereas the subordinated classes will carry higher interest rates. The SPE also typically will purchase the financial assets from the sponsor at a discount to their face amounts. As a result, the aggregate principal amount of financial assets owned by the SPE will exceed the aggregate principal amount of the debt securities

issued by it and such excess (“*overcollateralization*”) helps to protect the security holders against the consequences of defaults on the collateral.<sup>364</sup> In any securitization of marketplace loans, careful thought will need to be given to the amount of credit enhancement to be provided for the senior classes of ABS through overcollateralization and / or the sale of subordinated or equity tranches. A sponsor may also provide credit enhancement by funding a reserve account upon which the SPE will draw to make payments due on the senior securities if the transaction cash flow would otherwise result in a shortfall.<sup>365</sup> Credit enhancement can also be provided by monoline insurers or other financial institutions that “wrap” the securities and effectively guarantee scheduled payments of principal and interest on the most senior class of ABS and /or by requiring the SPE to pay down the senior securities at an accelerated rate if specified financial triggers are tripped. As performance data for marketplace loan securitizations is still not available for a complete credit cycle, investors in marketplace loan ABS may require the structures to include higher credit enhancement levels than might be expected for similar asset classes; however, these differentials recently have been decreasing as investors gain more confidence in the product.<sup>366</sup>

Rating agencies were originally somewhat reluctant to rate marketplace loan securitizations because of the limited performance history available for marketplace loans (including default, prepayment, and recovery characteristics). The agencies were particularly concerned (and to some extent remain concerned) that Operators cannot supply performance information covering a complete credit cycle. The decision by Moody’s in early 2015 to grant the first investment-grade rating to marketplace loan ABS therefore represented something of a milestone, and investment-grade ratings have subsequently become common.<sup>367</sup> Although the Dodd-Frank Act required federal regulators in many instances to replace references to securities ratings in federal banking and securities regulations with alternative metrics, many institutional investors by law or policy continue to be limited in their ability to purchase unrated debt securities. In consequence, the availability of investment grade ratings has played an important role in broadening the investor base for marketplace loan securitizations.

Of course, the rating agencies consider many factors beyond performance history when rating marketplace loan securitizations. Among other factors, the agencies will consider (i) default correlation

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<sup>364</sup> Any losses resulting from defaults on the collateral will be allocated in the first instance to the holders of the equity (or “residual”) in the SPE and thereafter to the several classes of notes issued in the securitization in reverse order of seniority.

<sup>365</sup> The reserve account will be funded by the sponsor at a specified level on the transaction closing date. Thereafter, the SPE will apply available funds from its cash flow on each scheduled distribution date to maintain the reserve account balance at a predetermined level after giving effect to any drawings made on the account. The sponsor is not permitted after the closing date to make discretionary contributions to the reserve account to support the senior securities, as any such contributions could undermine the SPE’s status as a bankruptcy-remote entity.

<sup>366</sup> The risks inherent in securitizing a relatively new asset class were demonstrated in 2016 and 2017 when certain marketplace loan securitizations hit early amortization triggers because of poor loan performance.

<sup>367</sup> In January 2015 Moody’s Investors Service assigned a Baa3 (sf) rating to the Class A Notes of Consumer Credit Origination Loan Trust 2015-1. The Class A Notes were collateralized by a portfolio of consumer loans originated by Prosper. There is strong market interest in the ratings analysis of marketplace loan securitizations, and a number of rating agencies have published related research reports or policy statements.

among borrowers, (ii) the limited operational history of marketplace lenders, (iii) whether lenders are able to detect fraud among potential borrowers, (iv) the lack of secondary liquidity in marketplace loans, (v) the unique aspects of servicing consumer loans originated through an Internet platform and the adequacy of the backup servicing arrangements, (vi) the number and depth of the credit tranches contemplated by the proposed structure, (vii) whether the lender has the financial capacity to repurchase ineligible loans from the SPE if so required (and whether repurchase obligations are triggered by a breach of any of numerous eligibility criteria or only in limited circumstances such as verifiable identity theft), (viii) the possibility that some borrowers may place a lower priority on repaying marketplace loans than other personal obligations (*e.g.*, residential mortgages or auto loans), and (ix) regulatory issues affecting the industry. At least in the short term, certain of these considerations could lower the ratings of marketplace loan ABS below the ratings that might otherwise be assigned to securitizations of traditional consumer loans of an equivalent credit quality (as measured by borrower credit scores).<sup>368</sup>

Most securitizations of traditional asset classes are sponsored by the loan originator or one of its affiliates. In this regard, a number of marketplace lenders regularly securitize loans which they hold on balance sheet and, and as discussed below, certain lenders are now sponsoring securitizations that permit multiple institutional investors to pool and securitize loans which they have purchased from the lender. At the same time, many marketplace loan securitizations have been sponsored by banks, investment funds, or other institutional investors (each, an “*Aggregator*”) who have acquired a substantial amount of loans from a particular marketplace lender with whom they are not affiliated. In these transactions, the lack of affiliation between the Aggregator and the lender can complicate the documentation. To take one example, much of the disclosure in the ABS offering materials will focus on risk factors specific to the originating marketplace lender as well as the lender’s underwriting policies, servicing practices, regulatory status, and loan performance information. Unless otherwise agreed in the loan purchase agreement pursuant to which the Aggregator has purchased loans from the marketplace lender (the “*Loan Purchase Agreement*”), the Aggregator, because it is not a lender affiliate, cannot require the lender either to provide information needed to prepare the offering materials or to certify that the relevant portions of the offering materials (once prepared by the Aggregator) are accurate. The underwriters or placement agents for the ABS will nonetheless want the Aggregator’s counsel and their own counsel to provide unqualified “negative assurance” letters as to the accuracy of the offering materials. Similarly, the Aggregator will want the SPE to have the benefit of any undertakings made by the marketplace lender to the Aggregator to repurchase ineligible loans

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368 The challenges rating agencies face in evaluating marketplace loan ABS were perhaps demonstrated in early 2016 when one rating agency put on watch for downgrade the junior tranches in three marketplace loan securitizations it had rated within the preceding 12 months. In each case, payment defaults on the securitized loans were higher than expected. The rating agency later determined—after reviewing several additional months of performance data—that loan performance had stabilized and it did not downgrade the tranches. At the same time, in a number of other cases rating agencies have issued post-closing upgrades to the ratings originally assigned to one or more senior tranches of marketplace loan ABS. The agencies approved the upgrades because strong loan performance and/or loan prepayments had enabled the issuers to pay down a substantial portion of their senior securities following the closing and such payments had meaningfully increased the level of overcollateralization supporting the remaining balance of the senior securities.

(i.e., loans the lender sold to the Aggregator in breach of the eligibility criteria stated in the Loan Purchase Agreement) or to pay related indemnities. Again, however, because the Aggregator is not an affiliate of the marketplace lender it cannot—except by contract—compel the lender to consent to any such assignment of the Aggregator’s rights. Aggregators therefore will want the marketplace lender to provide certain undertakings intended to facilitate future securitizations. Among other matters, the marketplace lender may agree in the Loan Purchase Agreement (or in a related “multi-party” agreement) to provide certain lender-related information for use in the securitization offering memorandum (including loan performance information); to indemnify the SPE and the underwriters against material inaccuracies in that disclosure; to arrange for its counsel to provide a “negative assurance” letter in relation to such disclosures (other than any financial disclosures); to authorize the SPE to rely upon its representations in the Loan Purchase Agreement; to repurchase ineligible loans from the SPE as if the SPE were the Aggregator; and, if the securities will be rated, to assist the Aggregator in responding to pertinent questions raised by the rating agencies. Marketplace lenders generally have been willing to provide some or all of these types of undertakings as they recognize that Aggregators can (and very often will) reinvest the securitization proceeds in new marketplace loans. The exact terms negotiated between marketplace lenders and Aggregators can nonetheless vary substantially from one transaction to the next. Of particular importance, the scope of the marketplace lender’s obligation to repurchase ineligible loans (or to pay related indemnities) has not been uniform across transactions. The lack of uniform terms can reduce secondary market demand for marketplace loan ABS and thereby impair the industry’s overall access to the securitization markets.<sup>369</sup>

Looking forward, Aggregator-sponsored securitizations are becoming relatively less common because of an important innovation in marketplace loan securitizations that made its debut in 2017. Specifically, several of the largest consumer marketplace lenders now operate securitization platforms that enable institutional investors to sell loans purchased by them from the lender to an SPE organized and managed by the lender. The ABS issued by the SPE typically will be collateralized by loans that the SPE has purchased both from the lender and from a number of institutional investors not affiliated with the lender. These multiseller structures provide significant benefits to both the participating loan investors and the sponsoring lenders. The investors, for their part, save the expense and administrative burden of sponsoring a securitization that is limited to loans they themselves own<sup>370</sup> and, since they are not the securitization sponsor, they are not subject to credit risk retention obligations under the

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<sup>369</sup> As discussed below, to date all marketplace loan ABS has been sold in private placements exempt from registration under the Securities Act. An active secondary market for the ABS that includes retail investors is therefore not possible. The ABS do remain eligible for resale to QIBs under Rule 144A. However, QIBs may have less interest in purchasing marketplace loan ABS in the secondary market if they believe that more effort is required to analyze the terms of individual marketplace loan securitizations than is needed for other ABS classes.

<sup>370</sup> Each participating investor will, however, likely be required to reimburse the sponsoring lender for the investor’s *pro rata* share of the transaction expenses and may be required to pay program fees to the lender as a condition to being allowed to participate in the securitizations.

Retention Rules.<sup>371</sup> The lenders also can use the structures as a convenient means to securitize loans they hold on-balance sheet. Of perhaps equal or greater importance, platform-sponsored securitizations—by providing institutional investors with a convenient means to resell purchased loans—can increase both investor interest in marketplace loan investing and the total volume of marketplace loan securitizations. Lenders further can use the structures to influence (if not control) the timing and amounts of the securitizations of their loans and to help ensure that key terms of the securitizations (*e.g.*, transaction structure, collateral composition, credit enhancement levels and ratings) are consistent from one transaction to the next. Greater consistency between transactions makes it easier for ABS investors to analyze individual ABS tranches and may result in greater investor demand. In view of these advantages, it is not surprising that lender-sponsored multiseller securitizations have accounted for a substantial portion of all marketplace loan ABS issued in the past two years and additional lenders will likely sponsor such platforms as their loan volumes increase.

Certain marketplace lenders have also established ongoing programs to issue asset-backed series certificates (“*ABS Certificates*”) collateralized by specific pools of consumer loans. These programs also can provide marketplace lenders and institutional loan investors with enhanced liquidity. At the same time, there are several important distinctions between these programs and other marketplace loan securitizations. The most important of these is perhaps frequency of issuance - whereas an SPE organized to issue marketplace loan ABS typically issues securities only on a single closing date, in an ABS Certificates program the issuer will purchase loans from its sponsor, and will issue a separate series of securities collateralized by the loans then being purchased (the “*Relevant Loans*”), on each of multiple closing dates. Each series of ABS Certificates entitles the holder to receive (through the issuer) the cash flow on the Relevant Loans (net of servicing fees and other expenses) but the holder will have no rights in the loans allocated by the issuer to any of its other ABS Certificates series.<sup>372</sup> Second, in contrast to traditional securitizations, the ABS Certificates programs have no credit tranching or

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<sup>371</sup> Although it could be argued that the participating investors (because they are selling assets into the securitization) are acting as “sponsors” of the securitization under the Retention Rules and are therefore subject to the risk retention requirement, in most cases the sponsoring lender will agree to be treated as the “sponsor” under the Retention Rules and to retain credit risk accordingly. The retention of credit risk by the lender will satisfy any obligation that the investors may have to retain credit risk. *See* footnote 359 above. A recent decision of the U.S. Court of Appeals for the District of Columbia Circuit does, however, strongly suggest that the lender must itself sell loans into the securitization to constitute a “sponsor” under the Retention Rules and that the Retention Rules will not be satisfied if the lender has organized and manages the ABS issuer and accepts credit risk at the level required by the rules but does not itself transfer any assets into the securitization. *See The Loan Syndications and Trading Association v. Securities and Exchange Commission and Board of Governors of Federal Reserve Association*, 882 F.3d 220 (D.C. Cir. 2018) (holding that open market CLO managers who do not themselves transfer assets into the CLO issuers they manage are not “sponsors” subject to the Retention Rules). There have also been recent securitizations involving multiple sellers in which one of the sellers (other than the marketplace lender) agreed to act as the securitization sponsor and to retain credit risk. These include certain transactions in which the sponsor also acted as the lead ABS underwriter and did not sell any loans to the SPE other than loans it acquired on the securitization closing date from other investors for the express purpose of securitizing them.

<sup>372</sup> The ABS Certificates issuer typically will be organized as a Delaware series trust. The Delaware Statutory Trust Act permits these trusts to issue beneficial interests in separate series, to allocate specific trust assets to specific series, and to provide that the debts and obligations of any series shall be enforceable only against the assets of that series and not against the assets of the trust generally or of any other series.

embedded credit support (such as overcollateralization, reserve funds or excess spread) and are not rated. Each ABS Certificate simply passes through to the certificate holder the economic performance of the Relevant Loans.<sup>373</sup> And finally, an ABS Certificate issuer typically will purchase loans only from a single marketplace lender or Aggregator (rather than from multiple potential sellers as in the multiseller securitizations discussed immediately above). An ABS Certificate program can provide a convenient means for a marketplace lender or Aggregator to effect periodic sales of loans that it has funded or acquired and reduces execution costs because all such sales will be made under a common template. Of course, since the programs have no credit enhancement, a structural solution may not be readily available if poor loan performance depresses investor demand for the ABS Certificates of any particular program.

The trade association for the securitization industry, the Structured Finance Industry Group (“SFIG”), recognized both the growing importance and the growth potential of marketplace loan securitizations by forming a Marketplace Lending Committee in August 2015. One of the Committee’s first goals is to develop recommended “best practices” for certain aspects of marketplace loan securitizations, including certain disclosure practices.<sup>374</sup> Any “best practices” the Committee publishes will be recommendations to the industry, rather than mandates, and will not have the force of law. SFIG nonetheless hopes that the “best practices” initiative will help to promote responsible growth in marketplace loan securitizations. Among other benefits, widespread industry acceptance of recommended “best practices” would help to establish uniformity across certain aspects of marketplace loan securitizations. This, in turn, could make marketplace loan ABS more liquid by making it easier for secondary market investors to review and compare the terms of individual securitizations. SFIG also believes that industry-developed disclosure standards may provide a helpful model if the SEC someday decides to apply Regulation AB II disclosure requirements to privately placed ABS.<sup>375</sup> From

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<sup>373</sup> As pass-through securities the ABS Certificates bear a strong resemblance to Platform Notes. They differ from Platform Notes, however, insofar as they (i) represent the economic interest in a pool of whole loans, rather than a fractional interest in a single loan, (ii) are sold only to institutional investors in private placements rather than to the general public in registered public offerings, (iii) require the sponsors to comply with the Retention Rules, and (iv) would generally be characterized as equity interests in the underlying debt comprising the loan pool, rather than as directly constituting debt themselves, for U.S. federal income tax purposes. See “*Tax Considerations – Tax Treatment of Platform Notes*” below.

<sup>374</sup> In February 2018 SFIG published the third edition of its “green paper” on recommended disclosure and reporting practice for marketplace loan securitizations. The paper sets forth separate recommendations for best practices in loan-level data disclosure, pool-level data disclosure and historical static pool performance data disclosure. SFIG expects to undertake further revisions and updates to the green paper and eventually to publish a “white paper” setting forth its final recommendations for data disclosures.

<sup>375</sup> As previously discussed, Regulation AB under the Securities Act governs disclosure requirements in registered ABS offerings. In August 2014 the SEC approved broad amendments to Regulation AB (so-called “Reg AB II”) that significantly expanded many of the required disclosures. Marketplace loan securitizations have not been subject to Reg AB II because to date all such securitizations have been sold in private placements rather than registered public offerings. It’s likely that marketplace loan ABS will continue to be privately placed due to cost considerations and comparative ease of execution. The SEC nonetheless has reserved the right to expand Reg AB II disclosure requirements to some or all ABS private placements.

a broader perspective, initiatives of this type also can help demonstrate to regulators an industry commitment to self-regulation.<sup>376</sup>

Any marketplace lender or Aggregator who sponsors a securitization will be subject to the federal risk retention rules previously discussed. The sponsor therefore will be required to retain at least 5 percent of the credit risk on each of the securitized loans. See “*Risk Retention Requirements*” above. The sponsor also must comply with a number of other SEC rules governing ABS offerings. Among other matters, the sponsor will be required to file periodic reports with the SEC disclosing the amounts of any demands that it receives from investors (or from an indenture trustee on behalf of investors) to repurchase ineligible loans and of any such repurchases that it makes. Any marketplace lender or Aggregator who sponsors a securitization should take care to review and understand the applicable requirements.

#### L. Closed-End Investment Companies

In 2016 the SEC approved the registration of the first marketplace lending funds to be registered with the SEC as investment companies under the Investment Company Act. These two investment companies—the RiverNorth Marketplace Lending Corporation<sup>377</sup> and the Stone Ridge Alternative Lending Risk Premium Fund<sup>378</sup> (each, a “*Fund*,” and together, the “*Funds*”)—operate as closed-end investment companies, or “closed-end funds,” one of three basic types of investment companies.<sup>379</sup>

**Noteworthy Development:** The creation of registered investment companies dedicated to marketplace loan investing has expanded the opportunities for retail investors to participate in the market and may lead to broader public knowledge and acceptance of the asset class.

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<sup>376</sup> Outside of the securitization context, another significant example of industry efforts at self-regulation is provided by the joint adoption in August 2015 of a “Small Business Borrowers’ Bill of Rights” by a number of leading non-bank small business lenders, loan brokers, and other market participants that have associated as the “Responsible Business Lending Coalition” ([borrowersbillofrights.org](http://borrowersbillofrights.org)). Small business lenders adhering to the Bill of Rights pledge themselves to respect certain fundamental borrower rights in their lending operations, including (among others) rights to transparent pricing and terms, to be offered nonabusive products, and to fair collection practices. Other industry organizations that promote “best practices” in marketplace lending and/or responsible innovation in online lending practices include the Marketplace Lending Association ([www.marketplacelendingassociation.org](http://www.marketplacelendingassociation.org)) and the Online Lending Policy Institute ([www.olpi.info](http://www.olpi.info)).

<sup>377</sup> See RiverNorth Marketplace Lending Corp. (SEC File Nos. 333-204866; 811-23067).

<sup>378</sup> See Stone Ridge Trust V (SEC File Nos. 333-208513; 811-23120).

<sup>379</sup> The SEC prohibits the two other basic types of investment companies, open-end mutual funds and unit investment trusts, from investing more than 15 percent of their portfolio in “illiquid assets” in order to ensure that they can generate enough cash to meet redemption requests. An illiquid asset is one that cannot be sold or disposed of in the ordinary course of business within seven calendar days at approximately the value ascribed to it by the fund. Revisions of Guideline to Form N-1A, 57 Fed. Reg. 9828, 9829 (Mar. 20 1992). As there is currently no developed secondary market for marketplace loans or Platform Notes, these assets would be considered illiquid assets under the Investment Company Act and thus a fund investing substantially in such instruments could not be a mutual fund or UIT. However, because closed-end funds are not required to make redemptions, they are not subject to the Investment Company Act liquidity requirements.

**Interval Closed-End Fund Structure.** The Funds currently operate as an “interval closed-end fund.” Interval funds are classified as closed-end funds but they are very different from “traditional” closed-end funds in that their shares typically do not trade on an exchange in the secondary market. Instead, their shares are subject to periodic repurchase offers by the Fund.<sup>380</sup> As an interval fund, the Funds will make periodic repurchase offers to their shareholders, generally every three, six, or twelve months, as disclosed in the Fund’s prospectus. When the Funds make a repurchase offer to their shareholders, they will specify a date by which shareholders must accept the repurchase offer. The price that shareholders will receive on a repurchase will be based on the per-share net asset value determined as of a specified (and disclosed) date. In addition, the Funds continuously offer their shares at a price based on the Fund’s net asset value.

**Platform Concentration Issues.** Registered investment companies are required to meet a diversification test in order to qualify as a regulated investment company (“RIC”) under the Internal Revenue Code of 1986, as amended (the “Code”). An investment company is required to be treated as a RIC under the Code in order to avoid entity-level income taxes. If an investment company is not eligible to be treated as a RIC due to its failure to meet the RIC diversification test, it would be obligated to pay applicable federal and state corporate income taxes on its taxable income. At the close of each quarter of the taxable year, (a) at least 50 percent of the value of a RIC’s total assets must be represented by (i) cash, cash equivalents, U.S. government securities, or securities of other RICs and (ii) other securities whose value with respect to any one issuer is not greater than 5 percent of the value of the total assets and does not represent more than 10 percent of the outstanding voting securities of any one issuer and (b) not more than 25 percent of the value of the RIC’s total assets may consist of (i) the securities of any one issuer (other than U.S. government securities or RICs) or of any two or more issuers controlled by the RIC and that are engaged in the same or similar trades or businesses or a related business, or (ii) the securities of one or more qualified publicly traded partnerships.<sup>381</sup> As a result of the above requirements, there is a concern that an investment company’s investment in marketplace loans concentrated in a particular platform would violate the RIC test.<sup>382</sup> For general U.S. federal income tax purposes, the person who is obligated under a debt is viewed as the issuer of the debt. As such, for purposes of the RIC diversification test, the individual borrowers of the marketplace loans purchased by the Fund should be considered to be the “issuer,” not the platform through which such whole loans were originated. In regard to the marketplace loans purchases, the Funds become the owner of the

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380 Rule 23c-3 of the Investment Company Act provides that a closed-end fund can adopt a policy of repurchasing between 5 percent and 25 percent of its outstanding common stock at periodic intervals pursuant to repurchase offers made to all shareholders.

381 I.R.C. § 851(b)(3).

382 In determining the issuer of a security for the purposes of the RIC qualification rules, the IRS will normally follow the guidance of the SEC on the issue. Rev. Rul. 77-342, 1977-2 C.B. 238. However, the IRS has also stated that the “issuer” of a security for the purposes of the RIC diversification rules is the entity whose economic fortunes ultimately determine the performance of the security—in short, the issuer is the person in whom the RIC invests. GCM 37233 (Aug. 25, 1977), underlying Rev. Rul. 83-69, 1983-1 CB 126. In other words, although the SEC guidance is normally determinative, the IRS has reserved the right to make an independent determination.

marketplace loans for U.S. tax purposes, bearing the risk of loss and the potential for profit on the purchase. A Fund's risk exposure on the marketplace loans is dependent upon the willingness and ability of the individual borrowers to pay—if one of the individual borrowers were not to pay, the platform seller would not be obligated to make the Fund whole. The platform seller, although retained as servicer, no longer bears the risk of loss on marketplace loans sold. This contrasts with Platform Notes, in which the applicable platform should be considered the issuer, as the Fund's risk exposure is also dependent upon the platform's ability to make the pass-through payments.

Separately, an investment company will need to limit the portion of its investments which it allocates to the marketplace loans from any single platform in order to avoid the potential for the SEC to require a platform to co-register as an issuer on the investment company's registration statement during the continuous offering of the securities. As set forth in the registration statements for the Funds and as further discussed herein, the SEC currently takes the position that marketplace loans facilitated by a platform involve an associated investment contract, or "security" under the Securities Act, issued by the platform in connection with the prepurchase activity by the platform, as well as the servicing and other arrangements.<sup>383</sup> Pursuant to Rule 140 under the Securities Act, a co-issuer is generally considered to exist with respect to "[a] person, the *chief* part of whose business consists of the purchase of the *securities* of one issuer . . ." The SEC has interpreted the term "chief" as used in Rule 140 to mean an investment of greater than 45 percent of a person's assets in an issuer.<sup>384</sup> Because the marketplace loans are treated as securities issued by a platform with respect to determining the co-issuer status of such platform, the RiverNorth Marketplace Lending Corporation was required to agree in its registration statement that it will not invest greater than 45 percent of its managed assets in the securities of, or marketplace loans originated by, any single platform.

***Investment Company Act Custody Requirements.*** Section 17(f) of the Investment Company Act requires that an investment company's "securities and similar investments" be placed and maintained in the custody of a bank, a member firm of a national securities exchange, or the investment company itself, subject to certain conditions or in accordance with the rules and regulations or orders as the SEC may prescribe. With respect to an investment company's custody of traditional loans, the SEC has conditioned compliance with Section 17(f) on whether (i) the fund's custodian would hold relevant documentation evidencing the fund's ownership in the loan; (ii) the documentation would permit the custodian to enforce all the fund's ownership rights in a court of law; and (iii) the administrative agents, in transmitting interest and principal payments to the fund, do not hold assets of the fund, but act as paying agents.<sup>385</sup>

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<sup>383</sup> See footnote 343 above for a more detailed discussion of the "investment contract" issue in the context of marketplace loan sales.

<sup>384</sup> See, e.g., FBC Conduit Trust I, SEC No-Action Letter (Oct. 6, 1987).

<sup>385</sup> The SEC issued a no-action letter to a Merrill Lynch fund that invested in loans. *Merrill Lynch Prime Fund*, SEC No Action Letter (Nov. 4, 1992).

As described in the Funds' registration statements, each borrower under a marketplace loan electronically signs the loan documents, binding the borrower to the terms of the loan, including provisions authorizing the lender to transfer the loan to another party. In general, each Fund will direct its custodian to open an account with each platform selected by the Fund. The account will be opened in the name of the custodian as custodian for the Fund. When a Fund directs the purchase of a loan, the Fund custodian receives electronically from the platform the loan documents and evidence of the Fund's purchase and ownership of the loan, thereby obtaining custody of the documentation that creates and represents the Fund's rights in the loan. In addition to the promissory note, such documentation generally includes (depending on the platform) the borrower agreement, authorization to obtain a credit report for loan listing, truth in lending disclosure, terms of use and consent to electronic transactions and disclosures, credit profile authorization, bank account verification, and debit authorization (or equivalents thereof). The Fund's custodian then wires funds to the platform in payment for the loans. The custodian maintains on its books a custodial account for the Fund through which the custodian holds in custody the platform account, the loan/loan documents, and, if applicable, any cash in the platform account including the interest and principal payments received on the loan. As transferee of the platform's contractual rights in the loan, the Fund obtains all of the platform's rights in the loan and is able to enforce those contractual rights against the platform and the borrower, as applicable.

**Valuation Considerations.** Investment companies are required to adopt and implement policies and procedures designed to prevent violation of the federal securities laws, including investment portfolio valuation requirements under the Investment Company Act.<sup>386</sup> An investment company's board must approve procedures pursuant to which the investment company will value its investments. If market quotations are not readily available (including in cases where available market quotations are deemed to be unreliable or infrequent), the Fund's investments will be valued as determined in good faith pursuant to policies and procedures approved by its board of directors ("*fair value pricing*"). As there is no developed secondary market for marketplace loans and Platform Notes, these instruments will necessarily be required to be fair valued.

Each Fund generally relies on prices provided by a third-party pricing service for its marketplace loans, which will be based upon the specific factors relating to such instruments as described below and subject to review by its board of directors or its designee. The criteria that will be used to value marketplace loans include the transaction data on initial purchases of loans from platforms and other relevant market data regarding loan productions and purchases generally for the current valuation

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386 Compliance Programs of Investment Companies and Investment Advisers, Investment Company Act Release No. 26299 (Dec. 17, 2003) (adopting rule 38a-1). Investment companies are required to adopt policies and procedures that require monitoring for circumstances that may necessitate the use of fair value prices; establish criteria for determining when market quotations are no longer reliable for a particular portfolio security; provide a methodology or methodologies by which the fund determines the current fair value of the portfolio security; and regularly review the appropriateness and accuracy of the method used in valuing securities, and make any necessary adjustments. Funds may be required to fair value portfolio securities if an event affecting the value of the security occurs after the market closes but before the fund prices its shares.

period including, but not limited to, FICO scores, borrower employment status, borrower delinquency history, credit inquiries, debt-to-income ratio, loan size, and loan age. Due to concerns with respect to the valuation of marketplace loans, the SEC required each of the Funds to represent in its registration statement that the Fund will invest solely in loans originated by platforms that will provide the Fund with a written commitment to deliver or cause to be delivered individual loan-level data on an ongoing basis throughout the life of each individual loan that is updated periodically as often as the Fund's net asset value is calculated to reflect new information regarding the borrower or loan.

## V. BANKRUPTCY CONSIDERATIONS

### A. Addressing Insolvency Risk

As Platform Notes are pass-through obligations of the Operators, and not direct obligations of the borrowers under the related Borrower Loans, holders of Platform Notes are exposed to the Operator's credit risk. An Operator that becomes subject to bankruptcy proceedings may be unable to make full and timely payments on its Platform Notes even if the borrowers under the related Borrower Loans timely make all payments due from them. A number of different aspects of the bankruptcy proceedings could result in investor losses. First, other creditors of the Operator may seek access in the bankruptcy proceeding to payments made on the Borrower Loans. Second, a bankrupt Operator may no longer have the financial capacity to continue to service the Borrower Loans and/or may reject its servicing agreement as an executory contract. Third, the investors will be subject to the Bankruptcy Code's "automatic stay" and therefore will be prohibited from taking legal action against the Operator to enforce their rights to payment. Fourth, the Bankruptcy Court may not recognize investor claims for interest that accrued on the Platform Notes after the bankruptcy proceedings commenced. An Operator could endeavor to mitigate some of these risks by granting the indenture trustee a security interest over the Borrower Loans, the Collections Account, and the proceeds thereof. It may also enter into a "backup" servicing agreement with an unaffiliated company pursuant to which the backup servicer agrees to service the Borrower Loans if the Operator can no longer do so. Any such measures, however, will provide the holders with less than complete protection. The holders of secured Platform Notes, for example, will remain subject to the automatic stay. It's also not certain that the Bankruptcy Court would require that the proceeds of each Borrower Loan pledged as collateral be applied to the payment only of the related Platform Notes. If, instead, the Bankruptcy Court (which has broad discretionary powers under the Bankruptcy Code) permitted the proceeds of the Borrower Loans to be applied on a *pari passu* basis to pay all amounts due on the Platform Notes, holders of Platform Notes could incur losses by reason of defaults on Borrower Loans other than the specific loans that they had elected to fund. Similarly, a backup servicer—particularly if it has not been appointed under a "live" backup servicing arrangement—may be unable immediately to service the loans if the Operator stops servicing them. Any lag that occurs between the termination (or withdrawal) of the Operator as servicer and the backup servicer's assumption of full servicing duties could significantly reduce loan collections and cause related losses on the Platform Notes.

**Caution:** Platform Note investors are not necessarily isolated from Operator insolvency risk. The degree of the risk is significantly affected by the platform structure and can be reduced by organizing a bankruptcy-remote issuer.

The risks to the Platform Note holders will be particularly acute if, as may be the case, the Operator does not pledge the Borrower Loans to secure the Platform Notes and is permitted by its governing documents to incur other indebtedness that is not subordinated to the Platform Notes and/or is permitted to pledge the Borrower Loans to secure indebtedness other than the Platform Notes. In this situation, the holders may see some or all of the collections on the Borrower Loans paid to other creditors of the Operator if the Operator becomes bankrupt. The risk to investors also is heightened if the Operator is thinly capitalized and/or has exposure to significant potential liabilities (e.g., pending litigation claims). It seems likely that many retail investors in Platform Notes—notwithstanding any related prospectus disclosures—will not fully appreciate the scope of the Operator credit risk that they have assumed. Institutional investors, however, are well aware of these risks and have insisted that Operators address them as a condition to committing significant capital to Platform Notes. In response to this pressure, Operators have implemented two different operating structures that are intended to isolate investors from Operator credit risk.

The first of these structures provides for the Operator to form a wholly-owned subsidiary (the “*Affiliated Issuer*”) that will assume the rights and obligations of the Operator under its agreements with the Funding Bank, the indenture trustee, other service providers, and the borrowers and lenders. The Affiliated Issuer will purchase the Borrower Loans from the Funding Bank and issue the Platform Notes in its own name. The Affiliated Issuer also will license or purchase the Operator’s proprietary technology and become the website operator. Simultaneously, the Affiliated Issuer will appoint the Operator to provide back-office services, to perform (or supervise the performance of) all of the Affiliated Issuer’s obligations to third parties, to service all of the Borrower Loans, and to manage both platform operations (including the issuance of Platform Notes) and the website as its agent. The Affiliated Issuer will pay the Operator a servicing fee tied to the amounts of origination and servicing fees it receives from borrowers and investors. The Affiliated Issuer will have no employees and the Operator will perform its servicing duties through its own employees. The Operator will remain the sole lessee under all office and equipment leases. The Affiliated Issuer will not incur any indebtedness other than the Platform Notes and will not accept liability for any claims made against the Operator including, if applicable, any preexisting litigation claims. The Affiliated Issuer’s governing documents will prohibit it from engaging in any business other than the issuance of Platform Notes and related activities and otherwise will impose limitations on its activities intended to reduce the likelihood that it will become subject to voluntary or involuntary bankruptcy proceedings. The structure therefore (i) makes the Operator solely responsible for the platform’s operating expenses (other than the servicing fees payable to the Operator itself), (ii) isolates the Affiliated Issuer from the Operator’s preexisting or future liabilities, and (iii) provides for the issuance of the Platform Notes through a

special-purpose, bankruptcy-remote entity (*i.e.*, the Affiliated Issuer) that will have no significant liabilities other than the Platform Notes.

The issuance of Platform Notes through an Affiliated Issuer will not benefit investors, however, if the Operator becomes bankrupt and the Bankruptcy Court uses its equitable powers to order “substantive consolidation” of the Affiliated Issuer and the Operator. Substantive consolidation is a judicially developed doctrine that, if applied, disregards the separate legal existence of a bankruptcy debtor and one or more of its affiliates, resulting in a combination of assets and liabilities and the elimination of intercompany claims between the entities being consolidated. Creditors of each entity become creditors of the combined entity. Although the court decisions that have ordered substantive consolidation have not always used the same analysis, in general a Bankruptcy Court could decide to consolidate two entities if (i) creditors dealt with the entities as a single economic unit and did not rely on their separate identity in extending credit, or (ii) their financial affairs are so entangled that consolidation will benefit all of their creditors. The Bankruptcy Court may also consider whether the benefits of substantive consolidation would outweigh the harm it would impose on any particular creditors. In the context of P2P lending, substantive consolidation of an Affiliated Issuer with a bankrupt Operator could make the Affiliated Issuer’s assets (*i.e.*, the Borrower Loans) available for the payment of the Operator’s liabilities (although, as discussed above, the risk that creditors other than investors would have access to payments on the Borrower Loans may be mitigated if the Affiliated Issuer grants a security interest in the Borrower Loans and the Collections Account). Any such result would make the Affiliated Issuer structure pointless since holders of the Platform Notes would remain exposed to the Operator’s credit risk.

An Operator that forms an Affiliated Issuer therefore must structure its program carefully to reduce the risk of substantive consolidation. The fact that the Affiliated Issuer will engage the Operator to manage the website and oversee the performance of the Affiliated Issuer’s contractual duties does not by itself mean that substantive consolidation would (or should) be ordered if the Operator were to become bankrupt. It is instead common in securitization transactions for the transaction sponsor and the special purpose issuer that it forms and services to address substantive consolidation risk by making certain “separateness covenants” intended to ensure that the parties will maintain separate legal identities and to make clear to investors that neither party is liable for the other’s debts. Although P2P lending does not involve traditional asset securitization, Operators and any Affiliated Issuers should follow the same approach. To that end, among other covenants the Affiliated Issuer should undertake to (i) conduct its business only in its own name, (ii) strictly comply with all organizational formalities required to maintain its separate existence, (iii) maintain its own separate books, records, and bank accounts, (iv) prepare its own financial statements and tax returns, (v) pay its liabilities only out of its own funds, (vi) maintain adequate capital in light of its contemplated business purpose, transactions, and liabilities, (vii) not hold out its credit or assets as being available to satisfy the obligations of others, and (viii) maintain an arm’s-length relationship with the Operator and its other affiliates. Without limitation to the foregoing, the Affiliated Issuer should operate the P2P website in

its own name (rather than that of its parent) and should execute in its own name all contracts with borrowers and lenders. If these and similar steps are taken (and the parties in fact observe their respective undertakings), there should be little risk that a Bankruptcy Court overseeing Operator bankruptcy proceedings would substantively consolidate the Operator and the Affiliated Issuer.<sup>387</sup>

The second approach that Operators have utilized to address Operator credit risk also entails the formation of a special purpose entity to issue pass-through securities but differs from the first approach insofar as the Operator itself continues to issue Platform Notes. Specifically, under the second approach the Operator forms (i) an investment fund that offers partnership interests or similar securities to institutional and/or high net worth investors on a private placement basis (the “Fund”), (ii) a subsidiary that acts as the Fund’s general partner and investment manager (the “Manager”), and (iii) a statutory trust or similar special purpose company that purchases Borrower Loans (or portions thereof) from the Operator (the “Trust”). The Fund will use its members’ capital contributions to purchase certificates (“Certificates”) from the Trust and the Trust in turn will use the Certificates’ purchase price to purchase the Borrower Loans from the Operator. Each Certificate will represent the right to receive all principal and interest payments (net of servicing fees) made on the related Borrower Loan. The Trust will appoint the Operator to service all Borrower Loans that it purchases. Although all Borrower Loans will continue to be funded through the website and initially will be purchased by the Operator from the Funding Bank, this structure largely eliminates Operator credit risk for the Fund investors by enabling them indirectly to invest in pass-through securities issued by an SPE (*i.e.*, the Trust) rather than in Platform Notes issued by the Operator.

The establishment of Funds rather than an Affiliated Issuer may offer the Operator greater flexibility in tailoring investment opportunities to specific investor interests. Stated differently, the Operator may be able to broaden its appeal to different institutional investors by forming multiple Funds that differ from one another in investment periods, management fees, minimum commitments, and/or investment strategies. An Operator that uses an Affiliated Issuer will not have such opportunities. At the same time, the use of Funds can have some disadvantages. As an initial matter, unless the Fund registers its interests under the Securities Act (and incurs the substantial related expenses) or is willing to observe the Regulation A+ offering cap, it will be permitted to offer its interests only to institutional

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<sup>387</sup> It should be noted, however, that if the Affiliated Issuer structure is used, because of the nature and extent of the Operator’s continuing involvement in managing the website, evaluating proposed loan postings, assigning proprietary credit ratings, participating in the loan origination process with the Funding Bank, and servicing the Borrower Loans, the SEC may deem the Operator to be offering “management rights” or an “investment contract” that constitutes a security that must be separately registered under the Securities Act. See footnote 343 above. Because such an approach results in prospective lenders being offered two separate securities by distinct but affiliated issuers in order to make an investment in Platform Notes, and therefore may arguably be confusing to investors as to whether they are looking to the Operator or the Affiliated Issuer, or both, as the party responsible to them for specific aspects of their investment, the substantive consolidation analysis becomes more complex. Under these circumstances, in addition to strict adherence to the “separateness covenants,” the manner in which the respective roles and obligations of the Operator and the Affiliated Issuer are presented in the disclosure in the offering materials, as well as the context in which each appears on the website, becomes critical if potential confusion as to which entity is responsible for what (which could provide an argument in favor of substantive consolidation) is to be avoided.

and/or high net worth investors. The Operator accordingly will want to continue to sell Platform Notes through its website. The purchasers of the Platform Notes, however, will continue to have exposure to Operator credit risk. The Fund structure therefore can result in retail investors who purchase Platform Notes having greater exposure to such credit risk than institutional investors who acquire Fund interests. In addition, the Manager (i) may need to register as an investment adviser, and (ii) will need to develop an investment strategy that fairly allocates the Borrower Loans available for investment (or portions thereof) between the Fund and direct purchasers of Platform Notes. See “*Investment Advisers Act*” above. Finally, although Fund investors may find it convenient to invest in Borrower Loans through the Fund (and thereby rely upon the Manager rather than their own efforts to identify specific Borrower Loans for investment), the management fees they pay to the Fund may exceed the servicing fees that Platform Note purchasers pay to the Operator.

As a final point, it should perhaps be noted that neither of the two structures fully eliminates the servicing risks associated with an Operator bankruptcy. In particular, a bankrupt Operator may be entitled to reject its servicing agreement as an executory contract and/or may need to obtain bankruptcy court approval to transfer its servicing duties to a backup servicer. Any such rejection or delay would not by itself expose investors to claims by the Operator’s creditors but could result in collections on the Borrower Loans being delayed or reduced. The funds available for distribution to investors similarly would be reduced if the backup servicer charges higher servicing fees than the Operator had charged.

## **B. Security Interests in Electronic Collateral**

As described above, careful structuring can significantly reduce the risk that the Platform Notes issuer will become subject to bankruptcy proceedings. It’s nonetheless impossible to be certain that such proceedings won’t occur or that outside creditors won’t assert claims against the issuer’s assets. An Operator therefore may choose to offer the noteholders additional protection by issuing its Platform Notes under an indenture and granting the indenture trustee a security interest over the underlying Borrower Loans and any bank account (other than the Collections Account) that it maintains to receive payments made on the related Borrower Loans (a “*Receipts Account*”).<sup>388</sup> If the Operator subsequently

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<sup>388</sup> As previously discussed, the Operator (if acting as loan servicer) typically will maintain a Collections Account into which all Borrowers are directed to make payments on their Borrower Loans. If the Operator is itself the issuer of secured Platform Notes, it will also maintain a Receipts Account with the indenture trustee and promptly transfer from the Collections Account to the Receipts Account any payments it receives on the underlying Borrower Loans (net of servicing fees and expenses). If the Operator is issuing the Platform Notes through an Affiliated Issuer, it similarly will be required, in its capacity as servicer, promptly to transfer from the Collections Account to the Receipts Account maintained by the Affiliated Issuer any payments it receives on the Borrower Loans owned by the Affiliated Issuer. If the Operator is servicing Borrower Loans that have been sold to an SPE in connection with a securitization or collateralized loan facility, it will be required promptly to transfer from the Collections Account to a Receipts Account maintained by the SPE any payments which the Operator receives on Borrower Loans owned by the SPE. The Operator typically will not grant a security interest over the Collections Account for the benefit of Platform Noteholders, ABS investors or warehouse lenders because the Collections Account will hold payments received on all of the Borrower Loans and not only on those owned by the Affiliated Issuer or SPE. Investors and lenders must instead accept the risk associated with the temporary commingling in the Collections Account of payments due to them with other Operator funds. This risk is addressed by requiring the Operator to transfer

does become insolvent, the security interest should provide the indenture trustee with a first priority claim on the Borrower Loans, any funds held in the Receipts Account, and any proceeds thereof. The security interest thus helps to ensure that any collections received on the Borrower Loans (including the proceeds of any dispositions) will be applied in the insolvency proceeding to the payment of the Platform Notes in priority over any claims that other Operator creditors might assert. An SPE that issues ABS in a securitization similarly will pledge its pool of Borrower Loans and the related Receipts Account to an indenture trustee for the benefit of the ABS investors. Outside of the context of securities issuances, any bank or other commercial lender that extends credit to an institutional investor for the purchase of Borrower Loans will try to reduce its potential exposure to a borrower default by requiring the borrower to grant a security interest over the purchased loans and any related Receipts Account.

The UCC has been enacted in every state (subject to certain variations between the states), and therefore consistent legal principles apply to transactions covered by the UCC regardless of jurisdiction. Article 9 of the UCC governs security interests granted on most types of personal property collateral, including assets like the Borrower Loans and deposit or securities accounts such as Receipts Accounts.<sup>389</sup> Article 9 also treats the interest of a buyer of most types of accounts, chattel paper, payment intangibles and promissory notes as a security interest.<sup>390</sup> Therefore, to the extent Borrower Loans fall within one of those four categories of collateral, Article 9 will apply to sales of those loans. Borrower Loans are not “promissory notes” because they are originated and documented in electronic form and are not evidenced by tangible written “instruments.”<sup>391</sup> Similarly, Borrower Loans are likely not “accounts” because they do not evidence a payment obligation for property sold or services rendered and therefore may not meet the requirements of that definition.<sup>392</sup> In relevant part, “chattel paper” is defined as a “record or records that evidence both a monetary obligation and a security interest in specific goods.” Consumer Borrower Loans are not “chattel paper” because the borrower’s payment obligations are not secured. Other types of Internet-originated loans, such as a commercial loan that is secured by specific

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any relevant collections from the Collections Account to the applicable Receipts Account promptly after its receipt thereof (typically within several business days) and by structuring the transaction to minimize substantive consolidation risk. See “- Addressing Insolvency Risk” above.

<sup>389</sup> The Convention on the Law Applicable to Certain Rights in Respect of Securities Held with an Intermediary (Concluded 5 July 2006) became effective in the United States on April 1, 2017 (the “*Hague Securities Convention*”), and supplants the ordinary UCC choice of law rules as applied to collateral held in securities accounts. A detailed analysis of the Hague Securities Convention is beyond the scope of this white paper. Lenders should consult legal counsel to determine the effect of the Hague Securities Convention on any transaction involving collateral held in a securities account.

<sup>390</sup> See UCC §§ 1-201(b)(35) and 9-109(a)(3).

<sup>391</sup> See UCC § 9-102(a)(65) (“a promissory note means an instrument”) and UCC § 9-102(47) (defining an “instrument” as “a negotiable instrument” or any other writing that evidences a right to payment of a monetary obligation”). See also, UCC § 1-201 (“writing” and “written” requires a “tangible form”), and UCC §§ 3-104(e), and 3-103(a)(12) (note that a negotiable instrument is required to be in writing).

<sup>392</sup> See UCC § 9-102(a)(2) (defining accounts primarily as “payment obligations” for “property that has been sold” or for “services rendered”).

equipment or goods, may constitute electronic chattel paper.<sup>393</sup> The term “payment intangible” is defined as a payment obligation where the “account debtor’s principal obligation is a monetary obligation” and such obligation is not one of the other collateral types defined in Article 9. Because Borrower Loans are either payment intangibles or, in certain instances, electronic chattel paper, Article 9 applies to sales of Borrower Loans.

The requirements for an enforceable security interest under Article 9 are: value, collateral rights, and an “authenticated” security agreement that includes a collateral description.<sup>394</sup> A loan to a Borrower or a payment of the purchase price to the seller of Borrower Loans constitutes value under the UCC. Depending on the structure of a transaction, satisfaction of the other two requirements may not be quite as straightforward. Often, the securitization of marketplace loans involves an SPE that is a statutory trust under Delaware law. Because the Delaware Statutory Trust Act<sup>395</sup> permits a trustee to hold “legal title to the property of the statutory trust”<sup>396</sup> a secured party must determine if the trust or the trustee (or a combination of the two) has rights in the collateral. If the trustee holds legal title to any portion of the trust estate, then both the trust and the trustee should be grantors under the security agreement. Although the Borrower Loans and related loan documents will be signed electronically in accordance with the E-Sign Act and UETA,<sup>397</sup> Platform Note indentures and ABS securitization documents are not typically prepared and executed with the E-Sign Act or UETA in mind. Therefore, a security agreement must be manually signed or electronically authenticated in accordance with the UCC.<sup>398</sup> The requirement that a security agreement adequately describe the collateral is easy to satisfy when the secured party takes a blanket lien on all of the debtor’s assets.<sup>399</sup> Collateral descriptions are more challenging when the security interest arises out of a sale of Borrower Loans, however, because the sold loans must be specifically identified each time a sale occurs.

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<sup>393</sup> Electronic chattel paper is defined as “chattel paper evidenced by a record or records consisting of information stored in an electronic medium.”

<sup>394</sup> UCC § 9-203(b). Article 9 permits parties to document security agreements either electronically or in tangible form. *See, e.g.*, UCC § 9-203(b)(3) (permitting security agreements to be “stored in an electronic or other medium and that is retrievable in perceivable form”). In addition, a signature that meets the requirements of an “electronic signature” under the E-Sign Act or UETA will satisfy the requirements of “authentication” under Article 9. *Compare*, UCC § 9-102(a)(7)(B) (defining authenticate to include “with present intent to adopt or accept a record, to attach to or logically associate with the record an electronic sound, symbol or process”) to 15 U.S.C. § 7006(5) of the E-Sign Act (defining an electronic signature to mean “an electronic sound, symbol, or process, attached to or logically associated with a contract or other record and executed or adopted by a person with the intent to sign the record”) and UETA § 2(8) (defining an electronic signature to mean “an electronic sound, symbol, or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record.”). The term “authenticate” also includes manual “wet-ink” signatures under Article 9. *See*, UCC § 9-102(a)(7)(A).

<sup>395</sup> Delaware Statutory Trust Act, Del. Code Ann. tit. 12, § 3801 et seq.

<sup>396</sup> Delaware Statutory Trust Act, Del. Code Ann. tit. 12 § 3805(f).

<sup>397</sup> *See* footnote 274 above.

<sup>398</sup> UCC § 9-102(a)(7).

<sup>399</sup> *See*, UCC § 9-108(b)(3) (permitting the use of Article 9 defined terms to describe the collateral.)

Creation of a valid security interest is only half of the story. A security interest must be perfected under Article 9 before it will be enforceable against third parties.<sup>400</sup> Filing a financing statement disclosing the security interest with the Secretary of State (or other appropriate authority) of the state in which the debtor is located<sup>401</sup> is necessary to perfect a security interest in most types of collateral.<sup>402</sup> If more than one financing statement is filed in relation to the same collateral, the financing statement with the earliest filing date will have priority.<sup>403</sup> A security interest in collateral consisting of electronic chattel paper or a securities account may be perfected by filing or by “control,”<sup>404</sup> but a security interest in a deposit account may only be perfected by “control.”<sup>405</sup> A security interest perfected by “control” will generally have priority over a security interest perfected by filing—even if the perfection by filing occurred first.<sup>406</sup> A security interest in tangible collateral may also be perfected by possession.<sup>407</sup> However, that method of perfection is not available with respect to Borrower Loans and related loan records that are documented entirely in electronic, or intangible, form.

**Worth Remembering:** A security interest in electronic notes evidencing Borrower Loans cannot be perfected by possession because electronic notes are not in tangible form. Similarly, a security interest in electronic notes cannot be perfected by “control” unless such electronic notes constitute “electronic chattel paper.” A financing statement should be filed to perfect a security interest in electronic notes evidencing Borrower Loans and related electronic loan records.

The definition of “control” depends on the type of collateral. A secured party has “control” of electronic chattel paper if, among other requirements, there exists “a single authoritative copy” of the paper which is “unique, identifiable and [with limited exceptions] unalterable” and such authoritative copy is “communicated to and maintained by the secured party or its designated custodian.” Although the UCC

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<sup>400</sup> UCC §§ 9-308 and 9-317. A security interest created upon the sale of payment intangibles and promissory notes is automatically perfected when the sale occurs. UCC § 9-309(3) and (4). Nevertheless, purchasers should file financing statements to ensure that third parties are aware of the purchaser’s rights in the assets that have been sold.

<sup>401</sup> This is usually the jurisdiction in which the debtor is organized, but different rules apply for certain foreign entities and for entities organized under federal law. *See*, UCC § 9-307.

<sup>402</sup> *See*, UCC §§ 9-310 and 9-312.

<sup>403</sup> Under the UCC, a purchase of payment intangibles technically is perfected when the security interest “attaches” (*e.g.*, when a loan purchaser has paid the purchase price to the seller under a written agreement). However, given the large number of Borrower Loans that are typically transferred to institutional investors in whole-loan purchase programs or to ABS issuers in securitizations, and the multiple electronic copies of the promissory notes and other loan documents that typically will exist, the purchaser should file a financing statement rather than rely solely upon automatic perfection. Doing so helps to ensure that the purchaser will retain a perfected security interest even if the characterization of the transaction as a “sale” is later disputed.

<sup>404</sup> UCC § 9-314.

<sup>405</sup> UCC § 9-312(b)(1).

<sup>406</sup> *See*, UCC § 9-322(f)(1). *See also*, UCC §§ 9-327, 9-328, 9-329, 9-330, and 9-331.

<sup>407</sup> UCC § 9-313.

does not indicate how the parties are to create a “single authoritative copy,” creditors who are secured by electronic chattel paper often arrange for an e-service provider to act as custodian of the electronic records. The custodian will hold each electronic record in a dedicated electronic “vault” (with the copies so held being deemed to constitute the authoritative copies), will “tag” each authoritative copy with an electronic identifier that permits it to be distinguished from all other electronic copies of the same record, and will otherwise employ procedures intended to provide the creditor with requisite degree of “control.”<sup>408</sup> To obtain “control” over a securities account or deposit account, the secured party must enter into a control agreement with the debtor and securities intermediary or depository bank, as applicable, whereby the securities intermediary or depository bank, as applicable, agrees to comply with instructions from the secured party without the need for consent or approval from the debtor.<sup>409</sup>

**Takeaway:** Warehouse lenders and whole loan purchasers should carefully review the security arrangements in their transaction documents to ensure that their interests are fully protected.

### C. Transferable Records

Article 3 of the UCC<sup>410</sup> governs promissory notes that qualify as “negotiable instruments” by meeting the following requirements: (1) the note contains an unconditional written promise to pay a fixed amount of money (with or without interest); (2) the note is payable “to bearer” or “to order” on demand or at a definite time; and (3) the note does not (subject to certain limited exceptions) include any other undertaking or covenant in addition to the payment of money.<sup>411</sup> The purpose of Article 3 is to facilitate the transfer of negotiable instruments by granting special rights to good faith purchasers of such

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<sup>408</sup> The creditor also should file a financing statement so that it will retain a perfected security interest even if the custodial arrangements are later determined not to have established “control.” A creditor secured by electronic notes other than electronic chattel paper also could decide to implement custodial arrangements of this type but, as discussed, doing so will likely not be sufficient under Article 9 to perfect the creditor’s security interest.

<sup>409</sup> See, § 9-104 (Control of Deposit Account) and §§ 8-106 (Control) and 9-106 (Control of Investment Property). As is the case with electronic chattel paper, the secured party should also file a financing statement with respect to its security interest in any securities account. It is not necessary to file a financing statement with respect to a deposit account, because a financing statement is ineffective to perfect a security interest in a deposit account.

<sup>410</sup> UCC § 3-102(a). Every state other than New York has adopted the 1990 version of Article 3 of the UCC. See, Legislative Fact Sheet—UCC Article 3, Negotiable Instruments (1990):

[http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=UCC%20Article%203,%20Negotiable%20Instruments%20\(1990\)](http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=UCC%20Article%203,%20Negotiable%20Instruments%20(1990)) (viewed 3.19.2018).

New York follows the version of Article 3 of the UCC that was adopted in 1962. Eleven states have adopted the 2002 amendments to the 1990 version of Article 3 of the UCC. See, Legislative Fact Sheet—UCC Article 3, Negotiable Instruments and Article 4, Bank Deposits (2002):

[http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=UCC%20Article%203,%20Negotiable%20Instruments%20and%20Article%204,%20Bank%20Deposits%20\(2002\)](http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=UCC%20Article%203,%20Negotiable%20Instruments%20and%20Article%204,%20Bank%20Deposits%20(2002)).

References in this white paper to Article 3 of the UCC are to the 1990 version of Article 3.

<sup>411</sup> UCC § 3-104(a) and (e).

instruments.<sup>412</sup> More specifically, a holder in due course<sup>413</sup> obtains a negotiable instrument free from the claims of others, including prior perfected security interests.<sup>414</sup> Furthermore, Article 3 limits the payment defenses that an obligor may raise against a holder in due course.<sup>415</sup> Unlike Article 9, Article 3 does not contemplate or permit the use of electronic documents or electronic signatures. Therefore, electronic notes are not negotiable instruments under Article 3 even if all of the other requirements of negotiability are satisfied.

To facilitate electronic commerce and create legal parity for electronic transactions, both the E-Sign Act and UETA include the concept of “transferable records” which are intended to be electronic equivalents of tangible negotiable instruments.<sup>416</sup> Neither statute attempts to insert the concept of a transferable record into the UCC or otherwise override Article 3. Instead, the E-Sign Act and UETA import from the UCC those concepts that are necessary to create a legal framework for transferable records that is the equivalent to the existing legal framework for tangible negotiable documents.<sup>417</sup> UETA defines a “transferable record” as “an electronic record that: (1) would be a note under [Article 3 of the UCC]... if the electronic record were in writing; and (2) the issuer of the electronic record expressly has agreed is a transferable record.”<sup>418</sup> The E-Sign Act adds a further requirement that a transferable record must relate “to a loan secured by real property.”<sup>419</sup> A transferable record can only be created at the time of issuance because the issuer of an electronic record must expressly agree that such record be treated as a transferable record in order to qualify as such.<sup>420</sup> In other words, a document that is issued as a

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<sup>412</sup> Frederick M. Hart, Erik F. Gerding, and William F. Willier, *Negotiable Instruments under the Uniform Commercial Code* (Matthew Bender, Second Ed.) (hereinafter “*Negotiable Instruments under the UCC*”) at § 1B.02.

<sup>413</sup> Article 3 of the UCC refers to a good faith purchaser as a “holder in due course.” See, § 3-302 for the requirements of a holder in due course.

<sup>414</sup> UCC § 3-306. See also, UCC § 9-331(a) (Article 9 does “not limit the rights of a holder in due course. . . [t]hese holders or purchasers take priority over an earlier security interest, even if perfected”).

<sup>415</sup> UCC § 3-305.

<sup>416</sup> Documents governed by Article 7 of the UCC are also included in the definition of “transferable record” under UETA, but are not included under the E-Sign Act. Because documents governed by Article 7 are not relevant to this white paper, they are not discussed here. New York’s ESRA does not specifically include the concept of a “transferable record.” Rather, § 307 of New York’s ESRA states: “This article shall not apply. . . To any negotiable instruments and other instruments of title wherein possession of the instrument is deemed to confer title, unless an electronic version of such record is created, stored or transferred pursuant to this article in a manner that allows for the existence of only one unique, identifiable and unalterable version which cannot be copied except in a form that is readily identifiable as a copy.”

<sup>417</sup> The “provisions of UETA are broader in scope [than the E-Sign Act], applying to all documents which would, if on paper, be. . . a promissory note under UCC Article 3.” *Why Enact UETA? The Role of UETA After THE E-SIGN ACT*, Patricia Brumfield Fry, Uniform Law Commission. The practical effect of these differences is that all transferable records under the E-Sign Act are transferable records under UETA. The converse, however, is not true.

<sup>418</sup> UETA § 16(a). Transferable records are a specific subset of “electronic records” under UETA. If a record does not meet the requirements of an “electronic record” it cannot be a “transferable record.” See, Subsection 6 “*Electronic Commerce Laws*” of Section C, “*Consumer Protection Laws*” above for a further discussion of the requirements of electronic records.

<sup>419</sup> See, 15 U.S.C. § 7021(a).

<sup>420</sup> See e.g., UETA § 16 Official Comment 2. Because New York’s ESRA does not include a requirement that the issuer of an electronic record expressly agree that such record is a transferable record, it may be possible for a tangible negotiable instrument to be converted to an electronic negotiable instrument under New York’s ESRA.

tangible negotiable instrument cannot later be converted to an intangible transferable record (for example, by storing an electronic copy of the tangible negotiable instrument and destroying the paper original.)<sup>421</sup>

Another element of creating an electronic equivalent to tangible negotiable instruments is to establish an equivalent method of transferring such records. UETA does this by “borrowing” the concept of “control” of electronic chattel paper from the UCC<sup>422</sup> which is discussed in the prior section of this white paper. Under UETA, a person has control of a transferable record if a system employed for evidencing the transfer of interests in the transferable record reliably establishes that person as the person to which the transferable record was issued or transferred.<sup>423</sup> Because “control” requires an uninterrupted and verifiable “chain of title,” the original holder to whom the transferable record is issued must have control of the transferable record from the outset to be able to transfer control to an assignee. A person having “control” of a transferable record has the same rights and defenses as a holder of a tangible negotiable instrument under the UCC, including, if the applicable statutory requirements under the UCC are satisfied, the rights and defenses of a holder in due course.<sup>424</sup> It is important to remember that “control” of a transferable record under UETA and the E-Sign Act does not perfect a security interest in such transferable record under Article 9.

**Worth Remembering:** Neither UETA nor the E-Sign Act amend or modify the UCC. Control of a transferable record under UETA and the E-Sign Act does not perfect an Article 9 security interest in such transferable record. A secured party must still comply with Article 9 to perfect its security interest.

Whether or not a marketplace lender should use transferable records is a business decision based on weighing the benefits and costs of creating transferable records. The benefit of using transferable records is that a holder of a transferable record with “control” may qualify as a holder in due course under the UCC.<sup>425</sup> The primary costs of using transferable records is the need to retain a third-party custodian to provide an electronic “vault” for establishing and maintaining control of the transferable

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<sup>421</sup> In fact, the intentional destruction of a negotiable instrument by the holder thereof may discharge the underlying obligation. UCC § 3-604.

<sup>422</sup> See e.g., UETA § 16 Official Comment 3. Notably, the definition of “control” in the E-Sign Act is essentially identical to the corresponding definition in UETA, See, 15 U.S.C. § 7021(b) and (c). Although New York has not adopted UETA’s definition of “transferable record”, it recognizes the existence of an electronic equivalent of negotiable documents and uses similar language for the concept of “control” without defining it as such. See, ESRA § 307.

<sup>423</sup> UETA § 16(b). See, Subsection 2 “Security Interests in Electronic Collateral” of Section D, “Bankruptcy Considerations” above for a further discussion of the requirements of “control.”

<sup>424</sup> UETA § 16(d) through (f) and the 15 U.S.C. § 7021(d) through (f). New York’s ESRA does not lay out the rules governing the manner and effect of enforcing electronic negotiable records in the detail specified in UETA § 16(d) through (f).

<sup>425</sup> At the same time, potential lenders against marketplace loans as collateral may prefer that the loans not be transferable records to eliminate the risk that a third party not associated with the financing will assert that it has acquired “control” of the loans from the borrower (or its assignee) and therefore has rights in the loans senior to those of the lenders.

records. If a marketplace lender is already using a third-party custodian to hold other electronic records, then the use of transferable records will cause significant additional expense. Another downside to using a transferable record is the requirements that the electronic note be payable “to bearer” or “to order.” Restrictions on assignment in the electronic note will adversely affect negotiability. Finally, the prohibition on including undertakings or covenants of the borrower in addition to the obligation to repay the loan, may not be acceptable to certain marketplace lenders. If a marketplace lender wishes to use transferable records, then the form of electronic note should be drafted to conform with the express requirements of UETA and, if applicable, the E-Sign Act. Conversely, if a marketplace lender does not want to use transferable records, then the form electronic note should not include the issuer’s agreement to treat the electronic note as a transferable record.<sup>426</sup> The classification of an electronic note must be made at the time it is issued, and once made that classification cannot be changed.

## VI. TAX CONSIDERATIONS

### A. Tax Treatment of Platform Notes

The appropriate treatment of Platform Notes for U.S. federal income tax purposes is uncertain and the related rules are complex. Among other possibilities, the Platform Notes could be characterized for tax purposes as debt instruments of the Operator (the “*Debt Approach*”) or as loan participations, or even as an equity interest in the Operator. The tax consequences to both the Operator and investors can vary substantially depending upon the characterization chosen. In the absence of guidance from the Internal Revenue Service (which has not yet been publicly provided), it’s not possible to be certain which characterization is “correct.” Both LendingClub and Prosper, however, have opted for the Debt Approach, and this choice does appear to be among those best suited to the economic substance of Platform Notes. The remainder of this section therefore focuses on the consequences of the Debt Approach. Prospective Operators are nonetheless reminded that they must carefully review with their counsel the tax treatment of any Platform Notes that they issue.

Under the Debt Approach, the Operator generally will recognize as income all interest that accrues on the Borrower Loans and will take a corresponding deduction for all interest amounts payable on the Platform Notes. Accordingly, the Operator will recognize as taxable income only those amounts (such as its servicing fee) that will not be paid through to the investors. The Debt Approach also requires that the Operator and the investors treat the Platform Notes as debt instruments issued with original issue discount, or “OID.”<sup>427</sup> In subjecting the Platform Notes to reporting under the OID rules, investors

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<sup>426</sup> For added certainty, the electronic note should include an express statement that it is neither a negotiable note under Article 3 of the UCC nor a transferable record under UETA or the E-Sign Act (if applicable). *See*, UCC § 3-104(d) (a note that bears a conspicuous statement when it first comes into possession of a holder that such note not negotiable or is not an instrument governed by Article 3 of the UCC is not a negotiable instrument.)

<sup>427</sup> Platform Notes treated as debt instruments, and treated as issued by the Operators, would be subject to the OID rules to the extent that interest on those notes is not regarded as “unconditionally payable”—an eminently reasonable assumption given that interest is payable only to the extent received on an underlying Borrower Loan. It is possible, however, that

effectively are required to report income for federal income tax purposes with respect to Platform Notes on an accrual rather than a cash method of accounting. Accrual accounting does, in general, more clearly reflect the investor’s economic income—but it also requires the investor to forego the otherwise potentially tax-advantageous income deferral that cash method accounting might allow.<sup>428</sup>

While the application of the OID rules to the Platform Notes is complex, the rules generally will require each investor to include in income for each taxable year an amount equal to the accrued, constant yield earned with respect to its Platform Note, determined on the basis of the Platform Note’s projected payments (net of Operator servicing fees but without regard to any potential default on the underlying Borrower Loan) and the Platform Note’s issue price (generally, its principal amount). This treatment will cause all stated interest on the Platform Note to be reported as OID, which (like interest) would constitute ordinary income; payments of interest and principal on the Platform Note would be treated first as a payment of accrued OID, and then as a payment of principal. A variety of special rules address and modify this baseline treatment in the event of payment delays on the underlying Borrower Loan (generally requiring a continuing accrual of Platform Note OID, notwithstanding late payment or nonpayment of the related underlying cash), Platform Note prepayment (or extension), Platform Note worthlessness, and Platform Note sale.

**Don’t Get Caught Short:** Platform Note investors who hold their notes in taxable accounts should remember that, under prevailing practice, they will be required to recognize income on an accrual basis for federal income tax purposes and accordingly, during any given reporting period could be required to recognize taxable income in excess of their related cash receipts.

Operators will be required under the Debt Approach to provide each investor with an annual tax information statement, generally on Form 1099-OID (or other applicable form) reporting the aggregate amount of OID accrued on the investor’s Platform Notes. The Operator also must file a copy of each such statement with the Internal Revenue Service. As investors typically will purchase multiple Platform Notes representing partial interests in a substantial number of different Borrower Loans, an Operator must implement procedures to aggregate the OID accrual information for each investor across multiple investments and to prepare and timely file the related reports. An Operator that fails to do so could be subject to financial penalties imposed by the Internal Revenue Service for deficient information reporting.

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interest on Platform Notes technically may be regarded as “unconditionally payable” based on the interest on the underlying Borrower Loans so qualifying and the economic linkage between Platform Notes and Borrower Loans—in which case, Platform Notes would not be subject to the OID rules. Most Operators do, nonetheless, apply OID reporting in their Platform Note programs, and do so notwithstanding the additional complexity, perhaps because—for the reasons expressed in the text immediately following this footnote—the Internal Revenue Service seems unlikely to question that treatment.

<sup>428</sup> Illustrative discussions of these modifications and other related Platform Note tax consequences (*e.g.*, market discount and premium) may be found in the tax discussions set forth in the disclosure documents for Prosper and LendingClub.

The fact (as discussed above) that the Debt Approach is not the only possible tax characterization of the Platform Notes does leave the investors at some risk of economic disruption if the Internal Revenue Service later requires a different characterization. Any such change in tax characterization could significantly affect the amount, timing, and character of the income, gain, or loss that an investor will recognize for tax purposes from an investment in Platform Notes. Equity for tax treatment of the Platform Notes—*i.e.*, treatment as Operator stock—in particular could be adverse as the Operator could no longer claim interest or OID deductions for payments or accruals made on the Platform Notes, and non-U.S. holders of the Platform Notes could become subject to 30 percent withholding tax (*i.e.*, the Operator would be required to withhold 30 percent of each interest or OID payment due to the non-U.S. holder, remitting the same to the Internal Revenue Service in satisfaction of the holder’s presumed U.S. tax liability in respect of such payments). In general, tax withholding on payments to non-U.S. holders would not be required if (as contemplated by the Debt Approach) income on the Platform Notes is properly treated as interest or OID. In order to limit the risk to investors that would result from equity recharacterization, an Operator might choose to offer its Platform Notes only to U.S. persons.<sup>429</sup>

#### **B. Direct Investments in Marketplace Loans by Non-U.S. Persons**

As previously discussed, most marketplace lenders do not issue Platform Notes but instead fund themselves through other means. In many cases, these other means include securitizations and sales of whole loans to institutional investors. A full discussion of the tax issues facing securitization and/or whole-loan investors is beyond the scope of this white paper. We would, however, like to highlight one issue that can strongly discourage foreign investors from purchasing whole loans and certain ABS tranches: U.S. withholding tax. Specifically, absent an exemption, non-U.S. investors generally will be subject to 30 percent U.S. withholding tax on *gross* payments of interest (and OID) made on any direct investments they make in marketplace loans. For these purposes, “direct” investments include both whole loans directly purchased by the foreign investor and equity tranches in marketplace loan securitizations or other funding vehicles. The potential for U.S. withholding tax can create a particular problem for start-up marketplace lenders who intend to borrow their initial lending capital from foreign investors (as can often happen when the sponsors of the lender are themselves foreign). Fortunately, certain structures can be employed that may provide an exemption from the withholding requirement. First, it is becoming increasingly common for marketplace loans to be documented with

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<sup>429</sup> Prosper, for example, generally does not permit non-U.S. residents to register as investors on its platform. LendingClub restricts only non-U.S. borrower members while evidently allowing non-U.S. residents to purchase Platform Notes, but its disclosure documents indicate that the percentage of such notes held by such persons from inception through December 31, 2016, amounted to less than one percent (by principal)—and the disclosure informs investors that those sales could result in fines and penalties (which may refer to penalties for failure to withhold tax). Further, neither Operator provides assurances or comfort in its tax disclosure regarding the tax consequences of an investment in Platform Notes to non-U.S. investors, perhaps shifting (or, at least, allowing for shifting by allowing for withholding) the withholding risk introduced by any such investors.

terms intended to satisfy the “registered form” provisions of the Internal Revenue Code.<sup>430</sup> The goal is to qualify any whole-loan purchasers for a withholding exemption generally available to non-U.S. purchasers of bonds and similar debt securities (the so-called “portfolio interest” exemption).<sup>431</sup> Securitization and funding structures also are often designed indirectly to achieve the same result with respect to loans that are not in registered form, by first repackaging the loans in pass-through trusts that issue certificates of beneficial interest which are themselves in registered form.<sup>432</sup> Second, some foreign investors who purchase newly originated marketplace loans may be subject to U.S. *net* income taxation if by reason of those investment activities (together with any other similar activities) the investor is deemed to be engaged in a trade or business of making loans in the United States. To help reduce that risk, some marketplace loan purchase facilities provide for the originator or a third party to “season” or warehouse the loans by retaining them for a specified period of time (often at least 30 days, but ranging as widely as from 5 to 90 days) before they are sold to the investor. The extended retention period bolsters the argument that the investor is purchasing the loans in a secondary market investment transaction (rather than as part of a business of originating loans) and therefore is exempt from U.S. net income tax under a safe harbor provided for “securities trading.”<sup>433</sup> Importantly, satisfactory resolution of both issues—*i.e.*, the adequacy of registered form provisions and the avoidance of material trade or business risk—will matter not only to foreign investors but also (and perhaps even more so) to marketplace lenders who, in serving as paying agents to pay through to investors amounts received by them (as servicers) on the purchased loans, may be liable for any tax owing by the investors but not properly withheld and remitted to the U.S. Treasury by such lenders.

## VII. BLOCKCHAIN

“Revolutionary!” “A Game-Changer!” “The Hottest Topic in Financial Services!” Such were the calls of proponents, media commentators and public company 10-Ks in 2017. The frenzy around blockchain technology has subsided in the subsequent year; however, the move toward actually building projects on blockchain has inched forward. In the lending world, the focus has been on finding ways to use this new technology to reduce processing costs and improve information security in documenting, executing and settling commercial and financial transactions.

In evaluating the claims made for blockchain, however, it is important to remember in the first instance that blockchain is not itself a financial product but refers instead to a new form of the computer science

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430 Generally, these provisions condition transfers of ownership interests in the loan upon the recording of that transfer in a registry of ownership.

431 The portfolio interest exemption is not available to certain affiliates of the loan seller and/or securitization sponsor.

432 This technique was originally authorized by U.S. Treasury Regulations in order to facilitate non-U.S. investment in pools of mortgage loans, since such loans were also traditionally not documented in registered form.

433 The securities trading safe harbor also requires that the purchaser purchase the loans at their market value on the purchase date. The required delay in the purchase date, together with the fact that the purchaser eventually may purchase the loans for less than par, very often makes it difficult for originators to offer these “season and sell” structures to interested non-U.S. investors.

technology used to develop and maintain databases. Instead of traditional structures that used a single, trusted server to maintain a database, blockchain technology allows for a shared record, or “distributed ledger”, that is accessible to all transaction participants and capable of near-instantaneous updating but which is (at least in certain cases) designed to prevent unauthorized transactions or after-the-fact changes to the record.

Advocates and analysts of blockchain-based solutions are still trying to identify where these data structures improve on existing, centralized systems, and are assessing where value accrues in so-called “decentralized finance” ecosystems. Blockchains can be applied in a variety of methods, and the applications (and blockchain networks, themselves) can be designed to fit the needs of the network participants. This means that market participants can select a network or platform with features involving decentralization, or with semi-centralization that relies on blockchains only in part.

Blockchain networks can be open and transparent, or can be made accessible only to a controlled set of users who have limited data access. Any changes in the ledger can be made only through the consensus of the participants.<sup>434</sup> Any information that is added to the ledger is recorded in a distinct electronic “block” and each block is irrevocably tied (or “chained”) to all blocks previously created for the transaction. The electronic records thus created are accessible to all transaction participants and, since each record has been created through consensus, the blockchain ledger at any point in time will constitute an authoritative statement of the transaction terms and status. In this regard, since each ledger is, in effect, created by the parties themselves according to the rules established for the network, blockchain can eliminate the need for the parties to affect their transactions through “trusted intermediaries” of the types that have traditionally been employed in similar transactions (e.g., registrars or escrow agents) and can thereby reduce both transaction costs and processing times.

Although Bitcoin is the first and most well-known blockchain network, newer blockchains are battling for open-source supremacy, particularly in the world of smart-contract computing on which enterprise use cases are theorized. Like the networks and platforms that utilize them, these smart contracts are designed to be somewhat decentralized, in that they operate automatically. But they are also architected or encoded by individuals, an important reminder that design choices and platform control impact the application and adoption of blockchain technologies.

Blockchain technology has application in many contexts and the financial services industry and cryptocurrency sponsors have not been and will not be the only users.<sup>435</sup> The potential for blockchain

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<sup>434</sup> Consensus for each data point proposed for the ledger is achieved through computations automatically performed by the computers having access to the database and does not require any hands-on intervention by the transaction participants’ employees (which would rather defeat the purpose of blockchain).

<sup>435</sup> As examples of the use of blockchain outside of the financial industry, manufacturers can use blockchain to track the movement of assets through their supply chains and shipping companies can use it to track the status and location of shipping containers. A discussion of the use of blockchain by cryptocurrency platforms is beyond the scope of this white paper.

to improve the efficiency of payment, clearance and settlement procedures is nonetheless of particular interest to financial institutions and commercial and investment banks have been among the leaders in blockchain implementation. Marketplace lenders also are well positioned to utilize blockchain, in part because their business models focus on technological innovation, but also, in part, because they have relatively little capital committed to legacy recordkeeping or transaction processing systems that blockchain could supplant.

A marketplace lender interested in its blockchain options must first decide whether it will use the technology to create a settlement system or a communications channel. In a settlement system, the underlying assets (i.e., the marketplace loans) are “tokenized” and the rights that attach to the tokens can be transferred and settled on the blockchain with near instant settlement. If the related regulatory issues could be solved, the tokenization process could greatly facilitate the development of an active secondary trading market for marketplace loans.<sup>436</sup>

In a communications channel, the blockchain is used as an interactive system that automates reconciliation, but does not consolidate all records and settlement within the blockchain. Under these circumstances, the assets are recorded and settlement takes place on traditional database stacks and the blockchain merely serves as a means of facilitating instructions and record transmission.

As one would expect, blockchain raises many novel legal questions, depending upon the specific uses to which the technology is put. The most fundamental question a marketplace lender will confront when approaching a potential blockchain-focused project or proposal is who “owns” the blockchain and what are the network characteristics. In this, a participant must consider who is selecting the type of blockchain (open or private<sup>437</sup>), who is providing administrative controls and maintenance, and who is permissioning access.

Parties joining onto blockchain based projects must also negotiate the terms of such access, particularly when the platform or network will be shared among multiple business participants. Although

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<sup>436</sup> It would be necessary to consider whether any tokens representing financial interests in marketplace loans constitute “securities” subject to regulation under federal and state securities laws. Any such tokens offered to retail investors would likely be treated as securities (which in turn would likely make the offering impractical because of securities law registration requirements).

<sup>437</sup> An open blockchain network, such as Bitcoin or Ethereum, features relative transparency of the data and transactions that appear on the network. This means that smart contract code, transaction volume, and transaction memo field contents are posted to the distributed ledger storing all network data. This data may be encrypted, at least in part, or may be shielded by technology such as zero knowledge proofs that has been pioneered in the cryptocurrency world; however, one of the fundamental questions regarding enterprise use of blockchain technology is the largely immutable publication of data to a public ledger.

Private blockchains, often built on top of Ethereum or Hyperledger code, can be designed to restrict both read and write access, meaning that some of the transparency and data retention issues can be mitigated; however, as parties move to private blockchains, they sometimes determine that the potential benefits of blockchain technology are removed, and that traditional data-structures with distributed systems can satisfy these results. In these cases, the specific uses and the potential benefits of smart contract implementations and immediate settlement and reconciliations systems drive considerations.

blockchain based projects are at least partially decentralized, the smart contract does not typically replace the legal constructs among counterparties. While many of the issues that relate to these platforms will be similar to other FinTech ventures, marketplace lenders and banks will be concerned with issues including whether or not a blockchain will be considered the definitive record of transactions recorded upon it, what administrative rights are held with respect to the blockchain, and how data is shared, monitored and owned on the blockchain. Recent developments in consumer data privacy also raise issues of the storage of financial and personally identifiable information on a relatively immutable and somewhat transparent data set. Blockchain technology may also raise unique questions of interpretation in regard to on-network governance and dispute resolution. To the extent that the programs are also built on open, distributed networks, allocation of liability for errors in code or in execution, as well as counterparty identification and anti-money laundering requirements will be heavily negotiated.

Lenders joining settlement based platforms and networks will also need to address the legal status of “tokens” used to transmit and settle information. In particular, the tokenization of information, rights and value can create issues under both securities laws and money service business laws. The facts and circumstances around a platform or networks architecture will largely determine this analysis, both for the tokens themselves and the rights or value tokenized therein. A growing body of guidance and, in some instances, case law is developing with respect to federal and state securities and money service laws.

In addition to these issues, there are jurisdictional questions. Several states have promoted pro-blockchain and pro-cryptocurrency legislation over the past two years. As the extreme example, Wyoming has aggressively pushed blockchain friendly legislation to address issues relating to state money transmission licensing, securities law, the enforceability of electronic signatures and smart contracts,<sup>438</sup> and the application of the UCC to tokens and cryptocurrency. However, these states are the outlier, and issues exist on both the federal and state level in the United States’ fragmented system of regulation. In addition, many platforms and most blockchain networks have global audiences and participants, opening up additional questions in this ever expanding landscape.

Finally, blockchain based platforms have increasingly incorporated the use of cryptocurrencies and stablecoins intended to represent fiat currencies. Cryptocurrencies are often used as collateral for loans

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<sup>438</sup> Smart contracts are, generally speaking, computer programs that are designed to be posted to a blockchain network, such as Ethereum, with a designed set of rules that operate strictly in accordance with the code. These programs can be complex, with participant voting rights, algorithmic decision-making, and references to on-chain events, or they can be simple “if this than that” scenarios that rely on a specific data point or particular actions that trigger a defined result. In many ways, smart contracts can reflect the commercial agreement, only documented electronically to provide for self-execution when applicable conditions precedent have been satisfied. As an example, a smart contract could provide for the automatic transfer of funds or delivery of goods to a contract participant when the conditions to such transfer or delivery have been satisfied as recorded in the related blockchain ledger.

in such platforms, and information regarding real world collateral may be tokenized for easy movement. It may be years before firm guidance exists regarding the use of cryptocurrency in lending or confirmation that blockchain and smart contract technology can be used to adequately describe assets intended as collateral for purposes of the UCC.

It follows that for the foreseeable future, certain aspects of blockchain systems will likely remain subject to some degree of legal uncertainty.

## VIII. CROWDFUNDING RULES

The term “crowdfunding” is often used broadly to include any Internet platform that matches multiple investors with natural persons and/or companies seeking debt or equity financing. In this sense, peer-to-peer platforms engage in crowdfunding. So also do sites that permit interested persons to contribute funds to a company or project without any expectation of earning a financial return.<sup>439</sup> There is yet another category of crowdfunding, however, that after a long incubation period finally became a reality in 2016: small business equity or debt securities offerings. Specifically, Congress in 2012 concluded that the federal securities laws unduly impeded small business capital formation and, accordingly, in the JOBS Act directed the SEC to provide an exemption from securities registration to small businesses that engage in crowdfunding in compliance with specified criteria. After considerable delay—resulting partly from the need to consider the views of multiple constituencies but also from significant concerns within the SEC that the exemption could be abused—the SEC in November 2015 adopted final rules (the “Rules”) to implement the crowdfunding exemption. The Rules became effective in May 2016. The remainder of this section summarizes the key provisions of the Rules.

**Worth Remembering:** The SEC crowdfunding rules relate to a specific Securities Act exemption and include restrictions which make them unlikely to be useful to marketplace lenders.

Section 4(a)(6) of the Securities Act (as added by the JOBS Act) exempts from Securities Act registration any sale of equity or debt securities made by a company in compliance with the Rules. The company therefore will not be required to register its securities with the SEC or sell them in a Regulation D private placement but may instead sell them through a crowdfunding platform to any investor regardless of the investor’s annual income or net worth. It merits noting, though, that Section 4(a)(6) and the Rules can be used to provide financing only to companies and not to individuals. The Rules therefore cannot be used to provide credit directly to consumers. The Rules also cannot be used by certain other categories of companies, including any company that files periodic reports with the SEC

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<sup>439</sup> These latter sites include such well-known venues as Kickstarter. The companies or projects that obtain funding through these sites may provide their backers with nonfinancial “perks” (e.g., samples of the company’s products), but they don’t transfer ownership interests to the backers and don’t undertake to repay the backers’ contribution with interest. As the sites don’t entitle the backers to any financial return on the contributed funds, they are not deemed to offer “securities” and therefore are not subject to securities or broker-dealer registration requirements under the federal securities laws.

under the Exchange Act (thus excluding any public company and many large private companies); any investment company, hedge fund, or similar vehicle; or any foreign company. Those companies that are eligible to use the Rules must observe a number of important conditions, including the following:

- The aggregate amount of securities sold by the issuer in reliance upon the Section 4(a)(6) crowdfunding exemption may not exceed \$1.07 million in any 12-month period. Securities sold by the issuer in offerings registered with the SEC or pursuant to other exemptions will not count against the \$1.07 million limit. An issuer therefore could undertake simultaneous Regulation D and Section 4(a)(6) offerings and could, in theory, sell unlimited amounts of the securities to accredited investors under Regulation D and not more than \$1.07 million of securities to other investors under Section 4(a)(6). Since, however, issuers may not advertise crowdfunding securities (except to the limited extent discussed below), issuers and crowdfunding platforms must take certain precautions if the issuer will undertake concurrent Rule 506(c) and Section 4(a)(6) offerings, as any general solicitation the issuer uses in the Regulation D offering could otherwise be deemed an unlawful advertisement for the crowdfunded securities.
- Investors are strictly limited in the amount of securities they may purchase under Section 4(a)(6) in any 12-month period. Investors having an annual income and/or a net worth of less than \$107,000 may purchase not more than the greater of \$2,200 or 5 percent of the lesser of the investor's annual income or net worth, and investors having both an annual income and a net worth of \$107,000 or more may purchase not more than the lesser of \$107,000 or 10 percent of the lesser of the investor's annual income or net worth. Note that these caps are applied against the aggregate amount of securities the investor purchases from any issuer through any crowdfunding platform and therefore any purchase of crowdfunding securities by an investor will reduce the amount of other crowdfunding securities that the investor may purchase during the following 12 months.
- Neither the issuer nor certain associated persons may be subject to specified criminal convictions or other disqualifying events. The relevant events are substantially similar to those that apply under Rule 506. See "*The Private Placement Rules*" above.
- The issuer must conduct its offering through a single intermediary that is registered with the SEC as either a broker-dealer or a "funding portal." The funding portal concept is new to the securities laws. It permits crowdfunding intermediaries—who otherwise would likely be subject to mandatory registration as broker-dealers—to register with the SEC under a simpler process and to avoid most of the ongoing compliance costs associated with broker-dealer registration. However, the Rules impose significant restrictions on funding portal operations. Among other matters, the funding portal may not offer investment advice or recommendations; solicit purchases, sales, or offers to buy the securities displayed on its platform; pay transaction-based compensation to its employees or agents; or hold, manage, or possess investor funds or securities. The funding portal also may not (absent suspicion of fraud) deny access to its website to an issuer based on the portal's evaluation of the merits of the offering. The portal may, however, apply objective criteria to screen issuers (for example, the portal could choose to list only issuers that are involved in a particular industry, are located in a particular geographic region, or are offering common stock or another

particular kind of security). The funding portal must maintain communication channels by which investors can communicate with one another and issuer representatives regarding each offering on the platform. The portal also must become a member of the Financial Industry Regulatory Authority (“FINRA”), provide investors with certain educational materials, and comply with certain FINRA rules and applicable privacy laws, anti-money laundering laws, and recordkeeping requirements.

- The issuer must make specified disclosures. Among other items, the issuer must provide the intermediary and investors with descriptions of its business, ownership, capital structure, and financial condition; the names and backgrounds of its officers and directors; statements of its anticipated business plan and of any material risk factors; the target offering amount and the intended use of proceeds; and the offering price or method for determining the price. Any issuer offering more than \$535,000 of securities must provide audited financial statements (subject to an exception for certain first-time issuers).<sup>440</sup> If the offering amount exceeds \$107,000 but not \$535,000, the issuer must provide audited financial statements (if such statements are available) or statements reviewed by an independent public accountant (if they are not). If the offering amount is \$107,000 or less, the issuer must provide audited or reviewed financial statements or, if such statements are not available, must disclose its total income, taxable income, and total tax for its most recently completed fiscal year and must provide its financial statements, in each case certified by its principal executive officer. The issuer must file the disclosure information with the SEC before commencing the offering and must make certain other filings during the course of the offering.
- The issuer may not advertise its offering except for notices that direct investors to the intermediary’s platform and contain only limited categories of information as specified in the Rules. The issuer nonetheless may communicate with investors regarding the offering through the communication channels maintained by the intermediary as described above.
- If the issuer succeeds in selling its securities it must thereafter file annual reports with the SEC containing information specified in the Rules until such time as (i) the issuer becomes a reporting company required to submit periodic reports under the Exchange Act, (ii) the issuer or another party repurchases all of the crowdfunded securities (including the full payment of any debt securities and the complete redemption of any redeemable securities), (iii) the issuer has filed at least one annual report and has fewer than 300 holders of record, (iv) the issuer has filed at least three annual reports and its total assets do not exceed \$10 million, or (v) the issuer liquidates or dissolves its business.

Any securities sold by an issuer pursuant to Section 4(a)(6) will also be exempt from registration under state securities (Blue Sky) laws.

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<sup>440</sup> First-time issuers may provide financial statements reviewed (rather than audited) by an independent public accountant if the offering amount exceeds \$535,000 but not \$1.07 million. In determining the financial disclosure requirements, the offering amount will be deemed to include the current offering and any other offering made by the issuer under Section 4(a)(6) of the Securities Act in the preceding 12-month period.

Many commentators have praised the crowdfunding exemption as an important step toward the “democratization” of finance since it can, in theory, permit small investors to make early-stage investments in promising companies that previously would have been funded only by venture capitalists and other accredited investors.<sup>441</sup> At the same time, there is certainly reason to question whether crowdfunding will meet the expectations of its strongest proponents. The percentage of start-up enterprises that become successful public companies or otherwise achieve a profitable exit is quite small. Although the Rules provide an exemption from Securities Act registration, they impose significant compliance costs that don’t apply in Regulation D offerings (particularly in respect of the need for ongoing SEC filings and, depending on the offering size, independent accountant reviews or audits).<sup>442</sup> The offering expenses incurred by an issuer will therefore often be greater under crowdfunding than under Regulation D and this, in turn, suggests that crowdfunding may be of particular interest to smaller, and frequently more risky, companies that are unable to obtain financing from traditional venture capital providers. It will be interesting to see whether Section 4(a)(6) crowdfunding, over the longer term, provides a net benefit to small investors.

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<sup>441</sup> The number of offerings conducted and the amount of funds raised under the Rules both increased significantly in 2018 (680 offerings in 2018 versus 474 in 2017 and total proceeds of \$109.2 million versus \$71.2 million). “*Regulation Crowdfunding performed solidly in 2018. Here’s the data*”, Sherwood Neiss, Crowdfund Capital Advisors (January 30, 2019). A number of aspects of the Rules—including the disclosure and reporting requirements, the caps on the offering and investment amounts and the exclusion of investment funds under the issuer eligibility criteria—nonetheless create obstacles or expense for potential issuers that may constrain future market growth.

<sup>442</sup> Broker-dealers and funding portals are permitted under the Rules to provide issuers with assistance in the preparation of disclosure materials. An intermediary may be able to help issuers reduce their offering costs by developing automated procedures for the preparation of initial drafts of the disclosure materials and related filings.

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## More Information

If you would like further information concerning any of the matters discussed in this survey, please contact Marc Franson or Peter Manbeck of Chapman and Cutler LLP, or contact any other Chapman and Cutler attorney with whom you regularly work.

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# Annex A

## About Chapman

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Chapman and Cutler LLP has represented nearly every type of financial services entity, from hedge funds to specialty lenders, to some of the world's largest financial institutions. Our lawyers are actively involved in providing legal advice to and about marketplace lending programs.

***We Know Lenders.*** For decades, we have represented lenders in capital structures ranging from the straightforward to the complex. For us, representing lenders isn't just another service area—rather, representing lenders is at the heart of what we do every day. Our experience has helped us gain a thorough understanding of our clients' processes, products, and systems, as well as their market challenges and legal needs.

***Commitment to Value.*** We understand the evolving needs of financial services clients and skillfully combine legal acumen with business and market insight. Our commitment to value goes beyond closing a deal or resolving a matter—we share our market knowledge to help clients advance their own business goals.

***Depth of Knowledge.*** We have extensive experience representing Internet-based platforms engaged in consumer, student, and small business lending and providing other financial products. We have the experience needed to help our clients comply with the novel legal and regulatory issues presented by these programs and to assist with expanding funding sources.

***Comprehensive Counsel.*** With our singular focus on finance, Chapman has developed a deep bench of attorneys with the experience and skills necessary to tackle virtually any issue our clients may face. From beginning to end, Chapman provides a tailored, dynamic team of attorneys prepared to respond to any legal matter that may arise.

***Securitization Experience.*** Chapman has been at the forefront of the efforts to develop securitization structures for marketplace lending platforms. Our broad experience in asset-backed transactions enables us to provide effective advice to our clients in connection with this developing sector of securitizations. We represent sponsors, agent banks, and investors in securitizations of consumer Internet loans as well as lenders and institutional investors in connection with securitization warehouse facilities.

## Marketplace Lending Services

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We handle funding arrangements for originators and purchasers of marketplace loans and also assist with development of programmatic whole-loan sale, servicing, and custodial agreements; due diligence and compliance reviews for investors; and assessment of federal and state regulatory requirements, including securities law compliance; lender, broker, and debt collector licensing requirements; usury and fee limitations; and disclosure, reporting, and fair lending regulations.

***Start-Up Advice.*** We advise start-up online lenders (in both consumer and commercial loan segments) in connection with the negotiation of program/marketing, servicing, and loan sale agreements with originating bank partners.

***Issuance Program and Regulatory Advice.*** We advise online lenders interested in establishing notes issuance programs and we counsel all participants on compliance with applicable federal and state laws, rules, regulations, and requirements.

***Regulated Investment Companies and Private Funds.*** We represent regulated investment companies and private funds in connection with investments in marketplace lending products. We were the first to structure a closed-end fund filed with the SEC specializing in marketplace lending investments.

***Consumer Loans.*** We represent various online lenders and loan investors in connection with loan sale and servicing agreements and participation agreements.

***Small Business Loans.*** We represent online small business lenders in structured loan facilities and in the establishment of Internet-based notes issuance programs directed to individual and institutional accredited investors.

***Student Loans.*** We were among the first to structure capital markets-based financing solutions for marketplace education finance platform sponsors and we have recently been involved as either bank/issuer counsel or counsel to lenders and note purchasers for three newly formed marketplace student loan originators.

***Securitization.*** We represent issuers, platforms, and lenders/investors on a variety of warehouse and term securitizations of consumer loans, student loans, small business loans, and other asset classes.

## Marketplace Lending Team

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