September 3, 2020

Acting Comptroller of the Currency
Brian Brooks
400 7th St SW
Washington, DC 20219

Re: Comments on Proposal "National Banks and Federal Savings Associations as Lenders"
Docket ID: OCC-2020-0026 RIN 1557-AE97

Dear Comptroller Brooks,

The undersigned North Carolina-based community, consumer, civil rights, faith and small business organizations write to strongly oppose the OCC's proposed rule addressing national banks and federal savings associations as lenders, which threatens to eviscerate North Carolina's lending laws and state rate caps around the country and encourage the spread of predatory lending. The proposed rule, if implemented, will harm the individuals and communities we serve.

We oppose the OCC's proposed rule to permit lenders to use the rent-a-bank model to avoid North Carolina's rigorously enforced interest rate cap. The OCC's proposed rule will let predatory lenders off the hook for charging interest and fees in excess of what is legally allowed in our state. This rule, if implemented, will bring back the harms associated with predatory lending and limit our state's ability to protect our consumers from those harms. This rule will not offer financial inclusion to the poor, as the OCC's Acting Comptroller suggests. Instead, making these loans available to low income and low wealth people in North Carolina will trap the borrowers in a cycle of debt. It will also see a slew of other harms, ranging from car repossession, assessment of bank overdraft fees; negative impact on borrowers' credit scores; reduced ability to pay for food, rent, and utilities; wage garnishment; and even bankruptcy. This type of credit is predatory. Payday lenders put borrowers into a worse situation and ruin their credit and ability to borrow at lower interest rates.

We also know that allowing predatory lenders back into our state will drain resources from our non-profits and faith-based organizations. These civic groups use their resources to help community members out of thousands of dollars of high-cost debt, siphoning resources away from other proactive efforts, like community development and wealth building. We also expect to see increased pressure on the North Carolina General Assembly from other lenders to increase rates allowed in the state, making credit more expensive and harder to repay for even more North Carolinians.

North Carolina has a unique history when it comes to eliminating payday lending in the state. North Carolina was the first state to:

- Roll back a once legal payday lending industry;

- Litigate the rent-a-bank model; and
- Force a bank to drop its bank payday loan product.

We recount this story below because it illustrates how strongly we believe that payday lending, including using the rent-a-bank model, causes tremendous harm to borrowers and their families. This story also describes how hard we have worked to keep all forms of high-cost lending out of our state; how hard the industry has fought, and will continue to fight, to bring it back; and the significance of the OCC's actions to North Carolina's ability to protect its residents from these high-cost loans. We know that North Carolinians are far better off without payday and will continue to fight to keep all forms of high-cost lending out of our state.

North Carolina's History with High-Cost Lending

North Carolina legalized payday lending for a brief period of four years, from 1997 to 2001. By 2000, 10% of the payday loan storefronts in the country were in North Carolina. These storefronts were concentrated around military bases and in Black neighborhoods. In 2000, the year before the law authorizing payday lending was scheduled to expire on its own terms, a broad coalition of North Carolina organizations, many of which are signatories to this comment, came together to oppose payday lending abuses and to advocate that North Carolina lawmakers allow the law legalizing payday lending to sunset. Following strong opposition to these 400% APR payday loans, and despite a vigorous and well-funded effort by the industry to keep payday lending legal, the North Carolina General Assembly allowed the law that authorized payday lending to sunset.

Following the sunset in August 2001, the NC Commissioner of Banks notified all payday lenders in the state that they were making illegal loans. Most shops closed their doors. Others used a variety of schemes to continue operating. The most common scheme to avoid our state interest caps and licensing requirements was the one that the OCC's current proposal threatens to bring back: the rent-a-bank model. Under this model, payday lenders claimed they were not making the loans themselves, but instead were the "marketing, processing and servicing agent" of an out-of-state bank which, the payday lenders claimed, was the "true lender."

The North Carolina Commissioner of Banks administers and enforces the Consumer Finance Act, a state law that caps interest rates on consumer loans under $15,000. In December 2005, the NC Commissioner of Banks completed its investigation of payday lender Advance America's partnership with out-of-state banks as a method to evade North Carolina law. The Commissioner issued a thorough ruling finding that that Advance America was illegally attempting to evade North Carolina's interest rate cap.

The ruling stated that Advance America itself was making illegal loans in North Carolina, and that it could not evade state lending laws by using a "partnership" with an out-of-state bank as a front to make illegal loans. Based on an exhaustive review of the business model, the Commissioner of Banks rightfully determined that Advance America was the true lender, not the bank Advance America paid to fund the loans before the loan obligation was quickly sold.

Advance America was unsuccessful on appeal. Shortly after the court ruled on appeal, in March 2006, the NC Attorney General announced consent agreements with the three remaining large payday chains still making loans here, all using the rent-a-bank model, First American Cash Advance (a subsidiary of CompuCredit), Check Into Cash, and Check 'n Go.

These actions forced the last payday shops out of our state, almost five years after the law authorizing payday lending in NC sunset. Since 2001, payday lenders, often joined by other high-cost lenders like car-title and installment lenders, have mounted aggressive lobbying campaigns in many of the subsequent 19 years to re-authorize payday lending in our state. Despite their aggressive efforts, we have held the line against payday, car-title and other forms of high-cost lending. The OCC's proposed "true lender" rule will eliminate the protections we have fought hard to keep in North Carolina.

The Fight to Keep High Cost Lending Out of North Carolina

Hundreds of organizations (and thousands of individuals) have been part of this 20-year fight to get and keep payday lenders out of our state, many for the entire period. Year after year, this effort has consumed significant financial and staff resources for these organizations, mostly non-profits. We have continued this fight because we understand first-hand the harm caused by payday lending in our state and the high stakes if predatory lending returns.

Payday loans caused tremendous harm during the nine years that payday lenders were active in our state; the four years when they were authorized (1997-2001) and the five years when they operated illegally under the rent-a-bank scheme (2001-2006).

Since payday lenders left the state, North Carolina consumers save over $457 million every year in loan fees. Research by the Consumer Financial Protection Bureau shows that they typical payday loan borrower takes out 10 loans per year. Keeping North Carolina residents out of this debt trap has saved them hundreds of millions of dollars. The University of North Carolina's Center for Community Capital found that after payday was banned in North Carolina there was not a restriction of access to credit at the state level, countering claims often made by industry. The same research found that most former payday borrowers in North Carolina saw a positive impact on their household after payday lending was banned.

Currently, North Carolina caps interest rates on loans of less than $4,000 at 30%, plus a fee of between $25 and $40 (depending on the size of the loan) that may be charged no more than twice a year. Capping interest rates is not only good for consumers' finances, it also specifically protects Black consumers, who were disproportionately targeted by payday lenders when payday lending was legal in North Carolina. Black neighborhoods had three times as many storefront payday lenders per capita as white neighborhoods. This disparity increased as the proportion of Black people in a neighborhood increased. This three-fold disparity remained unchanged even when the researchers controlled for the neighborhood characteristics of income, homeownership, poverty, unemployment rate, urban location, age, education, share of households with children, and gender. We have no reason to believe that high-cost lending will work differently this time. Allowing high-cost lending back into North Carolina through the rent-a-bank model will not help poor people access credit; it will drain resources mainly out of Black households and neighborhoods across North Carolina.

Recent Efforts by High -Cost Lenders to Avoid North Carolina's Rate Cap

Even with our interest rate cap, lenders sometimes try to find ways to offer predatory credit to consumers in violation of our law. North Carolina's Attorney General and Banking Commissioner continue to fight for our state's consumers in the battle with high cost lenders. In one example, companies CashCall and Western Sky made tens of thousands of loans to North Carolina consumers over the internet between 2000 and 2003. North Carolina consumers borrowed between $850 and $10,000 and Western Sky and CashCall charged annual interest rates of between 89% to well over 300%. These interest rates all far exceed North Carolina's legal rate of interest for installment loans, which ranges from 18% to 30%. A North Carolina court ordered CashCall and Western Sky to pay restitution to borrowers of over $9 million. The OCC's proposed rule will, if implemented, force North Carolina law enforcement to look the other way as high cost installment lending like that offered by CashCall and Western Sky come into the state.

Currently, an online lender called EasyPay claims that it makes loans in North Carolina at an annual interest rate of over 100% using the rent-a-bank model. If North Carlina consumers get trapped in these loans now, they have some recourse because of our state interest rate cap. If the rule proposed by the OCC is implemented, North Carolina consumers will have no recourse against this lender or others using the same model, even though our state law will continue to say that our maximum legal rate of interest for consumer loans is 30%. The OCC's proposed rule will make loan products North Carolinians do not want available to them. Two thirds of people in the state (66%) are concerned or very concerned about out-of-state banks enabling high-cost lending in violation of our interest rate cap.

In closing, loans made through rent-a-bank schemes are some of the most predatory on the market. Interest rate limits are the best way to protect consumers, and this rule will eliminate our state's ability to use the method we have been using to successfully protect consumers from predatory loans for over 15 years. Please withdraw the OCC proposed rule, "National Banks and Federal Savings Associations as Lenders."

Sincerely,

Elizabeth City Habitat for Humanity
Habitat for Humanity Cleveland County
Latino Community Credit Union
Innovative Systems Group, Inc.
NC Coalition for Responsible Lending

NC Conference of the United Methodist Church
Episcopal Diocese of North Carolina
Charlotte Center for Legal Advocacy
Disability Rights NC
Council of Churches
National Association of Consumer Bankruptcy Attorneys
Steve Schewel, Mayor of Durham
Noble Sites, LLC
Julie Eiselt, Mayor Pro Tem of Charlotte
National Association of Consumer Bankruptcy Attorneys
Cedar Grove Institute for Sustainable Communities
Girls on the Run of the Triangle
Coastal Credit Union
The Collaborative
Olive Hill Community Economic Development Corporation, Inc
New Hope Collaborative
Presbyterian Church, USA
North Carolina Justice Center
NC State Employees Credit Union
North Carolina Council of Churches
NC State AFL-CIO
S J Adams Consulting
Church Women United
MDC, Inc.
Financial Protection Law Center
NC Alliance for Retired Americans

BUSINESS

After a 15-year ban, could payday lending return to North Carolina?

BY SOPHIE KASAKOVE AUGUST 06, 2020 09:10 AM

In 2017, Melody Garrett was in a bind. She'd been laid off from her job at a garbage disposal company, and her new part-time job at CVS didn't pay enough for her to make the $1,400 rent on her Mount Holly apartment, where she lived with her teenage son.

She searched Google for loans and found that she could get a $2,200 car title loan online through a company called Approved Financial. The company asked her to send photos of her car, a 2011 Toyota Corolla, along with photos of both her driver’s license and car title.

“It was a last-minute quick decision. I was just stressed — my back was against the wall. I didn’t know where else to turn,” Garrett recalled Monday in a phone interview with The News & Observer.

But the loan came with highly punitive conditions. Despite website ads for “flexible payment options” and “low interest rates,” the interest rate noted in the loan agreement was 191.81%, adding up to a total of $8,689.92 to repay the $2,200 loan, including various fees.

After a family emergency, Garrett said she could not keep up with the $362 monthly payment. After missing two payments, she came out to the parking lot during her lunch break at work to find her car missing. Approved Financial informed her that her car would be sold unless she paid them more than $3,500.

She asked for a breakdown of fees but never received one, she wrote in an affidavit filed in a 2019 lawsuit by the North Carolina Attorney General's office against the company.

"They told me one thing and one thing led to another, and it just didn't go the way that they explained it to me," said Garrett. "There were all these little hidden rules and things that I didn't understand."

She managed to get her car back but fell behind again. The company took the car back for good. Without a car, she couldn't get to work, and she had to take out more loans to buy a new car.

"It was horrible. There's no way to describe it, you're at rock bottom," she said. "If I knew the things back then that I know now, I would have never went that route."

Garrett wasn't alone. After receiving other complaints about the company from borrowers, North Carolina Attorney General Josh Stein blocked the company from operating in North Carolina last year. The lender was charging 120% to 200% interest, according the lawsuit, far exceeding North Carolina's loan interest rate cap of 16% for unlicensed lenders.

The company had, the lawsuit argued, been "making and collecting on loans at oppressive and unfair rates, and making such loans without accounting for borrowers' ability to repay," a practice consumer advocates refer to as predatory lending.

But if a proposed federal rule passes, predatory lenders like Approved Financial could gain a foothold in North Carolina.

The rule, proposed last month by the Office of the Comptroller of the Currency, a bureau of the U.S. Treasury Department, would allow predatory lenders to partner with out-of-state banks in order to skirt the state's interest rate cap.

PRESSURE FROM THE POWERFUL LENDING INDUSTRY

The proposal comes after years of pressure from the highly profitable lending industry, which has argued that efforts to limit products like payday loans and title loans, like the one Garrett received, would deprive consumers of access to emergency credit. Federal regulators made another concession to the payday loan industry last month when they finalized a rule which removes the requirement that lenders check borrowers’ ability to pay back a loan.

The proposal has prompted backlash from officials and advocates in North Carolina who say that the change would hurt low-income people by trapping them in cycles of debt. Payday loans — marketed as a tool for cash-strapped borrowers to make it to the next paycheck — are small, short-term loans extended at a very high interest rate, often more than 400 percent.

“There are very few financial products that are just so patently unfair as a payday loan,” said Stein in a phone interview with The News & Observer.

“The whole premise of the industry is that a substantial portion of their customers will be on a debt treadmill and pay many times what the original loan amount was back in interest. A model that depends on people being in financial distress is one that we don’t need here in North Carolina.”

The practice of payday lending ended in North Carolina in 2006 after Joseph Smith, the state's banking commissioner at the time, ruled that the state's largest payday lender, Advance America, was operating in the state illegally. The state had banned payday lending back in 2001, but Advance America and other lenders had dodged the ban by partnering with out-of-state banks where payday lending was legal.

Smith ordered Advance America to cease operations in the state, prompting other payday lenders to leave the state, too.

North Carolina is one of 16 states, plus Washington D.C., where payday lending is illegal.

'DEVASTATING FOR LOW-INCOME COMMUNITIES'

Al Ripley, consumer and housing policy specialist at the North Carolina Justice Center, a non-profit advocacy organization, recalls regularly working with clients being charged as much as 400% interest on payday loans.

“They would not be able to repay that loan after two weeks, so they would renew and pay another $45 to borrow $300, every two weeks. It was not uncommon to see people in our office who had 15 to 20 of those loans in a row and just absolutely being financially destroyed by them,” Ripley recalled.

“It is one of the most pernicious and harmful lending products in the world. The idea of allowing it to come back to North Carolina would just be devastating for low-income communities.”

A 2014 study by the Consumer Financial Protection Bureau found that 80% of payday loans were rolled over or reborrowed within 30 days, incurring additional fees with every renewal.

With thousands of North Carolina residents still applying for unemployment benefits every day due to the COVID-19 pandemic, advocates say that the proposed rule change couldn't be more poorly timed.

"Especially during this time, during COVID-19, when a lot of low-income and Black families are facing some very challenging financial times, what we don't want is to make it a lot easier for organizations to target and to prey upon them for financial gain," said Marquita Robertson, executive director of The Collaborative, a non-profit that seeks to close the racial wealth gap in North Carolina.

"What we don't want is for [borrowers] to be feeling the consequences of this 10 years down the road for something they did when they were in a pinch in 2020."

Research has shown that payday lending specifically targets Black communities. In 2005, The Center for Responsible Lending, a nonprofit group that promotes policies to curb predatory lending, found that African-American neighborhoods in North Carolina had three times as many payday loan stores per capita as white neighborhoods.

The disparity increased as the proportion of African Americans in a neighborhood increased.

If payday lending is reintroduced in North Carolina, Robertson says that Black communities would once again be disproportionately impacted.

“When I drive down certain parts of Raleigh downtown — Black Raleigh — there are no banks. But you see pawn shops,” she said. “You’re going to see these pop up to replace banks in bank deserts... . That’s not what we need. Our people deserve better. They deserve safe affordable bank accounts and not predatory lenders.”

WHAT ARE THE OPTIONS?

Payday lenders make the argument that their services help people in need of cash for emergencies.

But consumer advocates say that emergency credit doesn’t have to come with terms that strip wealth from borrowers. They point to the State Employees’ Credit Union as a model, which developed its loan program in 1993 as an alternative for members who were finding themselves trapped in debt traps.

“Payday loans and payday lenders have over the years wreaked havoc on folks, principally of modest means, but not necessarily— the users of these products fall into every economic strata,” said Mike Lord, president and CEO of SECU, whose members are primarily active and retired teachers and state employees and their families.

Lord said that clients would regularly bring checks for $500 to the credit union teller that they had paid a payday lender $75 to obtain. Often, they’d take out the same loan the next month, and the month after.

SECU instead offers the same \$500 loan for \$5—a 12% annual percentage rate. Lord says that 87,000 members use this service on a monthly basis, adding up to \$73 million in savings on interest per year. The credit union also requires borrowers to put 5% of the loan amount into a savings account to help break the debt cycle.

“Lenders can make money and cover their costs by pricing products responsibly and reasonably,” said Lord. “It doesn’t have to savage and pillage individuals just because they’re in a weakened financial position and have to take whatever is available to them.”

PAYDAY LENDERS PUSH BACK

The payday lending industry and some legislators have made repeated attempts to loosen restrictions. In 2013, the industry hired 15 lobbyists to push a payday lending authorization bill that ultimately failed to make it through a House committee, according to CRL.

In 2017, U.S. Representative Patrick McHenry, a Republican from Denver, N.C., introduced a bill that would have required that interest rates remain unchanged even if the loan is sold. Consumer advocates said the bill would have allowed lenders to skirt North Carolina's restrictions. The bill stalled in the Senate.

McHenry supports the latest proposed rule change. "Now more than ever, it is critical families in need have access to every option to cover unexpected costs," he said in a press release last month. "For millions of Americans, small-dollar, short-term lending can be a lifeline in difficult times."

But consumer advocates say that these arguments don't hold up. In 2007, two years after the Commissioner of Banks' ruling against Advance America, researchers found that the absence of storefront payday lending "has had no significant impact on the availability of credit for households in North Carolina."

The study, prepared by the Center for Community Capital at UNC for the North Carolina Commissioner of Banks, found that more than twice as many former payday borrowers reported that the "absence of payday lending has had a positive rather than negative effect on their household."

The state has repeatedly stamped out attempts by payday lenders to operate in the state.

In 2013, then-Attorney General Roy Cooper and the state's Commissioner of Banks successfully blocked online lender Western Sky Financial and several of its affiliates from operating in the state. The company, based in the Cheyenne River Sioux Tribe Reservation in South Dakota, claimed that it was not subject to the jurisdiction of North Carolina. The state argued in court filings that it was "a front."

Because of state protections, fewer North Carolina residents have been trapped by payday lending debt in recent years. The rule change, however, would override the state's authority.

FIGHTING BACK

North Carolina officials say they are prepared to fight the rule change. The OCC is accepting comments on the rule until September 3 and both the state Attorney General's office and Commissioner of Banks intend to submit comments opposing the rule change. CRL and other advocacy groups intend to submit comments as well.

The states of New York, California, and Illinois last week filed a lawsuit against the OCC. Stein declined to say whether North Carolina would join the lawsuit but said that his office is in discussion with the plaintiffs and would consider taking legal action if the rule is adopted.

Ray Grace, NC's banking commissoner, said that while he is concerned about the rule, he is unsure of what power his office would have to challenge it if it's adopted.

"When federal law is enacted, it very frequently preempts state law," Grace said in a phone interview with The News & Observer. "Our actions are pretty much foreclosed at that point."

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BY BASSEM MROUE AND SARAH EL DEEB ASSOCIATED PRESS

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North Carolina State, County, and Congressional District Annual Fees Savings without Payday and Car Title Lending

Center for Responsible Lending

Delvin Davis, Senior Researcher
Susan Lupton, Senior Policy Associate

May 2018

In our January 2017 CRL Issue Brief, States without Payday and Car-title Lending Save $5 Billion in Fees Annually, we estimated that consumers in states without payday and car title lending save over $5 billion in fees each year – $2.2 billion in payday fees saved, plus another $2.8 billion in car title fees saved.

In this earlier Issue Brief, we also estimated that consumers in North Carolina save over $457 million in payday and car title fees every year, $255 million in payday fee savings and another $202 million in car title fee savings. Of the 32 states with payday and/or car title fee savings, North Carolina ranks third in savings, behind only New York and Pennsylvania.

In this new report, we estimate how these North Carolina fee savings break out by county and congressional district.

Rate Caps Prevent Harm from Payday and Car Title Lending

Payday and car title loans are small-dollar, high-cost products that rely on the borrower not being able to repay the loan without reborrowing, thus leading to a cycle of debt. With lenders doing essentially no underwriting, consumers find it easy to obtain these loans, often marketed as a solution to a financial emergency. However, the unaffordability of the loan and the lender's extreme leverage over the borrower – either through direct access to the bank account or threatening repossession of the borrower's car – makes it very difficult to escape a cycle of debt that can last months, if not years.

Debt trap products often lead to other financial harms, including delinquency on other bills, overdraft and NSF bank charges[1], and involuntary loss of bank accounts.[2] For car title loans specifically, 1 in 5 consumers end up losing their vehicle through repossession.[3]

Research from the Consumer Financial Protection Bureau (Consumer Bureau) shows that the average payday consumer takes out 10 loans a year, borrowing one loan immediately after another.[4] Similarly, the Center for Responsible Lending (CRL) found that the typical car title loan consumer will renew his or her loan eight times, paying more in fees than the amount originally borrowed.[5] Overall, repeat refinancing is essential to generate fee revenue for both the payday and car title business models. CRL estimates that, in states which allow them, payday and car title loans cost consumers over $8 billion in fees annually.[6]

Fifteen states and the District of Columbia have rate caps of 36% or less, which have been successful in stopping the debt trap of payday loans. North Carolina is one of these states. Additionally, the U.S. Department of Defense has adopted a 36% all-in rate cap to protect active duty servicemembers and their dependents. To date, no state deciding to rein in debt trap loans has reauthorized these loans, even with significant lobbying pressure from the payday and car title industries. Also, Arizona, Montana, Ohio, and South Dakota have instituted rate caps through a ballot vote, reflecting the desires of their citizenry to protect consumers.[7]

History of Payday Lending in North Carolina

North Carolina has a unique history with payday lending, as it was the first state to roll back a once legal payday industry. Payday lending was legal in North Carolina for only four years, from 1997 to 2001.

Following strong opposition from a broad coalition of North Carolina organizations, the North Carolina General Assembly allowed the authorization for payday lending to sunset in August 2001, once again making payday loans illegal here. Though more than half of the payday shops closed their doors following the sunset, others used a variety of schemes to try to continue operating. The most common scheme to avoid our state interest rate cap and licensing requirements was the rent-a-bank model, used by the large national chains. Under this model, payday lenders claimed they were not making the loans themselves, but instead were the "marketing, processing and servicing agent" of an out-of-state bank which, the payday lenders claimed, was the actual lender. Over the next 5 years, the NC Attorney General and the NC Office of the Commissioner of Banks took action to shut down the remaining payday storefronts, both the small shops as well as the large national chains making illegal loans under the rent-a-bank model. Federal banking regulators also acted to stop rent-a-bank abuses nationwide.

Thankfully, car title storefronts have never been legal in our state. In addition, online payday, car title, and triple-digit consumer installment loans are also illegal here. Our NC Attorney General has taken strong action against internet lenders making illegal loans to North Carolinians.

Payday loans caused tremendous harm during the nine years that payday lenders were active in our state: the four years when they were authorized (1997-2001) and the five years when they operated illegally under the rent-a-bank scheme (2001-2006). Having seen the devastating impact of the payday debt trap over these nine years, North Carolinians are strongly united in their opposition to payday and all other forms of high-cost lending.

Federal Threats

Our North Carolina interest rate cap is under serious threat at the national level. In recent months, many bills have been introduced in Congress that would undermine strong state usury caps by again allowing payday, car title, and other high-cost lenders to partner with banks to circumvent our state lending protections.[8] And, one of the federal banking regulators, the Office of the Comptroller of the Currency, is considering issuing national charters that would allow some non-bank lenders to circumvent state law, now only allowed for nationally chartered banks. Any of these developments could allow high-cost loans to flood into our state and leave North Carolina with no tools to enforce our long-standing usury laws.

In addition, while not a threat to our usury laws, but in a move that is a boon to the payday lenders, Congress is considering Congressional Review Act resolutions in both the House and the Senate that would repeal the Consumer Bureau's national payday rule and prevent the Bureau from regulating payday and car title loans in the future. Unfortunately, in a move to side with payday lenders rather than North Carolinians, several members of North Carolina's Congressional delegation are sponsors of this effort. [9]

The next two sections estimate fees saved by North Carolina county and congressional district. *If federal developments and regulatory changes allow payday and car title lenders to charge rates in excess of our long-standing interest rate limits, the fees saved due to North Carolina's strong laws could quickly turn instead to fees drained from the pockets of North Carolina families struggling to make ends meet.*

North Carolina Fee Savings from Payday and Car Title Lending by County

CRL estimates that consumers in North Carolina save over $457 million in fees *annually* – $255 million in payday fees saved, plus another $202 million in car title fees saved every year.

These savings are possible because North Carolina has a strict interest rate limit. Our state lending protections also prevent loopholes that high-cost lenders might use to attempt to circumvent North Carolina law.

In Figure 1, we estimate North Carolina annual fee savings for the ten counties with the highest savings. To see fee savings for all North Carolina counties, see Appendix A.

Figure 1: North Carolina Annual Payday and Car Title Loan Fee Savings for Ten Counties with Highest Savings

Fee Savings Rank	NC County	Estimated Payday Savings per County	Estimated Car Title Savings per County	Total Estimated Savings per County
1	Mecklenburg County	$25,656,549	$20,371,302	$46,027,851
2	Wake County	$21,374,473	$16,971,334	$38,345,807
3	Guilford County	$13,322,720	$10,578,241	$23,900,962
4	Cumberland County	$10,734,848	$8,523,470	$19,258,318
5	Forsyth County	$8,749,227	$6,946,887	$15,696,114
6	Durham County	$7,345,825	$5,832,585	$13,178,410
7	Onslow County	$6,017,448	$4,777,855	$10,795,303
8	Gaston County	$6,016,776	$4,777,320	$10,794,096
9	Pitt County	$5,347,549	$4,245,955	$9,593,504
10	Buncombe County	$5,296,303	$4,205,265	$9,501,569
	NORTH CAROLINA	**$255,144,890**	**$202,585,070**	**$457,729,960**

Fee savings by county are strongly impacted by county population and the percentage of subprime borrowers residing in each county. As a result, counties with larger populations are more likely to be listed in Table 1.

Many rural counties are also disproportionately impacted by payday and car title lending, since they have a high percentage of subprime borrowers despite their small populations. Figure 2 shows the 13 North Carolina counties with the highest share of subprime borrowers. All thirteen counties listed have a subprime population of 40 percent or greater, compared to the North Carolina average of 30.8 percent. These rural counties benefit the most from our state usury cap, since subprime borrowers are the most likely customers of payday and car title lenders.

See Appendix B for North Carolina county rankings by subprime population for all counties.

Figure 2: North Carolina County Rankings of Subprime Population Share

Subprime Population % Rank	NC County	% Subprime Population
1	Scotland County	43.7%
2	Robeson County	43.4%
3	Hoke County	43.0%
4	Edgecombe County	43.0%
5	Bertie County	42.7%
6	Halifax County	41.4%
7	Anson County	41.2%
8	Vance County	40.8%
9	Richmond County	40.7%
10	Hertford County	40.5%
11	Bladen County	40.5%
12	Cumberland County	40.2%
13	Northampton County	40.0%
	NORTH CAROLINA	**30.8%**

Research has shown that regulating debt trap lending has not resulted in a restriction of access to credit on a state level.[10] In fact, the same research found that the majority of former payday borrowers in North Carolina saw a positive impact on their household after all payday storefronts were forced to close in 2006. Many other studies confirm that consumers switch to other financial products or sources of cash when payday loans are no longer available, all of which are “far less harmful than payday borrowing.”[11]

North Carolina Fee Savings from Payday and Car Title Lending by Congressional District

Figure 3 estimates annual fee savings by North Carolina congressional district. These savings run from a high of almost $39.5 million annually in Congressional District NC-09 to $29.6 million annually in Congressional District NC-04.

Figure 3: North Carolina Annual Payday and Car Title Loan Fee Savings by Congressional District

NC Congressional Districts	Subprime Population in District 2016	Estimated Payday Savings per District	Estimated Car Title Savings per District	Estimated Savings per District
1	264,943	$21,643,181	$17,184,688	$38,827,870
2	252,641	$20,638,277	$16,386,794	$37,025,072
3	254,019	$20,750,871	$16,476,194	$37,227,065
4	202,321	$16,527,602	$13,122,918	$29,650,521
5	209,618	$17,123,690	$13,596,212	$30,719,901
6	233,639	$19,086,009	$15,154,293	$34,240,302
7	247,484	$20,217,001	$16,052,301	$36,269,302
8	266,842	$21,798,379	$17,307,915	$39,106,294
9	269,523	$22,017,342	$17,481,772	$39,499,114
10	232,191	$18,967,726	$15,060,377	$34,028,103
11	202,960	$16,579,818	$13,164,377	$29,744,195
12	250,504	$20,463,663	$16,248,151	$36,711,814
13	236,642	$19,331,330	$15,349,078	$34,680,408
Grand Total	**3,123,327**	**$255,144,890**	**$202,585,070**	**$457,729,960**

Methodology

The method we use to estimate payday and car title fees in North Carolina is based on what the estimated number of storefronts would be in our state if those lenders were active here. Using national payday and car title storefront counts as of 2016, we estimate the number of stores per 100,000 subprime consumers for states that allow payday and car title lending.[12] From there, we calculate our North Carolina fee savings based on storefronts per 100,000 subprime North Carolina residents, giving us a statewide fee savings estimate of $457 million.

To calculate savings on a county level, we use data from the 2016 U.S. Census to determine the number of adults per North Carolina county (age 18 and over). We then use data from the Federal Reserve Bank of New York to determine adults with a subprime score (with an Equifax score below 660) as of 4Q 2016, allowing us to estimate the subprime population in each North Carolina county (see Appendix B for North Carolina county ranking of subprime population shares). Having a figure for both statewide fee savings ($457 million) and total subprime population (over 3.1 million) allows us to estimate the payday and car title fee savings per subprime consumer ($81 and $64 per person for payday and car title, respectively). We multiply the North Carolina fee savings per subprime consumer by the subprime population of each county to estimate county-level fee savings.

Note that these estimates are solely based on our previous fee drain estimates from national storefronts. Thus, our fee savings estimates do not include online lending, nor all installment lending activity, making the estimates more conservative. Though some people assume that online lending increases when there are no payday lenders in a state, the opposite is true. In states without payday storefronts, only five percent of the consumers who had been taking out payday loans elect to go online or elsewhere to get a payday loan.[13]

Fee savings by NC congressional district is estimated similarly to savings by county, based on the subprime population in each area. For districts, we calculate subprime populations based on the county's population, and the percent of that population that resides in the corresponding district. After we estimate a district's subprime population, we estimate the savings per subprime consumer accordingly.

Conclusion and Recommendation

As stated earlier, our North Carolina interest rate cap is under serious threat from Congressional and regulatory action at the national level. There are numerous proposals that would embolden payday and car title lenders. Some would allow them to partner with out of state banks to circumvent state law. Others would allow them to get a national charter to preempt state usury caps and lending protections. Still others allow banks to get back into the business of making payday loans directly, as they did in the past with abusive direct deposit advance products. And finally, the Congressional Review Act resolutions introduced in both the House and the Senate would repeal the Consumer Bureau's national payday rule, five years in the making, *and* prevent the Consumer Bureau from regulating payday and car title lenders in the future, giving these dangerous lenders a free pass from oversight by the Consumer Bureau.

This Issue Brief takes the annual payday and car title fee savings for North Carolinians of $457 million and shows the savings by county and congressional district. These annual savings could turn quickly into a fee drain for North Carolina families if high-cost lenders are allowed to ignore our North Carolina interest rate cap and other lending protections.

Instead of opening our state borders to abusive payday and car title lenders, our North Carolina Members of Congress should:

- Strongly defend the Consumer Financial Protection Bureau's national payday rule;
- Oppose legislative and regulatory efforts to preempt or undermine state interest rate limits;
- Defend existing protections in the Military Lending Act, particularly the 36% all-in rate cap, that protect against abusive payday and car title loans to active duty military and their dependents; and
- Work to pass a 36% federal rate cap.

[1] Consumer Financial Protection Bureau, *Supplemental findings on payday, payday installment, and vehicle title loans, and deposit advance products*, June 2016, https://www.consumerfinance.gov/documents/329/Supplemental_Report_060116.pdf

[2] Consumer Financial Protection Bureau, *Online Payday Loan Payments*, April 2016. http://files.consumerfinance.gov/f/201604_cfpb_online-payday-loan-payments.pdf

[3] Consumer Financial Protection Bureau, *Single-Payment Vehicle Title Lending*, May 2016. http://files.consumerfinance.gov/f/documents/201605_cfpb_single-payment-vehicle-title-lending.pdf

[4] Consumer Financial Protection Bureau, *Payday loans and deposit advance products: A white paper of initial data findings*, 2013. http://1.usa.gov/1aX9ley

[5] Montezemolo, Susanna, *The State of Lending in America & its Impact on U.S. Households: Car-Title Lending*, Center for Responsible Lending, July 2013. http://www.responsiblelending.org/state-of-lending/reports/7-Car-Title-Loans.pdf

[6] Standaert, Diane, and Delvin Davis, *Payday and Car Title Lenders Drain $8 Billion in Fees Every Year*, Center for Responsible Lending, May 2016 (updated January 2017). http://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/crl_statebystate_fee_drain_may2016_0.pdf

[7] Since Ohio voted for a 28% rate cap in 2008, both payday and car title lenders have exploited loopholes in state law to continue lending, draining an estimated $502 million in fees annually.

[8] Bills currently under consideration in Congress that could undermine our strong state interest rate cap include H.R.3299/S.1642 and H.R.4439, among others.

[9] H.J. Res.122 is a Congressional Review Act resolution to repeal the Consumer Financial Protection Bureau's national payday rule and prevent the Consumer Bureau from regulating payday and car title lenders in the future. Six Congressmembers from North Carolina are co-sponsors of this House resolution: Representatives Ted Budd, Richard Hudson, Patrick McHenry, Robert Pittenger, David Rouzer, and Mark Walker. North Carolina has more co-sponsors on this bill than any other state.

[10] UNC Center for Community Capital, prepared for the NC Commissioner of Banks, *North Carolina Consumers after Payday Lending: Attitudes and Experiences with Credit Options*, Nov 2007. https://communitycapital.unc.edu/files/2007/11/NC_After_Payday.pdf

[11] Howarth, Robin, Delvin Davis, and Sarah Wolff, *Shark-Free Waters: States are Better Off without Payday Lending*, Center for Responsible Lending, August 2016 (updated September 2017). http://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/crl-shark-free-waters-aug2016.pdf

[12] Note that Illinois, Oregon, and Wisconsin were not included in this calculation, as store count numbers were not available for these three states.

[13] *Payday Lending in America: Who Borrows, Where They Borrow, and Why,* Pew Charitable Trusts, July 2012. http://www.pewtrusts.org/~/media/legacy/uploadedfiles/pcs_assets/2012/PewPaydayLendingReportpdf.pdf.

Appendix A: North Carolina Annual Payday and Car Title Loan Fee Savings by County

Fee Savings Rank	NC County	Estimated Payday Savings per County	Estimated Car Title Savings per County	Total Estimated Savings per County
17	Alamance County	$4,052,902	$3,218,005	$7,270,906
63	Alexander County	$929,296	$737,861	$1,667,156
98	Alleghany County	$212,331	$168,591	$380,922
68	Anson County	$856,942	$680,412	$1,537,354
83	Ashe County	$535,800	$425,425	$961,225
88	Avery County	$359,620	$285,539	$645,159
56	Beaufort County	$1,274,505	$1,011,957	$2,286,461
72	Bertie County	$692,881	$550,148	$1,243,028
60	Bladen County	$1,115,273	$885,527	$2,000,800
26	Brunswick County	$2,655,210	$2,108,237	$4,763,447
10	Buncombe County	$5,296,303	$4,205,265	$9,501,569
36	Burke County	$1,887,305	$1,498,521	$3,385,826
12	Cabarrus County	$5,171,660	$4,106,298	$9,277,958
30	Caldwell County	$2,257,109	$1,792,145	$4,049,254
95	Camden County	$246,059	$195,371	$441,430
53	Carteret County	$1,463,939	$1,162,367	$2,626,306
76	Caswell County	$635,187	$504,339	$1,139,526
22	Catawba County	$3,705,437	$2,942,118	$6,647,555
58	Chatham County	$1,195,414	$949,159	$2,144,573
79	Cherokee County	$615,223	$488,487	$1,103,710
85	Chowan County	$407,907	$323,878	$731,785
96	Clay County	$237,293	$188,411	$425,704
25	Cleveland County	$2,746,295	$2,180,559	$4,926,854
39	Columbus County	$1,822,356	$1,446,951	$3,269,308
27	Craven County	$2,572,375	$2,042,466	$4,614,841
4	Cumberland County	$10,734,848	$8,523,470	$19,258,318
81	Currituck County	$594,601	$472,113	$1,066,714
75	Dare County	$637,876	$506,474	$1,144,350
16	Davidson County	$4,337,623	$3,444,073	$7,781,696
67	Davie County	$859,070	$682,102	$1,541,172
44	Duplin County	$1,705,735	$1,354,354	$3,060,090
6	Durham County	$7,345,825	$5,832,585	$13,178,410
38	Edgecombe County	$1,872,178	$1,486,510	$3,358,688
5	Forsyth County	$8,749,227	$6,946,887	$15,696,114

34	Franklin County	$1,966,510	$1,561,409	$3,527,920
8	Gaston County	$6,016,776	$4,777,320	$10,794,096
91	Gates County	$328,840	$261,099	$589,939
97	Graham County	$233,927	$185,738	$419,666
47	Granville County	$1,616,190	$1,283,255	$2,899,444
80	Greene County	$602,187	$478,137	$1,080,324
3	Guilford County	$13,322,720	$10,578,241	$23,900,962
42	Halifax County	$1,751,788	$1,390,920	$3,142,707
19	Harnett County	$3,891,148	$3,089,572	$6,980,720
54	Haywood County	$1,420,821	$1,128,132	$2,548,952
32	Henderson County	$2,007,648	$1,594,073	$3,601,720
70	Hertford County	$798,789	$634,238	$1,433,027
37	Hoke County	$1,873,037	$1,487,192	$3,360,229
99	Hyde County	$143,590	$114,011	$257,601
18	Iredell County	$4,036,736	$3,205,169	$7,241,905
62	Jackson County	$954,189	$757,626	$1,711,816
11	Johnston County	$5,191,188	$4,121,804	$9,312,993
94	Jones County	$262,506	$208,430	$470,936
52	Lee County	$1,468,630	$1,166,093	$2,634,723
43	Lenoir County	$1,711,995	$1,359,324	$3,071,319
33	Lincoln County	$1,973,309	$1,566,808	$3,540,117
65	Macon County	$916,022	$727,322	$1,643,344
66	Madison County	$864,262	$686,224	$1,550,487
77	Martin County	$634,675	$503,932	$1,138,607
74	McDowell County	$650,050	$516,140	$1,166,190
1	Mecklenburg County	$25,656,549	$20,371,302	$46,027,851
92	Mitchell County	$318,306	$252,735	$571,040
71	Montgomery County	$782,000	$620,908	$1,402,908
40	Moore County	$1,766,792	$1,402,833	$3,169,625
24	Nash County	$2,908,407	$2,309,276	$5,217,683
14	New Hanover County	$5,009,141	$3,977,259	$8,986,400
73	Northampton County	$652,718	$518,258	$1,170,976
7	Onslow County	$6,017,448	$4,777,855	$10,795,303
31	Orange County	$2,199,059	$1,746,053	$3,945,112
93	Pamlico County	$284,763	$226,102	$510,865
55	Pasquotank County	$1,288,312	$1,022,920	$2,311,231
50	Pender County	$1,478,082	$1,173,597	$2,651,679
90	Perquimans County	$349,334	$277,371	$626,705
59	Person County	$1,139,424	$904,703	$2,044,127
9	Pitt County	$5,347,549	$4,245,955	$9,593,504
89	Polk County	$355,509	$282,274	$637,784

21	Randolph County	$3,733,368	$2,964,295	$6,697,663
49	Richmond County	$1,495,349	$1,187,307	$2,682,656
15	Robeson County	$4,726,884	$3,753,147	$8,480,031
28	Rockingham County	$2,430,612	$1,929,906	$4,360,518
20	Rowan County	$3,761,679	$2,986,774	$6,748,453
41	Rutherford County	$1,759,726	$1,397,222	$3,156,948
35	Sampson County	$1,910,357	$1,516,824	$3,427,181
57	Scotland County	$1,259,241	$999,838	$2,259,079
46	Stanly County	$1,619,539	$1,285,914	$2,905,452
61	Stokes County	$1,063,851	$844,698	$1,908,548
48	Surry County	$1,592,990	$1,264,834	$2,857,824
84	Swain County	$422,951	$335,823	$758,774
82	Transylvania County	$591,449	$469,611	$1,061,060
100	Tyrrell County	$118,097	$93,769	$211,867
13	Union County	$5,102,864	$4,051,674	$9,154,538
51	Vance County	$1,474,963	$1,171,121	$2,646,083
2	Wake County	$21,374,473	$16,971,334	$38,345,807
78	Warren County	$620,033	$492,306	$1,112,340
87	Washington County	$367,244	$291,592	$658,836
64	Watauga County	$920,686	$731,025	$1,651,711
23	Wayne County	$3,521,077	$2,795,735	$6,316,812
45	Wilkes County	$1,686,343	$1,338,956	$3,025,299
29	Wilson County	$2,380,394	$1,890,033	$4,270,427
69	Yadkin County	$845,515	$671,339	$1,516,853
86	Yancey County	$392,672	$311,782	$704,453
	NORTH CAROLINA	**$255,144,890**	**$202,585,070**	**$457,729,960**

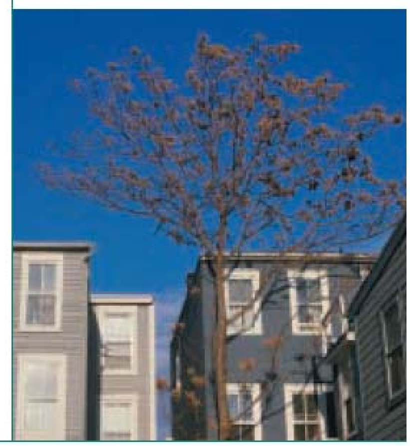
Appendix B: NC County Rankings of Subprime Population Share

Subprime Population % Rank	NC County	% Subprime Population
1	Scotland County	43.7%
2	Robeson County	43.4%
3	Hoke County	43.0%
4	Edgecombe County	43.0%
5	Bertie County	42.7%
6	Halifax County	41.4%
7	Anson County	41.2%
8	Vance County	40.8%
9	Richmond County	40.7%
10	Hertford County	40.5%

11	Bladen County	40.5%
12	Cumberland County	40.2%
13	Northampton County	40.0%
14	Pasquotank County	39.6%
15	Columbus County	39.5%
16	Onslow County	39.4%
17	Warren County	38.1%
18	Nash County	37.9%
19	Franklin County	37.2%
20	Sampson County	37.0%
21	Pitt County	36.9%
22	Washington County	36.9%
23	Lenoir County	36.6%
24	Martin County	36.4%
25	Harnett County	36.4%
26	Swain County	36.1%
27	Wilson County	35.7%
28	Person County	35.5%
29	Duplin County	35.4%
30	Gates County	35.1%
31	Montgomery County	34.9%
32	Tyrrell County	34.9%
33	Greene County	34.8%
34	Wayne County	34.7%
35	Chowan County	34.7%
36	Cleveland County	34.6%
37	McDowell County	34.3%
38	Gaston County	33.9%
39	Caswell County	33.9%
40	Caldwell County	33.9%
41	Granville County	33.5%
42	Graham County	33.5%
43	Johnston County	33.2%
44	Rowan County	32.9%
45	Beaufort County	32.8%
46	Jones County	32.6%
47	Stanly County	32.6%
48	Rockingham County	32.6%
49	Rutherford County	32.4%
50	Davidson County	32.2%
51	Perquimans County	32.1%

52	Randolph County	31.9%
53	Hyde County	31.9%
54	Cabarrus County	31.4%
55	Guilford County	31.3%
56	Alamance County	31.1%
57	Madison County	30.8%
58	Pender County	30.6%
59	Craven County	30.4%
60	Alexander County	30.4%
61	Lee County	30.2%
62	Wilkes County	30.0%
63	Mecklenburg County	29.8%
64	Lincoln County	29.8%
65	Durham County	29.4%
66	Catawba County	29.0%
67	Camden County	28.9%
68	Forsyth County	28.8%
69	Haywood County	28.7%
70	Iredell County	28.6%
71	Stokes County	28.3%
72	Currituck County	28.2%
73	Jackson County	27.7%
74	Yadkin County	27.6%
75	Union County	27.6%
76	New Hanover County	27.4%
77	Yancey County	27.2%
78	Pamlico County	27.2%
79	Surry County	27.0%
80	Cherokee County	27.0%
81	Clay County	26.6%
82	Carteret County	26.0%
83	Burke County	26.0%
84	Mitchell County	25.8%
85	Brunswick County	25.6%
86	Buncombe County	25.3%
87	Avery County	25.1%
88	Davie County	25.0%
89	Wake County	25.0%
90	Macon County	24.9%
91	Ashe County	24.4%
92	Alleghany County	24.0%

93	Moore County	22.6%
94	Dare County	21.7%
95	Transylvania County	21.6%
96	Henderson County	21.5%
97	Polk County	21.4%
98	Watauga County	20.9%
99	Chatham County	20.3%
100	Orange County	19.0%
	NORTH CAROLINA	**30.8%**



Race Matters:
The Concentration of Payday Lenders in African-American Neighborhoods in North Carolina

A research report by the Center for Responsible Lending

Uriah King, Wei Li, Delvin Davis, and Keith Ernst

March 22, 2005

CENTER FOR RESPONSIBLE LENDING

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Executive Summary

This report examines the neighborhood impact of payday lending in North Carolina. Previous research has shown that payday loans, though marketed as short-term emergency credit, in fact trap borrowers in high-cost, revolving debt. Although payday lending was banned by North Carolina in 2001, we have identified 385 payday loan stores that continue to operate openly across the state through affiliation with out-of-state banks in an arrangement known as the rent-a-bank model.

Through a series of empirical analyses, the Center for Responsible Lending finds that North Carolina payday lending storefronts are disproportionately located in African-American neighborhoods.

While the payday lending industry frequently describes its typical customer in detail, discussion of the role of race is noticeably absent. This report helps correct that omission. Our analysis of North Carolina neighborhoods reveals a powerful relationship between the proportion of African-Americans and the concentration of payday lending stores:

- African-American neighborhoods have three times as many stores per capita as white neighborhoods.[1] This disparity increases as the proportion of African-Americans in a neighborhood increases.

- This three-fold disparity remains unchanged even when we control for the neighborhood characteristics of income, homeownership, poverty, unemployment rate, urban location, age, education, share of households with children, and gender.

State and federal policymakers should take steps to end predatory payday lending, as it traps borrowers in a cycle of debt and has a disparate impact on neighborhoods historically disadvantaged by unfair lending practices.

[1] When we sort all NC census tracts by proportion of African-American residents, half of those tracts are at least 16% African-American, and half are less than 16% African-American. In the top half, there are 3 times as many payday stores per capita as in the bottom half.

Background: The High Stakes of Payday Lending

The Payday Loan Product and the Problem of Flipping

Payday loans are small, short-term loans extended at a very high interest rate for immediate cash, typically secured by a borrower's written check, or authorization for automatic withdrawal from the borrower's bank account.[2] They are called "payday loans" because they are marketed as a tool for cash-strapped borrowers to make it to the next paycheck.[3] Payday lending is a rapidly growing, $40 billion per year industry.[4]

To get a loan, a borrower gives a payday lender a postdated check or authorizes a future automatic debit from their bank account and receives cash, minus the lender's fees. On a $300 payday loan, a borrower typically incurs $45 in fees and receives $255 cash. The lender then holds the check until the borrower's next payday, which may be from less than a week to a month later. Annual percentage rates (APR) for payday loans generally start at 391 percent.[5]

Payday loans are typically originated without traditional underwriting and thus disregard debt-to-income standards.[6] While these loans are marketed as meeting emergency needs,[7] few borrowers actually use them in this manner. Our previous research shows that only one percent of payday loans go to one-time emergency users, while 91 percent of the loans go to borrowers who are caught in a cycle of debt (receive five or more loans per year).[8]

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[2] Notably, access to traditional banking services, like checking, are essentially a prerequisite to receiving a payday loan. *See* Jean Ann Fox & Edmund Mierzwinski, *Rent-A-Bank Payday Lending: How Banks Help Payday Lenders Evade State Consumer Protections*, Consumer Federation of America (CFA) and U.S. Public Interest Research Group (U.S. PIRG), (November 2001) at http://uspirg.org/reports/rentabank/Paydayreportnov13.pdf.
[3] Other names for payday loans include deferred presentment, deferred deposit, cash advance and check loans. *See* Jean Ann Fox, *Safe Harbor for Usury: Recent Developments in Payday Lending*, Consumer Federation of America (CFA), (September 1999), at http://www.consumerfed.org/safeharbor.pdf.
[4] Dennis Telzrow & David Burtzlaff, *Industry Report: Payday Loan Industry*, 4 Stephens, Inc., (May 24, 2004).
[5] Jerry L. Robinson & John D. Wheeler, *Update on the Payday Loan Industry: Observations on Recent Industry Developments,* 4 Stephens, Inc., (Sept. 26, 2004). Placing the general cost of payday loans between a $15 and $17 fee per $100 loaned for a period of approximately 14 days amounts to annual percentage rates of 391% and 443% respectively.
[6] This practice, often called asset-based lending or lending without regard to the ability to repay, was cited as an example of a predatory lending practice by the OCC. *See Guidelines for National Banks to Guard Against Predatory and Abusive Lending Practices*, 2 OCC Advisory Letter 2003-2 (Feb. 21, 2003), at http://www.occ.treas.gov/ftp/advisory/2003-2.pdf.
[7] See e.g., Community Financial Services Association of America, Ltd. Memorandum of Law Amicus Curiae, *BankWest v. Baker*, 8 No. 1:04-CV-1028-MHS, (N.D. Ga. 2004).
[8] A recent Washington State Department of Financial Institutions publication that examined the four largest payday lending chains in Washington State found similar results, with only 2% of borrowers receiving one payday loan annually. Notably, this Washington State figure assumes that a payday borrower only goes to one company and does not use other companies' storefronts. See *Payday Lending Report: Statistics and Trends for 2003*, Washington State Department of Financial Institutions (2005), at http://www.dfi.wa.gov/news/DFI_PaydayReport.pdf *; see also* Keith Ernst, John Farris & Uriah King, *Quantifying the Economic Costs of Predatory Payday Lending*, Center for Responsible Lending (2003), at http://www.responsiblelending.org/pdfs/CRLPaydayLendingStudy121803.pdf.

Because this type of loan is due in full on payday, borrowers expect to have money in their account to cover the check. However, many borrowers find that paying back the entire loan on payday would leave them without funds necessary to meet basic living expenses until the next payday, such as electricity, rent and groceries. Borrowers who cannot solve their emergency in two weeks—the vast majority of payday borrowers—are flipped into the cycle of loan extensions in the form of renewals[9] or back-to-back transactions.[10] To avoid defaulting on the $300 loan, they must pay the $45 fee every two weeks.

In this way, what started as a one-time loan becomes revolving, extremely high-cost debt that traps borrowers, rather than being beneficial credit that helps borrowers resolve financial emergencies. We have previously estimated that this debt trap of repeated transactions costs five million U.S. borrowers over $3.4 billion each year.[11] Given the industry's rapid growth, the cost of predatory payday lending continues to increase.[12]

The Legal Framework of Payday Lending in North Carolina

Before 1997, payday lending was illegal in North Carolina under both North Carolina's Consumer Finance Act and criminal law.[13] In 1997, the NC General Assembly enacted legislation authorizing check-cashing firms to provide short-term cash advances to customers, as a four-year experiment with payday lending. This law expired in August 2001 and was not renewed, again making payday loans illegal. However, payday lending did not disappear, even though this was the intent of the General Assembly.

After the payday authorization expired, some smaller companies sold out to large chains, reverted to their original check-cashing business, or went out of business. Other small operators continue to provide loans in violation of state law, at times providing payday loans under a different guise.[14] For example, one store began offering a $300 rebate for Internet access,

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[9] With a renewal or rollover, the borrower who cannot repay the loan at the end of two weeks may pay a fee (typically equal to the original $15 per $100 fee) to extend the loan term (generally the renewal has the same term as the original loan). The borrower still owes the original amount advanced, however. Rollovers can continue for months and years, with the borrower paying fees without the payday lender advancing the borrower any additional cash. In a short period of time, a customer who rolls over a single loan repeatedly will pay the lender fees that total more than the amount the customer originally received, and will still owe the original amount borrowed.

[10] In a "back-to-back" transaction, the borrower ostensibly pays off the first loan, but must immediately borrow again to meet financial needs until his or her next payday. To repay the first loan, the borrower either lets the lender cash the original post-dated check or pays the lender cash in an amount equal to the original loan amount, in which case the lender does not cash the borrower's original check. The borrower then takes out another payday loan immediately thereafter for a fee equal to the fee charged for the original loan. The cost to the borrower is the same as the cost of a rollover.

[11] See Keith Ernst, John Farris & Uriah King, *Quantifying the Economic Costs of Predatory Payday Lending*, Center for Responsible Lending (2003), at http://www.responsiblelending.org/pdfs/CRLPaydayLendingStudy121803.pdf

[12] The market has grown 60% to $40 billion since the previous calculation. See *Telzrow*, footnote 4. Using the methodology of our earlier research, the total cost of predatory lending now exceeds $5 billion annually.

[13] *NC AG 1992 opinion*, 60 N.C.A.G. 86 (1992).

[14] Some institutions have sought to evade North Carolina's usury law by describing the transaction as something other than a loan, such as a catalog sale or rental of Internet access. This report does not include this type of subterfuge loan shop in any data analyzed. North Carolina has taken action against some of these subterfuge loan shops. See *AG Cooper Shuts Down Phony Rebate Payday Loan Scheme*, North Carolina Attorney General press release (June 8, 2004) at http://www.ncdoj.com/DocumentStreamerClient?directory=PressReleases/&file=American%20funding.pdf

charging $15 every two weeks for a service that was rarely used and offered simply to disguise the payday loan.[15]

In addition, large chains like Advance America, Check 'n Go, and Check Into Cash continue to make loans by affiliating with out-of-state banks, claiming they are therefore exempt from state law.[16] In reality, however, these arrangements are structured so that the bank has little meaningful participation in the loan-making process, and little economic interest in the payday loans themselves. These one-sided relationships are known as the agent-assisted model, or more commonly, the rent-a-bank model.

Currently, the FDIC is the only federal regulator that permits its member banks to engage in rent-a-bank partnerships with payday lenders. The Office of the Comptroller of the Currency, which regulates national banks, the Office of Thrift Supervision, which regulates federal thrifts, and the Federal Reserve Board, which regulates member state-chartered banks, have all disallowed the practice for the banks they supervise.

The legal issues surrounding the rent-a-bank practice are unresolved. In 2002, the North Carolina Attorney General and North Carolina Commissioner of Banks sued Ace Cash Express for continuing to make payday loans in violation of North Carolina law. Later that year, Ace agreed to stop its payday lending activities and pay civil penalties of $325,000.[17]

More recently, a group of borrowers has filed suit against national payday lending chains, asserting that they are violating North Carolina's usury statute.[18] In addition, a public investigation into the rent-a-bank arrangements of Advance America, the largest payday lender in the state, has been launched by the North Carolina Commissioner of Banks and the state's Attorney General.[19] The Office of the Commissioner of Banks recently announced that it will hold a public hearing on April 19, 2005, "to determine whether the company has violated North Carolina's consumer finance and check casher laws and, if so, to assess or seek appropriate remedies under such laws."[20]

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[15] Jean Ann Fox, *Unsafe and Unsound: Payday Lenders Hide Behind FDIC Bank Charters to Peddle Usury*, 7-10 Consumer Federation of America, (Mar. 30, 2004), at http://www.consumerfed.org/pdlrentabankreport.pdf

[16] Fourteen states have laws that effectively prohibit payday loans through means such as civil and criminal usury caps, and several other states have significant restrictions on payday lending. To circumvent these restrictions, non-bank payday lenders partner with out-of-state banks to "export" certain loan terms from the bank's home state that are otherwise prohibited by the laws of the state where the borrower lives and/or the payday lender is located.

[17] *Attorney General asks Judge to Stop Illegal Payday Lending Scheme*, North Carolina Attorney General press release (Jan. 14, 2002), at http://www.jus.state.nc.us/in/press/01142002.htm.

[18] *Hager v. Check into Cash of North Carolina, Inc.*, No. 04-CVS-2859 (Super. Ct. N.C. filed July 27, 2004), at http://www.tlpj.org/briefs/check%20into%20cash%20complaint.pdf; *Kucan v. Advance America*, No. 04-CVS-2860 (Super. Ct. N.C. filed July 27, 2004), at http://www.tlpj.org/briefs/advance%20america%20complaint.pdf; *McQuillan v. Check 'N Go of North Carolina, Inc.* No. 04-CVS-2858 (Super. Ct. N.C. filed July 27, 2004), available at http://www.tlpj.org/briefs/check%20no%20go%20complaint.pdf.

[19] *AG Cooper launches investigation of state's largest payday lender*, North Carolina Attorney General press release (Aug. 26, 2004), at www.ncdoj.com/DocumentStreamerClient?directory=PressReleases/&file=Advance%20America.pdf; *Statement of Joseph A. Smith, Commissioner of Banks, on Payday Lending Investigation*, North Carolina Department of Commerce press release (Aug. 24, 2004), at http://www.nccob.org/NR/rdonlyres/8363628A-13AD-45D4-BD8E-CF57BB30383F/0/pay_day_lending.pdf.

[20] *NC Commissioner of Banks to Hold Public Hearing*, North Carolina Banking Commission news release, (February 2, 2005) at http://www.nccob.org/NR/rdonlyres/9B792DB5-7474-4722-81DC-745579CA1A6F/0/OCOBpublicnotice.pdf

In addition, the FDIC has recently amended its payday loan guidelines in an effort to meaningfully address the problem of the debt trap.[21] The guidelines call on banks to develop procedures to ensure that they do not make payday loans to customers who have had payday loans outstanding from any lender for a total of more than three months in the previous twelve months. Assuming a typical payday loan of two weeks, the FDIC guidelines would permit six transactions.[22] Our previous research suggests that just 16% of payday loans are made to borrowers who had six or fewer loans outstanding in a twelve-month period.[23] Consequently, this guidance, if effectively enforced, should lead to a substantial reduction of rent-a-bank payday lending in North Carolina.

Recent Analyses of the Location of Fringe Banking Services

A number of recent studies have explored the concentration of payday storefronts and other fringe banking services in North Carolina. For example, Kolb observes that in the Charlotte market, even in areas where mainstream banks have not withdrawn, payday lenders and check cashers favored zip codes with certain income levels.[24] The study found five outlets per 10,000 households in neighborhoods in which the median income was between $20,000 and $40,000, as compared to 3.4 outlets per 10,000 households in zip codes with less than $20,000 median income. Kolb also directly links the business of check cashing to race and ethnicity, finding that there were at least four times as many check cashers in zip codes that were 70 percent or greater minority as in zip codes that were less than 10 percent minority.

These findings are generally in line with work performed by Graves, a professor at California State University, Northridge. He develops a model based on population within one-quarter mile of a store's location and finds that the "payday lending industry is targeting neighborhoods with a higher percentage of poor and minority residents."[25]

In addition, University of North Carolina researchers Stegman and Faris report on a survey that finds that lower-income African-Americans were more likely than lower-income whites to receive payday loans in North Carolina in 2001.[26]

In the most recent research, Burkey and Simkins, professors at North Carolina A&T State University, look directly at the link between payday lending location and race. Their study examines factors affecting the location of payday lending storefronts within North Carolina and concludes that, after controlling for a number of variables, race is a powerful predictor of the locations of payday lenders. Using a zip code-based model, they find that, all else being equal, "a

[21] *Guidelines for Payday Lending*, Federal Deposit Insurance Corporation (FDIC), (March 2, 2005), at http://www.fdic.gov/news/news/financial/2005/fil1405a.html
[22] *See* FDIC, *footnote 21*.
[23] *See* Ernst, *footnote 11*.
[24] Anthony Kolb, *Spatial Analysis of Bank and Check Cashing Locations in Charlotte, North Carolina*, unpublished draft, University of North Carolina (December 30, 1999) (on file with authors).
[25] Steven M. Graves, *Landscapes of Predation, Landscapes of Neglect: A Location Analysis of Payday Lenders and Banks*, The Professional Geographer 55(3) at p312 (2003).
[26] Michael Stegman and Robert Faris, *Payday Lending: A Business Model that Encourages Chronic Borrowing*, 8 Economic Development Quarterly, Vol. 17, No. 1 at 18 (February 2003).

one percentage point increase in the population that is black will… increase the number of payday lenders by one percent." [27]

[27] Mark L. Burkey & Scott P. Simkins, "Factors Affecting the Location of Payday Lending and Traditional Banking Services In North Carolina", ***Review of Regional Studies***, Fall 2004 Vol. 34 no. 2, pp. 191-205.

Discussion of Findings: The Impact of Payday Lending on North Carolina Neighborhoods

In this study, we sought to evaluate whether rent-a-bank payday lending had a disproportionate impact on minority families in North Carolina based on store location. We collected data identifying the locations of payday stores that are operating under the rent-a-bank model. Using this information, we calculated the concentration of payday lending stores statewide in tracts with varying racial and ethnic compositions. For more information on our data collection and the dataset itself, see sidebar and Appendix 1.

We took the analysis further through negative binomial bivariate and multivariate regression modeling. The multivariate models were particularly helpful since they allowed us to control for factors that might explain the location of payday lending storefronts on the basis of variables other than race or ethnicity.

A Framework for Analysis

Because the relationship between minority composition and payday lending storefronts might not be linear (for example, increasing concentrations of minority residents might find exponentially greater—or fewer—numbers of payday lending stores per capita), we constructed a model that would allow us to make meaningful comparisons between areas with different proportions of minority residents.

We sorted all North Carolina census tracts by the racial or ethnic variable of interest and divided them into buckets. For example, the highest 20 percent of census tracts (top fifth) as sorted by African-American population were a minimum of 41.9% African-American, and the lowest 20 percent (bottom fifth) were no more than 3.9% African-American. The proportion of African-Americans in these buckets is shown in Table 1 below.

This relative measurement allows us to explore in-depth the association between minority population and payday lender concentration. Moreover, since the choice of location by a payday lender would presumably be based on relative options, a relative measurement of stores' locations better serves our purpose.

About the Data

The last available official dataset of licensed payday lenders from the North Carolina Commissioner of Banks is based on year 2000 data. We collected our own data to get an understanding of the current distribution of payday lending storefronts.

Since payday lending is prohibited under state law, payday lenders use the rent-a-bank model in order to appear to be operating legally. Accordingly, we first assembled a list of payday lenders known to engage in such schemes. Next, we submitted these names to a phone database to obtain 2,982 telephone numbers and shop addresses in 15 states. Finally, we randomly selected 200 storefronts for follow-up calls to verify name, address, and payday loan product availability.

This approach ultimately yielded the addresses of 385 payday loan storefronts openly operating in North Carolina. This dataset necessarily omits payday lenders engaging in the disguised payday loan transactions described in the section, "The Legal Framework of Payday Lending in North Carolina."

While the list of 385 store locations may not be comprehensive, we have no reason to believe that our methods introduce distortions along racial or ethnic lines. Moreover, it is more than double the 170 stores reported by Stephens, Inc. to be operating in North Carolina. (See Telzrow, footnote 4 at 5.) Still, to the extent that our dataset is a sample as opposed to a complete census, our statistical methods allow us to extrapolate findings.

Unfortunately, with a median Hispanic census tract population of just 2.9% and a highly significant correlation between African-American and Hispanic populations in North Carolina census tracts,[28] we find it difficult to clearly interpret the meaning of the results of our analysis for Hispanic populations. For interested readers, however, the full results of our Hispanic models are included in Appendix 1.

Other studies have used a variety of geographic frames through which to evaluate the neighborhoods surrounding payday lenders, ranging from zip codes to collections of census block groups (see *Recent Analyses* section above). We chose census tracts as an appropriate scale since a recent Morgan Stanley report concluded that payday lending stores may serve up to 2,000 households—a figure that harmonizes well with the 2,455 households per census tract with a payday lending store in our dataset.[29]

T

able 1: African-American (AA) Concentration in NC Census Tracts

Rank of Census Tracts by Proportion of African-Americans (AA)	Number of Census Tracts	AA Pop. / Total Pop.	Average AA Concentration	Average White Concentration
Highest 20% (top fifth)	311	Min 41.9%	64.7%	29.0%
Lowest 20% (bottom fifth)	311	Max 3.9%	1.5%	94.8%
Highest 30%	466	Min 30.0%	55.1%	38.0%
Lowest 30%	466	Max 6.7%	2.8%	93.1%
Highest 40%	622	Min 22.4%	47.8%	45.1%
Lowest 40%	622	Max 10.9%	4.3%	91.0%
Highest 50% (above median)	777	Min 16.0%	42.1%	50.8%
Lowest 50% (below median)	777	Max 15.9%	6.1%	88.8%

Descriptive Analysis

The calculations discussed in this section are based on the total number of payday lending stores statewide divided by the total population in tracts statewide; the next section discusses models set at the census tract level. When we compared census tracts by concentration of African-Americans, we found that the concentration of payday storefronts in North Carolina is substantially greater in neighborhoods with higher proportions of African-Americans.

Half of all North Carolina census tracts are at least 16% African-American, and half are less than 16% African-American. (See Table 1.) In the top half, we found a payday storefront density of 7.3 stores per 100,000 residents, while for the bottom half, we found a density of 2.5 stores per 100,000 residents. (See Figure 1.) This gives us a 3-to-1 ratio.

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[28] The Pearson correlation coefficient between African-American and Hispanic concentration in a census tract is 0.33, and it is highly significant at a 99.9% confidence level, which suggests that Hispanics tend to live in the same areas as African-Americans. This proximity between African-Americans and Hispanics is most likely driving the patterns revealed by our Hispanic models.

[29] *Advance America: Initiating with an Underweight-V Rating*, Morgan Stanley Equity Research, 25 (January 25, 2005).

The disparity increases as the proportion of African-American residents in a neighborhood increases. For example, in the 20 percent of neighborhoods across the state with the highest African-American concentration, we found a payday storefront density of 7.5 stores per 100,000 residents, while for the lowest twenty percent of African-American neighborhoods, the density of storefronts was only 1.6 stores per 100,000 residents. This gives us the ratio of 5-to-1.

Bivariate Analysis

The descriptive measurements discussed above are based on the statewide sum total number of payday stores in census tracts meeting the specific description, divided by the total population of those same tracts. In a sense, those figures provide us with state averages. When we change the frame of measurement directly to the census tract level by performing a bivariate regression, the results of which can be thought of as census tract averages, a consistent pattern emerges. (See Table 2.)

Table 2: North Carolina: Payday and Race Bivariate (Uncontrolled) Results

Rank of Census Tracts by Proportion of African-Americans	Ratio of payday stores
Highest 20% vs. Lowest 20%	5.8 to 1
Highest 30% vs. Lowest 30%	3.8 to 1
Highest 40% vs. Lowest 40%	3.8 to 1
Highest 50% vs. Lowest 50%	3.2 to 1

The top-to-bottom 20% comparison yields 5.8 times as many stores per capita on average in heavily African-American census tracts as compared with census tracts with low concentrations of African-Americans. Comparing the top half of census tracts to the bottom half, we find an average disparity of 3.2 times as many payday lending storefronts per capita.

All of the disparities in Table 2 are statistically significant at a 95% confidence level.

Figure 1: Concentration of payday storefronts, by concentration of African-Americans

See Appendix 1, Table A5 for complete data

Multivariate Analysis

Payday lenders have asserted that the location of their stores is based on market needs. In industry publications, they have typically described their customer base as employed checking account holders with annual incomes between $25,000 and $50,000, relatively young (with perhaps two-thirds under the age of 45), having high-school diplomas or some college education, disproportionately women and renters, and more likely to have children in the home.[30]

[30] Gregory Elliehausen & Edward C. Lawrence, *Payday Advance Credit in America: An Analysis of Consumer Demand*, Monograph 35, Credit Research Center (April 2001); Jerry L. Robinson & John D. Wheeler, *Update on*

These factors each have some plausible but unproven basis for explaining the appeal of payday loans. Borrowers with extremely low incomes might be expected to have less capacity to deal with short-term fiscal needs, families with very high incomes likely have alternatives to expensive payday loans, and relatively young families may have less accumulated savings.

Educational achievement may serve either as a proxy for stable employment or to having a checking account, which is a precondition to receiving a payday loan. A household with children may be more likely to encounter unbudgeted fiscal needs than a similarly situated household comprised solely of adults. Renters may be thought to have less wealth to draw on when encountering a fiscal bump. And finally, women may be uniquely disadvantaged by divorce and other events that tend to give rise to short-term economic needs.

Since many of these descriptions might be correlated with race in ways that explain the disparities we observe in the descriptive and bivariate context, we designed multivariate regression models to evaluate whether race would continue to be a significant factor after controlling for these alternative explanatory variables.

Specifically, our multivariate regression models control for census tract median family income, portion of families in poverty, proportion of homeowners, unemployment rate, ratio of younger (aged 20-44) adults to older (aged 45+) adults, share of adults over 25 with a high school education, gender, proportion of households with children, and whether the neighborhood is in an urban or rural area. The last variable was included because one might expect the concentration of population in urban areas to be attractive to any retail operation, including payday lenders.

Data on creditworthiness is not available in the context of this analysis. Though inclusion of that variable would allow a more direct control measuring the availability of alternatives to payday loans for a particular neighborhood, our controlling for income and homeownership at a census tract level serves a similar purpose.

Similarly, while data on commercial zoning in census tracts across North Carolina are not readily available, we believe that by including income and our other control variables we have sufficiently controlled for the effects of this unobserved variable. After all, we find it unlikely that low-income African-Americans are significantly more likely to live in census tracts with a disproportionate share of commercial zoning than low-income whites, especially once our other variables that describe education, urban status, homeownership rates, etc. are controlled.

As described below, we find that the concentration of payday loan storefronts is significantly greater in African-American neighborhoods than in white neighborhoods, even when controlling for all of these other variables.

Multivariate Results for Race

As shown in Table 3, after controlling for the effects of income and eight other variables, we find that the highest 20% of African-American neighborhoods had 4.1 times as many storefronts per capita compared to the lowest 20%, and the highest-to-lowest 50% had a ratio of 2.9-to-1. Both

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the Payday Loan Industry: Observations on Recent Industry Developments, Industry Article, Stephens Inc. (Sep. 26, 2003).

findings are highly statistically significant at a 95% confidence level, as are the findings in our other two regression models used to compare top-to-bottom 30% and 40% buckets. For full results for all four regression models, see Appendix 1.

The pattern in the relationship between race and payday lending store concentrations is strong and consistent in our multivariate models. The concentration of payday lending stores increases uniformly as the concentration of African-Americans increases.

The inclusion of nine control variables that purportedly describe the payday lending customer base made surprisingly little difference in our model. Without the control variables, we observed from 3.2 to 5.8 times as many payday lending stores per capita in higher African-American areas compared to areas with lower concentrations of African-Americans. After we included these nine control variables, the range changed only marginally in our models (2.9 to 4.1).

These findings are in-line with the findings of the two other researchers who have examined the location of payday lending stores. Kolb finds four times as many check cashing stores in 70% minority neighborhoods as in 10% minority neighborhoods. Our most analogous comparison is between neighborhoods that are a minimum of 42% African-American and those that are a maximum of 4% African-American. In that case, our multivariate analysis yields a disparity of 4.1. Comparisons to Burkey and Simkins work is complicated by their choice to model race as a continuous independent variable. However, our general findings accord with their conclusion, shared by Graves, that payday lending storefronts are more prevalent in African-American neighborhoods.

Table 3: North Carolina: Payday and Race Multivariate (Controlled) Results

Rank of Census Tracts by Proportion of African-Americans	Ratio of payday stores
Highest 20% vs. Lowest 20%	4.1 to 1
Highest 30% vs. Lowest 30%	3.7 to 1
Highest 40% vs. Lowest 40%	3.2 to 1
Highest 50% vs. Lowest 50%	2.9 to 1

To further explore these findings, we developed maps of every North Carolina metropolitan statistical area (MSA). For a complete set of maps, see Appendix 2. Below are maps of Charlotte and Fayetteville, which are particularly illustrative of the findings.

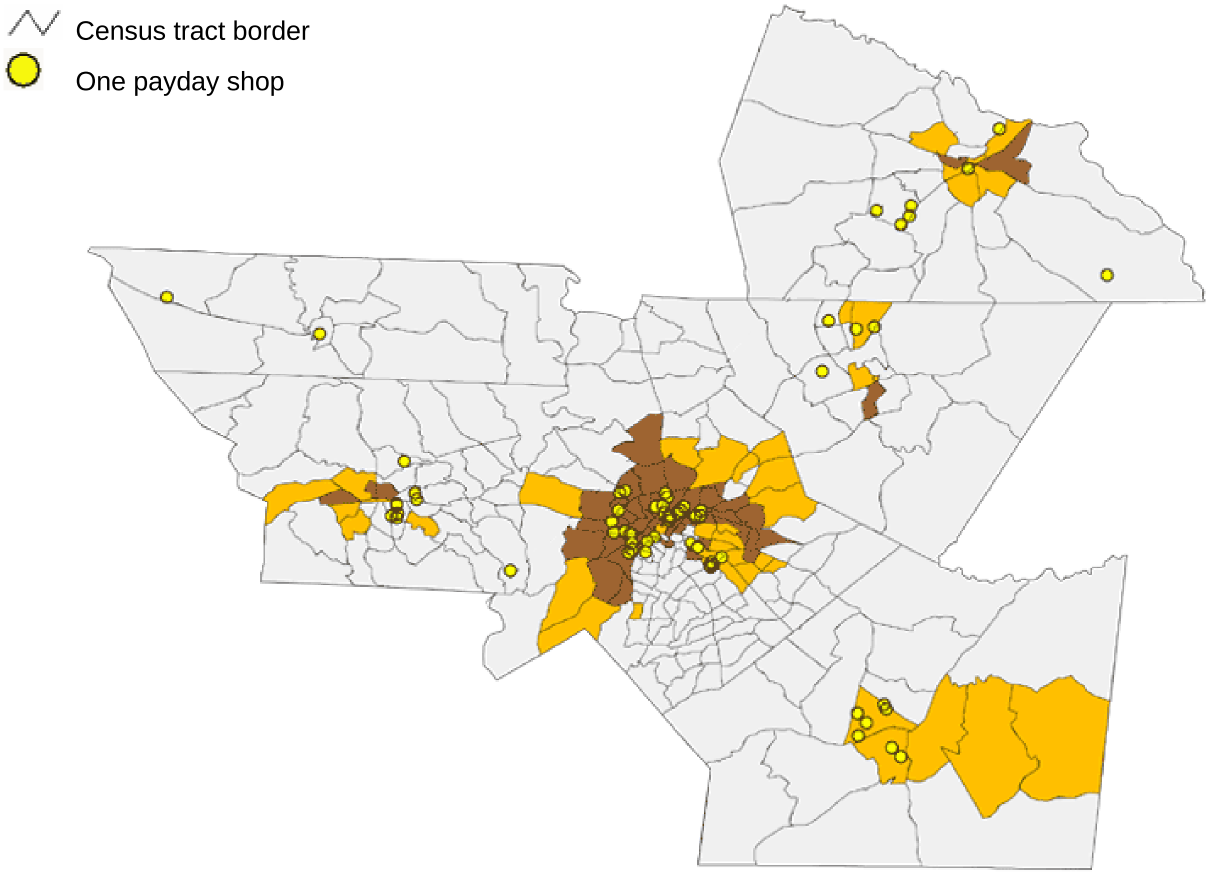
The Charlotte map (Figure 2) shows a striking grouping of rent-a-bank payday lending stores in African-American neighborhoods. The shaded areas represent tracts in the top 20% and the top 21-40% of African-American neighborhoods statewide (darker and lighter shading, respectively) and the dots represent payday lending stores. Of the payday lending stores in the MSA, 28 of 63 stores are located in the top 20% tracts.

Figure 2: Charlotte MSA, NC Payday Shop Concentrations

SOURCE: 2000 U.S. Census, 2004 Online address directories

Proportion of African-American (AA) Residents	% AA	% Hispanic	Shops/ 100k Pop.	# Payday Shops
Top 20% Tracts	63.6	9.5	13.2	28

Top 21-40% Tracts	28.4	9.8	6.3	15
Lowest 60% Tracts	8	3.4	2.3	20



In Fayetteville (Figure 3), two-thirds of the rent-a-bank payday lending stores are located in the top 20% African-American tracts. In addition, a substantial number of stores are clustered in census tracts northwest of downtown, near the U.S. Army Base, Fort Bragg. This map may illustrate the larger trend toward disproportionate numbers of military personnel receiving payday loans, as recently reported by the New York Times.[31]

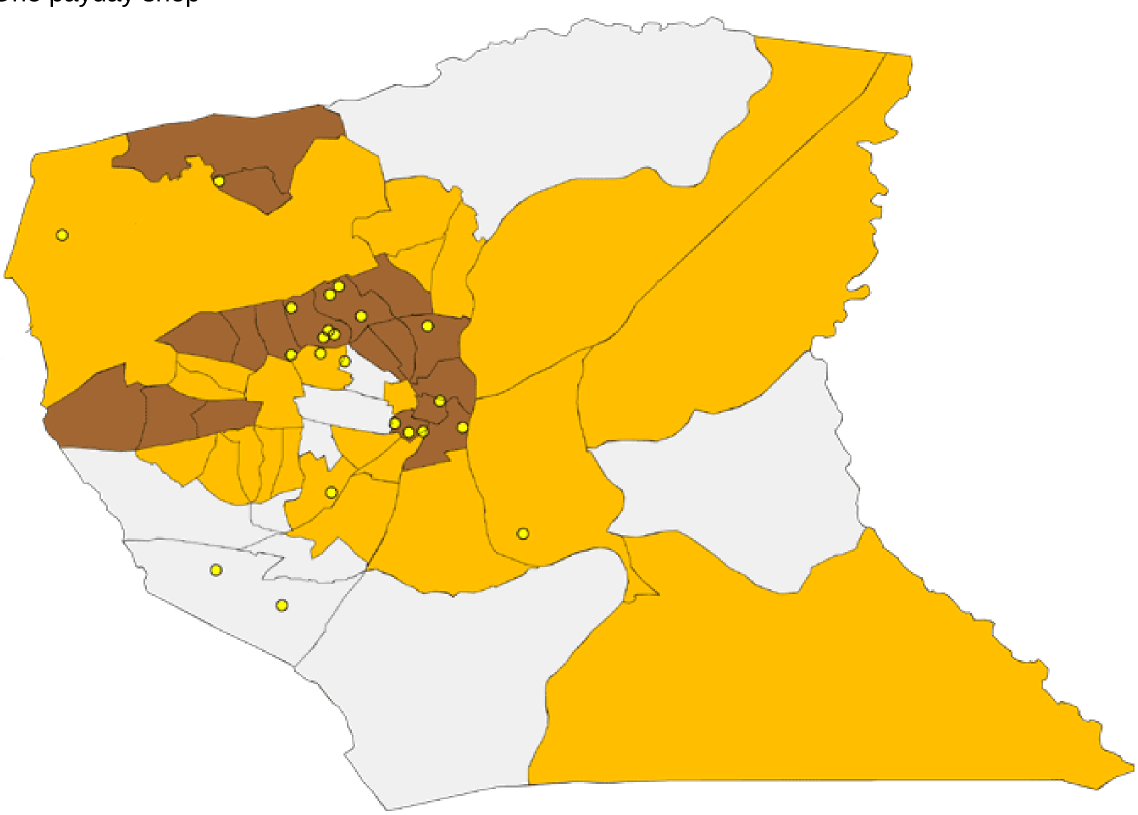
Figure 3: Fayetteville MSA, NC Payday Shop Concentrations

SOURCE: 2000 U.S. Census, 2004 Online address directories

Proportion of African-American (AA) Residents	% AA	% Hispanic	Shops/ 100k Pop.	# Payday Shops
Top 20% Tracts	56.1	7.0	16.9	15
Top 21-40% Tracts	29.0	7.8	2.7	4
Lowest 60% Tracts	17.3	4.3	4.7	3

Census tract border

One payday shop



Other Variables

[31] Diana Henriques, *Lenders at the Gate; Debtors in the Barracks*, New York Times (December 7, 2004). Given research by Graves and anecdotal information on the prevalence of subterfuge payday loan stores around military bases, we believe additional research is needed to examine the impact of payday lending on families living near military bases.

Of the control factors we analyzed, census tracts in urban settings have a higher concentration of payday storefronts than those in rural settings, with significant findings across all four regression models. A change from a rural to an urban setting in our top-to-bottom 50% model would roughly double the number of stores expected per capita (2.2 times).

Homeownership was significant or marginally significant in all four of our models, and inversely associated with payday lending store prevalence. For a sense of scale, our top-to-bottom 50% model suggests that a 20 percentage point decrease in homeownership would lead to almost twice as many (1.9 times) payday lending stores per capita. This is in line with industry descriptions of the market.

Income was significant or marginally significant in three of four models, with higher incomes associated with lower concentrations of payday lending stores. For example, for the top-to-bottom 50% comparison, the results suggest that a drop of $20,000 in census tract median income will result in a doubling (2.0 times) of the number of payday lending stores per capita, all else being equal. This suggests, at the least, that high-income neighborhoods should be expected to have relatively few stores. However, our models failed to produce significant findings for proportion of a tract below poverty, making it difficult to understand the lower bound for market incomes.

Finally, the proportion of households with children was significant in three of our four models; however, the result was the opposite of what might be expected. Our models suggest that tracts with higher proportions of households with children should be expected to have lower concentrations of payday lending stores. In fact, our top-to-bottom 50% model predicts that a ten percentage point increase in the proportion of households with children will cut the concentration of payday lending stores by two-thirds (0.68 times). The remaining factors (unemployment, poverty, age, education, and gender) were generally insignificant in our models.

Conclusion: Fair Lending Implications

The results of this CRL analysis clearly indicate that North Carolina rent-a-bank payday lenders are disproportionately located in African-American neighborhoods. The concentration of payday storefronts in North Carolina is three times greater in African-American neighborhoods than in white neighborhoods. This disparity increases as the proportion of African-Americans in a neighborhood increases.

The three-fold disparity remains when we control for income, homeownership, poverty, unemployment rate, urban location, age, education, share of households with children, and gender—variables that the payday lending industry asserts as key demographics of its customer base. Our findings show that race matters, even when we control for income and these other factors.

These findings raise troubling questions about whether these payday lenders are in compliance with federal and state fair lending laws. The Equal Credit Opportunity Act protects minority communities from discriminatory practices in the credit market. Predatory lending in protected communities may constitute discrimination—not because it excludes minorities, but because it targets and exploits them by offering loans with abusive terms and conditions.[32] Since North Carolina has prohibited payday loans, an implicit recognition that the product is abusive, our research suggests that some payday lenders operating in North Carolina may be violating anti-discrimination laws.

Further research is needed to determine whether the disparate impact found here in North Carolina also occurs in other states, especially those where payday lenders have partnered with banks in an attempt to evade the state's legal restrictions on payday lending.

[32] Recent court opinions have affirmed that specifically targeting and exploiting minority markets does constitute a violation of the Fair Housing Act. See *Hargraves, et al. v. Capital City Mortgage Corporation and Thomas K. Nash* [Civ. No. 98-1021 (JHG/AK) - United States District Court for the District of Columbia] and *Honorable, et al. v. Easy Life Real Estate System, et al.* [Civ. No. 97-C-6009: United States District Court for the Northern District of Illinois, Eastern Division].

Appendix 1: Methods and Supplementary Results

Methods

Data

To assemble a list of payday stores operating in association with banks, we first identified payday lending companies engaged in such schemes based on company websites, newspaper articles, company advertisements, and advocates' reports. Next, we submitted this consolidated roster of companies to an electronic directory maintained by the Internet company switchboard.com to obtain street addresses and telephone numbers. We then called a random sample of 200 of the stores to verify that our list was accurate. Finally, stores located outside North Carolina were deleted from the dataset. These efforts resulted in a dataset of 385 total payday storefronts in 185 of 1,554 North Carolina census tracts. Among these tracts, 96 census tracts have one store each, 30 have two stores each, 27 have three stores each, 19 have four each, and 13 have more than four stores each.

Other studies have used a variety of geographic frames through which to evaluate the neighborhoods surrounding payday lenders, ranging from zip codes to collections of census block groups (see *Recent Analyses* section above). We chose census tracts as an appropriate scale since a recent Morgan Stanley report concluded that payday lending stores may serve up to 2,000 households—a figure that harmonizes well with the 2,455 households per census tract with a payday lending store in our dataset.[33]

Information about the population, minority composition, family median income, portion of population below poverty, homeownership, location in an urban or rural area, portion of households with children, portion of adults (25 years old or older) having a high-school education, younger (20 to 44 years old) to older (>44 years old) adult ratio, and gender for each census tract was obtained from the Census 2000 SF3 database and merged into the dataset.

Race and ethnicity are defined in our methodology according to the definition used by the U.S. Census. The Census defines ethnicity as "Hispanic" or "Not Hispanic", and race as a subset of ethnicity. The total population would be the sum of the Hispanic and Not Hispanic ethnicities. Within either ethnicity category, a person may additionally identify themselves as one or more of the following races: White; Black or African-American; American Indian or Alaskan Native Asian; Native Hawaiian or Pacific Islander; Other; Two or more races.

Theoretically, one can be classified as both African-American *and* Hispanic, or Asian and Hispanic, etc. For the purposes of this study, any individual identified in the Hispanic ethnicity, regardless of race, was included in the Hispanic population count. Therefore African-Americans in the Hispanic ethnicity were counted as Hispanic, not African-American, in order to rule out

[33] *Advance America: Initiating with an Underweight-V Rating*, Morgan Stanley Equity Research, 25 (January 25, 2005).

counting the same residents more than once. All populations other than Hispanic were counted from the "Not Hispanic" ethnicity.

Variables

For census tract i, n_i is the total population, y_i is the number of payday storefronts, x_{1i} is the median income, x_{2i}, x_{3i}, x_{4i}, x_{5i}, x_{6i}, and x_{7i} are the portion of population below poverty line, unemployed, homeowners, African-Americans, Hispanics, and females, respectively, x_{8i} is the portion of adults having a high school diploma, x_{9i} is the portion of households with children, x_{10i} is the ratio of younger (20 to 44 years old) to older (>44 years old) resident, and x_{11i} is a dummy variable defined by

$$x_{11i} = \begin{cases} 1, \text{ if } i \text{ in a MSA} \\ 0, \text{else} \end{cases} \tag{1}$$

Let M be the total number of census tracts in our dataset, among which, there are m census tracts whose African-American concentration is equal or less than Q_j, where Q_j is the j^{th} percentile for the African-American concentration for our dataset. For j=20, 30, 40, and 50,[34] we define $A_{i,j}$ as a dummy variable by

$$A_{i,j} = \begin{cases} 0, \text{ if } x_{5i} < Q_j \\ 1, \text{ if } x_{5i} > Q_k, \text{ where } k = 100\text{-}j \end{cases} \tag{2}$$

For example, when j=20, $A_{i,20}=0$ if and only if the African-American concentration of the i^{th} census tract is less than the 20^{th} percentile of the dataset. $A_{i,20}=1$ if and only if the African-American concentration of the i^{th} census tract is greater than the 80^{th} percentile of the dataset.

Similarly, if P_j is the j^{th} percentile for the Hispanic concentration for our dataset, we define $H_{i,j}$ as a dummy variable by

$$H_{i,j} = \begin{cases} 0, \text{ if } x_{6i} < P_j \\ 1, \text{ if } x_{6i} > P_k, \text{ where } k = 100\text{-}j \end{cases} \tag{3}$$

Concluding that the relationship between the concentration of payday storefronts and the concentration of minorities is likely nonlinear and difficult to model with a known function, we use dummy variables rather than directly using the continuous variable of minority concentrations. These dummy variables allow us to distinguish census tracts located at the two

[34] The rationale discussed by Tabachnik & Fidell (1996) underlies our decision to choose 20% as the starting cutting point for the buckets. Given the skewed distribution of the dependent variable and high correlation between independent variables, the small sample size (about 310 census tracts) for the lowest and highest 10% buckets is not large enough for a revealing multivariate negative binomial regression. On the other hand, the sample size (about 630 census tracts) for the 20% lowest and highest buckets is reasonably large enough for a revealing multivariate negative binomial regression in this context. Tabachnik, B. G., & Fidell, L. S. (1996). *Using Multivariate Statistics* (3rd ed.). New York: HarperCollins College Publishers.

ends of a spectrum of the African-American or Hispanic concentrations. Consequently, this approach allows us to contrast the concentration of payday storefronts of census tracts in these two ends. Moreover, since the choice of location by a payday lender would presumably be based on relative options, a relative measurement of stores' locations better serves our purpose.

Descriptive Analysis

For African-Americans,

$$C^{\mathrm{AA}}_{\mathrm{lowest},\,j} = \frac{100{,}000 \times \sum_{i=1}^{M} (1 - A_{i,j}) \times y_i}{\sum_{i=1}^{M} (1 - A_{i,j}) \times n_i} \tag{4}$$

$$C^{\mathrm{AA}}_{\mathrm{highest},\,j} = \frac{100{,}000 \times \sum_{i=1}^{M} A_{i,j} \times y_i}{\sum_{i=1}^{M} A_{i,j} \times n_i} \tag{5}$$

For Hispanics,

$$C^{\mathrm{HA}}_{\mathrm{lowest},\,j} = \frac{100{,}000 \times \sum_{i=1}^{M} (1 - H_{i,j}) \times y_i}{\sum_{i=1}^{M} (1 - H_{i,j}) \times n_i} \tag{6}$$

$$C^{\mathrm{HA}}_{\mathrm{highest},\,j} = \frac{100{,}000 \times \sum_{i=1}^{M} H_{i,j} \times y_i}{\sum_{i=1}^{M} H_{i,j} \times n_i} \tag{7}$$

We use the above four parameters to describe the overall concentration of payday storefronts for census tracts less than the j^{th} percentile or greater than $(100-j)^{th}$ percentile for African-Americans or Hispanics for our dataset, respectively.

Negative Binomial Regression Models

To test the significance of the relationship between the concentration of payday storefronts in a census tract and the concentration of the minorities as described by the four parameters, we designed the following negative binomial regression models, which we call bivariate models. For African-Americans

(8)

For Hispanics,

(9)

where

(10)

is the expectation of the dependent variable conditional on $A_{i,j}$, and

(11)

is the expectation of the dependent variable conditional on $H_{i,j}$.

We see that

$$\frac{E(y_i | A_{i,j} = 1)}{E(y_i | A_{i,j} = 0)} = \exp(\beta_{AA,j}) \qquad (12)$$

which gives the ratio of payday storefronts in a tracts with relatively few African-Americans to those with high portions of African-Americans in a function of the regression coefficient. Similarly,

$$\frac{E(y_i | H_{i,j} = 1)}{E(y_i | H_{i,j} = 0)} = \exp(\beta_{HA,j}) \qquad (13)$$

gives the ratio of payday storefronts in tracts with relatively few Hispanics to those with high concentrations of Hispanics in a function of the regression coefficient. We can then easily test the significance of the ratios, by examining the significance of the coefficients yielded by equations (12 and 13).

Payday lenders may assert that the location of their stores is based on the market need of low- or middle-income families or other factors. In order to evaluate whether that assertion holds true (whether factors besides race and ethnicity account for the concentration of payday storefronts in minority census tracts in North Carolina), we added certain factors—median family income, portion of families in poverty, portion of homeowners, unemployment rate, whether the neighborhood is in an urban or rural area, portion of households with children, education, portion of younger adults, and portion of females—to the regression models as described by equation (8) and (9), which gives us a series of multivariate regression models:

$$\log(\lambda_{i,j}^{AA}) = \alpha + \beta_{\mathrm{AA},j} \times A_{i,j} + \mathbf{BX}_i \qquad (14)$$

$$\log(\lambda_{i,j}^{HA}) = \alpha + \beta_{\mathrm{HA},j} \times H_{i,j} + \mathbf{BX}_i \qquad (15)$$

where $\mathbf{B} = [\beta_1, \beta_2, \beta_3, \beta_4, \beta_7, \beta_8, \beta_9, \beta_{10}, \beta_{11}]$, is the vector of coefficients corresponding to the control factors; and $\mathbf{X}_i = [x_{1i}, x_{2i}, x_{3i}, x_{4i}, x_{7i}, x_{8i}, x_{9i}, x_{10i}, x_{11i}]$, is the vector of control factors.

We see that

$$\frac{E(y_i | A_{i,j} = 1, \mathbf{X}_i = \mathbf{x}_i)}{E(y_i | A_{i,j} = 0, \mathbf{X}_i = \mathbf{x}_i)} = \exp(\beta_{AA,j}) \qquad (16)$$

which gives the ratio of payday storefronts in a tract with relatively few African- Americans to those tracts with higher portions of African-Americans in a function of the regression coefficient, by holding the control factors constant. Similarly,

$$\frac{E(y_i | H_{i,j} = 1, \mathbf{X}_i = \mathbf{x}_i)}{E(y_i | H_{i,j} = 0, \mathbf{X}_i = \mathbf{x}_i)} = \exp(\beta_{HA,j}) \qquad (17)$$

gives the ratio of payday storefronts in tracts with relatively few Hispanics compared to those in tracts with higher portions of Hispanics in a function of the regression coefficient, by holding the control factors constant.

We use the population of the census tract as an offset variable to control its effect on the dependent variables.

Supplementary results

Descriptive statistics for the independent variables

Table A4 provides some additional statistics to describe these census tracts. Compared to lower portion minority tracts, tracts with higher portions of minorities also had higher unemployment and poverty rates, higher portions of households with children, and younger residents; lower median income and homeownership rates, lower education levels; and little or inconsistent differences in total population, urban status and gender.

For example, in the 20% of tracts with the lowest African-American concentration, on average, the data shows: $44,800 for median family income, 5,000 for population, 31.2% are homeowners, 10% are below poverty, 1.8% are unemployed, and 19% are in an MSA, 29.8% households have children, 78.9% of adults have high school diploma, 0.9 to 1 for younger to older resident ratios, and 51% are females; in the highest 20% bucket, on average, the data shows: $27,400 for median family income, 4,000 for population, 20.3% are homeowners, 21.2% are below poverty, 3.9% are unemployed, 14% are in an MSA, 31.8% households have children, 67.2% of adults have high school diploma, 1.3 to 1 for younger to older resident ratios, and 52.2% are females.

In the 20% neighborhoods with the lowest Hispanic concentration, on average, the data shows $39,700 for median family income, 4,700 for population, 28.7% are homeowners, 13.6% are below poverty, 2.4% are unemployed, 14% are in an MSA, 29.9% households have children, 75.9% of adults have high school diploma, 0.9 to 1 for younger to older resident ratios, and 51.6% are females; in the highest 20% bucket, on average, the data shows $33,300 for median family income, 5,100 for population, 21.1% are homeowners, 15.9% are below poverty, 2.5% are unemployed, 21% are in an MSA, 33.5% households have children, 71.7% of adults have high school diploma, 8.2 to 1 for younger to older resident ratios, and 49.8% are females.

Results for Hispanics

The findings of our analysis for Hispanic tracts are similar to those for African- Americans, if less pronounced. However, a challenge in modeling the effects for Hispanic residents is the relatively low overall portion of Hispanic in the state. The 2000 Census found that the median census tract has just 2.9 percent Hispanic residents. At this low level, it seems that referring to a neighborhood as “Hispanic” is not appropriate. Moreover, the Pearson correlation coefficient between African-American and Hispanic concentration in a census tract is 0.33, and tests highly significant even at 0.1% level, which suggests that Hispanics tend to live together with African-Americans, and African-American residents living in the same neighborhood as Hispanics are most likely driving the results of our Hispanic models.

To further test whether the Hispanic model results were driven by African-American concentrations, we created buckets based on the combined concentration of African-American and Hispanics. Both the descriptive and regression-based results on these combined buckets show that the pattern of the disparate distribution of payday shops among the combined buckets closely resemble the pattern revealed in the buckets delineated by African-American concentration alone. On the basis of these observations, we chose to omit the Hispanic results from our report, but present them here for the interested reader.

While the relatively low concentration of Hispanics in the state limits our ability to fully analyze this population's experience with payday lending, it is still interesting to note that our bivariate and multivariate regression models did yield statistically significant evidence of disproportionate payday lending storefront concentrations in more heavily Hispanic neighborhoods.

Table A5 provides summary statistics on the number of "Stores per 100,000 population." These measurements, taken at the state level, show that payday stores tend to be located in tracts with higher portions of Hispanic residents.

In the 20%, 30%, 40% and 50% of neighborhoods with the highest Hispanic concentration, we found a payday storefront density of 8.0, 7.0, 6.6 and 5.8 stores per 100,000 residents, respectively, while for the respective lowest buckets, the density of storefronts was only 4.0, 3.7, 3.6 and 3.7 stores per 100,000 residents, respectively.

The bivariate regressions for each pair of buckets summarized in **Table A6** show that, without controlling for the other factors, the ratio of storefront concentration in the highest 20% of Hispanic neighborhoods as compared to the lowest is 2.3-to-1. For the 30%, 40 and 50% buckets, the ratio of storefront concentration is 2.0, 2.0 and 1.6-to-1, respectively. All of these ratios are significantly different from one at a 95% confidence level.

Table A10 also shows that these results hold even after controlling for the other factors thought to likely influence the concentration of payday stores. More specifically, we found that the concentration of payday loan storefronts is significantly greater in tracts with higher portions of Hispanics, even when comparing neighborhoods with similar incomes, poverty level, unemployment rate, geographic location, education, gender, age structure, and the proportion of households with children.

Our multivariate analysis further shows, by holding the other factors constant, the highest 20% of Hispanic neighborhoods had storefront concentrations at a ratio of 2.0-to-1 as compared to the lowest 20%, the highest 30% had a ratio of 1.9-to-1, the highest 40% had a ratio of 1.8-to-1 and the highest 50% had a ratio of 1.5-to-1. The ratios are consistent for all 4 pairs of buckets. All of the ratios are significantly different from one at a 95% confidence level (**Table A6**).

Table A1

Description of African-American census tracts. Set of census tracts determined by African-American concentration used throughout this paper.

Set of census tracts by racial concentration	# of Census Tracts	African-Americans / Pop. (%)	Average Afr-Amer Concentration (%)	Std Dev of Afr-Amer Concentration (%)	Average White Concentration (%)	Std Dev of White Concentration (%)
Highest 20%	311	> 41.9	64.7	17.3	29.0	16.7
Lowest 20%	311	< 3.9	1.5	1.2	94.8	5.9
Highest 30%	466	> 30.0	55.1	19.7	38.0	19.2
Lowest 30%	466	< 6.7	2.8	2.1	93.1	6.9
Highest 40%	622	> 22.4	47.8	21.3	45.1	20.8
Lowest 40%	622	< 10.9	4.3	3.2	91.0	8.2
Highest 50%	777	> 15.9	42.1	22.3	50.8	22.2
Lowest 50%	777	≤ 15.9	6.1	4.7	88.8	9.2

Table A2

Description of Hispanic census tracts. Set of census tracts determined by Hispanic concentration used throughout this paper.

Set of census tracts by ethnic concentration	# of Census Tracts	Hispanics / Pop. (%)	Average Hispanic Concentration (%)	Std Dev of Hispanic Concentration (%)	Average White Concentration (%)	Std Dev of White Concentration (%)
Highest 20%	311	> 7.0	12.9	5.8	56.1	23.0
Lowest 20%	311	< 1.0	0.5	0.3	73.5	28.7
Highest 30%	466	> 4.9	10.6	5.8	59.7	22.8
Lowest 30%	466	< 1.6	0.8	0.5	74.3	28.1
Highest 40%	622	> 3.7	9.0	5.7	62.3	23.4
Lowest 40%	622	< 2.2	1.0	0.6	74.7	27.3
Highest 50%	777	> 2.9	7.8	5.6	64.2	23.6
Lowest 50%	777	≤ 2.9	1.3	0.8	75.4	26.0

Table A3

Description of African-American + Hispanic census tracts. Set of census tracts determined by African-American + Hispanic (AA + H) concentration used throughout this paper.

Set of census tracts by racial + ethnic concentration	# of Census Tracts	AA+H Pop / Total Pop (%)	Average AA + H Concentration (%)	Std Dev of AA + H Concentration (%)	Average White Concentration (%)	Std Dev of White Concentration (%)
Highest 20%	311	> 49.2	71.2	16.5	28.8	16.4
Lowest 20%	311	< 6.4	3.2	1.8	94.7	7.6
Highest 30%	466	> 36.8	61.7	19.2	38.0	19.0
Lowest 30%	466	< 9.9	4.9	2.8	93.2	6.8
Highest 40%	622	> 27.8	54.2	21.1	45.0	20.7
Lowest 40%	622	< 15.0	6.7	4.1	91.2	7.7
Highest 50%	777	> 21.4	48.3	22.3	50.8	22.0
Lowest 50%	777	≤ 21.4	9.0	5.9	88.8	9.4

Table A4

Descriptive statistics of the control factors

Census Tract Characteristics		20%				30%				40%				50%			
		Afr-Am		Hispanic		AA		H		AA		H		AA		H	
		Lo	Hi	Lo	Hi	L	H	L	H	L	H	L	H	L	H	L	H
Income (K)	MEAN	44.8	27.4	39.7	33.3	46.8	29.4	40.7	34.7	46.3	31.1	40.8	35.9	45.4	33	41.4	37
	SD	19.4	8.8	17.4	8.9	19.5	9.1	17.9	10	18.1	9.5	17.6	11.5	17.2	10.3	17.6	12.7
Homeowners (%)	MEAN	31.2	20.3	28.7	21.1	30.7	21.7	28.7	22.5	30	22.5	28.6	23.3	29.3	23.4	28.6	24.1
	SD	5.8	8.9	7.6	8.6	5.6	8.6	7.3	8.3	6.2	8.3	7.3	8.2	6.5	8.2	7.1	8.2
Poverty (%)	MEAN	10	21.2	13.6	15.9	9.3	19.6	13.3	14.8	9.4	17.9	12.8	14.3	9.7	16.6	12.4	13.9
	SD	6.6	10.6	8.8	8.1	6.3	10	9.1	8.1	6.3	9.6	9	8.5	6.3	9.2	8.7	8.5
Unemployed (%)	MEAN	1.8	3.9	2.4	2.5	1.7	3.5	2.5	2.4	1.7	3.2	2.5	2.4	1.8	3	2.4	2.5
	SD	1.5	4.1	2	2	1.7	3.6	2.5	2.3	1.6	3.3	2.7	2.3	1.8	3.2	2.6	2.7
Population (K)	MEAN	5	4	4.7	5.1	5.2	4.4	4.9	5.2	5.3	4.7	4.9	5.2	5.4	5	5.1	5.3
	SD	2.4	1.9	2.4	2.9	2.4	2.2	2.4	2.8	2.5	2.5	2.4	2.7	2.6	2.6	2.5	2.6
Households w/ children (%)	MEAN	29.8	31.8	29.9	33.5	30.9	31.8	30.3	33	31	31.7	30.3	32.6	31.2	31.9	30.5	32.6
	SD	7.1	8	7.3	11	7.9	8.1	7.6	10.6	8.5	8.1	7.6	10	9.1	8.6	7.8	9.7
Adults w/ High School Diplomas (%)	MEAN	78.9	67.2	75.9	71.7	80.3	69.3	76.8	73.5	80.6	71.2	77.5	74.8	80.6	73	77.9	75.7
	SD	11	10	11	12	11.3	10.6	11.5	12.1	11.3	11	11.5	12.1	11.1	11.3	11.5	12.1
Ratio of younger to older adults	MEAN	0.9	1.3	0.9	8.2	0.9	1.3	0.9	6	1	1.5	1.1	4.8	2.9	2.4	1.2	4.1
	SD	0.5	1	0.4	72	0.5	0.8	0.5	58.8	0.6	2.8	4.7	50.9	38.5	24.8	4.2	45.6
Female (%)	MEAN	51	52.2	51.6	49.8	51	51.9	51.7	50.2	51	51.7	51.7	50.5	50.9	51.5	51.7	50.7
	SD	1.8	6	3.5	6	2	5.1	3.2	5.4	2.7	4.7	3.1	5	3.3	4.4	3	4.6
Tracts in MSA		60	45	45	65	90	62	73	91	117	93	102	113	151	112	125	138

Table A5

Concentration of payday storefronts, by Racial/Ethnic Concentration in Census Tracts

Set of census tracts by racial + ethnic concentration	African-American			Hispanic			African-American + Hispanic		
	# of Payday Stores	Total Pop	Stores/ 100k Pop	# of Payday Stores	Total Pop	Stores/ 100k Pop	# of Payday Stores	Total Pop	Stores/ 100k Pop
Highest 20%	95	1,258,610	7.5	127	1,596,459	8	92	1,289,516	7.1
Lowest 20%	25	1,540,486	1.6	58	1,448,190	4	22	1,563,564	1.4
Highest 30%	161	2,049,337	7.9	170	2,420,945	7	174	2,105,182	8.3
Lowest 30%	56	2,403,727	2.3	85	2,275,554	3.7	48	2,435,920	2
Highest 40%	232	2,925,657	7.9	212	3,211,663	6.6	230	2,951,666	7.8
Lowest 40%	72	3,287,238	2.2	112	3,070,079	3.6	71	3,301,774	2.2
Highest 50%	282	3,859,940	7.3	237	4,091,313	5.8	277	3,824,478	7.2
Lowest 50%	103	4,189,373	2.5	148	3,958,000	3.7	108	4,224,835	2.6

Table A6

Summary Results for Payday Storefront Concentration and Race/Ethnicity

Negative Binomial Regression	Set of census	African-American			Hispanic			Afr-Amer + Hispanic		
		Ratio of Shops (Highest/ Lowest)	95% Confidence Interval: Lower Limit	95% Confidence Interval: Upper Limit	Ratio of Shops (Highest/ Lowest)	95% Confidence Interval: Lower Limit	95% Confidence Interval: Upper Limit	Ratio of Shops (Highest/ Lowest)	95% Confidence Interval: Lower Limit	95% Confidence Interval: Upper Limit
Bivariate[35]	20%	5.8	3.0	11.2	2.3	1.3	3.8	6.5	3.3	12.7
	30%	3.8	2.3	6.1	2.0	1.3	3.0	4.6	2.8	7.6
	40%	3.8	2.5	5.8	2.0	1.3	2.9	3.9	2.6	5.9
	50%	3.2	2.2	4.5	1.6	1.1	2.4	3.0	2.1	4.3
Multivariate[36]	20%	4.1	1.7	9.8	2.0	1.2	3.4	4.9	2.0	12.0
	30%	3.7	2.0	6.7	1.9	1.2	3.0	4.2	2.3	7.9
	40%	3.2	2.0	5.3	1.8	1.2	2.7	3.4	2.1	5.6
	50%	2.9	1.9	4.3	1.5	1.1	2.2	2.6	1.7	3.9

[35] Bivariate analysis: analyzing relationship between concentration of shops and race.
[36] Controls for income, homeownership, poverty, unemployment, education, gender, households with children, younger to older adults ratio, and MSA status.

Table A7

Payday Storefronts and Race. Bivariate negative binomial regression with payday storefront concentration as dependent variable and African-American indicator as independent variable.

Parameters	Estimate of Coefficient	95% Confidence Interval		Pr>χ2
		Lower limit	Upper limit	
Regression 1: (n=622 census tracts)				
Intercept	-1.8858	-2.4126	-1.3590	<.0001
Highest (20%) tracts	1.7560	1.0940	2.4181	<.0001
Regression 2: (n=932 census tracts)				
Intercept	-1.4838	-1.8572	-1.1104	<.0001
Highest (30%) tracts	1.3272	0.8429	1.8114	<.0001
Regression 3: (n=1244 census tracts)				
Intercept	-1.5309	-1.8563	-1.2055	<.0001
Highest (40%) tracts	1.3306	0.9126	1.7486	<.0001
Regression 4: (n=1554 census tracts)				
Intercept	-1.4251	-1.7039	-1.1462	<.0001
Highest (50%) tracts	1.1508	0.7879	1.5137	<.0001

Table A8

Payday Storefronts and Race. Multivariate negative binomial regression with payday storefront concentration as dependent variable, African-American indicator and other control factors as independent variables.

Parameters	Estimate of Coefficient	95% Confidence Interval Lower limit	Upper limit	Pr>χ2
Regression 1: (n=622 census tracts)				
Intercept	3.3936	-1.6450	8.4321	0.1868
Highest (20%) tracts	1.4225	0.5595	2.2856	0.0012
Income (K)	-0.0260	-0.0736	0.0215	0.2837
Portion of homeowners	-5.9356	-12.5980	0.7269	0.0808
Portion below poverty line	-1.8643	-7.3135	3.5849	0.5025
100*Unemployed Portion	-0.0519	-0.1786	0.0748	0.4217
Rural	-0.8700	-1.6074	-0.1326	0.0207
Portion of households w/ children	-3.1225	-8.3754	2.1304	0.2440
Residents aged 20-44/Residents 45+	-0.5071	-1.2847	0.2704	0.2011
Portion of residents aged 25 or over with high school education	1.1836	-3.4466	5.8138	0.6164
Portion of females	-1.8979	-10.9165	7.1207	0.6800
Regression 2: (n=932 census tracts)				
Intercept	1.8645	-2.0254	5.7543	0.3475
Highest (20%) tracts	1.3071	0.7116	1.9026	<.0001
Income (K)	-0.0299	-0.0656	0.0058	0.1005
Portion of homeowners	-5.8377	-10.5985	-1.0769	0.0162
Portion below poverty line	-3.1715	-7.2385	0.8956	0.1264
100*Unemployed Portion	-0.0078	-0.1025	0.0870	0.8724
Rural	-1.1163	-1.6667	-0.5658	<.0001
Portion of households w/ children	-5.4883	-9.2065	-1.7700	0.0038
Residents aged 20-44/Residents 45+	-0.4608	-1.0421	0.1205	0.1203
Portion of residents aged 25 or over with high school education	2.4191	-1.1540	5.9922	0.1845
Portion of females	1.7250	-4.9326	8.3825	0.6116
Regression 3: (n=1244 census tracts)				
Intercept	-0.1806	-3.4804	3.1191	0.9146
Highest (20%) tracts	1.1730	0.6854	1.6605	<.0001
Income (K)	-0.0368	-0.0686	-0.0050	0.0232
Portion of homeowners	-3.6488	-7.4853	0.1876	0.0623
Portion below poverty line	-2.7746	-6.5349	0.9856	0.1481
100*Unemployed Portion	-0.0059	-0.0994	0.0875	0.9010
Rural	-0.8506	-1.3379	-0.3634	0.0006
Portion of households w/ children	-4.5251	-7.4706	-1.5796	0.0026
Residents aged 20-44/Residents 45+	-0.0160	-0.0916	0.0597	0.6791
Portion of residents aged 25 or over with high school education	2.0741	-0.7537	4.9019	0.1506
Portion of females	3.6432	-2.0795	9.3659	0.2121
Regression 4: (n=1554 census tracts)				
Intercept	0.6558	-2.3296	3.6413	0.6668
Highest (20%) tracts	1.0477	0.6399	1.4556	<.0001
Income (K)	-0.0349	-0.0630	-0.0067	0.0151
Portion of homeowners	-3.1891	-6.5116	0.1335	0.0599
Portion below poverty line	-3.0404	-6.4184	0.3375	0.0777
100*Unemployed Portion	-0.0046	-0.0904	0.0812	0.9159
Rural	-0.7979	-1.2314	-0.3645	0.0003
Portion of households w/ children	-3.9219	-6.4278	-1.4160	0.0022
Residents aged 20-44/Residents 45+	-0.0302	-0.0837	0.0233	0.2692
Portion of residents aged 25 or over with high school education	1.2146	-1.2313	3.6604	0.3304
Portion of females	2.7940	-2.3097	7.8976	0.2833

Table A9

Payday Storefronts and Ethnicity. Bivariate negative binomial regression with payday storefront concentration as dependent variable and Hispanic indicator as independent variable.

Parameters	Estimate of Coefficient	95% Confidence Interval		Pr>χ2
		Lower limit	Upper limit	
Regression 1: (n=622 census tracts)				
Intercept	-0.9623	-1.3565	-0.5682	<.0001
Highest (20%) tracts	0.8144	0.2965	1.3323	0.0021
Regression 2: (n=932 census tracts)				
Intercept	-0.9946	-1.3251	-0.6641	<.0001
Highest (30%) tracts	0.6688	0.2299	1.1076	0.0028
Regression 3: (n=1244 census tracts)				
Intercept	-1.0368	-1.3349	-0.7386	<.0001
Highest (40%) tracts	0.6666	0.2681	1.0651	0.0010
Regression 4: (n=1554 census tracts)				
Intercept	-0.9897	-1.2596	-0.7199	<.0001
Highest (50%) tracts	0.4958	0.1298	0.8617	0.0079

Table A10

Payday Storefronts and Ethnicity. Multivariate negative binomial regression with payday storefront concentration as dependent variable, Hispanic indicator and other control factors as independent variables.

Parameters	Estimate of Coefficient	95% Confidence Interval Lower limit	95% Confidence Interval Upper limit	Pr>χ2
Regression 1: (n=622 census tracts)				
Intercept	-0.7960	-4.4794	2.8873	0.6719
Highest (20%) tracts	0.6969	0.1618	1.2320	0.0107
Income (K)	-0.0392	-0.0794	0.0011	0.0564
Portion of homeowners	-2.6778	-7.4083	2.0528	0.2672
Portion below poverty line	0.4793	-4.5660	5.5246	0.8523
100*Unemployed Portion	0.0256	-0.1131	0.1642	0.7179
Rural	-0.6202	-1.2163	-0.0241	0.0414
Portion of households w/ children	-4.9789	-8.3339	-1.6239	0.0036
Residents aged 20-44/Residents 45+	-0.0053	-0.0438	0.0332	0.7880
Portion of residents aged 25 or over with high school education	2.1705	-1.2478	5.5888	0.2133
Portion of females	4.2512	-2.2462	10.7485	0.1997
Regression 2: (n=932 census tracts)				
Intercept	-1.4231	-4.8271	1.9808	0.4125
Highest (30%) tracts	0.6595	0.1977	1.1214	0.0051
Income (K)	-0.0485	-0.0830	-0.0140	0.0058
Portion of homeowners	-2.7930	-6.9220	1.3359	0.1849
Portion below poverty line	0.0573	-4.2711	4.3857	0.9793
100*Unemployed Portion	-0.0076	-0.1222	0.1070	0.8963
Rural	-0.6152	-1.1259	-0.1045	0.0182
Portion of households w/ children	-4.2784	-7.2955	-1.2612	0.0054
Residents aged 20-44/Residents 45+	-0.0106	-0.0693	0.0482	0.7247
Portion of residents aged 25 or over with high school education	2.7983	-0.1382	5.7349	0.0618
Portion of females	5.0379	-0.9863	11.0620	0.1012
Regression 3: (n=1244 census tracts)				
Intercept	-0.4494	-3.6163	2.7176	0.7809
Highest (40%) tracts	0.5713	0.1610	0.9815	0.0063
Income (K)	-0.0457	-0.0767	-0.0148	0.0038
Portion of homeowners	-2.6227	-6.3586	1.1131	0.1688
Portion below poverty line	-1.1701	-4.8792	2.5390	0.5364
100*Unemployed Portion	0.0204	-0.0874	0.1283	0.7104
Rural	-0.6876	-1.1548	-0.2203	0.0039
Portion of households w/ children	-3.1073	-5.8110	-0.4035	0.0243
Residents aged 20-44/Residents 45+	-0.0313	-0.0844	0.0218	0.2484
Portion of residents aged 25 or over with high school education	2.3349	-0.3805	5.0503	0.0919
Portion of females	3.1923	-2.1581	8.5428	0.2422
Regression 4: (n=1554 census tracts)				
Intercept	0.5175	-2.5110	3.5460	0.7377
Highest (50%) tracts	0.4166	0.0494	0.7839	0.0262
Income (K)	-0.0479	-0.0762	-0.0196	0.0009
Portion of homeowners	-3.6923	-7.0956	-0.2890	0.0335
Portion below poverty line	-2.5635	-6.0129	0.8859	0.1452
100*Unemployed Portion	0.0130	-0.0790	0.1050	0.7820
Rural	-0.5839	-1.0137	-0.1541	0.0077
Portion of households w/ children	-3.2103	-5.7344	-0.6863	0.0127
Residents aged 20-44/Residents 45+	-0.0319	-0.0846	0.0209	0.2364
Portion of residents aged 25 or over with high school education	1.3899	-1.1149	3.8946	0.2768
Portion of females	3.8130	-1.3219	8.9480	0.1456

Table A11

Model Fit Statistics for Regression Models Listed in Table A7

Criterion	DF	Value	Value/DF
Regression 1			
Deviance	620	181.6249	0.2929
Scaled Deviance	620	181.6249	0.2929
Pearson Chi-Square	620	553.6831	0.8930
Scaled Pearson X2	620	553.6831	0.8930
Log Likelihood		-215.7074	
Regression 2			
Deviance	930	313.6345	0.3372
Scaled Deviance	930	313.6345	0.3372
Pearson Chi-Square	930	1058.6809	1.1384
Scaled Pearson X2	930	1058.6809	1.1384
Log Likelihood		-359.0071	
Regression 3			
Deviance	1242	419.3188	0.3376
Scaled Deviance	1242	419.3188	0.3376
Pearson Chi-Square	1242	1421.0270	1.1441
Scaled Pearson X2	1242	1421.0270	1.1441
Log Likelihood		-465.5792	
Regression 4			
Deviance	1552	539.3240	0.3475
Scaled Deviance	1552	539.3240	0.3475
Pearson Chi-Square	1552	1642.8111	1.0585
Scaled Pearson X2	1552	1642.8111	1.0585
Log Likelihood		-606.5450	

Table A12

Model Fit Statistics for Regression Models Listed in Table A8

Criterion	DF	Value	Value/DF
Regression 1			
Deviance	611	186.8504	0.3058
Scaled Deviance	611	186.8504	0.3058
Pearson Chi-Square	611	593.4358	0.9713
Scaled Pearson X2	611	593.4358	0.9713
Log Likelihood		-205.9836	
Regression 2			
Deviance	920	319.6635	0.3475
Scaled Deviance	920	319.6635	0.3475
Pearson Chi-Square	920	932.8234	1.0139
Scaled Pearson X2	920	932.8234	1.0139
Log Likelihood		-332.3420	
Regression 3			
Deviance	1230	420.0275	0.3415
Scaled Deviance	1230	420.0275	0.3415
Pearson Chi-Square	1230	1172.3083	0.9531
Scaled Pearson X2	1230	1172.3083	0.9531
Log Likelihood		-440.0469	
Regression 4			
Deviance	1540	540.1420	0.3507
Scaled Deviance	1540	540.1420	0.3507
Pearson Chi-Square	1540	1448.6689	0.9407
Scaled Pearson X2	1540	1448.6689	0.9407
Log Likelihood		-578.3791	

Table A13

Model Fit Statistics for Regression Models Listed in Table A9

Criterion	DF	Value	Value/DF
Regression 1			
Deviance	620	257.0514	0.4146
Scaled Deviance	620	257.0514	0.4146
Pearson Chi-Square	620	751.6868	1.2124
Scaled Pearson X2	620	751.6868	1.2124
Log Likelihood		-280.2534	
Regression 2			
Deviance	930	358.7810	0.3858
Scaled Deviance	930	358.7810	0.3858
Pearson Chi-Square	930	1076.2213	1.1572
Scaled Pearson X2	930	1076.2213	1.1572
Log Likelihood		-398.3535	
Regression 3			
Deviance	1242	443.7377	0.3573
Scaled Deviance	1242	443.7377	0.3573
Pearson Chi-Square	1242	1324.1357	1.0661
Scaled Pearson X2	1242	1324.1357	1.0661
Log Likelihood		-504.7925	
Regression 4			
Deviance	1552	533.9418	0.3440
Scaled Deviance	1552	533.9418	0.3440
Pearson Chi-Square	1552	1592.9143	1.0264
Scaled Pearson X2	1552	1592.9143	1.0264
Log Likelihood		-621.7507	

Table A14

Model Fit Statistics for Regression Models Listed in Table A10

Criterion	DF	Value	Value/DF
Regression 1			
Deviance	610	251.4082	0.4121
Scaled Deviance	610	251.4082	0.4121
Pearson Chi-Square	610	486.3848	0.7974
Scaled Pearson X2	610	486.3848	0.7974
Log Likelihood		-262.9497	
Regression 2			
Deviance	919	353.9066	0.3851
Scaled Deviance	919	353.9066	0.3851
Pearson Chi-Square	919	781.6013	0.8505
Scaled Pearson X2	919	781.6013	0.8505
Log Likelihood		-374.2643	
Regression 3			
Deviance	1231	443.7167	0.3605
Scaled Deviance	1231	443.7167	0.3605
Pearson Chi-Square	1231	1171.8785	0.9520
Scaled Pearson X2	1231	1171.8785	0.9520
Log Likelihood		-480.0932	
Regression 4			
Deviance	1540	539.2787	0.3502
Scaled Deviance	1540	539.2787	0.3502
Pearson Chi-Square	1540	1440.2683	0.9352
Scaled Pearson X2	1540	1440.2683	0.9352
Log Likelihood		-588.5932	

Appendix 2: Maps of Payday Lending Storefront Locations for North Carolina Metropolitan Statistical Areas

The maps included in Appendix 2 are based on data from the 2000 U.S. Census specifying the racial demographics of each census tract in North Carolina. Out of the 1,554 tracts in the state, the 20% (311 tracts) with the highest percentages of African-American populations are shaded dark brown. A second category of tracts with the 21% to 40% highest African-American populations were shaded light brown. The remaining 932 tracts, representing the 60% with the lowest percentages of African-Americans, were shaded grey.

The maps are also based on payday shop data from the online directory Switchboard.com, giving us addresses to each payday shop in the state as of late 2004. Each dot represents one payday shop. However, the dots do not necessarily reflect the exact street level location within the census tract, due to limitations in mapping software. The maps do reflect the exact number of rent-a-bank payday shops in each census tract.

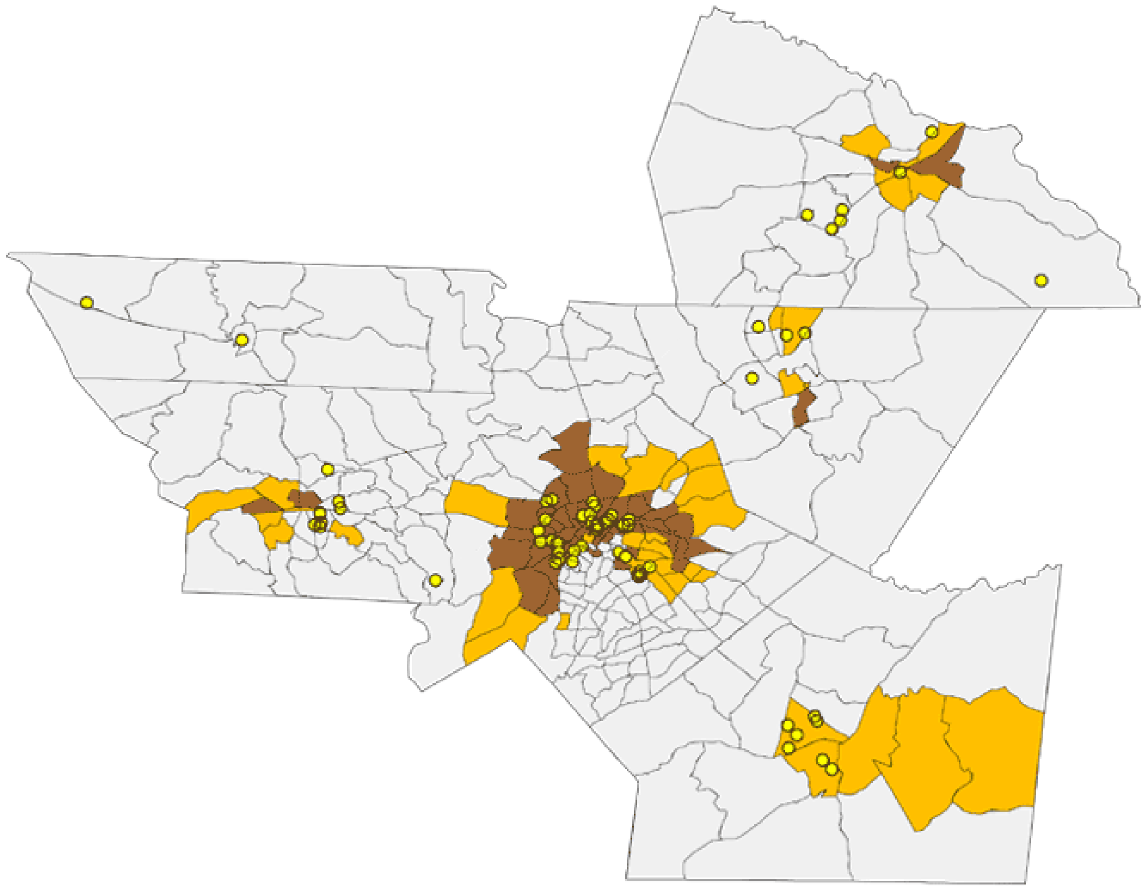
Asheville MSA, NC
Payday Shop Concentrations

Proportion of African-American (AA) Residents	% AA	% Hispanic	Shops/ 100k Pop.	# Payday Shops
Top 20% Tracts	66.9	3.2	0	0
Top 21-40% Tracts	28.4	3.0	0	0
Lowest 60% Tracts	3.8	2.5	2.0	4

Cen
sus tract
border

Charlotte MSA, NC
Payday Shop Concentrations

Proportion of African-American (AA) Residents	% AA	% Hispanic	Shops/ 100k Pop.	# Payday Shops
Top 20% Tracts	63.6	9.5	13.2	28
Top 21-40% Tracts	28.4	9.8	6.3	15
Lowest 60% Tracts	8.0	3.4	2.3	20



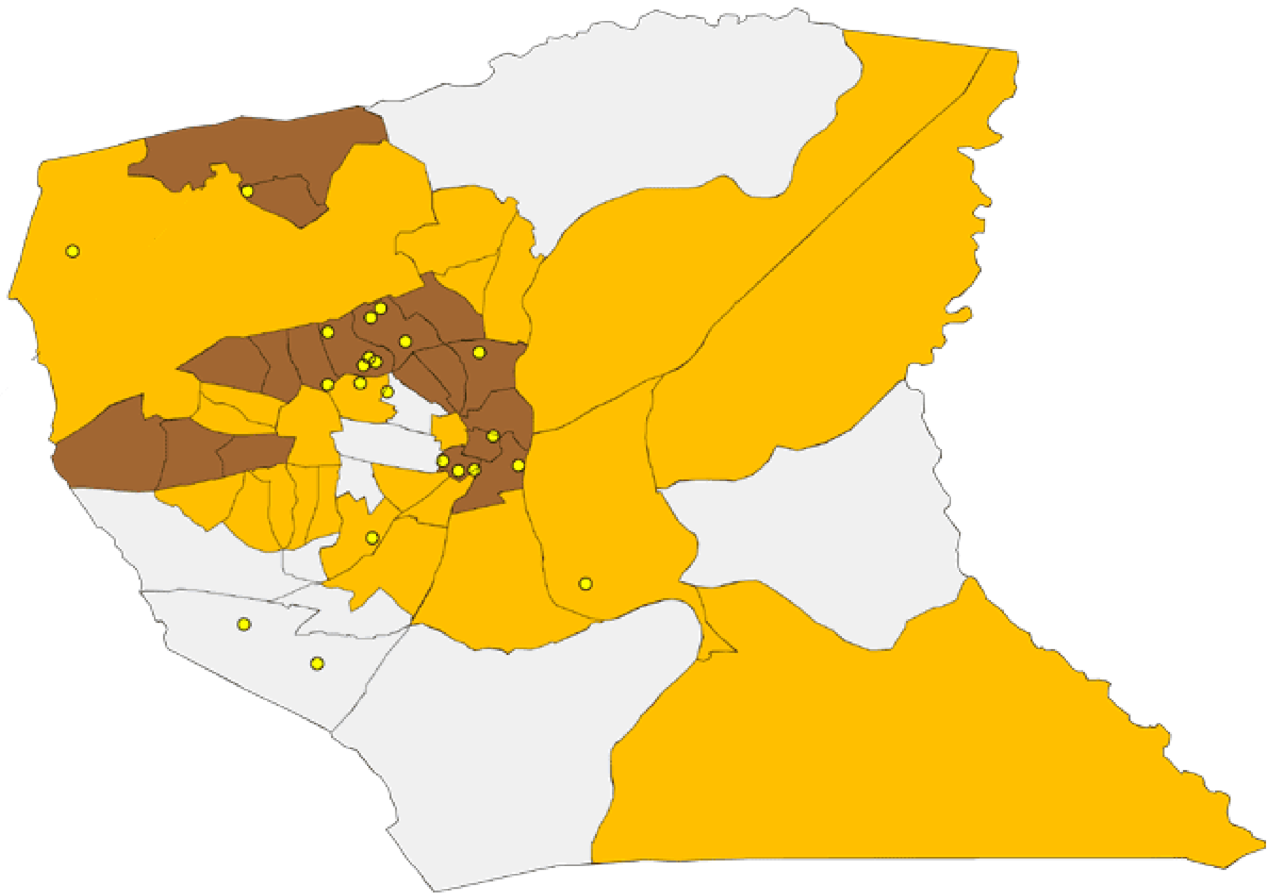
Fayetteville MSA, NC
Payday Shop Concentrations

Proportion of African-American (AA) Residents	% AA	% Hispanic	Shops/ 100k Pop.	# Payday Shops
Top 20% Tracts	56.1	7.0	16.9	15
Top 21-40% Tracts	29.0	7.8	2.7	4
Lowest 60% Tracts	17.3	4.3	4.7	3

Census tract border

One payday shop

SOURCES: 2000 U.S. Census, 2004 Online address directories



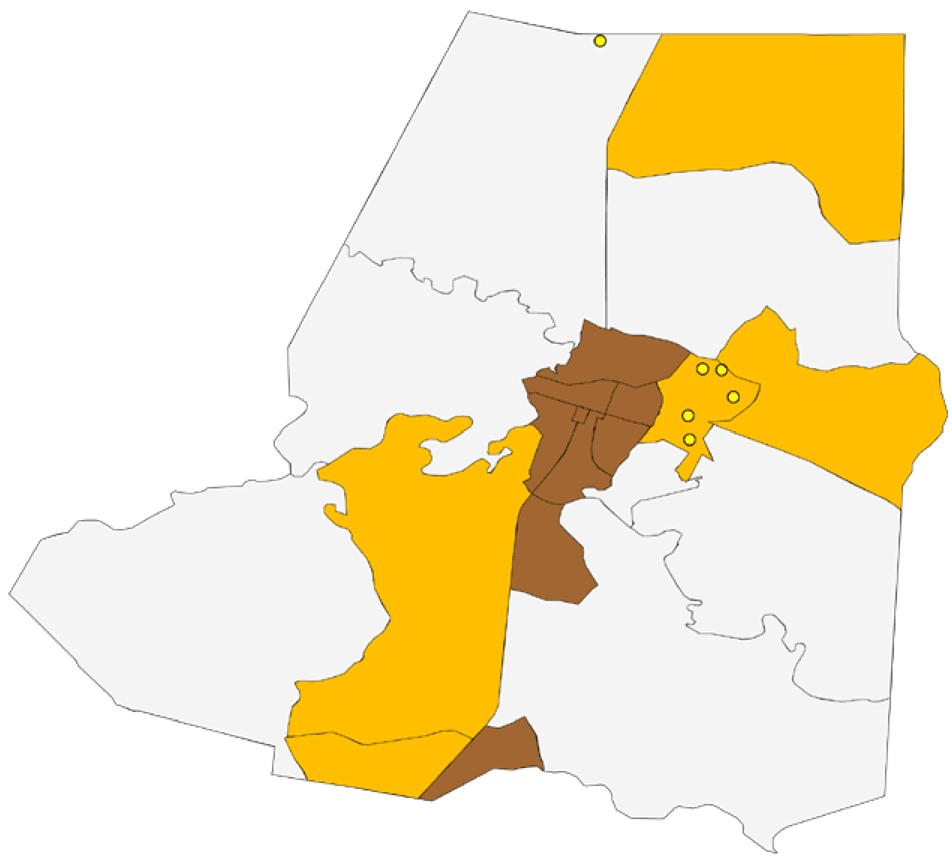
Goldsboro MSA, NC
Payday Shop Concentrations

Proportion of African-American (AA) Residents	% AA	% Hispanic	Shops/ 100k Pop.	# Payday Shops
Top 20% Tracts	66.1	2.1	0	0
Top 21-40% Tracts	29.7	4.0	16.9	5
Lowest 60% Tracts	1.6	6.5	1.9	1

Census tract border

One payday shop

SOURCES: 2000 U.S. Census, 2004 Online address directories



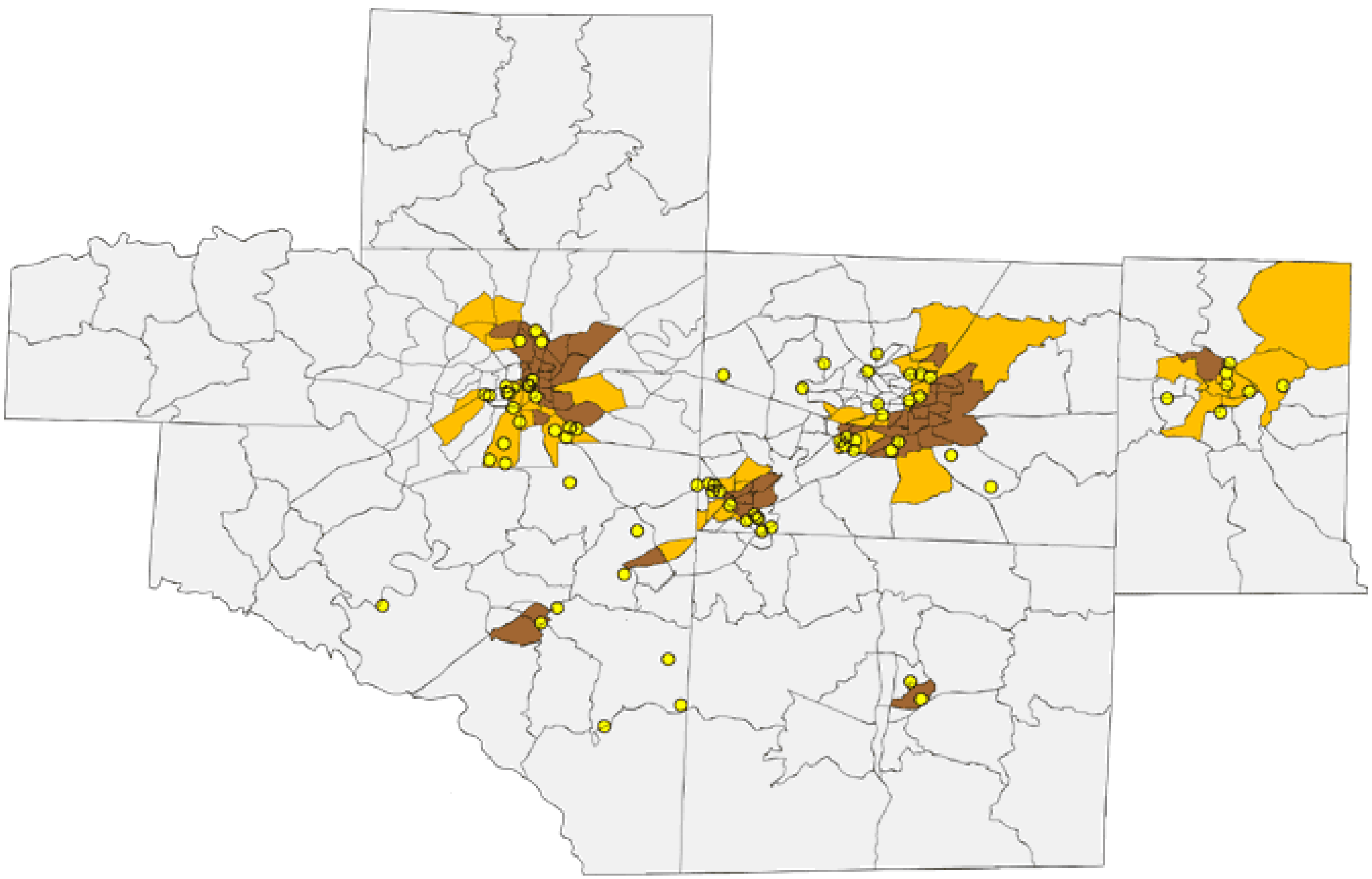
Greensboro, High Point, Winston-Salem (Triad) MSA, NC
Payday Shop Concentrations

Proportion of African-American (AA) Residents	% AA	% Hispanic	Shops/ 100k Pop.	# Payday Shops
Top 20% Tracts	68.6	7.9	6.1	11
Top 21-40% Tracts	30.6	9.1	14.0	27
Lowest 60% Tracts	7.5	3.5	4.0	35

Census tract border

One payday shop

SOURCES: 2000 U.S. Census, 2004 Online address directories



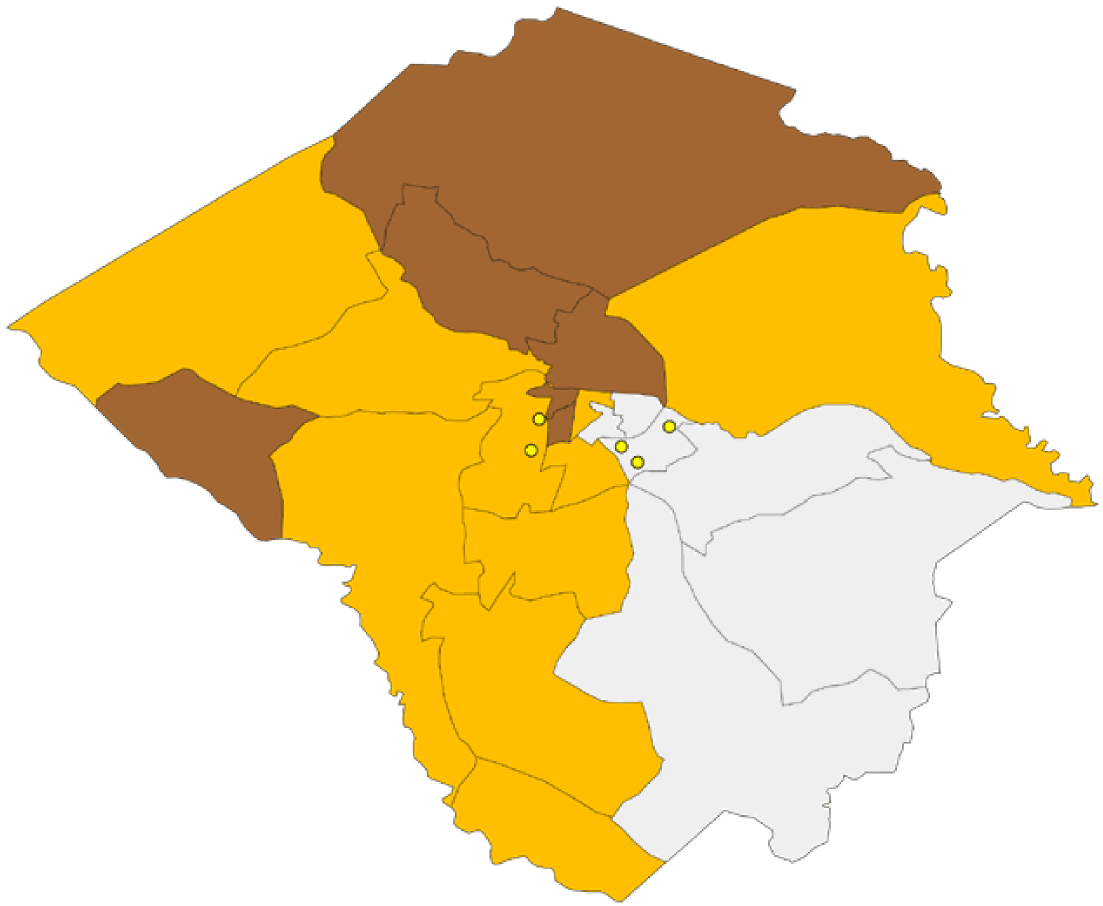
Greenville MSA, NC
Payday Shop Concentrations

Proportion of African-American (AA) Residents	% AA	% Hispanic	Shops/ 100k Pop.	# Payday Shops
Top 20% Tracts	63.2	5.0	0	0
Top 21-40% Tracts	31.7	2.2	3.1	2
Lowest 60% Tracts	16.3	3.0	7.2	3

Census tract border

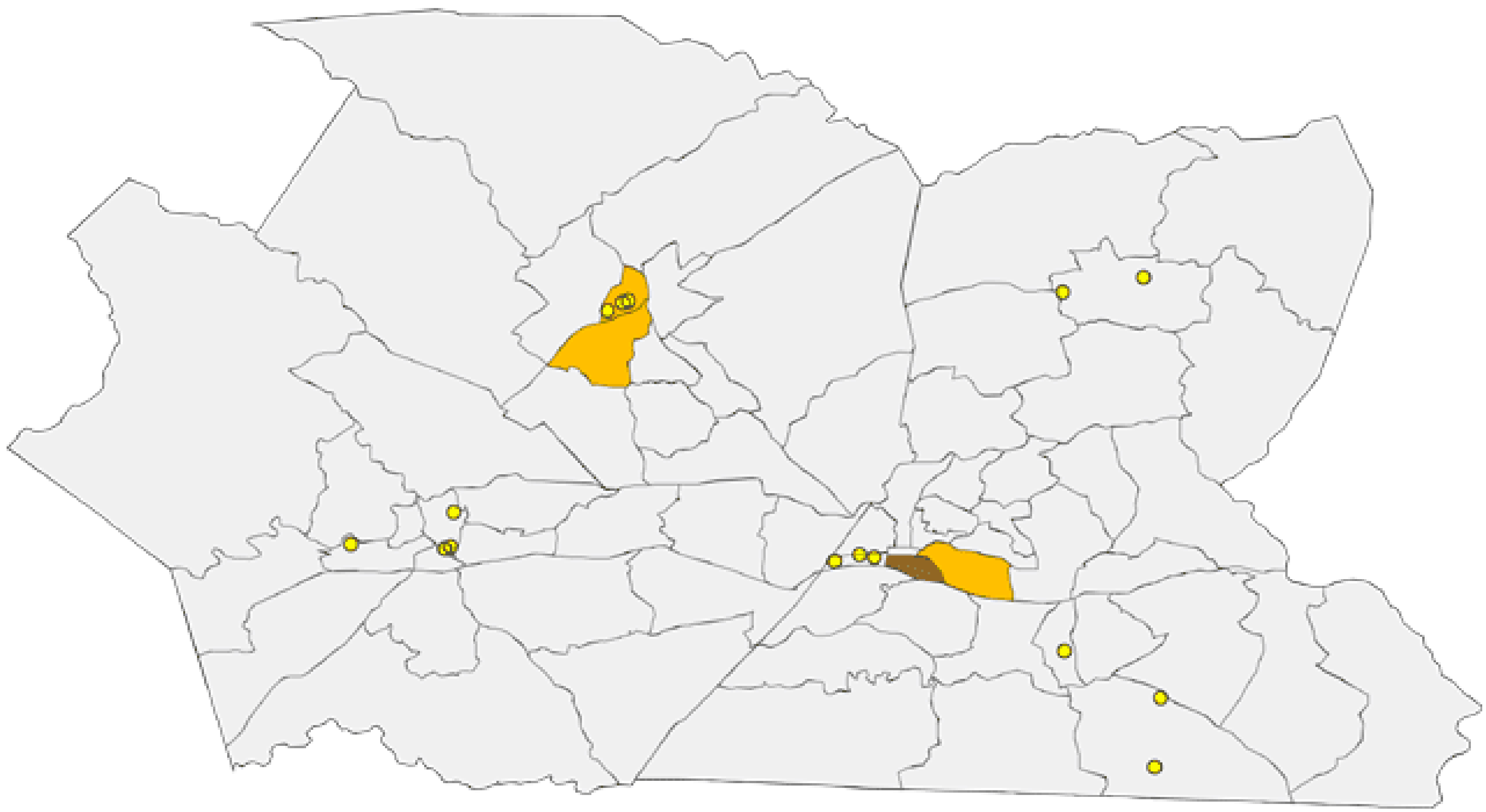
One payday shop

SOURCES: 2000 U.S. Census, 2004 Online address directories



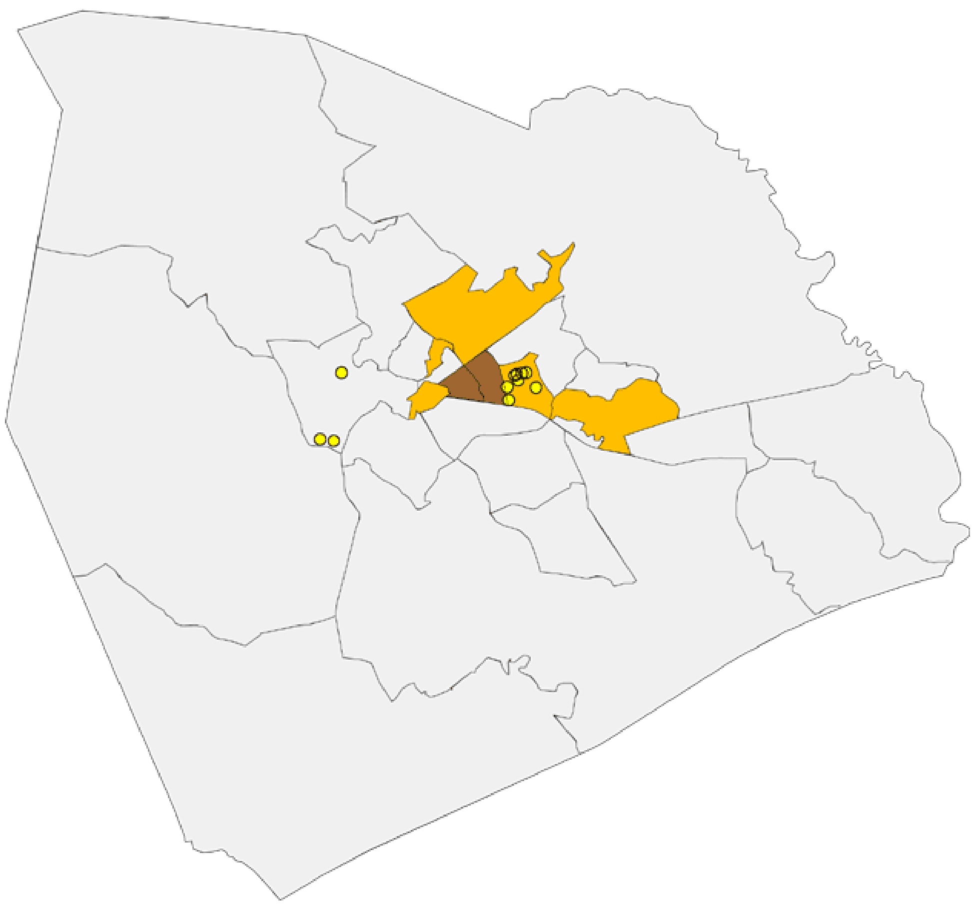
Hickory, Morganton, Lenoir MSA, NC
Payday Shop Concentrations

Proportion of African-American (AA) Residents	% AA	% Hispanic	Shops/ 100k Pop.	# Payday Shops
Top 20% Tracts	56.7	10.9	0	0
Top 21-40% Tracts	27.2	5.5	22.9	3
Lowest 60% Tracts	5.4	3.7	3.7	12



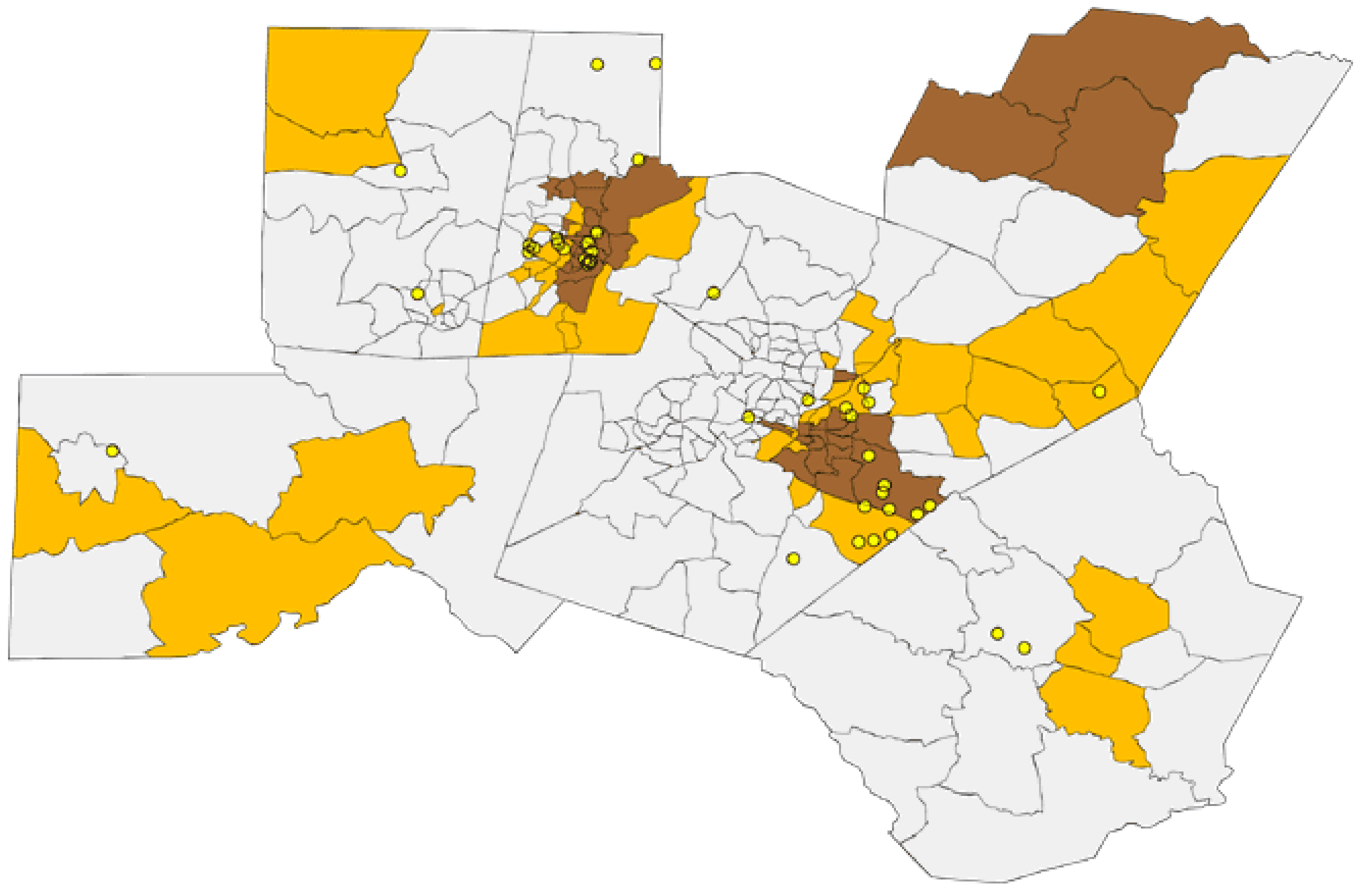
Jacksonville MSA, NC
Payday Shop Concentrations

Proportion of African-American (AA) Residents	% AA	% Hispanic	Shops/ 100k Pop.	# Payday Shops
Top 20% Tracts	65.0	9.0	0	0
Top 21-40% Tracts	27.0	7.4	26.0	7
Lowest 60% Tracts	14.1	7.0	2.5	3



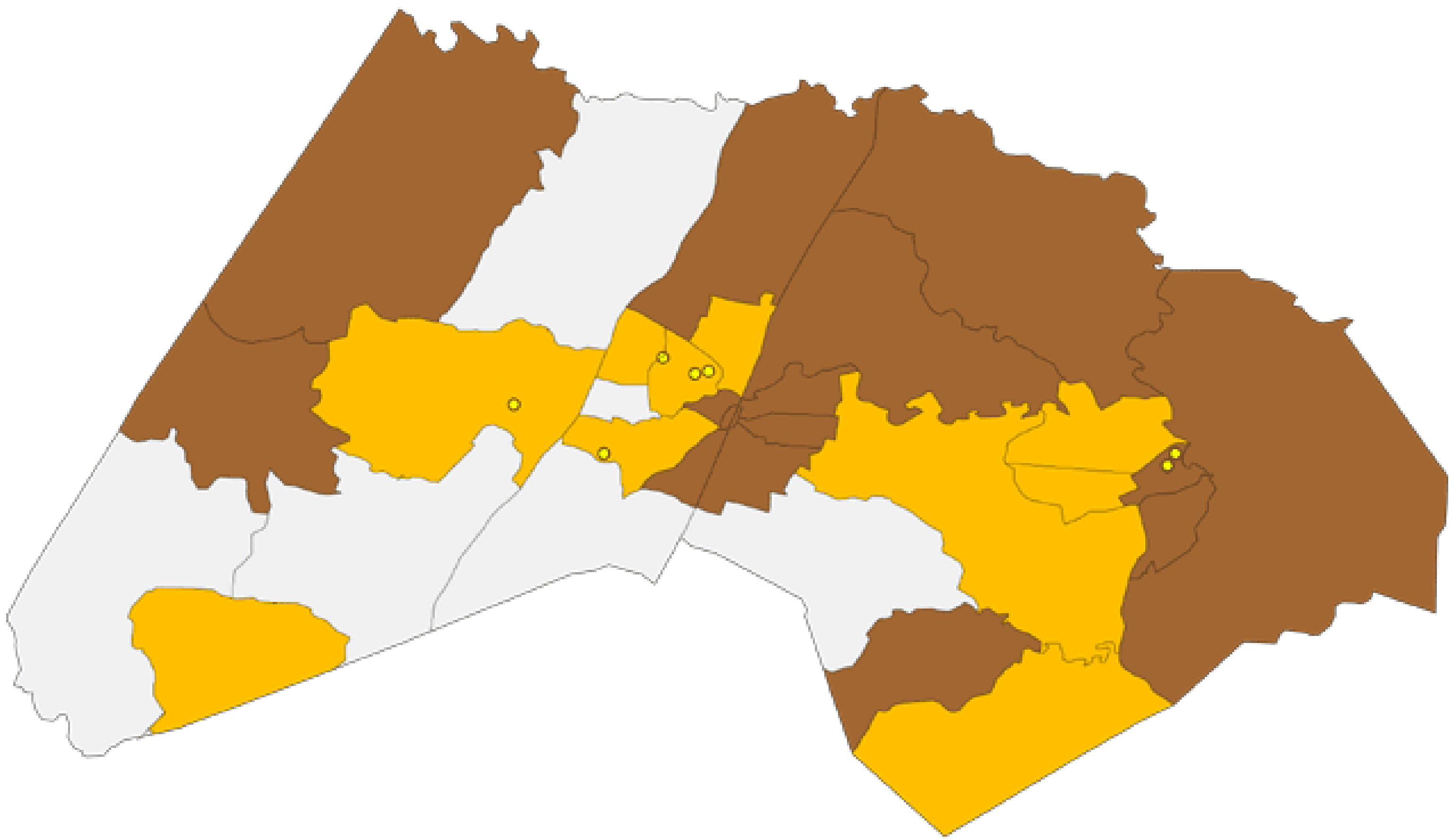
Raleigh, Durham, Chapel Hill (Triangle) MSA, NC
Payday Shop Concentrations

Proportion of African-American (AA) Residents	% AA	% Hispanic	Shops/ 100k Pop.	# Payday Shops
Top 20% Tracts	64.6	9.3	8.2	14
Top 21-40% Tracts	30.0	7.8	6.4	14
Lowest 60% Tracts	11.4	5.0	1.5	12



Rocky Mount MSA, NC
Payday Shop Concentrations

Proportion of African-American (AA) Residents	% AA	% Hispanic	Shops/ 100k Pop.	# Payday Shops
Top 20% Tracts	67.1	1.8	3.4	2
Top 21-40% Tracts	30.7	3.3	9.1	5
Lowest 60% Tracts	18.9	5.2	0	0



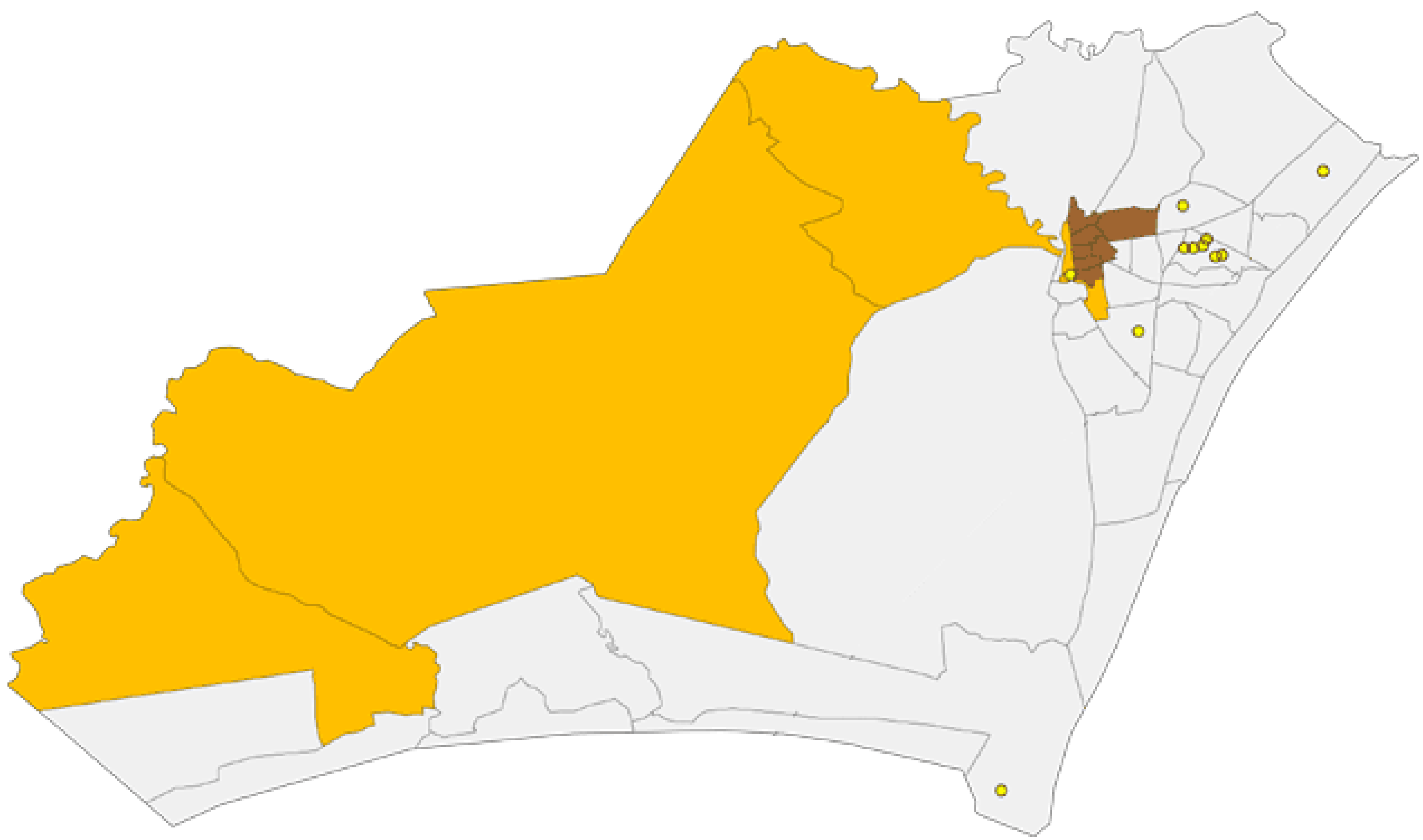
Wilmington MSA, NC
Payday Shop Concentrations

Proportion of African-American (AA) Residents	% AA	% Hispanic	Shops/ 100k Pop.	# Payday Shops
Top 20% Tracts	68.7	2.1	0	0
Top 21-40% Tracts	26.2	4.5	3.0	1
Lowest 60% Tracts	8.3	2.0	5.5	10

Census tract border

One payday shop

SOURCES: 2000 U.S. Census, 2004 Online address directories



STATE OF NORTH CAROLINA

WAKE COUNTY

IN A MATTER
BEFORE THE COMMISSIONER OF BANKS
DOCKET NO: 05:008:CF

IN RE:	)	
	)	
ADVANCE AMERICA, CASH ADVANCE CENTERS OF NORTH CAROLINA, INC.	)	**ORDER**
	)	

THIS MATTER came before the Commissioner of Banks ("Commissioner") pursuant to N.C. Gen. Stat. § 150B-38(b) and 4 NCAC 3B .0200, *et seq*., upon a Notice of Hearing and Mandatory Pre-Hearing Conference dated February 1, 2005 and the Amended Notice of Hearing dated July 11, 2005.

This matter was instituted to determine whether certain business activities of Advance America Cash Advance Centers of North Carolina, Inc. ("AANC" or "Respondent") violated applicable North Carolina law and, if so, to order appropriate remedies. Based on a review of the entire record[1] in the matter and of applicable legal and regulatory authority, I find in this Order that (i) AANC's business conduct as the purported marketing, processing and servicing agent of certain out-of-state banks violates the North Carolina Consumer Finance Act, Article 15 of Chapter 53 of the North Carolina General Statutes, N.C. Gen. Stat. §§ 53-164 *et seq.* (the "Consumer Finance Act" or "CFA"); (ii) AANC is not exempt from the provisions of the Consumer Finance Act pursuant to the terms of the statute itself or to any other constitutional or legal authority; and (iii) the Office of the North Carolina Attorney General ("OAG") and the Office of the North Carolina Commissioner of Banks ("OCOB") are not estopped to enforce the CFA against AANC. On the basis of these findings, I order hereinafter that AANC cease and desist from the conduct of its business in North Carolina. My factual findings, legal analysis and conclusions, and order to AANC are set forth below.

[1] The evidence in this case, from which the findings of fact are taken, includes, but is not limited to, five primary parts: 1) The Commissioner's Evidence, consisting of numbered documents which I have entered on my own motion, hereinafter referred as "Commissioner's Exhibits;" 2) Petitioners' Stipulations and Exhibits/Petitioners' Supplemental Exhibits, consisting of numbered documents submitted by the OCOB and the OAG, hereinafter referred to as "Petitioners' Exhibits;" 3) Exhibits in Support of Respondent's Post-Hearing Memorandum, numbered documents submitted by AANC's lead counsel, hereinafter referred to as "Respondent's Exhibits; 4) a stack of unnumbered documents, affidavits, and deposition transcripts, submitted by AANC's co-counsel, hereinafter referred to as "Unindexed Exhibits;" and 5) stipulations signed by counsel for all parties. A full description of the evidence is found in the Final Order Regarding Admissibility of Evidence, dated December 19, 2005.

I. FINDINGS OF FACT

AANC and Its Corporate Affiliates

AANC is a Delaware corporation.[2] From and after October 1, 1997, AANC conducted business operations in North Carolina.[3] During this period of time, AANC has operated as many as 118 cash advance centers in North Carolina.[4] On September 14, 2005, AANC's parent company announced that the bank for which AANC was marketing, processing and servicing payday cash advances and installment loans had temporarily suspended its loan originations in North Carolina and that the company anticipated that such suspension would continue at least until the issuance of a ruling in this matter.[5]

AANC is the wholly-owned subsidiary of Advance America, Cash Advance Centers, Inc. ("Parent"),[6] a Delaware corporation. Parent is the largest provider of payday cash advance services in the United States, as measured by the number of payday cash advance centers operated.[7] Parent does business in 34 states, operating through wholly-owned subsidiaries in each of such states.[8] The sole business of Parent, through its subsidiaries, is either the making or the processing, marketing and servicing of payday cash advance transactions.[9]

Parent, through its wholly-owned subsidiaries, conducts its business through either a standard business model or an agency business model.[10] Under the standard business model, payday cash advances are offered and made by Parent, through a wholly-owned subsidiary, directly to its customers.[11] Under the agency business model, payday cash advances are made pursuant to processing, marketing and servicing agreements between subsidiaries of Parent and out-of-state, state-chartered banks.[12] Parent conducted operations, through AANC, in North Carolina under the standard business model from October 31, 1997 through August 31, 2001, and the agency business model thereafter.[13]

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[2] Pre-Hearing Stipulations, dated May 20, 2005 ("PHS"), Stipulation of Facts ("SF") No. 1.
[3] PHS SF Nos. 8, 15-18 (operations of AANC and McKenzie Check Advance of North Carolina, LLC (which was acquired by AANC's Parent in 1999 and consolidated with AANC) for the period October 1, 1997 through August 31, 2001); PHS SF Nos. 23, 32, 33 (operations from September 1, 2001, through July 6, 2005); Petitioners' Exhibit 87 (operations from July 6, 2005, to September 15, 2005).
[4] PHS SF No. 3.
[5] Periodic Report on Form 8-K, dated September 14, 2005, of Advance America, Cash Advance Centers, Inc., *available at* http://www.sec.gov/Archives/edgar/data/1299704/000110465905044205/a05-16288_18k.htm.
[6] PHS SF No. 4.
[7] PHS SF No. 7.
[8] PHS SF No. 5.
[9] PHS SF No. 6.
[10] PHS SF No. 5.
[11] PHS SF No. 9
[12] PHS SF No. 11.
[13] PHS SF No. 3.

AANC is operated under the supervision and control of a "Zone Director" of the Parent, who reports to the President of the Parent and who is responsible for oversight and management of all AANC locations.[14] At all times since September 30, 1997, AANC has received corporate supervision and support services from the Parent under a Management Agreement between AANC and Parent (the "Management Agreement").[15] Pursuant to the Management Agreement, the services to be performed by Parent "as agent for the Company" (that is, for AANC) include:

1. Supervision of professionals in corporate qualification to do business in state,

2. Recommend Branch site locations and conduct lease negotiations,

3. Supervise new Branch construction and opening,

4. Marketing and advertising coordination,

5. Provide personnel for District and Regional operations management and procedures for daily Branch operations,

6. Payroll and payroll tax services (through a third party service company as selected by the Parent),

7. Provide personnel and procedures for management of Human Resources,

8. Benefit program (medical, life and AD&D insurances; 401(K); other as requested by AANC) implementation and maintenance,

9. MIS support, including but not limited to, (1) hardware and software decisions and purchases, and (2) help desks,

10. Treasury services, including, but not limited to, bank relations (account establishment, loans, etc.), cash management, and lease versus buy evaluations,

11. Accounting services, including, but not limited to:
    A. General ledger maintenance,

[14] Prospectus, filed pursuant to Securities and Exchange Commission Rule 424(b)(1), of Advance America, Cash Advance Centers, Inc. (the "Prospectus"), that is included in the record of this matter as Petitioners' Exhibit 2 and Respondent's Exhibit 78, pp. 83, 84; Affidavit of Jennifer Rodriguez, dated August 2, 2005, and included in the record of this matter as Respondent's Exhibit 10. Prospectus *available at* http://www.sec.gov/Archives/edgar/data/1299704/000104746904037527/a2148783z424b1.htm.

[15] Management Agreement, dated September 30, 1997, between Advance America, Cash Advance Centers, Inc. and Advance America, Cash Advance Centers of North Carolina, Inc., comprising Exhibit 1 to letter from AANC counsel to the Commissioner, dated December 17, 2004, and included in the record of this matter as Respondent's Exhibit 75 [hereinafter Management Agreement].

B. Internal and external financial reporting,
C. Bank account reconciliations,
D. Fixed asset accounting and ledger maintenance,
E. Accounts payable accounting and payment, and
F. Tax accounting, compliance and planning for federal, state and local jurisdictions.

12. Legal services coordination,

13. Risk management, including, but not limited to, (1) security, and (2) insurance coverage and policy negotiation, and

14. Other general management services as determined necessary by the Parent or as requested by AANC.[16]

In consideration of the performance of these services by Parent for AANC, AANC is obligated to pay to Parent "an amount equal to 10.0% of monthly revenues" as a management fee for which Parent would invoice monthly, and to pay to Parent all direct expenses incurred by Parent for AANC.[17]

Under the Management Agreement, Parent also provided financing for AANC through cash advances and working capital loans.[18] Such advances or loans bear monthly interest at "NationsBank prime interest rate at the beginning of the calendar month" applied to 90% of the average amount of such advance or loan outstanding at the beginning and end of the month.[19]

AARC, Inc. ("AARC"), another subsidiary of Parent, owns all of the Parent's intellectual property, including trademarks, logos and other such property.[20] Each operating subsidiary of Parent, including AANC, has access to such intellectual property only through a licensing agreement with AARC.[21] AANC and other operating subsidiaries of Parent utilize the Parent's proprietary computer information system, known as "Advantage," to record and transmit information solicited from a loan customer at each branch location, and Parent retains total control over this information system under both the standard and agency business models.[22]

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[16] *Id.* ¶ *1.*
[17] *Id.* ¶ *2.*
[18] *Id.* ¶¶ 2-3.
[19] *Id.*
[20] Prospectus, *supra* note 14, p. 85.
[21] *Id.*
[22] *Id.* pp. 81, 82.

In its financial statements, Parent accounts for the income generated by its business activities as follows:[23]

1. Total Revenues is comprised of (i) fees and interest charged to customers and (ii) processing, marketing and servicing fees. Item (i) of Total Revenues represents the direct charges to customers in standard business model states; item (ii) the charges to banks in agency business model states.

2. Provision for doubtful accounts and agency bank losses is subtracted from Total Revenues to determine Net Revenues. Provision for doubtful accounts relates to standard business model states; provision for agency bank losses relates to agency business model states.

3. Total Center Expenses are subtracted from Net Revenues to determine Center Gross Profit. Total Center Expenses is comprised of (i) salaries and related payroll costs; (ii) occupancy costs; (iii) center depreciation expense; (iv) advertising expense; and (v) other center expenses. Center Gross Profit represents the operating results of cash advance centers operated by Parent through its various subsidiaries.

4. Corporate and Other Expenses (Income) are subtracted from Center Gross Profit to determine Income Before Income Taxes. Corporate and Other Expenses is comprised of: (i) general and administrative expense; (ii) corporate depreciation expense; (iii) amortization expense; (iv) options purchase expense; (v) interest expense (net of interest income); and (vi) loss on disposal of property and equipment.

5. Net income is determined by subtracting Income Tax Expense from Income Before Income Taxes.

It is not clear from Parent's financial statements how the costs of advances from the Parent to AANC are accounted for. For purposes of this Order, it will be assumed that the interest charged and paid to Parent under the Management Agreement is included in Other Center Expenses.

[23] Prospectus, *supra* note 14, p. 41 (for North Carolina centers); *Id.* pp. 52-56 (for Parent on a consolidated basis).

Payday Cash Advances

Payday cash advances are advances of cash, typically for a period of approximately 14 days, in exchange for a check drawn on the consumer's bank account in an amount equal to the amount of the cash advance plus applicable fees and / or interest.[24] As part of business operations under the agency business model, such advances were made either through issuance of a bank check or from cash of the bank held by AANC.[25] In all instances relevant to this matter, the fee for such payday cash advances is not less than $15 per $100 advanced.[26] Advances of this kind are hereinafter referred to as "Advances."

Advances are considered consumer loans for purposes of bank regulatory and financial accounting, and fees are treated as interest for such purposes.[27] Advances are subject to applicable federal regulation relating to consumer loans, including the Truth in Lending Act, Equal Credit Opportunity Act, Fair Credit Reporting Act, and Gramm-Leach-Bliley Act, and the regulations thereunder.[28]

Treatment of Advances under North Carolina Law

Prior to October 1, 1997, the making of Advances was not expressly permitted by North Carolina law.[29] Short term loans of all kinds were subject to the North Carolina Consumer Finance Act and North Carolina's usury law.[30]

On October 1, 1997, the North Carolina Check Cashing Act[31] became effective. Section 53-281 of that statute permitted Advances in exchange for a borrower's check in a face amount of no more than $300 (including authorized fees), for terms not to exceed 31 days, at fees not to exceed 15% of the face amount of the check and subject to further limitations and requirements.[32] Advances under the statute could only be made by persons or entities licensed as check cashers.[33]

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[24] PHS SF Nos. 10, 12.

[25] PHS SF Nos. 27, 28; Respondent's Pre-Hearing Stipulations ("RPHS"), dated September 2, 2005, Nos. 49, 50 and 51. For Peoples National Bank ("PNB") transactions, only a check was issued. Letter of Counsel for AANC to Commissioner, December 17, 2004, Petitioners' Exhibit 31, item no. 28. For Republic Bank & Trust Company ("RBT") transactions, a check was issued that was sometimes immediately converted to cash. Petitioners' Exhibit 11, p. B-5 and Petitioners' Exhibit 13. First Fidelity Bank ("FFB") transactions followed the same pattern as RBT, Petitioners' Exhibit 62, p. B-7.

[26] PHS SF Nos. 19, 29, 35. For RBT, Petitioners' Exhibit 7, 19. For FFB, Petitioners' Exhibit 51.

[27] Securities Exchange Act Registration Statement on Form 10-K of Republic Bancorp, Inc. for the Fiscal Year ended December 31, 2004 ("Republic 2004 10-K"), included in the record of this proceeding as Commissioner's Exhibit 7, pp. 28-29, 65. The Republic 2004 10-K is available on-line at: http://www.sec.gov/Archives/edgar/data/921557/000110465905011522/a05-1744_110k.htm. *See also*, Prospectus, *supra* note 14, p. F-9 ("Revenues on payday cash advances can be characterized as fees and / or interest depending upon certain state laws.").

[28] Prospectus, *supra* note 14, p. 90.

[29] Opinion of North Carolina Attorney General, Commissioner's Exhibit 16.

[30] *See* discussion of CFA legislative history *infra* text accompanying notes 211-213.

[31] Session Laws 1997-391.

[32] *Id.*; *see also* OCOB Declaratory Ruling, dated November 30, 1998, at http://www.nccob.org/NR/rdonlyres/86909C76-A60E-4D8D-A81B-

As enacted, G.S. § 53-281 had a "sunset date" of July 31, 2001.[34] The 2001 Session of the General Assembly considered extension of that provision and did so for thirty days but not longer.[35] On August 31, 2001, G.S. § 53-281 expired by its terms.

Since August 31, 2001, the North Carolina General Assembly has considered legislation to expressly permit the making of Advances in each of its legislative sessions.[36] No such legislation has been adopted.

<u>Conduct of Business by AANC</u>

AANC commenced operations in North Carolina in 1997, after the effective date of the Check Cashers Act, and it has operated in this state continuously since that time until the suspension of business discussed above.[37] Its operations were conducted in the manner described below.

AANC Operates on its Own: October 1, 1997 to August 31, 2001

During the effectiveness of G.S. § 53-281, from October 1, 1997 to August 31, 2001, AANC operated under the standard business model.[38] Advances made during this period are hereinafter referred to as "AANC Advances." AANC was licensed as a check casher and made AANC Advances from its own funds.[39] An AANC customer who had no funds in his or her checking account could write a check to AANC and receive an immediate cash advance.[40] The maximum fee for such a transaction in North Carolina was 15% of the face amount of the check, with maximum face amount (loan plus fees) of $300.[41] In a typical transaction, an AANC customer would write a check for $117, which was made payable to AANC and receive $100 in cash.[42] The effective annual percentage rate for such a transaction, repayable in 14 days, was 443.21%.[43]

75D36CDD60EF/0/DeclaratoryRuling_CheckCashersAct.pdf and OCOB Regulations at 4 N.C.A.C, Subchapter 3L.

33 G.S. § 53-276.

34 Session Law 1997-391.

35 Session Law 2001-323.

36 During the 2001-2002 Session: S. 104, *see* "Regulate Deferred Deposit;" H. 670, "Reform Payday Lending;" S. 862, "Procedure for Delayed Deposit Checks;" H. 1172, "Revise Law Governing Delayed Deposit of Checks;" H. 1365, "Improve Regulation of Payday Lenders;" H. 1608, "Revise Payday Lending Regulations." During the 2003-2004 Session, *see, e.g.*, H. 1005, "Authorize and Regulate Deferred Deposit Loans." During the 2005-2006 Session, *see, e.g.*, S. 947, "Regulate Deferred Deposit" and three different legislative study bills (H. 1269, H. 413, and H. 1723).

37 *See supra* text accompanying note 5.

38 PHS SF No. 3.

39 PHS SF Nos. 15 - 18.

40 PHS SF No. 19.

41 G.S. § 53-281.

42 PHS SF No. 19.

43 *Id.*

The documentation required of a customer to obtain an AANC Advance included: (1) identification, (2) a pay stub or other evidence of income, (3) a copy of a recent bank statement. The customer was required to enter into a delayed deposit transaction agreement and repayment agreement with AANC, to write a check to AANC for the amount of the advance plus the applicable fee, and to set a date to return to the AANC location to pay off the delayed deposit transaction and to reclaim the customer's check.[44] AANC employees then entered the customer application information into the Advantage system, a proprietary point of sale system of Parent used in all operating locations of Parent's operating subsidiaries, where it was recorded, transmitted and stored.[45]

In addition to Advantage, AANC received a variety of supervisory and support services from Parent, pursuant to a Management Agreement with Parent, during its operations under the standard business model.[46] AANC also received financing of its operations from Parent in accordance with the Management Agreement.[47] AANC used Parent's proprietary intellectual property through a licensing agreement with AARC.[48]

In addition to services provided by Parent and AARC, AANC contracted, directly or indirectly, with Teletrack, a third party vendor, for services in connection with the making of AANC Advances.[49]

During this period, Center Gross Profit Under Standard Model (CGPSM) for AANC may be expressed, consistent with Parent's financial statements, as follows:

CGPSM = Customer Fees (CF) – Provision for Doubtful Accounts (PDA)
– Center Expenses (CE)[50]

As previously stated, it is assumed that the cost of financing from Parent is included in the other subcategory of Center Expenses.

When G.S. § 53-281 expired on August 31, 2001, AANC ceased making Advances for consideration, and, as of September 20, 2001, notified OCOB of its cessation of operations as a check cashing business and its intent to surrender all check cashing licenses for its North Carolina locations.[51]

[44] PHS SF No. 26.
[45] Prospectus, *supra* note 14, pp. 81-83.
[46] *See supra* text accompanying notes 15-19.
[47] *Id.*
[48] *See* discussion of AARC *supra* notes 20-22.
[49] *See* discussion *supra* text accompanying notes 14-22. Teletrack is a third party service provider who gathers and disseminates to industry subscribers various customer data.
[50] Prospectus, *supra* note 14, F-4.
[51] PHS SF No. 22.

AANC Operates in a Relationship with Peoples National Bank of Paris, Texas: September 11, 2001 to February 28, 2003

After August 31, 2001, AANC entered into a Marketing and Servicing Agreement (the "Peoples Agreement") with Peoples National Bank of Paris, Texas ("PNB") and began to operate its existing cash advance centers under the agency business model.[52] Advances under the Peoples Agreement are hereinafter referred to as "Peoples Advances." In a typical transaction, the customer would write a check for $117, which was made payable to PNB, and receive a PNB check for $100.[53] The effective annual percentage rate for such a transaction, repayable in 14 days, was 443.21%.[54]

The documentation required of a customer to obtain a Peoples Advance included: (1) identification, (2) a pay stub or other evidence of income, and (3) a copy of a recent bank statement. The customer was required to enter into a cash advance and repayment agreement with PNB, to write a check to PNB for the amount of the advance plus the applicable fee, and to set a date to return to the AANC location to pay off the Peoples Advance (which funds would then be deposited into a PNB account) and to reclaim the customer's check.[55]
AANC employees then entered the customer application information into the Advantage system which automatically transmitted the information to Teletrack, as a result of which the transaction was approved or denied.[56]

Under the Peoples Agreement, AANC agreed to, among other things: (i) maintain and staff its cash advance centers, (ii) conduct advertising and marketing for Peoples Advances, (iii) accept and process applications, (iv) distribute the Peoples Advance or a notice of declination to each customer, (iv) hold customer checks when delivered at closing, (v) deposit repayment amounts received from customers, and (vi) provide accounting and collection services.[57] All loan documentation named PNB as the lender.[58]

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[52] PHS SF No. 23.
[53] Letter, dated December 11, 2001, from Monica L. Allie, Senior Vice President of Regulatory and Legal Affairs, Advance America, Cash Advance Centers, Inc., to Philip A. Lehman and L. McNeil Chestnut, North Carolina Department of Justice ("Parent 2001 Letter"), p. 2. The Parent 2001 Letter is referred to an Attachment to the Affidavit of Monica Allie, Respondent's Exhibit 1, ¶ ¶ 11, 12, but is only generally referred to in Respondent's Post Hearing Memorandum ("RPHM"), p. 15. The Parent 2001 Letter is not included in the Exhibits in Support of Respondent's Post-Hearing Memorandum, but it was submitted in the Unindexed Exhibits, and has been marked by the OCOB as UE-1.
[54] PHS SF No. 29.
[55] PHS SF No. 24.
[56] Deposition of Monica L. Allie, August 16, 2005, pp. 28-32, Petitioners' Exhibit 82; Parent 2001 Letter, *supra* note 5, p. 3.
[57] Marketing and Servicing Agreement, dated as of September 11, 2001, between Peoples National Bank and Advance America, Cash Advance Centers of North Carolina, Inc., included in the record of this matter as Petitioners' Exhibit 41, as amended by a Second Amendment to the Marketing and Servicing Agreement, dated February 12, 2002, also included in Petitioners' Exhibit 41 (the "Peoples Agreement").
[58] *Id*.

For its services under the Peoples Agreement, AANC received compensation determined as a percentage of the income generated by the Peoples Advances.[59] The Peoples Agreement further provided that AANC's compensation was to be adjusted by (i) reducing it if losses on "Loans" (as the Peoples Agreement called Peoples Advances) exceeded eight percent of the "finance charges on the Loans," by the amount of such excess; or (ii) increasing it by the amount eight percent of such finance charges exceeded losses.[60] AANC's "Fees" were to be paid twice a month, payable within one day after receipt by PNB of an invoice from AANC.[61] It appears from the invoices from AANC to PNB that AANC was charged for the expense of PNB's Teletrack services (TC).[62]

Gross Center Profit under the Peoples Agreement (GCPPA) may be expressed as follows:

GCPPA = Marketing Processing and Service Fees (MPSF) – Provision for Agency Bank Losses (PABL) – CE – TC

MPSF is comprised of the percentage compensation earned by AANC for services rendered plus the portion of losses assumed by PNB.[63] The AANC compensation percentage varied during the term of the Agreement, but was never less than 81.8667% of Customer Fees, and PNB's portion of losses was 8% of Customer Fees.[64] The PABL was AANC's estimate of the excess of uncollectible accounts over PNB's portion of the losses.[65] In addition, AANC would have received the financial benefit of the assumption of accounts receivable funding costs by PNB.[66]

The difference in operating results for AANC under the Peoples Agreement, as compared to operation under the standard business model, may be expressed as follows:

$$\text{GCPSM} - \text{GCPPA} = [\text{CF} - \text{PDA} - \text{CE}] - [0.8987\ \text{CF} - \text{PABL} - \text{CE}] = 0.1013\ \text{CF} - \text{PDA} + \text{PABL}$$

This comparison is, of course, on an accrual accounting basis. The provision figures, PDA and PABL are estimates,[67] and CF is accrued on a constant yield basis.[68]

As will be seen below, payments to AANC from its bank partners under the bank agency model were computed on a cash basis, not an accrual basis. To convert the comparison of accrual basis operating results to a cash basis, the computation starts with total loan

[59] Peoples Agreement, *supra* note 57, ¶ 2(g)(i) and Exhibit A.
[60] Peoples Agreement, *supra* note 57, ¶ 2(e)(i).
[61] Peoples Agreement, *supra* note 57, Exhibit A.
[62] Petitioners' Exhibit 42.
[63] Prospectus, *supra* note 14, F-9.
[64] Peoples Agreement, *supra* note 57.
[65] Prospectus, *supra* note 14, pp. F-9, F-10.
[66] There is evidence in the record that AANC or Parent made a loan of $3 million to PNB or its parent as part of this relationship. *See* Petitioners' Exhibit 31, Letter of Counsel for AANC to Commissioner, December 17, 2004, item nos. 2 and 3.
[67] Prospectus, *supra* note 14, pp. F-9, F-10.
[68] *Id*. p. F-9.

fees paid by customers (F) in a given period rather than CF. One must then subtract from F actual losses in such period (L), rather than PDA or PABL. Under this cash method of presentation, Center Cash Profit (CCP) is determined by subtracting from F (or in the case of agency agreements, a percentage of F) losses (L) and Center Expenses (CE). Under this approach, the difference between AANC's Center Cash Profit operating under the standard method (CCPSM) and under the Peoples Agreement (CCPPB) can be stated as follows:

$$CCPSM – CCPPB = [F – L – CE] – [0.8987\ F – L – CE] = 0.1013\ F$$

The foregoing computation shows that AANC gave up approximately 10% percent of gross cash fees to be able to continue to operate in North Carolina. In addition, AANC paid for Teletrack and for the fees of a Texas law firm. Teletrack would probably have been borne by AANC under the standard model; the fees of the Texas law firm, for a relatively small sum, probably not.

The record of this matter includes thirty-five (35) half-monthly AANC Marketing and Servicing Invoices to PNB for periods beginning on September 12, 2001, and ending February 28, 2003.[69] A review of these invoices confirms that:

1. AANC's fee was calculated based on a percentage of the Gross Fees received by PNB for the period in question, subject to various adjustments.

2. A Bad Debt Allocation was stated to be 8% of the Loan Fees Paid stated on the invoice. From this allocation was subtracted actual charge-offs for the period. If the remainder was positive, the charge-offs having been greater than the Bad Debt Allocation, the Amount Due to AANC for such period was reduced by such remainder. If the remainder was negative, with the Bad Debt Allocation exceeding charge-offs, the Amount Due to AANC was increased by such excess.

3. During the 35 periods in question, aggregate fees (F) were $35,528,966. The aggregate "Bad Debt Allocation" for these periods, representing the portion of bad debts borne by PNB was $2,842,317.32, which was 8% of F for such periods. AANC's aggregate base fee for the periods was $29,105,259.23, or 81.92% of F.

4. Aggregate losses (L) for the periods in question were $3,878,503.69, or 10.9% of F. Accordingly, L exceeded the proportion of losses for which PNB was contractually obligated. AANC derived no benefit from PNB's obligation for losses up to

[69] Petitioners' Exhibit 42.

8% of F and in fact absorbed additional losses of $1,036,186.37, or 2.9% of F.

5. Additional charges and adjustments born by AANC for the periods in question aggregated $1,401,739.49, or 3.9% of F. As noted above, most of these expenses would have been borne by AANC under the standard business model.

6. As the result of the foregoing, AANC received aggregate compensation of $26,667,363.37, or 75% of F, for the periods in question.[70]

7. PNB received an aggregate of $3,581,319.82, or 10.08% of F for funding the transactions,[71] and the use of its charter.

The foregoing analysis confirms the mathematical computations that preceded it. AANC continued its cash advance lending business in North Carolina after the State's payday lending law expired by "outsourcing" the funding and underwriting of its operations for a fee of just over 10% of gross revenue.

On March 18, 2002, the Office of the Comptroller ("OCC"), PNB's primary financial regulator, announced the filing of a notice of charges against PNB alleging that PNB had engaged in unsafe and unsound practices in connection with its payday lending program.[72] Among the alleged unsafe and unsound acts were (i) allowing the payday lending program to grow at a rate beyond prudent limits; (ii) inadequate capital; (iii) excessive reliance on "two third-party vendors to market, underwrite, originate, disburse, service and collect payday loans" while failing to assure itself such vendors could perform such services; and (iv) acceptance of "a $3 million loan from the third party that originated all of its payday loans … [with] a rapidly escalating interest rate [that] … provides strong incentive for the bank to maintain its payday loan volume at an excessive level to generate earnings to repay the loan."[73]

On January 31, 2003, the OCC announced that Parent and PNB had agreed to end their payday lending relationship and PNB agreed to pay $175,000 in civil money penalties.[74] Under the consent decree issued in connection with this settlement, Parent agreed to end its relationship with PNB in North Carolina and not to enter any contract to become either an agent or bank service provider for a national bank without first applying to the

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[70] Some figures may not foot due to rounding.
[71] *See* Petitioners' Exhibit 31, Letter of Counsel for AANC to Commissioner, December 17, 2004, item nos. 2 and 3 for details on the loan of Parent to PNB.
[72] OCC Press Release, "OCC Files Notice of Charges Against People's National Bank of Paris, Texas," March 18, 2002, *available at* http://www.occ.treas.gov/ftp/release/2002-26.txt.
[73] *Id*. A copy of the Notice of Charges may be viewed at http://www.occ.treas.gov/ftp/release/2002-26a.doc.
[74] OCC News Release, NR 2003-06, dated January 31, 2003, *available at* http://www.occ.treas.gov/toolkit/newsrelease.aspx?Doc=2BQJOXBC.xml.

OCC.[75] In a press release announcing the settlement, then Comptroller of the Currency John D. Hawke said, "We have been greatly concerned with arrangements in which national banks essentially rent out their charters to third parties who want to evade state and local consumer protection laws … The preemption privileges of national banks derive from the Constitution and are not a commodity that can be transferred for a fee to nonbank lenders."[76] Copies of the documentation of Parent's entry into this settlement are included in the record of this matter.[77]

In light of its inability to continue to operate under the Peoples Agreement, AANC terminated that agreement, in connection with which it paid PNB or its parent $6,325,000, a portion of which was used to repay the outstanding loan to PNB's parent holding company.[78]

AANC Operates in a Relationship with Republic Bank and Trust Company: February 12, 2003 to July 6, 2005

After entry of the OCC consent decree mentioned above, and effective on or about March 1, 2003, AANC entered a Marketing and Servicing Agreement (the "Republic Agreement") with Republic Bank and Trust Company ("Republic" or "RBT").[79] Republic was a bank organized under the laws of the State of Kentucky and headquartered in Louisville, Kentucky. Republic had the authority to make deferred deposit transactions under Chapter 368 of the Kentucky Revised Statutes.[80] During the period when the Republic Agreement was in effect, Republic did not make Advances in its home state of Kentucky.[81] During that same period, Parent, through another subsidiary, operated not less than thirty locations in Kentucky.[82] Advances under the Republic Agreement are hereinafter referred to as "Republic Advances."

Under Kentucky law, the maximum fee for such a transaction was $15 per $100 of the face amount of each check accepted for deferred deposit.[83] Republic was permitted to assess a fee of $17.50 per $100 advanced on each check accepted for deferred deposit on its North Carolina transactions.[84] In a typical transaction, an AANC customer would write a check for $117.50, which was made payable to RBT and receive $100 check or,

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[75] *Id.*
[76] *Id.*
[77] Petitioners' Exhibit 8.
[78] Prospectus, *supra* note 14, pp. F-18, F-19.
[79] PHS SF No. 32; Marketing and Servicing Agreement, dated as of February 12, 2003, between Republic Bank and Trust Company and Advance America, Cash Advance Centers of North Carolina, Inc. and McKenzie Check Advance of North Carolina, LLC d/b/a National Cash Advance, as amended by First, Second and Third Amendments thereto (the "Republic Agreement), all contained in Petitioners' Exhibit No. 1. Expurgated versions of these documents are also contained in Republic 2004 10-K, Exhibit 10.27. *Available at* http://www.sec.gov/Archives/edgar/data/921557/000110465905011522/a05-1744_110k.htm.
[80] PHS SF No. 35.
[81] PHS SF No. 36.
[82] Prospectus, *supra* note 14, p. 77.
[83] Ky. Rev. Stat. Ann. § 368.100 (2005).
[84] PHS SF No. 35.

after May 3, 2004, funds of Republic on hand at the AANC location.[85] The effective annual percentage rate for such a transaction, repayable in 14 days, was 456.26%, as shown in the Republic truth-in-lending disclosure.[86]

The documentation required of customers to obtain Republic Advances included: (1) identification, (2) a pay stub or other evidence of income, (3) a copy of a recent bank statement and (4) an "Other Transactions" certification, as required by Kentucky law. The customer was required to enter into a deferred deposit transaction agreement and repayment agreement with Republic, to write a check to Republic for the amount of the Advance plus the applicable fee, and to set a date to return to the AANC location to pay off the deferred deposit transaction for deposit into a Republic account and to reclaim the customer's check.[87] AANC employees then entered the customer application information into the Advantage system, which automatically transmitted the information to Teletrack. Teletrack would then on an automated basis apply the credit criteria and credit scoring previously established by the bank and then provide electronic feedback within minutes to the AANC store.[88]

Under the Republic Agreement, AANC agreed to, among other things: (i) maintain and staff its cash advance centers, (ii) conduct advertising and marketing for Republic Advances, (iii) accept and process applications, (iv) distribute the Advance or a notice of declination to each customer, (iv) hold customer checks when delivered at closing, (v) deposit repayment amounts from customers, and (vi) provide accounting and collections services.[89] All loan documentation named Republic as the lender.[90] AANC's performance was guaranteed by Parent.[91]

For its services under the Republic Agreement, AANC received 67% of the revenue (F) generated by the Republic Advances, net of certain expenses.[92] In addition, Republic agreed to assume losses on Republic Advances up to 20% of F in any given period; if losses exceeded 20% of F, Republic reduced its bi-weekly payment to AANC accordingly, and if losses were less than 20% of F, Republic increased its bi-weekly payment to AANC accordingly.[93] AANC was not obligated under the Republic Agreement to pay Teletrack's charges (TC) for services to Republic, which were paid by Republic.[94] In addition, Republic funded outstanding receivables, which reduced Parent's liability to its lenders and, accordingly, AANC's financial liability to Parent, and

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[85] PHS SF No. 28.
[86] PHS SF No. 35.
[87] PHS SF No. 25.
[88] Deposition of Monica L. Allie, *supra* note 56, pp. 28-32. Applications for loans through National Cash Advance (Petitioners' Exhibit 20), PNB (Petitioners' Exhibit 21 and Petitioners' Exhibit 24), and RBT (Petitioners' Exhibit 23), all informed customers of this use of the Teletrack database.
[89] Republic Agreement, *supra* note 79.
[90] Republic Agreement, *supra* note 79, ¶ ¶ 1(gg), 4(a), and 5(a); *see also* Deposition of Leigh Anna Hollis, August 15, 2005, Respondent's Exhibit 18, pp. 34-36.
[91] Joinder and Guaranty Agreement between RB&T, NCA, AANC, and Advance America, dated February 12, 2003, together with amendments. These documents appear as Petitioners' Exhibit 3.
[92] Republic Agreement, *supra* note 79, Exhibit A.
[93] Republic Agreement, *supra* note 79; Otis Meacham Affidavit, Petitioners' Exhibit 39, ¶ ¶ 17, 28.
[94] This is assumed from the absence of a charge on the AANC invoices to RBT.

any relevant interest charges on the liability (LP). In light of the foregoing, cash profit from North Carolina operations under the Republic Agreement (CCPRA) may be stated as follows:

$$CCPRA = 0.87F – L – [CE – TC – LP] = 0.87F – L – CE + TC + LP$$

Invoices calculating the amounts owed under the formula contained in the Republic Agreement were issued at the end of each two-week period of operation and payment was due the day following delivery of such invoices.[95]

The difference in operating results for AANC under the Republic Agreement, as compared to operation under the standard method, may be expressed as follows:

$$\begin{aligned} CCPSM – CCPRA &= [F – L – CE] – [0.87 F – L – CE + TC +LP] \\ &= 0.13 F – TC – LP \end{aligned}$$

Assuming a constant level of customer fees and center expenses, the foregoing computation shows that AANC gave up 13 percent of revenue, such amount being reduced by the costs of Teletrack and of receivables financing (each of which was now born by the bank) to be able to continue to operate in North Carolina.

The foregoing calculations are confirmed by the actual operating results under the Republic Agreement. The Petitioners' expert witness reviewed operating invoices under the Republic Agreement for the seventeen month period beginning March 1, 2003, and ending July 31, 2004, and gave evidence that (i) AANC received net fees of \$35,603,052.48, or 76.16% of aggregate adjusted Fees for the period; (ii) Republic received net payments of \$6,068,633.06, or 12.99% of aggregate adjusted Fees; and (iii) the remaining 10.85% of adjusted gross fees consisted of bad debt losses.[96] Assuming an efficiency ratio of 60%, AANC's estimated take during this period (\$14,241,221) is over 2.3 times amounts received by Republic, without accounting for the costs of Teletrack or costs of funding receivables.[97]

During the period of operation under the Republic Agreement, Republic and AANC, as an institution affiliated party of Republic, were subject to supervision and examination by KOFI and FDIC.[98] On March 1, 2005, FDIC issued revised examination guidance on payday lending programs (the "Revised Guidance").[99] The Revised Guidance was issued by FDIC staff in furtherance of the agency's obligation to promote safe and sound operation of banks and was the latest in a series of examiner guidance publications

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[95] Republic Agreement, Exhibit A, Petitioners' Exhibit 1.
[96] Petitioners' Exhibit 39. Affidavit of Otis Meacham ¶ 19 and Exhibit thereto.
[97] The efficiency ratio for North Carolina centers for the nine months ended September 30, 1994, was approximately 60.7%. Prospectus, *supra* note 14, p. 41. Using figures for the same period, raising the efficiency ratio to 65% results in a net return to AANC (\$12,461,068) that is still over twice the gross return to Republic.
[98] RPHS, SF No. 44; Republic Agreement, *supra* note 79, Affidavit of Monica L. Allie, *supra* note 56, Attachment ¶ ¶ 20, 74-76, and 91-99.
[99] FDIC FIL-14-2005, "Guidelines for Payday Lending," Respondent's Exhibit 50.

regarding subprime lending generally and payday lending in particular.[100] Its stated purpose was to describe "safety and soundness and compliance considerations for examining and supervising state nonmember institutions that have payday lending programs."[101] Requirements of financial institutions under the Revised Guidance included the following:

1. Establish appropriate "cooling off" or waiting periods between the time a payday loan is repaid and another application is made;

2. Establish the maximum number of loans per customer that are allowed within one calendar year or other designated time period; and

3. Provide that no more than one payday loan is outstanding with the bank at a time to any one borrower.

4. Ensure that payday loans are not provided to customers who had payday loans outstanding **at any lender** for a total of three months during the previous 12 months. When calculating the three-month period, institutions should consider the customers' total use of payday loans at all lenders.[102]

As a result of the change in FDIC guidance, AANC and Parent terminated the Republic Agreement.[103] In announcing this action, Parent's statement included the following:

> On March 2, 2005, the FDIC issued revised Payday Lending Guidance …that limits the frequency of borrower usage of payday cash advances and limits the period a customer may have payday cash advances outstanding from any lender to an aggregate of three months during the previous 12 month period … On July 5, 2005, and effective July 6, 2005, we terminated our marketing and servicing agreement with Republic and entered into a new marketing and servicing agreement (the "First Fidelity Agreement") with First Fidelity Bank, a South Dakota bank … to operate as a marketing, processing, and servicing agent for payday cash advances and installment loans made by First Fidelity in our 117 payday cash advance centers in North Carolina.[104]

[100] *Id.* p. 1 and footnote 1 therein.
[101] *Id.* p. 1.
[102] *Id.* p. 9.
[103] Current report on Form 8-K of Advance America, Cash Advance Centers, Inc, dated on July 6, 2005, (the "Parent July 2005 8-K"), p. 2, included in the record of this matter as Respondent's Exhibit 79 and as Commissioner's Exhibit 4. *Available at* http://www.sec.gov/Archives/edgar/data/1299704/000110465905031764/a05-11992_18k.htm.
[104] *Id.*

While the foregoing statement appears to link the issuance of the revised payday guidance to the termination of the Republic Agreement, it does not do so in so many words. In fact, the foregoing disclosure does not state any basis for such termination. A review of the Republic Agreement makes this circumstance clearer, for it shows that there was not any basis in the agreement for termination at all, much less in the preemptory manner noted above.

Section 8 of the Republic Agreement is entitled "Term and Termination." Its provisions may be summarized as follows:

1. Paragraph (a) of Section 8 provides that the term of the agreement shall be three years from the effective date of the agreement.[105] As February 12, 2003 is the effective date of the Republic Agreement, this paragraph is clearly inapplicable.

2. Paragraph (b) of Section 8 provides that if the State of North Carolina enacts legislation *satisfactory to AANC* regarding the making of Advances, then AANC *upon 30 days notice* is authorized to (i) require Republic to continue making Advances under the Agreement, subject to a requirement to assure receipt of a stipulated amount; or (ii) terminate the agreement and enter into a replacement agreement with Republic in another state; or (iii) make Advances in its own name and pay Republic a stipulated amount through the term of the Republic Agreement.[106] This paragraph is revealing of the nature of the relationship of AANC and Republic, but is not a ground for immediate termination in the circumstances described above.

3. Paragraph (c) of Section 8 provides for the payment of a stipulated sum upon the termination of the Republic Agreement without cause by Republic.[107] This paragraph is inapplicable to the facts surrounding the termination by AANC.

4. Paragraph (d) of Section 8 allows termination by AANC six months after (i) the commission of a material breach of the Republic Agreement by Republic or (ii) the filing by Republic under state or federal liquidation, receivership or conservatorship statutes or (iii) the bankruptcy of AANC.[108] There was no ground for termination under this paragraph.

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[105] Republic Agreement, *supra* note 79, ¶ 8(a). It should be noted that this paragraph and paragraphs of Section 8 subsequently quoted are disclosed in an expurgated version of the Republic Agreement which appears as Exhibit 10.27 to Republic 10-K, Year End December 31, 2004, which Form 10-K is included in this record as Commissioner's Exhibit 7.
[106] Republic Agreement, *supra* note 79, ¶ 8(b).
[107] *Id.* ¶ 8(c).
[108] *Id.* ¶ 8(d)(i), (ii), (iii).

5. Paragraph (e) of Section 8 allows AANC to terminate the agreement on 30 days written notice if (i) Republic ceases to fund Advances, (ii) any amendment to the Kentucky law authorizing the Republic Advances or other applicable law has an adverse effect on AANC, or (iii) Republic amends its policies and procedures in a way that is materially adverse to AANC. This paragraph is inapplicable to the facts surrounding the termination.

6. Paragraph (h) of Section 8 authorizes termination *on 30 days written notice* if (i) an act of God or other natural disaster makes performance impossible, (ii) "if a party's performance hereunder is rendered illegal or materially adversely affected by reason of changes in law or regulations (either federal or state) applicable to the [Republic Advances] or to either party hereto."[109] Although it may be argued that the amended FDIC guidance on payday lending is a materially adverse regulation, such argument would be incorrect for a number of reasons, to wit: (a) it is not a "rule or regulation" as that phrase is used in the Federal Deposit Insurance Act[110] and (b) the guidance does not materially and adversely affect Republic's ability to make Republic Advances, only the amount and timing of such Advances, as to which there is no requirement in the Republic Agreement. The effect of the amended FDIC guidance is more specifically addressed in paragraph (i) of Section 8.

7. Paragraph (i) of Section 8 allows termination by a party that has been advised in writing by a regulatory agency having jurisdiction of such party or the Republic Advances "that the performance of that party's obligations under this Agreement is or may be unlawful or *constitutes or may constitute an unsafe or unsound banking practice or that such activity may jeopardize such party's standing with or applicable rating from such regulatory agency*, then the party …who has been so advised … may terminate this Agreement *by giving written notice at least six (6) months in advance of termination to the other party…*"[111] The amended FDIC Guidance clearly did provide that the frequency and certain other aspects of the Republic Advances could constitute unsafe or unsound banking practice *by Republic*, which was the party to the Republic Agreement to whom the guidance was directed. Accordingly, *Republic* rather than AANC had the option under

[109] *Id.* ¶ 8(h).
[110] As noted above, the Revised Guidance is just that: guidance to examiners. It is not an agency rule interpreting the FDI Act or any other law. The status of an attempt by the FDIC to issue rules with respect to interstate operation of banks generally is discussed at notes 258-263 *infra*.
[111] Republic Agreement, *supra* note 79, ¶ 8(i) (emphasis added).

> Paragraph 8(i) to terminate the Republic Agreement, and then only upon six months written notice.

AANC had no ground to peremptorily terminate the Republic Agreement as a result of the Revised Guidance. This conclusion was shared by Republic. In response to a July 5, 2005, letter from AANC purporting to terminate the Republic Agreement on July 6,[112] the General Counsel of Republic responded with a letter that included the following statements:

> your letter does not specify under what provision of Section 8 you are proceeding. Additionally, we have no record of any notice of termination from you prior to July 5, 2005 … nor any recent conversations whereby we agreed to terminate … Republic specifically reserves all rights available to it pursuant to the North Carolina M&S Agreement dated February 12, 2003.[113]

Republic's parent holding company subsequently publicly disclosed that the Republic Agreement had been terminated by Parent and that it would commence the offering of payday loans directly through its Indiana bank subsidiary.[114]

AANC Operates in a Relationship with First Fidelity Bank: July 6, 2005 to September 15, 2005

FFB's relationship with AANC began in 2001 when the bank was contacted by AANC or Parent.[115] After the termination of AANC's relationship with RBT, on or about July 6, 2005, AANC entered into a Marketing, Processing and Servicing Agreement (the "FFB Agreement") with First Fidelity Bank of Burke, South Dakota ("FFB").[116]

FFB is a state non-member bank organized under the laws of South Dakota and, accordingly is subject to regulation by the FDIC and South Dakota Division of Banking ("SDDB").[117] At June 30, 2005, FFB had total assets of $204,390,000, equity capital of

[112] Letter, dated July 5, 2005, from S. Sterling Laney III, Vice President, Counsel and Chief Compliance Officer of Parent, to Mike Beckwith and Michael Ringswald of Republic, included in the record of this matter as Petitioners' Exhibit 76.
[113] Letter, dated July 6, 2005, from Michael A. Ringswald, General Counsel of Republic to Sterling Laney and John T. Egeland of Parent and Robert M. Buell, Esq., included in the record of this matter as Petitioners' Exhibit 77.
[114] Report on Form 8-K of Republic Bancorp, Inc., dated July 5, 2005, included in the record of this matter as Commissioner's Exhibit 12. *Available at* http://www.sec.gov/Archives/edgar/data/921557/000110465905031950/a05-12073_18k.htm.
[115] Deposition of George Kenzy, President and Chief Executive Officer of FFB, Respondent's Exhibit 19, p. 10.
[116] Affidavit of George Kenzy, dated August 2, 2005, Respondent's Exhibit 7, Attachment ¶ 4; Marketing, Processing and Servicing Agreement, dated as of July 6, by and between First Fidelity Bank and AANC, (the "FFB Agreement") included in the record of this matter as Petitioners' Exhibit 45.
[117] Affidavit of George Kenzy, Attachment ¶ ¶ 39, 42 as Respondent's Exhibit 7.

$29,777,000 and net income of $3,103,000.[118] At that same date, Parent had total assets of $400,444,000, total stockholders' equity of $307,613,000 and net income of $30,483,000.[119] Of FFB's total loan portfolio of $90.6 million, farmland and agricultural loans accounted for approximately $53 million, other loans secured by real estate for approximately $17 million, other commercial and industrial loans for $10.4 million and "other consumer loans" for $8.6 million.[120] In his deposition, FFB's President estimated the amount of FFB Advances to be $6 million and $4.5 million and the amount of Installment Loans to be $5.5 million.[121] In order to comply with FDIC capital guidelines, FFB participated 37% of its North Carolina consumer loans to a Washington bank and 20% of such loans to two individual FFB insiders.[122]

AANC's change of banks was the result of the Revised Guidance and, in particular, the restrictions that such guidance put on the number of payday advances that could be made to a customer in a year while allowing other alternative long-term credit products, generally installment loans.[123]

To achieve optimal compliance with the Revised Guidance, Parent rearranged its contractual relations in agency states by: (i) amending its agreement with a South Dakota bank other than FFB in Pennsylvania to include consumer installment loans; (ii) terminating its agreement with a Washington state-chartered bank in Arkansas and entering an agreement with FFB regarding operations in that state; and (iii) replacing Republic with FFB in North Carolina.[124] In addition, Parent caused an agreement with FFB in Michigan to be terminated and began offering cash advance services to customers in that state directly in a manner similar to the standard method.[125] Parent's disclosure of these changes went on to state that "we expect that we will retain 60 - 80% of *our revenue"* in agency states but that it expected the share of overall revenue represented by the three states just mentioned to drop from 14% of total revenue to 10% (a reduction of 29%).[126]

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[118] Federal Financial Institutions Examination Council, Consolidated Reports of Condition and Income in Respect of FFB for the period ended June 30, 2005 (the "FFB June 2005 ROC"), included in the record of this matter as Petitioners' Exhibit 89, Schedules RC and RI.
[119] Quarterly Report on Form 10-Q of Parent, for the quarter ended June 30, 2005, appears in this record as Commissioner's Exhibit 5 and Respondent's Exhibit 80. *Available at* http://www.sec.gov/Archives/edgar/data/1299704/000110465905039695/a05-13162_110q.htm.
[120] FFB June 2005 ROC, *supra* note 118, Schedule RC-C.
[121] Deposition of George Kenzy, *supra* note 115, pp. 9, 49.
[122] *Id*. pp. 56-58.
[123] Parent Form 10-Q for the quarter ended June 30, 2005, Respondent's Exhibit 80, Commissioner's Exhibit 5, p. 25.
[124] *Id.* p. 26.
[125] *Id.* p. 28.
[126] *Id*. pp. 26-27 (emphasis added).

FFB was authorized to make both FFB Advances and high interest rate installment loans under South Dakota law.[127] Notwithstanding its authority to do so, FFB did not make Advances in South Dakota.[128] During 2002, 2003 and 2004, Parent, through a subsidiary, operated between eight and ten locations in South Dakota.[129] FFB did not make Advances in any states other than Michigan, North Carolina and Arkansas.[130]

Republic was not authorized under Kentucky law to make high interest rate installment loans comparable to the FFB installment loans at the rates charged by FFB under South Dakota law and, accordingly was replaced by Parent in North Carolina.[131] FFB was removed from Michigan, where Parent could offer advances directly, such loss being replaced by funding of loans in Arkansas and North Carolina.

Under the FFB Agreement, AANC agreed to provide marketing, processing and collection services similar to those provided under the Republic Agreement.[132] As in the Republic agreements, documentation named FFB as the lender and FFB Advances were funded by FFB checks or cash from funds of FFB held by AANC on behalf of FFB.[133]

Operations under the FFB Agreement differed from the prior agency arrangements in North Carolina in several respects. FFB Advances were made for a fee of $20 per $100 advanced, resulting in an APR of 521.43% for a 14 day advance.[134] In addition, North Carolina customers were also offered consumer installment loans ("Installment Loans") that were, as the name implies, repayable in twice monthly installments over a loan term that did not exceed four months, for a fee of between $55 and $65 per $100 lent.[135] The one example of an Installment Loan analyzed by Petitioners' expert witness had an APR of over 300%, and FFB concedes that the interest on such loans exceeds the rates permitted by North Carolina law.[136] In order to obtain a FFB Advance or Installment Loan, the customer was required to provide the AANC location with a customer information work sheet, pay stub, bank statement, blank check and two forms of identification.[137] Customer information regarding FFB Advances or Installment Loans was then sent to Teletrack, for review and approval or denial in accordance with standards established by FFB; including debt to income analysis in the case of

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[127] Affidavit of Kenzy, *supra* note 116, Attachment ¶ 52, referring to SDCL 54-3-1.1 (this reference applies only to the statements in the paragraph as to South Dakota Law).
[128] Deposition of Kenzy, *supra* note 115, p. 17.
[129] Prospectus, *supra* note 14, p. 78.
[130] Deposition of Kenzy, *supra* note 115, p. 15.
[131] Deposition of Monica Allie, *supra* note 56, pp. 23, 24.
[132] Supplemental Affidavit of Otis Meacham, Petitioners' Exhibit 86, ¶ 9.
[133] Affidavit of Kenzy, *supra* note 116, attachment ¶ ¶ 28, 29; Deposition of Kenzy, *supra* note 115, pp. 44-46.
[134] Kenzy Deposition, *supra* note 115, pp. 41, 43-44; Petitioners' Exhibit 55 [TILA chart] and Respondent's Exhibit 72.
[135] Kenzy Deposition, *supra* note 115, pp. 42, 43; s*ee also* Petitioners' Exhibit 54 and Respondent's Exhibit 73.
[136] Otis Meacham Supplemental Affidavit, *supra* note 132, ¶ 7; Kenzy Affidavit, *supra* note 116, Attachment ¶ 52.
[137] Deposition of Kenzy, *supra* note 115, pp. 28-32 and Exhibits 2 and 3 thereto.

Installment Loans.[138] If the loan was approved, the customer was required to execute and deliver loan documents and a personal check for the loan amount plus the applicable fee and, in return, received a FFB check or cash of FFB in the possession of AANC.[139]

AANC's compensation under the FFB Agreement was as follows:

> (i) for FFB Advances (A) a Marketing and Processing fee of $40 per closed loan and (B) a Servicing and Collection Fee of 71% of fees collected minus the Marketing and Processing Fee; and (ii) for Installment Loans (A) a Marketing and Processing Fee of $200 per closed loan, payable on a per installment basis and (B) a Servicing and Collection Fee equal to 71% of fees collected minus the Marketing and Servicing Fee.[140]

Settlement under the FFB Agreement was to be made by ACH transfer on the date immediately following "settlement," which in this case would be delivery of an AANC invoice.[141]

Evidence about the actual results of operation under the FFB Agreement is sparse, given the short period of time under which such operations were conducted. Assuming for the purposes of this analysis that AANC's portion of Fees (which for this purpose includes interest on Installment Loans) is 71%, center cash profit from North Carolina operations under the FFB Agreement (CCPFFB) may be expressed as follows:

$$\text{CCPFFB} = 0.71\text{F} - \text{CE} + \text{TC} + \text{LP}$$

The difference between cash profit under the standard method and under the FFB Agreement may be expressed as follows:

$$\begin{aligned}\text{CCPSM} - \text{CCPFFB} &= [\text{F} - \text{L} - \text{CE}] - [0.71\text{F} - \text{CE} + \text{TC} + \text{LP}]\\ &= 0.29\text{F} - \text{L} - \text{TC} - \text{LP}\end{aligned}$$

As shown above, under the FFB Agreement, AANC gives up 29% of gross fees in exchange for a release from all responsibilities for losses, Teletrack costs and the cost of funding receivables. On a gross basis AANC's share of F (71%) is 2.4 times the share of FFB. Petitioners' expert witness compared the financial results of operations under the Republic Agreement with those under the FFB Agreement. He found that under the RB&T agreement, RBT was paid $2.25 for each $100 loan, and that RB&T was required to set aside $3.50 (20% of each $17.50 loan fee). He also found that FFB received $5.80 for each $100 in loans, but was required to bear the loss of unpaid loans. The difference of $3.55 between the two banks is almost identical to the $3.50 RB&T was required to set

[138] *Id.* pp. 23-27.
[139] *Id.* pp. 27, 36.
[140] FFB Agreement, *supra* note 116, Exhibit A.
[141] *Id.* ¶ 8.

aside for bad loans. In other words, when the risk of bad loans shifted to the bank, so did almost the precise amount of fees needed to cover any bad loans.[142]

While a comparison of net returns to AANC and FFB is difficult to make since figures are not available from AANC's relationship with FFB, it is not unreasonable to assume that at a 60% efficiency ratio, AANC's CCPFFB would be 28.4 % of F; and, assuming L under the FFB Agreement continued at the rate of prior agency arrangements in North Carolina (10.8% of F) and other operating expenses of FFB were only 0.2%, then FFB's net return would be 18% of F. Accordingly, AANC's CCPFFB would be approximately 1.6 times that of FFB. At a 65% efficiency ratio, AANC's net would be 1.4 times that of FFB.

On September 14, 2005, Parent announced that FFB was temporarily suspending its payday cash advance and installment loan originations as of the close of business on September 15, 2005.[143]

Statements and Actions of Governmental Agencies and Officials

The Commissioner of Banks is charged by statute with interpreting and administering the CFA. Official interpretations of the statute by the Commissioner may take the form of declaratory rulings under G.S. § 150B-4. The Attorney General of North Carolina has a statutory duty under G.S. § 114-2(5)"to give, when required, his opinion upon all questions of law submitted to him by the General Assembly, or by either branch thereof, or by the Governor, Auditor, Treasurer, or any other State officer." Attorney General opinions are advisory and do not have the force of law.[144]

Statements and Actions Relating to the Interpretation of § 53-281

While G.S. § 53-281 was still in force, the Commissioner, responding to a request, issued a declaratory ruling on November 30, 1998, with respect to the practices of certain check cashers, especially with respect to deferred deposit check cashing transactions. The Respondent participated in the process that led to that declaratory ruling.[145] Beginning in 1999, the Office of the Commissioner of Banks, with the assistance and support of the payday lending industry, promulgated and adopted regulations relating to Article 22 of Chapter 53,[146] which became effective July 1, 2000.

The only other official pronouncements having to do with payday lending under G.S. § 53-281 which followed from the Office of the Commissioner of Banks were (i) a notice dated July 24, 2001, to the effect that the legislature had postponed the sunset date of that provision in an effort to consider applicable legislation that would re-authorize and

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142 Supplemental Affidavit of Otis Meacham, *supra* note 132, ¶ 8.
143 *See supra* text accompanying note 5.
144 *Lawrence v. Shaw*, 210 N.C. 352, 361 (1936) *rvs'd on other grounds*, *Lawrence v. Shaw*, 300 U.S. 245 (1937).
145 See Declaratory Ruling dated November 30, 1998, ¶ 1.
146 Title 4 N.C. Admin. Code Subchapter 3L "Check-Cashing Businesses," Sections .0101 *et seq.*

reform the regulation of payday lending;[147] and (ii) a similar notice, dated August 30, 2001, informing check-cashing licensees that G.S. § 53-281 would expire on August 31, 2001 and that consequently, "there is no lawful basis for 'payday lending' without such a law, *including 'payday lending' transactions effected by 'agents' or 'facilitators' of out-of-state institutions."*[148]

There is no evidence in the record to indicate that after the sunset date of G.S. § 53-281 on August 31, 2001, a declaratory ruling was sought by AANC, Parent or any other person engaged in the business of lending with regard to Advances nor is there any evidence of anyone seeking a declaratory ruling that such activity was permitted by North Carolina law. Further, there is no evidence that an opinion of the North Carolina Attorney General was sought with regard to such issue by any private party or by the Commissioner.

Statements and Actions Relating to the Legislative Debate on a Successor to G.S. § 53-281.

During the course of the 2001-2002 Session of General Assembly, no fewer than six different bills were introduced having to do with the regulation of payday lending in one way or another, not counting the measure which postponed the sunset.[149] This pattern of interest and debate and activity on the part of the public and members of the legislature continued for subsequent sessions of the legislature,[150] with no one measure ever finding enough support to win approval by both houses. The sunset, as a consequence, continues in place.

As a condition imposed when the North Carolina General Assembly enacted G.S. 53-281, the Commissioner of Banks was instructed to report to the 2001 General Assembly on the practices of licensees with regard to checks cashed pursuant to the provisions of this section, including any evidence as to consumer complaints, unfair or deceptive trade practices, and the frequency of repeat use by individuals of postdated or delayed deposit checks.[151] This official, written report was made and delivered to the legislature by then Commissioner of Banks Hal D. Lingerfelt on or about February 22, 2001.[152]

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[147] Petitioners' Exhibit 78. Commissioner's Exhibit 17.

[148] Petitioners' Exhibit 79. Commissioner's Exhibit 19. (Emphasis added). The **"URGENT MEMO"** went on to state, "…licensees should **make no further payday loans after August 31, 2001**, …either directly or as agent for another, since they are without legal authority to enter such transactions." (Emphasis in the original).

[149] 2001-2002 Session: S. 104, "Regulate Deferred Deposit"; H. 670, "Reform Payday Lending"; S. 862, "Procedure for Delayed Deposit Checks"; H. 1172, "Revise Law Governing Delayed Deposit of Checks"; H. 1365 "Improve Regulation of Payday Lenders"; H. 1608, "Revise Payday Lending Regulations."

[150] During the 2003-2004 Session, *see, e.g.*, H. 1005, "Authorize and Regulate Deferred Deposit Loans." During the 2005-2006 Session, *see, e.g.*, S. 947, "Regulate Deferred Deposits," and three different "study bills," H. 1269, H. 413, and H. 1723.

[151] Session Laws 1997-391, s. 2.

[152] This document is available online at: http://www.nccob.org/NR/rdonlyres/2A95D7DA-75C0-49F3-B896-CAC45D947727/0/CheckCashersReporttoGenAssembly.pdf.

North Carolina Attorney General Roy Cooper took an interest in the legislative debate on payday lending.[153] Before G.S. § 53-281 expired, he issued a statement urging the General Assembly to "close the out-of-state bank loophole," by which payday loans were being made in North Carolina "without any regulation."[154] A similar statement was issued by Joshua Stein, Senior Deputy Attorney General on August 22, 2001.[155] Commissioner of Banks Hal Lingerfelt corresponded with Attorney General Cooper during the on-going debate, and on May 8, 2002, he shared with him a draft of a proposal, requested by the North Carolina Speaker of the House, for a new bill that, among other things, would "end unregulated, bank-affiliated payday lending."[156]

Statements and Actions in Enforcing the CFA against Payday Lenders After the Sunset of G.S. § 53-281

Before the enactment of G.S. § 53-281, payday lending was subject to the CFA and to N.C. usury law.[157] G.S. § 53-281 carved out a temporary exception to the CFA on behalf of payday lenders. When § 53-281 expired, so did the authorization for payday lenders, and payday lending then became subject again to the CFA and N.C. usury law.[158] Accordingly, in a notice dated August 30, 2001, the Commissioner of Banks informed all persons who were thought to be engaged in payday lending that the authorizing statute had expired and that there was no longer any legal authority for such activity in North Carolina.[159] William Webster IV, CEO of Advance America, has given evidence that, on November 27, 2001, he heard comments at a meeting with some members of the OAG which gave him the "impression that the government had concluded that [AANC's activities in North Carolina were] legal, albeit unregulated, under North Carolina law."[160]

The Attorney General and the Commissioner of Banks filed an action in Wake County Superior Court on January 14, 2002, seeking to enjoin Ace Cash Express, which was purportedly acting as the agent of Goleta National Bank, from "offering, arranging, and making usurious consumer loans known as 'payday loans.'"[161]

On August 26, 2004, the Commissioner of Banks officially notified Mr. Webster that the payday lending activities of Advance America were being investigated. In contrast, Mr. Webster has given evidence that, as late as December 2004, he *knew*, through discussions with unspecified "government representatives" that OCOB believed it "lacked jurisdiction over [consumer] complaints" about AANC's activities in North Carolina.[162] Attorney General Roy Cooper allegedly informed Mr. Webster at an unspecified time, "in

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[153] *See, e.g.*, Statement from Attorney General Roy Cooper, July 11, 2001, House Financial Institutions Committee, found in the record at Respondent's Exhibit 27.
[154] *Id.*
[155] Respondent's Exhibit 30.
[156] Respondent's Exhibit 34.
[157] *See supra* text accompanying note 30.
[158] *Id.*
[159] *Id.*
[160] Affidavit of William M. Webster, IV, June 23, 2005, Respondent's Exhibit 13, Aff. ¶ 3.
[161] *State v. Ace Cash Express*, No. 020 CvS 00330 (Wake Co. Superior Ct., N.C., Jan. 14, 2002).
[162] Affidavit of Webster, *supra* note 160, Aff. ¶ 6.

words or substance," that AANC's activities were "unregulated in North Carolina," and that the State "lacked jurisdiction" over the activities of AANC, and therefore AANC "could proceed lawfully in the State."[163]

On December 8, 2004, Charlie Fields, an examiner employed by the OCOB, responded to a consumer complaining about AANC's business practices by informing her that the OCOB had "no jurisdiction in this matter" and referring her to the South Dakota Division of Banking.[164] The obvious purpose of this letter was merely practical: to direct a consumer to a possible source of a timely resolution of a consumer complaint about a bank in South Dakota, and not to express a legal opinion about a controversial subject.

Summary: Findings of Material Facts

The record in this proceeding is extensive and, accordingly, I have set forth below a summary of the factual inferences and conclusions, supported by the clear weight of the evidence, upon which I have based the legal analysis and conclusions that follow in this Order. The following summary does not, of course, foreclose my use of other facts found above in such legal analysis and conclusions.

AANC is an operating extension of Parent and cannot be viewed in isolation from the overall operations of Parent.

AANC is an operating subsidiary through which Parent conducts its business in North Carolina. All issues regarding operating policies and procedures other than minor ministerial functions at the store level are determined by the Parent. Supervision, oversight and executive management are provided by the Parent. It is telling to note that none of the affidavits included in Respondent's evidence are from officers or employees of AANC. All are from officers of Parent or expert witnesses not affiliated with AANC or Parent.

Parent operates a multi-state financial services business engaged in the making, processing and servicing of loans in different formats dependent upon the laws of the states in which it operates. AANC is one of its operating arms in the conduct of such business.

AANC's operating arrangements with banks were established and altered by Parent in order to maximize Parent's financial return from such operations based on federal and state laws at any particularly time pertaining.

When permitted by North Carolina law, AANC operated under the standard business model, making loans in its own name.

[163] *Id.* at ¶ 9.
[164] Respondent's Exhibit 44.

When the North Carolina law permitting direct Advances expired, Parent and AANC entered a contractual arrangement with a national bank, seeking to obtain the benefit of federal preemption of state usury and consumer protection laws and thus to avoid the proscriptions of North Carolina law. To achieve this result, Parent lent the national bank or its parent holding company $3 million to enhance the capital of the bank.

When the OCC ordered Parent, AANC and the national bank to cease operations, and the Comptroller of the Currency declared such activity to be an impermissible "charter rental" by the bank, Parent sought and found another charter to rent, this time the charter of a state chartered bank supervised by the Commonwealth of Kentucky and the FDIC. Through this arrangement, Parent sought to continue its avoidance of North Carolina usury and consumer protection laws by claiming federal preemption under the interest exportation provisions of the Federal Deposit Insurance Act (the "FDI Act").[165]

When the FDIC revised its supervisory guidance on payday advance lending in a way that reduced the volume of transactions that could be generated by AANC in accordance with Kentucky law, Parent peremptorily terminated AANC's contractual relationship with the Kentucky bank. Parent then had AANC enter into a marketing and servicing arrangement with a bank from South Dakota, a state whose laws permitted high interest rate lending of a kind that would allow Parent, acting through AANC, to continue is operation under the purported protection of federal law and to maximize transaction volume through AANC centers.

AANC was not the agent in any meaningful sense of the banks with which it entered marketing, processing and servicing agreements; rather the banks provided funding for Parent's operations in North Carolina through AANC.

At the outset, it must be noted that AANC has shown by a preponderance of the evidence that in its operating arrangements under the bank agency model the bank for which AANC purports to be an agent has (i) been the lender on the notes executed by customers at AANC locations; (ii) reviewed and approved operating policies and procedures; and (iii) established or agreed to underwriting criteria that were applied by AANC, Parent and Teletrack in a way that allowed the automated system of loan origination operated by Parent to generate loans with a level of risk agreed to by the bank. Funding of the Advances and, in the case of FFB, Installment Loans, is more problematic. As mentioned above, Parent provided $3 million of funding for PNB, and 57% of the funding by FFB is from participations, 20% of FFB's portfolio funding coming from two bank insiders.

Parent's activities, through subsidiaries under both the standard and agency business models, are wholly or partially funded by banks.[166] The difference in the various modes of operation is the cost of such funding. When AANC operated under the standard business model, its receivables were financed by Parent under the Management

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[165] 12 U.S.C. § 1811 *et seq.*

[166] *See* Prospectus, *supra* note 14, p. F-3, which included the balance sheet of Parent at September 30, 2004, in which outstanding amounts on a revolving credit facility comprise approximately 43% of total assets, 55% of total liabilities and 200% of total stockholders equity.

Agreement with intercorporate advances that bore interest at 90% of NationsBank prime, a reflection of the cost to Parent of financing such inventory. In addition to the interest cost of bank financing to Parent, Parent also bore the cost of compliance with the terms and conditions of bank loan agreements. As the analysis above shows, the change from the standard business model to the agency business model in North Carolina kept the basic cost structure of AANC in place. What changed was the cost of financing its receivables, which reflected (i) the cost of use of the bank's charter and (ii) the extent to which the bank's financing of receivables had or did not have stop loss protection from AANC. In even the most costly of its marketing and servicing arrangements, which occurred when AANC contracted with FFB, AANC's operating return was 40% to 60% greater than that of FFB, without taking into full consideration the financing and related costs avoided by that relationship.

AANC's and Parent's control of the relationship with the agency banks is further evidenced by procedures used by AANC. The customer interface and application process was virtually identical, whether AANC was operating on its own or as a purported agent of the banks with which it related.

Additionally, the amounts, means and methods of the payments AANC received under the various bank agreements show AANC's control of the relationships. AANC received more than 80% of the gross fees in its relationship with PNB, and more than 70% of the gross fees in its relationships with RB&T and FFB. The payments to AANC were calculated with reference only to the amount of fees generated in its centers, were billed bi-weekly, and were paid virtually immediately by the bank upon receipt of AANC's invoice. The suggestion that AANC's compensation was received from the general funds of the bank, as if dollars received from fees are somehow different from dollars in the banks' accounts, is risible.

The analysis above makes clear that Parent and AANC had a clear and continuing operating control of, and a predominant economic interest in, the relationships with each of the banks for which AANC was the purported agent, and that Parent changed such relationships aggressively, and in the case of Republic unlawfully, when such change suited the purposes of Parent, operating through AANC.

AANC's Marketing and Servicing Relationship with FFB Confers Material Economic Benefit on Two Individuals

As noted above,[167] a substantial portion of FFB's Advances (and perhaps Installment Loans) were participated to a bank chartered by the State of Washington and to two individuals who were described by the President of FFB as "insiders."[168] The "insiders" held aggregate participations equal to 20% of the North Carolina portfolio. Given the size of the bank and the probable control status of the "insiders," I infer that a material portion of the economic benefit derived by FFB through its relationship with AANC was conferred on two persons in a position to control the conduct of FFB's business. In its

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[167] *See* discussion *supra* text accompanying note 122.
[168] Deposition of Kenzy, *supra* note 115. *See* discussion *supra* text accompanying note 122.

arrangements with FFB, AANC operated as the purported agent not only of a bank but of two individuals who, although associated with a bank, were acting in their individual capacities.

AANC has produced no direct official statement from either the Attorney General or the Commissioner to it after the sunset date of the North Carolina payday lending law either authorizing AANC's activities or taking a no-action position with respect to its activities.

None of the statements of public officials upon which AANC purports to have relied has been shown to be worthy of reliance by AANC or Parent and none has been shown to be binding on me in deciding this matter. Further, none of such statements was an official interpretive statements to AANC authorizing or approving its conduct of business operations in North Carolina after the expiration of G.S. § 53-281 or taking a no-action position with respect to such operations. There is no evidence in the record that AANC or Parent sought such an official interpretation, even though the record clearly establishes that they knew that such official guidance was available and how to ask for it.

II. LEGAL ANALYSIS AND CONCLUSIONS

The North Carolina Consumer Finance Act

Summary of the CFA

The North Carolina Consumer Finance Act[169] is a consumer protection statute that prohibits the contracting for, exaction or receipt of excessive compensation in connection with the making of small consumer loans and provides for a system of licensing of the makers of such loans at rates otherwise prohibited by the North Carolina usury law, Chapter 24 of the General Statues of North Carolina ("Chapter 24").

The provision of the CFA defining its scope, G.S. § 53-166(a), reads as follows:

> No person shall engage in the business of lending in amounts of ten thousand dollars ($10,000) or less and contract for, exact, or receive, directly or indirectly, on or in connection with any such loan, any charges whether for interest, compensation, consideration, or expense, or any other purpose whatsoever, which in the aggregate are greater than permitted by Chapter 24, except as provided in and authorized by this Article, and without first having obtained a license from the Commissioner. The word "lending" as used in this section, shall include, but shall not be limited to, endorsing or otherwise securing loans or contracts for the repayment of loans.[170]

[169] Session Law 1961-1053. Codified as Article 15, Chapter 53, North Carolina General Statutes. N.C. Gen. Stat. §§ 53-164--191.
[170] G.S. § 53-166 (a).

This provision goes on to include within the statute's prohibitions avoidance by "any device, subterfuge or pretense whatsoever"[171] and establishes penalties for noncompliance.[172] The term "person" includes "any person, firm, partnership, association, or corporation."[173] The "amount of the loan" is defined to include "the aggregate of the cash advance and the charges authorized under the CFA.[174]

The CFA provides for a system of licensure and supervision of persons who make loans covered by the statute.[175] It further provides for limitations on fees and charges and other normative restrictions on the conduct of licensees in the making of such loans.[176]

The CFA confers on the State Banking Commission and the Commissioner rulemaking power under the statute.[177] The statute confers on the Commissioner the power to conduct investigations, hold hearings, issue cease and desist orders, seek injunctive relief in the courts, and make criminal referrals.[178]

The CFA exempts from its coverage "any person, firm or corporation doing business under the authority of any law of this State or the United States relating to banks" or other institutions and agencies or certain other enumerated activities.[179] It also contains a provision dealing with the application of the statute to out-of-state lenders and their agents.[180]

North Carolina's usury law provides that consumer loans such as Advances and Installment Loans may not exceed sixteen percent (16%) per annum unless they are made by a licensed lender under the CFA.[181] The CFA prohibits the making of loans of $10,000 or less with rates and charges in excess of this statutory maximum *except* as provided in the CFA *and* only then if the person engaged in the business of making such loans is licensed by the Commissioner.[182] The statute allows for the making of installment loans *by licensees* of $3,000 or less at rates not exceeding 36% per annum on the first $600 and 15% per annum on any balance in excess of that amount.[183] The CFA also permits installment loans *by licensees* of $10,000 or less at rates not exceeding (i) 30% per annum of the unpaid balance not exceeding $1,000 and 18% for the rest of the principal, if the loan is not exceeding $7,500; and (ii) a straight 18% per annum on the outstanding balance, if the loan is over $7,500.[184]

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[171] G.S. § 53-166(b).
[172] G.S. § 53-166(c),(d).
[173] G.S. § 53-165 (j).
[174] G.S. § 53-165(a), (c); G.S. § 53-173; G.S. § 53-176.
[175] G.S. §§ 53-167 -- 53-172.
[176] G.S. §§ 53-173 -- 53-184; 53-189.
[177] G.S. § 53-185.
[178] G.S. §§ 53-186, 53-187.
[179] G.S. § 53-191.
[180] G.S. § 53-190.
[181] G.S. § 24-1.1.
[182] G.S. § 53-166(a).
[183] G.S. § 53-173. This provision contains other conditions and limitations on such loans not here relevant.
[184] G.S. § 53-176. This provision contains other conditions and limitations not here relevant.

Issues to Be Determined

The CFA confers upon the Commissioner of Banks the following powers:

1. To issue subpoenas, conduct hearings and transcribe testimony in making the investigations and conducting the hearings provided for herein or in the other exercise of his duties, and to give such publicity to the investigation as he may deem best for the public interest.[185]

2. When the Commissioner has "reasonable cause to believe that any person is violating or threatening to violate any provisions" of the CFA, the Commissioner is authorized to issue an order to "desist or to refrain from such violation" and to pursue other equitable remedies.[186]

The CFA also makes violation of its provisions a Class 1 misdemeanor and requires the Commissioner to refer such violations to the appropriate district attorney.[187] The statute also provides for further penalties for violations, including voiding of loan contracts.[188]

In a Pre-Hearing Order, dated April 21, 2005, the Commissioner ruled that the central issue in contest in this proceeding is "whether AANC's operations violate the Consumer Finance Act" and that the sole remedy in respect of a violation or violations, if found, would be issuance of an order to cease and desist.[189] After the issuance of the April 21, 2005 Pre-Hearing Order, AANC terminated the Republic Agreement and entered the FFB Agreement.[190] For purposes of this proceeding, the "current operations" of AANC means its operations from the commencement of this proceeding, February 1, 2005, until suspension of operations on or about September 15, 2005. This period includes operations under the Republic Agreement and the FFB Agreement. Factual findings above relating to prior periods are relevant for purposes of this Order as they show that operations during the period from and after February 1, 2005, are part of a continuing course of conduct by Parent and AANC.

In order to determine whether a cease and desist order should issue, the Commissioner must determine three separate but related issues: (i) whether AANC is subject to the CFA at all, and, if so, whether it has violated that statute; (ii) whether AANC is exempt from the application of the CFA, either under the terms of the statute or otherwise; and (iii) whether the Commissioner or his office is estopped to enforce the CFA against AANC.

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[185] G.S. § 53-186.
[186] G.S. § 53-187.
[187] G.S. § 53-166(c).
[188] G.S. § 53-166(d).
[189] April 21, 2005 Pre Hearing Order, findings ¶ 10; findings ¶ 8-9, order ¶ 2.
[190] Parent July 2005 8-K, *supra* note 103, p. 2.

Is AANC Subject to the CFA?

In order to establish that AANC is subject to the CFA, it must be determined that AANC is (i) a person that is (ii) engaged in the business of lending, (iii) which lending is in amounts of $10,000 or less. We consider these elements in order.

Is AANC a "person" under the CFA?

As to this first element, there is no dispute. AANC is a Delaware corporation and, accordingly, it is a "person" under the CFA.[191]

Is AANC "engaged in the business of lending" under the CFA?

There is substantial dispute about whether AANC is "engaged in the business of lending" as that phrase is used in the CFA.

The Attorney General argues that the CFA should be interpreted liberally and that under such interpretation AANC is so engaged because the entire purpose of all of its activities is in furtherance of the business of lending.[192] Intervenors similarly argue that the legislative and regulatory history of the CFA supports a broad interpretation of that statute in the interest of consumer protection and that AANC's conduct involves the business of lending.[193]

AANC advances four arguments against application of the CFA to its activities under the bank agency model:

1. The plain language of G.S. § 53-166(a) does not apply to AANC's business activities under the agency business model.[194]
2. The legislative history of the CFA supports AANC's argument that the statute does not apply to it.[195]
3. The CFA should be interpreted strictly in AANC's favor because it is criminal in nature.[196]
4. General principles of usury militate against the application of G.S. § 53-166(a) to AANC.[197]

AANC makes an additional argument that the law of agency "dictates" against a finding of liability under the CFA.[198] Resolution of the issues enumerated above also resolves the issues raised by this argument from the law of agency.

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[191] G.S. § 53-165(j). PHS SF No. 1.
[192] Petitioners' Brief, pp. 22-39.
[193] Intervenors' Brief, pp. 24-35.
[194] Respondent's Brief, pp. 39, 43-47.
[195] Respondent's Brief, pp. 40, 47 – 52.
[196] Respondent's Brief, pp. 40, 53.
[197] Respondent's Brief, pp 40, 53-56.
[198] Respondent's Brief, pp. 40, 56-60.

All parties agree that the interpretation of the phrase "engaged in the business of lending" under the CFA is a matter of first impression. There is no reported case, rule, declaratory ruling or other official statement of any governmental person or entity that specifically interprets the phrase.

Given this lack of authority, the meaning of this phrase must be determined by reference to (i) the literal language of G.S. 166(a), (ii) the language and structure of the CFA generally and (iii) the legislative history of the statute.[199] On the basis of such a review, I have determined that AANC is "engaged in business of lending" as that term is used in CFA.

G.S. § 53-166(a) is intended to effect two legislative purposes: (i) to prohibit the contracting for, exaction or receipt of compensation in connection with small consumer loans that exceed the limits set by Chapter 24 and the CFA; and (ii) to require licensing of and regulatory compliance by persons who make loans under G.S. §§ 53-173 and 53-176 at the rates of interest and with the attendant charges permitted by those provisions of the statutes. The CFA may be violated by a person who contravenes either of those legislative purposes or both of them.

As to the first of these purposes, the statute is very expansive, defining its scope as follows:

> *No person* shall engage in the business of lending in amounts of ten thousand dollars ($10,000) or less *and* contract for, exact or *receive*, *directly or indirectly*, on *or in connection with* any such loan, *any charges* whether for interest, *compensation, consideration, or expense, or any other purpose whatsoever* which *in the aggregate* are greater than permitted by Chapter 24…[200]

This is very broad language indeed, and a review of the plain language of the rest of the CFA makes clear the intention of the General Assembly that this statement of the statute's scope be interpreted and applied broadly. Subsection (b) of G.S. § 53-166 states that subsection (a) applies to "*any person* who seeks to avoid its application by *any* device subterfuge or pretense *whatsoever*."[201] G.S. § 53-166(b) reinforces the clear intention of the General Assembly that the broad language of subparagraph (a) is to be read and applied broadly.

The breadth of language in G.S. § 53-166 is in sharp contrast to the language employed regarding the second of the two legislative policies of the CFA: licensing and regulation of small lenders who wish to obtain exemption from the application of Chapter 24 by obtaining a license and complying with the provisions of the CFA.[202] G.S. § 53-173, one

[199] Intervenor's Brief, pp. 24-25, "Principles of Statutory Construction," and cases cited therein.
[200] G.S. § 53-166(a) (emphasis added).
[201] G.S. § 53-166(b) (emphasis added).
[202] G.S. § 53-166 (a) goes on to provide that its prohibitions shall apply "except as provided in and authorized by this Article, and without first having obtained a license."

of the two provisions implementing this exception authorizes such lending in the following terms:

> Every *licensee* under this section may *make loans* in installments not exceeding three thousand dollars ($3,000) in amount, at *interest rates* not exceeding [statement of rate limitations]…[203]

This section of the CFA goes on to describe applicable rates and charges for such loans in significant detail.[204] In the same way, G.S. § 53-176, the second of the two exceptional lending authorizations, begins as follows:

> In lieu of making loans in the amount and at the interest stated in G.S. 53-173 and for the terms stated in G.S. 53-180, a *licensee* may at any time elect to *make loans* in installments not exceeding ten thousand dollars ($10,000) and which shall not be repayable in less than six months or more than 84 months and which shall not be secured by deeds of trust or mortgages and which are repayable in substantially equal consecutive monthly payments [the section goes on to a statement of rate limitations]…[205]

Here again, this provision goes on to define the conditions and limitations relating to such loans in detail.[206] G. S. § 53-180, which is referred to in the provision just cited, states that:

> Except as otherwise provided in this Article, no *licensee making a loan* pursuant to G.S. 53-173 shall *enter into any contract of loan* under this Article providing for any scheduled repayment of principal more than [a series of limitations follows]…[207]

This section also contains a detailed list of conditions regarding the making of loans.[208] G.S. § 53-172, which deals with "other business" of licensees, begins as follows:

> No licensee shall conduct *the business of making loans* under this Article within any office, suite, room, or place of business in which any other business is solicited or transacted.[209]

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[203] G.S. § 53-173(a) (emphasis added); *see* rate limitations discussion *supra* note 183.
[204] G.S. § 53-173.
[205] G.S. § 53-176 (a) (emphasis added); *see* rate limitations discussion *supra* note 184.
[206] G.S. § 53-176.
[207] G.S. § 53-180(a) (emphasis added).
[208] G.S. § 53-180.
[209] G.S. § 53-172 (emphasis added).

The foregoing recitation makes clear that when the General Assembly wished to refer in the CFA to the making of loans, it knew how to do so clearly and distinctly. Such references are to "licensees" under G.S. § 53-173 or G.S. § 53-176.[210] The use in the very first substantive clause on the CFA of the phrase "engage in the business of lending" accordingly refers to something different and broader than "licensees," and the phrase includes the activities of persons engaged in such business but not directly making loans--persons such as AANC.

This interpretation is supported by the legislative history of the CFA. In AANC's recounting of the legislative history of the CFA, it argues that the statute is derived from:

1. A 1945 consumer loan law that defined "loan agencies or brokers" by reference to a relevant privilege license tax statute, to include, "persons or concerns…commonly known as loan companies or finance companies…and those persons, firms, or corporations pursuing the business of lending money… "[211]

2. The North Carolina Small Loans Act, enacted in 1955, rewrote the 1945 law, expanding its protection of borrowers, but retaining its definition of "loan agencies or brokers."[212]

AANC goes on to point out that the CFA does not define "lender" or "lending," claims that the jurisdictional basis of the statute is the same as prior law, and argues that a broader interpretation of the reach of the statute leads to anomalous results under G.S. §§ 53-172, 53-173, 53-175, 53-176, 53-179, 53-180, 53-181, and 53-182. AANC does not discuss the reason for the breadth of G.S. § 53-166(a) or (b).

AANC's reading of the CFA in light of prior law might be persuasive if (i) Section 165 defined "lender" and "loans" in language similar to prior law; (ii) Subsection 166(a) said that the CFA applied to every person engaged in the business of "making loans or lending money" and deleted the broad additional language about forms of compensation included in the scope of the statute and language regarding direct or indirect receipt of such compensation, the need for which language is obviated by the explicit requirements of the supervisory provisions mentioned above; and finally, if (iii) Subsection 166(b) were deleted from the statute. Unfortunately for AANC's argument, none of this is so. Rather, the statute is intentionally broader than prior law and is intended to reach beyond the limits which AANC's argument seeks to impose.

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[210] This same interpretation applies to the other provisions of the CFA cited by AANC in its brief, i.e., G.S. §§ 53-175, 53-179, 53-181 and 53-182.
[211] Respondent's Brief, p. 47 (quoting G.S. § 105-88(b) (1950)).
[212] Respondent's Brief, p. 47 (referencing G.S. § 53-164 *et seq.* (Public Laws 1955, c. 1279)). A 1957 amendment replaced the reference to the privilege tax statute and defined "lender" as "…any person, firm or corporation engaged in the business of making loans, lending money, or accepting fees for endorsing or otherwise securing loans or contracts for repayment of debts." (1957, c. 1429, s. 1). Much of this broadened 1957 language is still in the CFA; *see* G.S. § 53-191.

The scope of the CFA is broad because its creation and enactment were intended to address abuses not adequately addressed by prior law. According to Mr. Edwin Gill, North Carolina's Treasurer at the time of the approval of the CFA by the Banking Commission for submission to the General Assembly:

> some time ago there were complaints about the way in which the small loan law was being administered and there were talk of abuses and at one time the Attorney General made some very forceful statements about the matter … And time and again, complaints were made that the enforcement of the law was not good enough and it would often turn out that the reason the Banking Commissioner could not enforce the law better was because the law itself was far from perfect. In other words, it was susceptible to what had been termed abuses.
>
> When we went into it we found that some of the so-called abuses were actually permitted by the present law … the things that were being done which had in some way shocked the conscience of the State apparently were legal under the present law.[213]

While much of the discussion of the proposed statute by Mr. Gill deals with stricter regulation of small loan companies, the policy driving the preparation and enactment of the statute was clear: to prevent abusive lending that technically complied with the law. Section 166 of the CFA was broadly drafted to that end.

It is clear that amounts received by AANC in connection with Advances and Installment Loans under the bank agency model of operation, if covered by the CFA, have vastly exceeded the amounts established by either Chapter 24 or the CFA. Accordingly, receipt of such amounts would violate the CFA. AANC argues that an interpretation subjecting AANC to the CFA is inconsistent with Chapter 24. AANC submits that the CFA was "written over the general backdrop of a general North Carolina usury statute … The statutes, then, must be considered in *pari materia*."[214] AANC argues that Chapter 24 applies to "lenders;" that AANC is not a lender contemplated by Chapter 24, but a third party agent or broker; that applicable authority requires that the two statutes be harmonized or reconciled; and that the treatment of AANC as a lender makes such reconciliation impossible and is inconsistent with decisions under Chapter 24.[215]

AANC's argument regarding the relationship of the CFA and Chapter 24 is neither correct nor persuasive. The two statutes are consistent and require little or no harmonization or reconciliation. The CFA refers to Chapter 24 but does not incorporate its definitions or its substantive provisions, including remedies. If AANC is found to be subject to the CFA and to have received compensation greater than the amount determined with reference to Chapter 24 or the CFA, it will be made subject to a cease

[213] Transcript of a Special Called Meeting of the North Carolina Banking Commission, December 7, 1960; Intervenors' Exhibit 19, p. 1; quoted in Intervenors' Brief, pp. 7-8.
[214] Respondent's Brief, p. 53.
[215] *Id.* pp. 53-56.

and desist order. There is no inconsistency in the two statutes. The CFA extends to persons and conduct that are not covered by Chapter 24 in a way that does no damage to that statute whatsoever.

Finally, AANC argues that the CFA must be interpreted strictly in its favor because the statute is a criminal statute.[216] This argument does not prevail for two reasons. First, the legislative history and plain language make clear that the CFA is a remedial statute enacted to protect the public and that as such it should be interpreted liberally to give effect to the clear intentions of the General Assembly.[217] Second, this is not a criminal proceeding; rather, it is a civil proceeding where the relief sought, if granted, will be prospective and injunctive under the April 21, 2005 Pre-Hearing Order in this matter.

It is clear from the record in this matter that during the period from the February 1, 2005 through suspension of business on September 15, 2005, AANC was "engaged in the business of lending" in North Carolina for purposes of the CFA. In particular, at all times during such period:

1. AANC was the wholly-owned and controlled subsidiary of a company (Parent) whose sole purpose was and is to engage in the business of lending.

2. The sole purpose of AANC's centers in North Carolina, both before and during the period in question, was the origination, processing and servicing of loans. Accordingly, such centers were operated solely in furtherance of the business of lending.

3. AANC, as operating arm of Parent, conducted its operations in a manner intended to maximize the financial return from its business operations in the centers, which returns were directly related to volume of lending business in such centers. When Republic was unable, due to legal constraints, to generate volumes sufficient to meet the volume goals of AANC and Parent, it was summarily replaced with a bank that could make loans of a kind sufficient to meet such goals.

4. AANC, as Parent's operating arm, was clearly the controlling entity in its relationships with Republic and FFB. AANC's financial returns from its operations were substantially greater than those of the banks in question, on both a gross and net basis. Further, Parent altered its bank partners from state to state as its needs dictated and as various laws changed. The banks provided (i) a banking rationale on the basis of which AANC and Parent could assert state law exemption and (ii) financing of receivables.

[216] *Id*. p. 53
[217] *See generally* Petitioners' Brief, pp. 26-38 and particularly, p. 36 and cases cited there; also, Intervenor's Brief, pp. 2-9, and pp. 24-25 and cases cited there.

> These bank services were in furtherance of the conduct of the business of lending by AANC and Parent rather than the conduct of AANC being in the furtherance of the business of banking.

These findings are supported by the additional findings above that AANC's operations during the period in question were part of a consistent course of conduct that began at the sunset of G.S. § 53-281.

Are AANC's Advances and Installment Loans covered by the CFA?

The CFA covers the business of lending in amounts of $10,000 or less.[218] The statute defines the "amount of the loan" to mean "the aggregate of the cash advance and the charges authorized by G.S. 53-173 and G.S. 53-176."[219] "Cash advance" is defined as "the amount of cash or its equivalent that the borrower actually receives..."[220]

It is clear from the foregoing that Advances and Installment Loans are covered by the CFA. Advances and Installment Loans are loans in which the borrower receives cash or its equivalent (a bank check) in an amount less than ten thousand dollars.

Finding

As a result of the foregoing analysis, I find that AANC is, and at all times relevant to this proceeding has been, a person engaged in the business of lending in amounts of ten thousand dollars or less as those terms are used in the CFA and, accordingly, AANC is subject to the CFA.

<u>Has AANC Violated the CFA</u>?

It is a violation of the CFA for a person engaged in the business of lending in amounts of ten thousand dollars or less to:

> contract for, exact, or receive, directly or indirectly, on or in connection with such loan, any charges whether for interest, compensation, consideration, or expense, or any other purpose whatsoever" amounts greater than that permitted by Chapter 24.[221]

As noted above, the quoted provision goes on to permit the charges higher than those permitted by Chapter 24 to licensees; however, AANC is not a licensee. Accordingly, the issue to be decided here is whether AANC received compensation in amounts greater than permitted by Chapter 24 and, as a result, in violation of the CFA.

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[218] G.S. § 53-166(a).
[219] G.S. § 53-165(a).
[220] G.S. § 53-165(c).
[221] G.S. § 53-166(a).

AANC Received Compensation in Excess of the Amounts allowed by the CFA

It is clear from the record that during the period in question, AANC contracted for and received, in connection with loans covered by the CFA, indirect compensation which in the aggregate was greater than permitted by Chapter 24 or the CFA.

Following the sunset of G.S. § 53-281, AANC surrendered its check cashing license and opened a relationship with Peoples National Bank.[222] Peoples Advances bore interest at a rate of 443.21%.[223] Under the Peoples Agreement, AANC never received less than 81.8667% of Customer Fees, adjusted for small expenses and losses.[224] Actual cash flow receipts of AANC in this record[225] show that, in accordance with the Peoples Agreement, AANC received fees in amounts (0.82 X 443% = 365.28%) which exceeded the amounts allowed under Chapter 24 or the CFA.

Republic Advances bore interest at the rate of 456%.[226] Under the Republic Agreement, AANC received base compensation of 67% of fees generated by Republic Advances of adjustments for certain immaterial expenses and losses.[227] Analysis of the actual flow of payments under the Republic Agreement show that the actual receipts by AANC were on average 76% of fees generated by Advances.[228] Accordingly, AANC's base charges, calculated as APR of such advances, were approximately 303% (0.67 X 456%) and approximately 347% after adjustments (0.76 X 456%). These payments are vastly greater than the amounts permitted by Chapter 24 or the CFA.

FFB Advances bore interest at the rate of 521% and Installment Loans bore interest at higher rates than that.[229] The First Fidelity Agreement provided that AANC was to receive compensation based on flat fees and a percentage of the total fees generated by First Fidelity Advances.[230]

As more fully discussed above,[231] it is reasonable to assume that AANC charged and received payments under the FFB Agreement in an amount not less than 71% of the fees and interest generated by FFB Advances and Installment Loans. Assuming an APR of 521% on such Advances and Installment Loans, AANC's portion represents an APR of

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[222] *See* discussion *supra* text accompanying notes 51-52. PHS SF Nos. 15, 21-23.
[223] A fee schedule for Peoples Advances does not appear in this record, *but see* PHS SF No. 23 and SF No. 29.
[224] Marketing and Servicing Agreement with Peoples National Bank dated September 11, 2001, together with First and Second Amendments thereto ("Peoples Agreement"), appear in this record as Petitioners' Exhibit 41.
[225] Invoices from AANC to Peoples National Bank for the period September 12, 2001 to February 28, 2003, appear in this record as Petitioners' Exhibit 42.
[226] *See supra* text accompanying note 86; PHS SF No. 35.
[227] Republic Agreement, *supra* note 79, Exhibit A.
[228] Invoices from AANC to Republic Bank & Trust for the period August 1, 2004, to May 31, 2005, appear in this record as Petitioners' Exhibit 43.
[229] For Advances, *see* fee schedule at Petitioners' Exhibit 51; for Installment Loan, *see* sample agreement at Petitioners' Exhibit 54.
[230] FFB Agreement, *supra* note 116, Exhibit A.
[231] *See supra* text accompanying notes 140-142.

approximately 370%. Assuming an APR of 300% for Installment Loans, AANC's share would amount to an APR of 213%. These payments are vastly greater than the amounts permitted by Chapter 24 or the CFA.

AANC argues that it did not violate the CFA because, among other things, it did not directly receive any portion of the amounts paid by the borrowers of Peoples Advances, Republic Advances, FFB Advances or FFB Installment Loans.[232] This argument is incorrect as a matter of law. G.S. § 53-166(a) clearly states that it covers amounts "indirectly" received by a person engaged in the business of lending. In the case at hand, AANC received, earlier from Peoples and later from both Republic and from First Fidelity, amounts equal to either (i) a fixed sum per loan or (ii) a percentage of the fees and interest received on Advances and Installment Loans. Such sums were to be paid by the relevant bank virtually immediately after receipt of an invoice from AANC. The payments received by AANC under the Peoples Agreement, Republic Agreement, and First Fidelity Agreement were clearly indirect payments of amounts in respect of the relevant loans and far exceeded the limits of Chapter 24 or the CFA.

Findings

On the basis of the foregoing, I find that AANC contracted for, exacted and received, indirectly, in connection with the Peoples Advance, Republic Advances, FFB Advances and FFB Installment Loans, charges that in each case in the aggregate were greater than permitted by Chapter 24 or the CFA.

As I have found previously that AANC is a person engaged in the business of lending and that the Republic Advances, First Fidelity Advances and First Fidelity Installment Loans are all loans subject to the CFA, I further find that at all times during its current operations under the Republic Agreement and First Fidelity Agreement, AANC was in violation of the CFA.

<u>Is AANC Exempt from the CFA</u>?

Notwithstanding the determination above that AANC has violated the normative provisions of the CFA, it remains to be determined whether AANC is exempt from the CFA by the terms that statute or otherwise. This determination involves the further interpretation of the CFA itself and consideration of whether enforcement of the statute is preempted by federal law.[233] In this regard, AANC argues that it is exempt under G.S. § 53-190 or G.S. § 53-191.[234] It further argues that enforcement of the CFA against it is preempted by federal law and, accordingly, the United States Constitution.[235]

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[232] *See, e.g.*, Respondent's Brief, p 52.
[233] The issue of possible federal preemption of the CFA on the basis of Peoples National Bank's status as a federally-chartered bank is not before me and consequently will not be considered.
[234] Respondent's Brief, pp. 39, 41-43.
[235] Respondent's Brief, pp. 64-79.

Is AANC Exempt under G.S. § 53- 190?

G.S. § 53-190 reads as follows:

> (a) No loan contract made outside this State in the amount or of the value of ten thousand dollars ($10,000) or less, for which greater consideration or charges than are authorized by G.S. 53-173 and 53-176 of this Article have been charged, contracted for, or received, shall be enforced in this State. Provided, the foregoing shall not apply to loan contracts in which all contractual activities, including solicitation, discussion, negotiation, offer, acceptance, signing of documents, and delivery and receipt of funds, occur entirely outside North Carolina.
>
> (b) If any lender or agent of a lender who makes loan contracts outside this State in the amount or of the value of ten thousand dollars ($10,000) or less, comes into this State to solicit or otherwise conduct activities in regard to such loan contracts, then such lender shall be subject to the requirements of this Article.
>
> (c) No lender licensed to do business under this Article may collect, or cause to be collected, any loan made by a lender in another state to a borrower, who was a legal resident of North Carolina at the time the loan was made. The purchase of a loan account shall not alter this prohibition.[236]

AANC argues that because G.S. § 53-190(b) refers to agents of out-of-state lenders but does not state that such agents are liable under the CFA, such agents are therefore exempt from the statute.[237] This argument misreads the CFA generally and G.S. § 53-190 in particular.

G.S. § 53-190 is clearly intended to define the extent to which the CFA extends to lenders, not otherwise exempt from the statute, that operate outside the borders of the State of North Carolina. Subsection (a) makes clear that loans that would be subject to the CFA if made in the State of North Carolina are only enforceable by out-of-state lenders if all of the material aspects of the loan transaction occur outside North Carolina. Subsection (b) makes clear that an out-of-state lender is subject to the CFA if either the lender or its agent comes into the state to solicit loans or otherwise conduct lending activity. Subsection (c) makes clear that out-of-state lenders cannot use lenders licensed under the CFA to collect non-compliant loans as agent or through sale of the loans to the licensees.

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[236] G.S. § 53-190.
[237] Respondent's Brief, pp. 41, 42.

Read in context, subsection (b) of G.S. § 53-190 is a long-arm statute intended to extend the State's jurisdiction to out-of-state lenders when they operate in North Carolina, either directly or through agents. The reason this provision is silent as to agents is that agents are not the target of the provision. In the case of an agent of an out-of-state lender the issue of jurisdiction does not apply to the agent, which is operating in North Carolina and as a result is clearly subject to the State's jurisdiction. Rather, the issue is whether the CFA applies to the lender. G.S. § 53-190(b) clearly deals with this issue alone. There is nothing in the language of this provision that even remotely suggests that the General Assembly intended G.S. § 53-190 to amend or repeal G.S. § 53-166 directly or by implication.

Is AANC Exempt under G.S. § 53-191 or Principles of Federal Preemption?

G.S. § 53-191 reads as follows:

> Nothing in this Article shall be construed to apply to any person, firm or corporation doing business under the authority of any law of this State or of the United States relating to banks, trust companies, savings and loan associations, cooperative credit unions, agricultural credit corporations or associations organized under the laws of North Carolina, production credit associations organized under the act of Congress known as the Farm Credit Act of 1933, pawnbrokers lending or advancing money on specific articles of personal property, industrial banks, the business of negotiating loans on real estate as defined in G.S. 105-41, nor to installment paper dealers as defined in G.S. 105-83 other than persons, firms and corporations engaged in the business of accepting fees for endorsing or otherwise securing loans or contracts for the repayment of loans.[238]

The operative language for purposes of this matter is "a person, firm or corporation doing business under the authority of any law … of the United States relating to banks."[239] G.S. § 53-191 would apply to either Republic or FFB if (i) either of those institutions were a party to this proceeding; and (ii) there were a federal statute under the authority of which they were doing business. As neither bank is a party, the issue to be determined is whether AANC is operating under the authority of federal law as a result of its relationship with either of the banks.

AANC makes a separate but related argument that enforcement of the CFA against it is preempted under federal law and the United States Constitution.[240] This argument is based in the concept of "conflicts preemption," under which a state cannot enforce a law that conflicts with or frustrates the purposes of federal law.[241] Here, AANC argues that enforcement of the CFA against it would frustrate the interstate operations of the banks provided for by the FDI Act.

[238] G.S. § 53-191.
[239] *Id.*
[240] Respondent's Brief, pp. 42, 43.
[241] *See id.*, pp. 64-65, 69-71.

The federal statute on which AANC bases its claim for exemption or preemption is Section 27 of the Federal Deposit Insurance Act, 12 U.S.C. 1831d ("Section 27"), which reads, in pertinent part, as follows:

> In order to prevent discrimination against State-chartered insured depository institutions … with respect to interest rates, if the applicable rate prescribed in this subsection exceeds the rate such State bank … would be permitted to charge in the absence of this subsection, such State bank … may, notwithstanding any State constitution or statute which is hereby preempted for the purposes of this section, take, receive, reserve, and charge on any loan or discount made, or upon any other note, bill of exchange, or other evidence of debt, interest at a rate of not more than 1 percentum in excess of the discount rate on ninety-day commercial paper in effect at the Federal Reserve bank in the Federal Reserve district where such State bank … is located or at the rate allowed by the laws of the State … where the bank is located…[242]

AANC argues that the Republic and FFB Advances and the FFB Installment Loans were made by banks located in states where the fees and charges in respect of such instruments were legal, that such lending activity was undertaken in reliance on Section 27 and settled principals of federal preemption.[243] AANC further argues that the nature of its relationship with the banks was of such a nature that forbidding it to continue would frustrate the banks' lending programs and federal policy and, as a result, is preempted by federal law and the United States Constitution. These arguments do not withstand scrutiny.

State law is not lightly set aside, especially in areas typically regulated by state law, like banking[244] and consumer protection,[245] unless Congress has shown a clear intent to preempt the state law, either by express language, by clear implication,[246] or by a federal agency acting within the authority given to it by Congress.[247]

The express language of Section 27 refers to the protection of banks with regard to interest rates charged by banks in states other than their home states. The authority of Republic or FFB to charge the rates reviewed above on Advances and Installment Loans is not at issue in this matter. If it were, Republic and FFB would be the proper parties to raise such issue. Neither bank is a party to this matter and neither has raised this issue in collateral proceedings or any other way.

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[242] 12 U.S.C. § 1831d(a).
[243] Respondent's Brief, pp. 64-66.
[244] *See, e.g., Munn v. Illinois*, 94 U.S. 113 (1876) (Field, J. dissenting) (noting that usury law is a traditional area of state regulation); *Abilene Nat'l Bank v. Dolley*, 228 U.S. 1 (1913) (denying national bank's motion to enjoin the Kansas Commissioner of Banks from enforcing state law).
[245] *General Motors Corp. v. Abrams*, 897 F.2d 34, 41-42 (1990).
[246] *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); *Cipollone v. Liggett Group*, 505 U.S. 504, 518 (1992).
[247] *New York v. FERC*, 535 U.S. 1, 18 (2002).

AANC then seeks to find direct authority for the preemption argument on its behalf and has difficulties. Its opening sentence on the applicability of conflict preemption to this case states that:

> Although Section 27(a) contains express preemption language, courts have reached mixed results on whether it forecloses the application of state law.[248]

AANC's brief then cites two cases: one that preempts the assertion of state usury claims against state chartered banks,[249] clearly not directly apposite here; and the second, *Bankwest, Inc. v. Baker*,[250] where the 11th Circuit Court of Appeals upheld a Georgia law outlawing payday lending in that state. AANC cites *Bankwest* at 1345 to acknowledge that the FDI Act cannot support preemption of state law under the doctrine of field preemption.[251] It goes on to argue that the CFA is preempted on a "conflicts preemption" theory and bases that argument on *Cline v. Hawke*,[252] an unpublished case involving an OCC interpretation of the Gramm-Leach-Bliley Act to preempt a state law governing insurance sales.[253] AANC cites no federal case wherein a court has found any congressional intent which supports AANC's interpretation of Section 27.

AANC goes on to argue that it should gain the benefit of federal preemption under Section 27 because the banks were the true lenders of Advances and Installment Loans and AANC was only their agent, providing ministerial services in connection with such advances and loans.[254] This argument is not supported by the facts in this matter. As fully set forth above, the facts do not support the characterization of AANC as a mere agent. AANC and Parent were the controlling parties in all such relationships, took the predominant share of the benefits of such relationships, and changed partners virtually at will to insure the maximum return to Parent. Further, even if AANC's argument regarding agency is accepted for this purpose, the language it quotes from the legislative history of Section 27 supports the banks' ability to export rates, which is not at issue here.

AANC argues by implication, though not expressly, that a federal agency acting within the authority given to it by Congress has preempted the CFA. AANC argues that federal regulators and home state bank regulators have authority to supervise and regulate third party providers without establishing that such authority creates a preemptive right on behalf of either the agent bank or AANC.[255] AANC's brief reviews in detail the provisions of the Bank Service Company Act but does not point to any preemptive provisions in that statute or to any cases applicable to this matter. The one case cited by

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[248] Respondent's Brief, p. 69.
[249] *Hill v. Chemical Bank*, 799 F. Supp. 948, 952 (D. Minn. 1992), cited in Respondent's Brief, p. 69.
[250] *Bankwest, Inc. v. Baker*, 411 F. 3d 1289 (11th Cir. 2005).
[251] Respondent's Brief, p. 71.
[252] 51 Fed. Appx. 392, 2002 U.S. App. LEXIS 23831, 2002 WL 31557392 at *4, (4th Cir. Nov. 19, 2002), cert. denied, 540 U.S. 813 (2003).
[253] Respondent's Brief p. 71.
[254] Respondent's Brief, pp 66-69.
[255] Respondent's Brief, pp. 72-76.

AANC involves conflict between two federal agencies regarding enforcement of federal law.[256] This is interesting, but inapposite.

AANC argues that the FDIC's March 31, 2005 Revised Guidance to examiners is evidence that the FDIC "has expressly acknowledged the legitimacy of third-party relationships and issued specific guidance to institutions regarding management of such relationships."[257] What AANC does not say is that the Revised Guidance is not an interpretation of the FDI Act, including particularly Section 27, or the United States Constitution. As its name implies, the Revised Guidance is examiner guidance issued as part of the agency's overall program of bank supervision. It is the latest in a series of such documents relating to the involvement of insured depository institutions in subprime lending. While I have the greatest respect for the FDIC, I do not view the Revised Guidance as binding or particularly instructive with regard to statutory and constitutional interpretation. Statutory extension of FDIC enforcement to third parties, and the Examiner Guidance which implements the statute for practical use is meant to protect depositors and cannot possibly be stretched to defeat the CFA, which is meant to protect borrowers from abuse.

Of greater relevance to this matter is an ongoing proceeding of the FDIC that AANC has not seen fit to mention: the agency's rulemaking proceedings with regard to the preemption of state law under Sections 24(j) and 27 of the FDI Act.[258] These proceedings began with the publication by the FDIC of a "Petition for Rulemaking to Preempt Certain State Laws," submitted to the agency by the Financial Services Roundtable, a financial services industry trade group.[259] The petition requested that the FDIC act to address alleged imbalances in the interstate operations of federal and state-chartered banks. The Financial Services Roundtable requested, among other things, that the FDIC (i) define the scope and application of Section 104(d) of the Gramm-Leach-Bliley Act ("GLBA") regarding preemption of state laws that impose a requirement, limitation or burden on a depository institution *or its affiliate (emphasis added)* and (ii) promulgate regulations to implement Section 27.[260] Based on the language in GLBA § 104(d), the petition urged the FDIC to define circumstances under which state laws would be preempted.[261] By contrast, the petition requested that implementation of Section 27 make the exportation of interest rates under that statutory provision comparable to the rights of national banks under Section 85 of the National Bank Act.[262]

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[256] Federal Trade Commission, In the Matter of Dillard Department Stores, Inc., quoted in Respondent's Brief at p. 74.
[257] Respondent's Brief, p. 76
[258] Federal Deposit Insurance Corporation, Notice of Proposed Rulemaking, Interstate Banking; Federal Interest Rate Authority, 70 Fed. Reg. 60,019 (October 14, 2005).
[259] Federal Deposit Insurance Corporation, Petition for Rulemaking to Preempt Certain State Laws, 70 Fed. Reg. 13,413 (March 21, 2005).
[260] *Id*. pp. 13,416, 13,418, 13,425.
[261] *Id*. pp. 13,424, 13,425.
[262] *Id*. p. 13,425.

After reviewing extensive comments, the FDIC issued a Notice of Propose Rulemaking limited to the implementation of FDI Act Sections 24(j) and 27.[263] The proposed rule with regard to Section 27 applies to banks and, by reference to OCC interpretations, to operating subsidiaries of banks. It does not refer at all to agents or other affiliated parties of a bank. Further, the proposal to use GLBA § 104(d) as a ground for preemption of state laws has been dropped. The comment period for the proposed rule extended to December 13, 2005, and there is no assurance that the requested rule will be finally adopted, even with its diminished scope.

The foregoing discussion makes clear that the FDIC, arguably the federal agency empowered to interpret the FDI Act, when presented with the opportunity to officially interpret the preemptive effect of federal law generally and Section 27 in particular, has not extended such preemption to third party providers such as AANC.

AANC has also argued that an adverse ruling by the Commissioner in this matter will somehow inhibit the use of third party marketing arrangements by state-chartered banks.[264] That said, its evidence does not show with any specificity how an adverse ruling in this matter will adversely affect any activities of state-chartered banks. This argument is of no effect.

Summary

For the reasons set forth above, I find that AANC is not exempt from the provisions of the CFA under Sections 53-190 or 53-191 thereof; and that enforcement of the CFA by the Attorney General or the Office of Commissioner of Banks is not preempted by the FDI Act or the United States Constitution. With regard to its arguments under G.S. § 53-191 and federal preemption, AANC has failed to show that it is a person operating under the authority of a federal banking law, or that any principles of federal preemption control to the application of the CFA to its operations in North Carolina.

<u>Are the Attorney General and Commissioner of Banks Estopped from Enforcing the CFA Against AANC?</u>

AANC argues that the prior inconsistent conduct of the Attorney General and OCOB prevent enforcement of the CFA under principles of "quasi-estoppel" and / or "equitable estoppel." For reasons set forth below, these arguments are ineffective.

Quasi Estoppel

The term "quasi estoppel," in its modern usage, was defined by the North Carolina Court of Appeals in 1976.[265]

[263] Federal Deposit Insurance Corporation, Notice of Proposed Rulemaking, Interstate Banking; Federal Interest Rate Authority, 70 Fed. Reg. 60,019 (October 14, 2005).
[264] Respondent's Brief, pp. 79-81.
[265] *Redevelopment Com. of Greenville v. Hannaford*, 29 N.C. App. 1, 4 (1976).

> ‘Quasi estoppel,’ … *has its basis in acceptance of benefits*. [internal citations omitted] Where one having the right to accept or reject a transaction or instrument *takes and retains benefits* thereunder, he ratifies it, and cannot avoid its obligation or effect by taking a position inconsistent with it.”[266]

Quasi estoppel, while similar in concept to equitable estoppel, is different from it.[267] Equitable estoppel requires evidence of detrimental reliance by one party on the statements of another while quasi estoppel conclusively presumes detrimental reliance because the party which is estopped has received benefits from the other.[268]

Since 1976, “quasi estoppel” has been used in thirty cases reported by the North Carolina appellate courts. In *all* of those cases, except for one cited by AANC,[269] which is addressed below, the outcome of the quasi estoppel issue turned on whether or not the party denying its burdens in a dispute--typically a contract dispute--had received benefits. A party which receives benefits cannot deny the burdens which accompany them.[270]

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[266] *Id.* at 4 (emphasis added).
[267] *Gupton v. Builders Transport*, 83 N.C. App. 1, 7 (1986), *rvs’d on other grounds*, *Gupton v. Builders Transport*, 320 N.C. 38, 357 S.E.2d 674 (1987).
[268] *Id.*
[269] *Holland Group, Inc. v. North Carolina Dep't of Admin.*, 130 N.C. App. 721 (1998).
[270] *See, e.g., Whitacre P'ship v. BioSignia, Inc.*, 358 N.C. 1, 18 (2004) (“[The North Carolina Supreme] Court has also recognized that branch of equitable estoppel *known as ‘quasi-estoppel’ or ‘estoppel by benefit*.’” (emphasis added); *Pinehurst v. Regional Inv. of Moore, Inc.*, 330 N.C. 725, 730 (1992) (finding plaintiff’s quasi estoppel argument unfounded when the benefits defendant allegedly received were insubstantial); *Beck v. Beck*, 163 N.C. App. 311, 315 (2004) (holding that receipt of a benefit is “necessary to support the application of quasi-estoppel”); *Parkersmith Props. v. Johnson*, 136 N.C. App. 626, 632 (2000) (holding that plaintiff’s argument for quasi estoppel has no merit when defendant has received no benefits from plaintiff); *Kennedy v. Kennedy*, 160 N.C. App. 1, 7 (2003) (holding that defendant is estopped from using a technicality to deny responsibility in a contract when it had accepted the benefits of the contract, and defining quasi estoppel as “estoppel by acceptance of benefits”); *Ellis v. White*, 156 N.C. App. 16, 24 (2003) (finding plaintiff is estopped from suing because he accepted benefits from defendant which justified defendant’s actions and defining quasi estoppel as “estoppel by acceptance of benefits.”); *County of Wake v. N.C. Dep't of Env't*, 155 N.C. App. 225, 240-41 (2002) (holding town estopped from contesting location of landfill when it had received benefits from its earlier acquiescence to the landfill); *Shell Island Homeowners Ass'n v. Tomlinson*, 134 N.C. App. 217, 277 (1999) (holding plaintiffs estopped from attacking the constitutionality of a regulatory scheme when they had benefited earlier from the same scheme). *See also Computer Decisions v. Rouse Office Mgmt.*, 124 N.C. App. 383, 387-88 (1996) and *B & F Slosman v. Sonopress, Inc.*, 148 N.C. App. 81 (2001) (both cases finding that quasi estoppel argument has no merit when defendant has accepted no benefits from plaintiff); *Carolina Medicorp v. Board of Trustees of the Teachers' & State Employees’ Comprehensive Major Medical Plan*, 118 N.C. App. 485 (1985) (estopping plaintiff from challenging contracts on the basis that defendant did not follow state law, i.e. competitive bids, when plaintiffs had benefited from the contracts); *Land-of-Sky Regional Council v. County of Henderson*, 78 N.C. App. 85, 92 (1985) (holding county government estopped from denying its membership in a regional council and from withholding its share of the budget when the county had benefited from the work of the council). *See also Taylor v. Taylor*, 321 N.C. 244, 251 (1987) (holding wife estopped from denying existence of bigamous marriage when she sought alimony from her first husband); *Amick v. Amick*, 80 N.C. App. 291, 295 (1986) (ruling husband estopped from denying divorce on account of legal defect when he had enjoyed the benefits of the divorce); *and Mayer v. Mayer*, 66 N.C. App. 522, 535 (1984), (estopping husband # 2 from denying the validity of wife’s foreign divorce in her first marriage

AANC cites two cases in support of its quasi estoppel defense, which are easily distinguishable from the facts of this case. First, AANC cites *Godley v. Pitt County*.[271] *Godley* is no different from the quasi estoppel cases discussed above. In *Godley*, an insurance company which had received premiums on behalf of an employee was estopped from later using a technicality in the governmental entity's employee classification to deny paying the employee's claim.[272] Simply put, the insurance company had accepted benefits under a contract, and it was therefore estopped from later denying the burdens created by that contract.[273] AANC in particular relies on one sentence from *Godley*, "quasi estoppel, which does not require detrimental reliance per se by anyone, but is directly grounded instead upon a party's *acquiescence* or acceptance of payment or benefits, by virtue of which that party is thereafter prevented from maintaining a position inconsistent with those acts."[274]

AANC clings to the word "acquiescence" to imply that since the OCOB and the OAG did not take legal action against it from the sunset of North Carolina's payday lending law in August 2001 until commencing this action in August of 2004, somehow those two offices by this "acquiescence" are now estopped from enforcing the law. In light of the clear meaning of quasi estoppel in North Carolina discussed above, AANC has misconstrued the meaning of "acquiesce." The meaning of "acquiesce" cannot be interpreted apart from the phrase "acceptance of benefits." The court in *Godley* was simply acknowledging that a party need not affirmatively accept benefits--for example, cashing a check--for quasi estoppel to apply. It is quite possible for a party to benefit by simply remaining silent (acquiescing); for example, a property owner who silently watches as the town constructs a public road on its property is estopped from later asserting that it owns the road.[275]

Even if the OAG and the OCOB had declined to attack AANC's continued payday lending, the joint action by the OAG and the OCOB in Wake County Superior Court in January 2002 against one of AANC's competitors, ACE Cash Express, seeking to enjoin it from "making usurious. . . 'payday loans,'" proves conclusively that OAG and OCOB did not acquiesce to continued payday lending after the sunset of G.S. 53-281. AANC cannot wrest the word "acquiescence" from its clear context in North Carolina quasi estoppel law to claim that the OAG and the OCOB are now estopped from enforcing the law of this state.

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when husband # 2 encouraged and participated in foreign divorce and sought to use its invalidity of that divorce to escape an obligation to pay alimony.)

[271] 306 N.C. 357 (1982).

[272] *Id.*

[273] *Id.*

[274] Respondent's Brief at 61 (quoting *Godley* at 361 (quoting 31 C.J.S. Estoppel § 107 (1964)) (emphasis by Respondent)).

[275] *In re Southern Ry. Co. Paving Assessment*, 196 N.C. 756 (1929).

AANC also seeks refuge in *Holland Group, Inc. v. North Carolina Dep't of Admin.*.[276] The issue in *Holland Group* was a particular statute, G.S. § 150B-44, which "provide[s] procedural protection" by defaulting to an administrative law judge's (ALJ) recommendation when a state agency does not act to accept or reject that recommendation in a timely manner after it receives the official record of the ALJ's proceeding."[277] In *Holland Group*, the agency was estopped from denying that it had received the official record, when the agency in so doing was really seeking more time before the ALJ's recommendation would be presumed to be the agency's final decision.[278]

In a very narrow holding, grounded in the procedural protections of G.S. § 150B-44, the *Holland Group* court expanded the conclusive presumption of detrimental reliance in which the doctrine of quasi estoppel is rooted to include a situation where 1) a statute is very precise in establishing a procedural safeguard; 2) a state official signs a document which bears his or her department's official caption, and the document has been officially filed with the Attorney General, accompanied by a certificate of service; *and* 3) only the state agency has the means to determine whether or not the contents of the document are true.

Holland Group cannot be reasonably stretched to grant AANC a conclusive presumption of detrimental reliance where there is no statute requiring the OAG and OCOB to prosecute actions under the CFA within a certain period of time, where the document supposedly relied on by AANC were simply efforts by the AG to lobby for legislation based on his understanding of *federal* law that has been evolving all through that time, and where many of the statements relied on by AANC are its president's self-serving testimony of what was said in private meetings with the Attorney General.

AANC has no claim whatsoever to a quasi estoppel defense. It is not entitled to any conclusive presumption of detrimental reliance based on the rule that presumes detrimental reliance when one party receives benefits from another. There is no allegation that the OAG or the OCOB received any benefit from AANC which would require either of them to bear the burden of failing to enforce the law which they have sworn to uphold. Nor is AANC entitled to a conclusive presumption of detrimental reliance under *Holland Group*'s very narrow application of quasi estoppel to a state agency.

Equitable Estoppel

In General

Equitable estoppel is akin to fraud; the fundamental difference is that scienter is not required.[279] The party which is estopped need not have intended to defraud another, but

[276] 130 N.C. App. 721 (1998).
[277] G.S. § 150B-44.
[278] *Holland Group* at 726-727.
[279] *Maxton Auto Company, Inc. v. Rudd*. 176 N.C. 497, 498-99 (1918).

at some point the one party's reliance on the representations of another cross a line from which equity and justice require that the estopped party be held to his words.[280] The essence of equitable estoppel is that a party 1) relied in good faith on the conduct of another and 2) "changed his position for the worse."[281]

More precisely, a party seeking to prevail on a claim of equitable estoppel bears the burden of proving six elements:

> (1) The conduct to be estopped must amount to false representation or concealment of material fact or at least which is reasonably calculated to convey the impression that the facts are other than and inconsistent with those which the party afterwards attempted to assert;
>
> (2) Intention or expectation on the party being estopped that such conduct shall be acted upon by the other party or conduct which at least is calculated to induce a reasonably prudent person to believe such conduct was intended or expected to be relied and acted upon;
>
> (3) Knowledge, actual or constructive, of the real facts by the party being estopped;
>
> (4) Lack of knowledge of the truth as to the facts in question by the party claiming estoppel;
>
> (5) Reliance on the part of the party claiming estoppel upon the conduct of the party being sought to be estopped;
>
> (6) Action based thereon of such a character as to change his position prejudicially.[282]

Further, a party cannot rely on equitable estoppel if it "was put on inquiry as to the truth and had available the means for ascertaining it."[283]

The first element requires that the party making the statement or concealment intend to convey an impression that is inconsistent with the facts. To make such a charge against the North Carolina's duly elected chief law enforcement officer and its Commissioner of Banks is quite serious. In fact, AANC has not alleged any such intention by the OAG or the OCOB in its legal argument. In not even alleging any intent to convey an impression

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[280] *Id.*
[281] *Meehan v. Lawrance*, 166 N.C. App. 369, 377 (2004).
[282] *Parkersmith Props. v. Johnson*, 136 N.C. App. 626, 633 (2000) (quoting *State Farm Mut. Auto. Ins. Co. v. Atlantic Indemnity Co.*, 122 N.C. App. 67, 75, 468 S.E.2d 570, 574-75 (1996) (citations omitted)).
[283] *Parkersmith Props*. at 634 (quoting *Hawkins v. Finance Corp.*, 238 N.C. 174, 179, 77 S.E.2d 669, 673 (1953)).

that is inconsistent with the facts on the part of these officials, AANC has certainly failed to prove it.

Similarly with the second element: AANC has not alleged that the OAG or the OCOB intended for AANC to rely on the statements in question. Many of the statements which AANC offered as background were efforts by the OAG to lobby in favor of certain legislation. Even if the statements which AANC alleges were made by the OAG directly to AANC's management were in fact actually made, AANC has not proven that the AG intended for AANC to rely on them. This argument might conceivably have a place (though we doubt it would prevail) if AANC pled a defense of entrapment in a criminal proceeding, but this is not a criminal proceeding.

The third element requires knowledge of the real facts by the party being estopped. It cannot be denied that the law regarding whether "rent-a-charter" arrangements provide a safe harbor from state consumer protection law has been a subject of much debate since August 2001. The OAG's *ad hoc* opinions, which have no indicia of being official pronouncements, cannot reasonably be construed as knowledge of facts. This is especially true of "rent-a-charter" arrangements with state banks, which arose only after the OCC made it clear in 2002 and 2003 that such "rent-a-charter" arrangements were not acceptable for national banks.

The fourth element requires a lack of knowledge of the facts on the part of the party seeking estoppel. One of AANC's key strengths, according to its public filings with the SEC, is its ability to stay on top of laws and regulations which affect its industry. The industry group (CFSA) in which AANC and its Parent play a key part has issued numerous pronouncements concerning the state of the law concerning "rent-a-charter" arrangements, and neither AANC nor Parent can credibly assert that it had no such knowledge. It should also be noted that actual knowledge is not even required. If AANC were put on notice as to the truth and had the means to find it out, it may not claim estoppel. Surely the two memoranda issued by the Commissioner at the time of the sunset created some knowledge on the part of AANC. Surely the OAG's and OCOB's joint action against ACE Cash Express in 2002 should have put AANC on notice as to how the state of North Carolina regarded payday lending through "rent-a-charter" arrangements, and the publicly filed complaint against ACE provided AANC with ample opportunity to find out this fact.

Fifth, AANC must prove that it relied on the assertions made by the OAG and the OCOB. AANC was doing business under G.S. 53-281, the statute which authorized payday lending, before the sunset of that provision on August 31, 2001. It continued to do business after the sunset of that provision in substantially the same manner as before. The record is devoid of evidence that AANC made large investments in its payday lending business after its authorization to do that business expired. AANC simply continued doing business just as it had before August 31, 2001.

Lastly, a party claiming equitable estoppel must prove that it has changed its position prejudicially, and be worse off than it had been if it had not relied on the other party's assertions. AANC booked over ten million dollars in profits from its North Carolina payday lending activities in 2004 (over 10% of its total profits earned in the 34 states where it does business). To say AANC has not been harmed by its alleged reliance on OAG or NCCOB is an understatement.

Estoppel of State Government

Even if AANC could prove the six elements of equitable estoppel listed above, the State cannot be estopped from exercising its governmental functions. North Carolina courts make a careful distinction between governmental functions and proprietary functions before applying estoppel to governmental entities.[284] A governmental function is something *only* a governmental entity can do; a proprietary function is something any "corporation, individual or group of individuals" can do.[285]

The State cannot be estopped from exercising its governmental functions even in an egregious case where harm can be easily proved. In *Henderson v. Gill*,[286] an agent of the Revenue Department (RD) advised a business owner that it need not collect and remit sales tax on a part of its sales. Relying on this advice, the business did not collect the taxes.[287] Later, the RD forced the business to remit sales tax on all of its sales, including the portion which it had not collected because of the advice of the RD agent.[288] When the business sued the State a return of those taxes under a theory of estoppel, the court ruled in favor of the State.[289] Not only did the court not prevent the RD from collecting the tax prospectively, but it also even allowed the RD to collect the tax retroactively, an act strongly akin to an *ex post facto* law. The court reasoned, first of all, that estopping the state from exercising its governmental functions would lead to chaos and endless disputes.[290] Secondly, agents of the State do not have the power to change the law.[291] By the authority of *Henderson*, the Commissioner and the Attorney General would not only have the power to enforce N.C. usury law against AANC prospectively, he would also have the authority to enforce it retroactively by declaring all prior loans null and void!

Both of the cases which AANC cites in support of its equitable estoppel argument, *Mulberry-Fairplains Water Ass'n v. North Wilkesboro,* and *Land-of-Sky Regional Council v. County of Henderson*,[292] clearly involve the government in its proprietary functions--that is, contracts made by the governmental entity which it later sought to escape. In contrast, enforcement of North Carolina usury law is plainly the exercise of a governmental function, which North Carolina law expressly gives to the COB.

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[284] *See, e.g., Mulberry-Fairplains Water Ass'n v. North Wilkesboro*, 105 N.C. App. 258, 264 (1992).
[285] *Tabor v. County of Orange*, 156 N.C. App. 88, 91 (2003) (emphasis added).
[286] 229 N.C. 313 (1948).
[287] *Id.* at 314.
[288] *Id.* at 314-15.
[289] *Id.* at 316.
[290] *Id.*
[291] *Id.*
[292] 78 N.C. App. 85 (1985).

AANC's equitable estoppel argument is doubly without merit. First of all, AANC cannot prove even one of the six elements of equitable estoppel. Furthermore, even if AANC could prove *all* the six elements of equitable estoppel, it would still not be able to estop the government of the state from exercising the clear governmental function of enforcing the law.

Legal Conclusions

Based on a review of the record in this matter and the analysis of relevant legal authorities discussed above, I find:

1. AANC is a person engaged in the business of lending in North Carolina, as those terms are used in the CFA.

2. At all times since August 31, 2001, and, in particular, from February 1, 2005 through September 15, 2005, AANC contracted for, exacted and received indirectly charges in respect of loans covered by the CFA that substantially exceeded the levels of charges permitted by Chapter 24 or the CFA.

3. At all times since August 31, 2001, and, in particular, from February 1, 2005 through September 15, 2005, AANC violated the normative provisions of the CFA through the receipt of the compensation referred to in paragraph 2 of these Legal Conclusions.

4. AANC is not exempt from the CFA under G.S. § 53-190 or G.S. § 53-191.

5. Enforcement of the CFA against AANC is not preempted by the Federal Deposit Insurance Act or the United States Constitution.

6. Neither the Attorney General nor the Commissioner of Banks is estopped to enforce the CFA against AANC by the equitable principles of quasi-estoppel or equitable estoppel.

As a result of the foregoing, I further find by a clear preponderance of the evidence presented to me, that the grounds for issuance to AANC of an order to cease and desist have been established.

III. ORDER

1. Based on the foregoing findings, the Commissioner hereby orders Advance America Cash Advance Centers of North Carolina, Inc. immediately to cease and desist from the further operation of its payday advance centers in North Carolina, to the extent that they make payday loans, whether on behalf of FFB or any other insured depository institution.

2. Any violation of this Cease and Desist Order may result in the imposition of civil or criminal penalties pursuant to the provisions of G.S. § 53-166 and further injunctive relief under G.S. § 53-187.

3. This Order may be appealed by giving written notice within 20 days of the service hereof to the State Banking Commission pursuant to G.S. § 53-92(d), to which reference is hereby made. Any appeal to the State Banking Commission should be mailed to the attention of:

   Daniel E. Garner, Executive Legal Specialist
   316 W. Edenton Street
   4309 Mail Service Center
   Raleigh, NC 27699-4309

   If you have any questions concerning an appeal of this Order, Mr. Garner may be contacted at (919) 733-3016 or by fax at (919) 733-6918.

This the 22nd day of December, 2005.

Joseph A. Smith, Jr.
Commissioner of Banks

CERTIFICATE OF SERVICE

THE UNDERSIGNED hereby certifies that he has this day served a copy of the foregoing Order by facsimile and by placing a copy of the same in the mail, at Raleigh, first class mail, postage prepaid and addressed to the persons listed below:

This the 22nd day of December, 2005.

Daniel E. Garner

Daniel E. Garner, Executive Legal Specialist
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North Carolina Consumers after Payday Lending:

Attitudes and Experiences with Credit Options

November 2007

Prepared for the
North Carolina Commissioner of Banks

Center *for* Community Capital
Research and analysis on the transformative power of capital

UNC
COLLEGE OF
ARTS & SCIENCES

The Center for Community Capital at the University of North Carolina at Chapel Hill is the leading center for research and policy analysis on the transformative power of capital on households and communities in the United States.

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Roberto G. Quercia
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Executive Summary

The UNC Center for Community Capital undertook this study at the request of the North Carolina Office of the Commissioner of Banks to assess the household credit market since the closure of payday lending stores in North Carolina in 2006.

Researchers were asked to determine:

- What effect has the end of storefront payday lending had on low- and middle-income households?
- Do residents have adequate options to deal with financial hardships?
- What options are most commonly used, and how do they compare to payday loans?
- Are North Carolina residents worse off or better off without payday lending?

The Center conducted two phases of consumer research:

1. A survey of 400 low- and middle- income North Carolinians about financial shortfalls their households faced, and how they managed these shortfalls when they occurred.
2. Focus groups of former payday borrowers to understand their experiences with payday lending, and the impact payday de-authorization had on their ability to manage financial shortfalls.

Researchers concluded that the absence of storefront payday lending has had no significant impact on the availability of credit for households in North Carolina. The vast majority of households surveyed reported being unaffected by the end of payday lending. Households reported using an array of options to manage financial shortfalls, and few are impacted by the absence of a single option—in this case, payday lending.

More than twice as many former payday borrowers reported that the absence of payday lending has had a positive rather than negative effect on their household. The ban on payday lending has made no difference to most, and helped more households than it has harmed.

Payday borrowers gave first-hand accounts of how payday loans are easy to get into but a struggle to get out of. These borrowers universally agreed that the cost of payday loans was excessive.

Nearly nine out of ten households surveyed think that payday lending is a bad thing. This overwhelming negative view of the product did not vary significantly for households that had experienced a financial shortfall.

Phase I: Consumer Survey

The goal of the consumer survey was to learn how low- and middle-income households manage financial shortfalls, particularly now that storefront payday lending is not available. Proponents of payday lending have argued that without access to payday loans, low- and moderate-income households would struggle in the face of financial crises or turn to more onerous options. We wanted to explore householders' actual experiences. What resources do they use in the event of financial shortfalls? Were they obtaining payday loans via the Internet, crossing state lines perhaps, or using more costly alternatives?

Sample Selection and Survey Methodology

The Center's objective was to survey people who may have been most likely to consider obtaining a payday loan prior to closure of payday loan stores. In North Carolina, payday borrowers generally had a household income below $50,000.[1] To qualify for a payday loan, they also had to have a checking account and be employed. We limited our sample to households making no more than $45,000 per year, with a regular source of income and a checking account in the past three years, and where the primary wage earner was not a full-time student.

We contacted households in three urban areas—Charlotte, Raleigh, and Fayetteville—that had among the highest number of payday lending stores when the practice was allowed. Charlotte, North Carolina's largest city, is close to the border of South Carolina, where payday lending is still legal. Raleigh, the state capital, is more centrally located in the state. Fayetteville, in eastern North Carolina, is home to the Fort Bragg military base and had a high level of payday loan stores per capita before the ban.[2] Previous data indicates there is a significant, positive relationship between the number of payday stores in one's neighborhood and the likelihood of taking out a payday loan.[3] Therefore, we targeted our calls to zip codes where there had been the most payday lending stores.

The survey was conducted in the spring of 2007 using random-digit dialing to call phone numbers within the three target areas, in English only, giving us a random cluster sample of lower-income, English-speaking, urban residents of North Carolina who have (or recently had) a bank account. At the beginning of the 10 to 15-minute survey, we told people we were conducting a survey about how people use credit and manage expenses; we did not use incentives. The cooperation rate was a low 7.79%, primarily because we were unable to contact anyone at many of the numbers called.[4] The refusal rate was 38.21%; the majority of those declined before we gave them any information about the survey, so we have no basis to believe bias was introduced by refusals. Our overall contact rate was 46.86%, and we completed 401 interviews.[5]

Survey Findings

We differentiated the interviewees between those who had a recent financial crisis and those who had not. The first group, 159 respondents, reported they were unable to meet household expenses or had a financial need that they could not pay with their regular household income. The second group, 240 respondents, reported not having had a financial crisis in the previous three years that they could not handle with their regular income.

Table 1 below presents descriptive statistics on these groups. Though random cluster sampling should assure us of a representative sample, when compared to all households earning less than $45,000, our sample includes fewer White and Hispanic households and more Black households, probably attributable to the neighborhood focus and English-only survey. Most significantly, our sample includes substantially fewer married households than expected. Likely due to the study being conducted via telephone during a short period of time, our sample includes more widowed respondents than expected since they are more likely to be retired and easier to contact quickly by telephone. To ensure that the distribution of marital status within our data set did not compromise the representativeness of our findings, we weighted the sample to mirror the overall population attributes for marital status and found almost identical responses for the data presented in Table 2.[6] For more details on this analysis, see the endnote (6). The distribution pattern is an artifact of the survey delivery method and is unrelated to our sample selection criteria. Moreover, it did not affect the findings related to awareness and attitudes about payday lending.

Table 1: Descriptive Statistics

	All respondents (N=401)		Had financial crisis (N=159)		No recent financial crisis (N=240)	
	Freq	Percent [1]	Freq	Percent [1]	Freq	Percent [1]
Male	132	32.9%	52	32.7%	80	33.3%
Female	269	67.0%	107	67.3%	160	66.7%
Own home	281	70.6%	92	57.9%	188	78.3%
Rent home	106	26.6%	60	37.7%	46	19.2%
No children at home	335	84.0%	116	72.9%	217	90.4%
1 or more children	64	16.0%	42	26.4%	22	9.6%
1 Adult in household	231	58.0%	87	54.7%	143	59.6%
2 Adults in household	146	36.7%	59	37.1%	86	35.8%
3 + Adults in household	21	5.2%	11	6.9%	10	4.2%
Receive any government income	127	31.7%	35	22.0%	92	38.3%
Income Less than $10,000	43	12.0%	18	11.3%	25	10.4%
Income $10,000 to under $20,000	75	21.0%	40	25.2%	34	14.2%
Income $20,000 to under $30,000	109	30.5%	45	28.3%	64	26.7%
Income $30,000 to under $45,000	130	36.4%	45	28.3%	84	35.0%
Single, never married	119	30.0%	55	34.6%	64	26.7%
Married or living with a partner	104	26.3%	43	27.0%	60	25.0%
Divorced or separated	69	17.4%	36	22.6%	33	13.8%
Widowed	104	26.3%	23	14.5%	80	33.3%
White, Non-Hispanic	225	57.1%	75	47.2%	149	62.1%
Black, Non-Hispanic	151	38.3%	76	47.8%	74	30.8%
Hispanic	5	1.3%	0	0.00%	5	2.1%
Asian	3	0.8%	2	1.26%	1	0.4%
Other Race	10	2.5%	5	3.14%	5	2.1%
Has a credit card	293	73.1%	97	61.0%	195	81.3%
Gone over credit card limit	29	9.2%	22	19.6%	6	3.0%
Denied credit	50	12.6%	37	23.6%	13	5.5%
No savings account	83	21.0%	46	29.1%	36	15.3%
<2 months expenses in savings	106	34.4%	66	60.0%	40	20.2%

[1] Within-category percents do not sum to 100 because some people elected not to answer all questions

There are some significant differences between the two groups.[7] People who had experienced a financial crisis in the prior three years were more likely to:

- Rent their home
- Not have a credit card
- Have gone over the credit limit if they had a credit card
- Have been denied credit or not received as much credit as requested
- Not have a bank or credit union savings account
- Have less than two months of living expenses in savings
- Be divorced

Payday Lending is Not Missed

We asked about the termination of payday lending in the state (see Table 2). Most respondents—three out of five—were not even aware that payday lending is no longer allowed in the state. The exception was former payday borrowers of whom 60% were aware of North Carolina's ban on payday lending.[8]

The vast majority of households surveyed—more than three out of four—said the elimination of payday lending had no effect on their household. This percentage declined only slightly for those families that experienced financial distress (71%) or who had been payday borrowers in the past (68%).

The overwhelming majority of households—almost nine out of ten—said payday lending was a "bad thing." [9] This strong negative rating held true for households that had experienced a financial hardship or had borrowed from a payday lender in the past.

Respondents who felt they were better off without payday lending well out-numbered those who thought they were better off with it. For the full sample, twice as many respondents said the absence of payday lending has had a positive effect on their household than said it has had a negative effect. The 159 respondents who actually experienced a recent financial shortfall—arguably those most likely to consider a payday loan and miss its availability—had responses similar to the overall survey population. Notably, the ratio of positively-affected households to negatively-affected households was highest in this group—more than 3-to-1. Likewise, former payday loan borrowers generally felt the absence of payday lending to be a good thing, rather than a bad thing. (While a sample size of 23 former payday loan customers is insufficient to draw conclusions of statistical significance, it is notable that the numbers follow a pattern similar to the full sample and to the sub-sample of those who had experienced a financial shortfall.) In short, the responses suggest that former payday customers do not, on the whole, have a different view of payday lending than other respondents to the survey.

Table 2: Payday Lending Attitudes and Experiences

	Full Sample		Financial Shortfall		Former Customers	
	Freq.	Percent	Freq.	Percent	Freq.	Percent
Aware that payday lending is not allowed in North Carolina	155	39.6%	66	42.0%	14	60.9%
Not Aware	236	60.4%	91	58.0%	9	39.1%
	N=391		N=157		N=23	
Think payday lending was *A Bad thing*	286	88.3%	114	87.0%	17	73.9%
A Good thing	38	11.7%	17	13.0%	6	26.1%
	N=324		N=131		N=23	
Prohibiting payday lending has *no effect* on my household	287	77.2%	107	71.8%	15	68.2%
Positive effect	58	15.6%	32	21.5%	5	22.7%
Negative effect	27	7.3%	10	6.7%	2	9.1%
	N=372		N=149		N=22	

See endnote (6) for results using weighted samples.

Households are hardest hit by shocks to income and expense

The findings presented in the remainder of this section apply only to the subsample of 159 participants who reported experiencing at least one financial shortfall in the past three years (unweighted).[6] Of these, 142 were able to identify the factors that contributed to the **most recent time** they had a shortfall (see Table 3). For most (60%), the financial crisis resulted from a combination of factors rather than from one single event. The single most common cause was an illness or some other medical expense, followed by transportation expense. Conceivably, these top two causes have a compound effect of both increasing household expense and decreasing income (if illness or transportation impedes ability to work). Tied for third place was loss of income and home repairs.

Table 3: Reasons Given for Most Recent Financial Shortfall

Reason	Frequency	Percent [1]
Illness, disability or some kind of medical expense	70	49%
Car repair or other transportation-related costs	53	37%
Home repairs	42	30%
A loss of income due to a job loss or cutback	42	30%
A major household appliance purchase	18	13%
Tuition or other school-related expenses	12	8%
Regular expenses exceeding income	11	7%
Other income or expense shocks[2]	8	5%
Other[2]	4	3%

[1] Percents do not sum to 100 because respondents could select multiple options
[2] “Other income and expense shocks” include such events as death or divorce, apartment fire, loss of child support, need to pay property taxes. “Other” includes spending on vacation travel, entertainment-type purchases, gambling, and friends.

People Use Multiple Options to Handle Shortfalls

We asked these 159 respondents whether they had used any of a series of options during periods of financial shortfall. To learn more about specific behaviors, we also asked them to reflect on the *most recent* financial crisis in particular.

Our research revealed important information about how people handle financial emergencies. The most common option, over the last three years and most recently, was to pay the expense late or not to pay (see Table 4). Of those who obtained funds to pay the expense, most relied on credit cards, savings, or friends or family members. Bank loans and bank overdrafts were other frequent options.

Most people used more than one strategy. The 159 respondents used more than 500 options in the last three years and just over 300 options in their latest shortfall alone. About a quarter of respondents said they used only one or none of the options over the previous three years, indicating that around three-fourths of those surveyed are familiar with a range of credit options.

Eight percent used payday loans in the prior three years. Storefront payday lending ended in North Carolina roughly one year prior to our survey. Though some lenders offer Internet payday loans in this state, these are subject to North Carolina law as well, regardless of the lender's location.[10]

Table 4: Number of respondents who used each option in previous three years

	For all shortfalls in past three years		During most recent shortfall specifically	
Option	Freq.	Percent who used [1]	Freq.	Percent who used[1]
Did not pay/paid the expense late	82	52%	68	43%
Used money from a savings account	70	44%	53	33%
Obtained money from friends/family	67	42%	47	30%
Used a credit card/cash advance	62	39%	33	21%
Took out a bank loan/line of credit	44	28%	19	12%
Bounced checks/used overdrafts	36	23%	16	10%
Borrowed from insurance/retirement	26	16%	14	9%
Received money from church/charity	21	13%	12	8%
Obtained a pawnshop loan	17	11%	9	6%
Loan from finance company	15	9%	5	3%
Sought bankruptcy protection	15	9%	6	4%
Received a payday loan	13	8%	6	4%
Received tax refund advance	10	6%	5	3%
Borrowed from employer	9	6%	4	3%
Obtained loan from auto title lender	9	6%	1	1%
Entered debt negotiation	9	6%	3	2%

[1] Percents do not sum to 100 because respondents could select multiple options

These findings are roughly consistent with a survey of the general population in March and April of 2007.[11] Among those 500 households surveyed, 8% reported using a finance company, 7% taking out a tax refund anticipation loan (RAL), 4% borrowing from a payday lender, and 3% pawning an item in the prior two years.

The most frequent strategy survey respondents used was to skip paying an expense or to pay it late, but it was rarely the only strategy. Of the 68 people who skipped a payment or paid late, only 9 said that was the only thing they did. The remaining 59 people used a median of three options. The use of multiple options suggests an elaborate level of management, where consumers are layering in resources in some order of preference.

Table 5 shows the distribution of options people used to address their most recent financial shortfall. In the Options rows, the numbers are the number of people selecting that option. For example, of the 32 people who used 3 options the last time they had a financial shortfall, 25 paid an expense late or skipped paying it.

Table 5: Options used during most recent financial crisis

# Options Used	1		2		3		4	
# of People	44		35		32		20	
Total options used	44		70		96		>80	
Options:	# times used	Percent of options used	# times used	Percent of options used	# times used	Percent of options used	# times used	Percent of options used
Pay late/not pay	9	20%	16	46%	25	78%	18	90%
Family/ friends	8	18%	14	40%	11	34%	14	70%
Savings	8	18%	13	37%	22	69%	10	50%
Credit Card	5	11%	10	29%	11	34%	7	35%
Bank Loan	5	11%	6	17%	6	19%	2	10%
Bounced Checks	1	2%	2	6%	5	16%	8	40%
Charity	2	5%	2	6%	3	9%	5	25%
Retirement	3	7%	3	9%	3	9%	5	25%
Payday Loan	2	5%	1	3%	-	-	3	15%
Finance Company	1	2%	1	3%	-	-	3	15%
Pawn Shop	-	-	1	3%	3	9%	5	25%
Bankrupt	-	-	-	-	4	13%	2	10%
Auto Title Loan	-	-	-	-	1	3%		0%
Tax Advance	-	-	-	-	1	3%	4	20%
Debt Negotiation	-	-	1	3%	1	3%	1	5%
Employer Loan	-	-	-	-	-	-	4	20%

Note: Percentages represent the number of people in each column who selected a given option

More than half of those who used multiple options used their own savings as one option (45 out of 87). Only those using 3 or more options turned to bankruptcy, and only those using 4 or more chose employer loans. Payday loans were not among the most common choices.

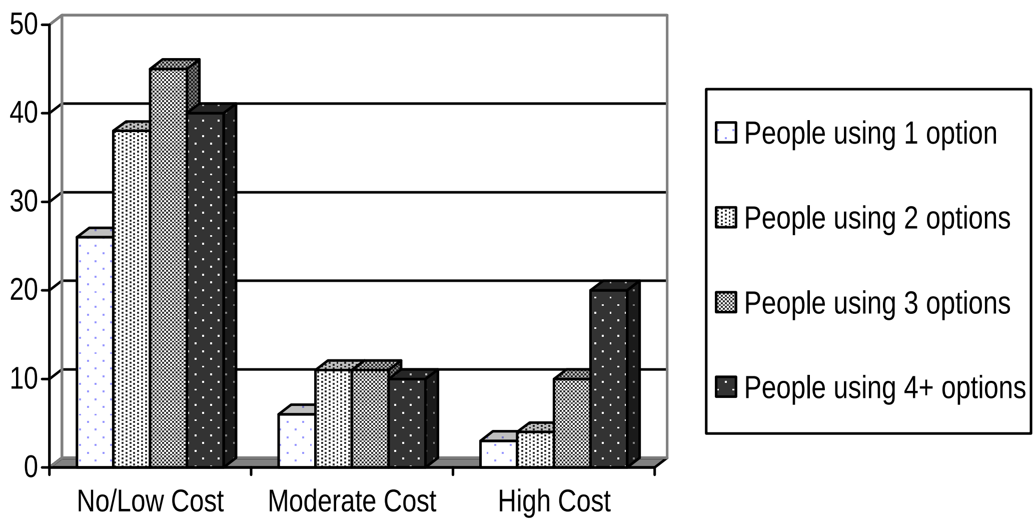
Cost Is a Factor in Selecting Options

We used reasonable assumptions of cost to categorize the alternatives as "no or low cost" (friends and family,[12] savings, retirement, charity, employer loan, bank loan), "moderate cost" (credit card, finance company loans), and "high cost" (bounced check, pawn, payday, auto title, tax advance). We did not include the unknown and highly variable options, which includes bankruptcy, debt negotiation, and not paying or paying late.

The cost of not paying or paying late was too variable to categorize. Fifty-nine of the no- or late-payers were willing to talk about their experiences of paying bills late. About 40% of these said they incurred no cost, but rather negotiated the payment over time, simply paid late, received phone calls, or had no consequences at all. Ten percent had utilities disconnected, went without a prescription medication, or had a damaged credit rating. The remaining half incurred late fees and charges, including eight respondents who said their bill was turned over to a collection agency or that they faced repossession or bankruptcy.

After separating responders by the number of options they used, we analyzed whether any group was more likely to select higher-cost options (see Chart 1). For all groups, the most commonly used options were no- or low-cost, especially if one considers that 40% of no- or late-pay events also carried no financial cost. The exception was those who tapped many sources, where high-cost options out-numbered moderate-cost options (driven by a relative increase in bounced checks and decrease in credit card use.

Chart 1: Number of options used in each cost category, by number of options respondent used in most recent financial crisis *(excluding no-/late-pay, bankruptcy and debt negotiation)*



Most people need more than $300

Table 6 shows the amounts people borrowed, by option. We used $300 as the dividing line, since this was the maximum allowable payday loan in North Carolina when the practice was authorized. Overall, the most popular amounts to borrow from a single source were from $100 to $299 and from $1,000 to $2,999.[13]

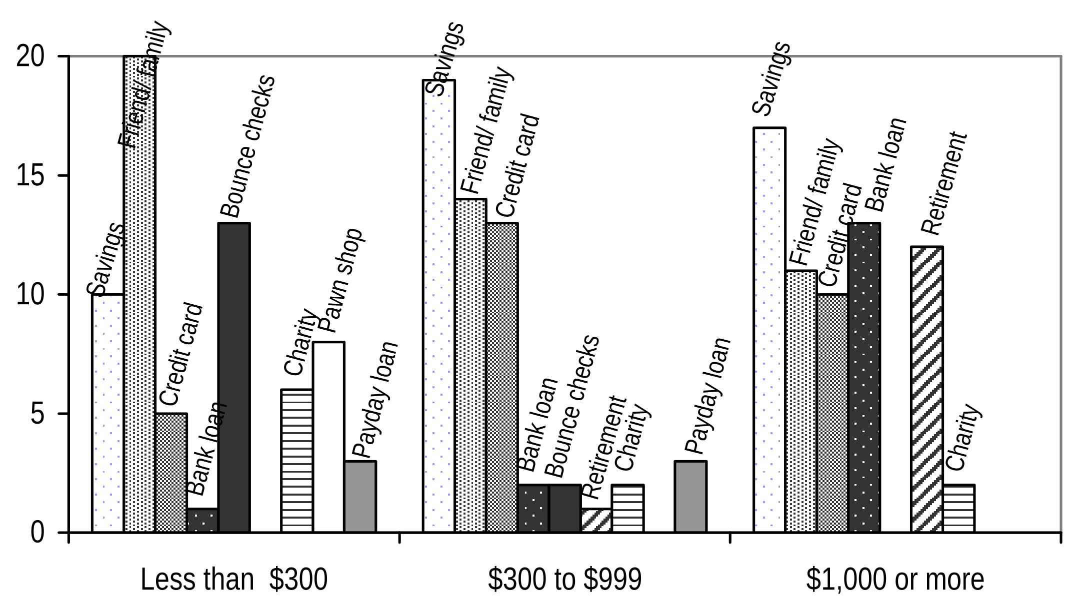
After not paying, the most common borrowing option people tapped was taking money from savings, which occurred regardless of amount of funds needed. The next most common option was to borrow from friends and family, who tended to provide somewhat smaller amounts though could still be generous. Responders across the board used credit cards but most often in the $300 to $500 range, while bank loans were the most popular resource in the high-dollar categories. Bounced checks and pawnshops were almost exclusively limited to small amounts. While only six people reported obtaining a payday loan to cover their most recent shortfall, half borrowed above $300. Of those who obtained a loan from a finance company, four out of five borrowed over $1,000. Likewise, three out of five who received a tax advance loan borrowed over $1,000, probably driven by the total amount of their refund. Pawn shops and employer loans were used exclusively below $300 while retirement and finance companies were never used for less than $300.

Table 6: Amounts Borrowed, by Source

	Less than $100	$100 to $299	$300 to $499	$500 to $999	$1,000 to $2,999	$3,000 to $9,999	$10,000 or More	Total
Savings	2	8	11	8	10	5	2	46
Friend/ family	7	13	9	5	9	2		45
Credit card	2	3	8	5	3	4	3	28
Bank loan	-	1	2	-	4	7	2	16
Bounce checks	5	8	2	-	-	-	-	15
Retirement	-	-	-	1	7	3	2	13
Charity	2	4	1	1		1	1	10
Pawn shop	5	3	-	-	-	-	-	8
Payday loan		3	2	1	-	-	-	6
Finance company	-	-	-	1	3	1	-	5
Tax advance	-	-	1	1	3	-	-	5
Employer loan	1	2	-	1	-	-	-	4
Auto title	-	-	-	1	-	-	-	1
Total	24	45	36	25	39	23	10	202

Chart 2 illustrates the nine most common options used by size (including the top five for each size category). When borrowing less than $300, the top five options are friends or family members, bounce checks, savings, pawning items, and charity. For loans between $300 and $999, people mostly rely on savings, friends and family, and credit cards. For amounts over $1,000, the top five options include those same three sources plus bank loans and retirement assets.

Chart 2: Amount Borrowed During Most Recent Financial Shortfall, by source



While people commonly borrowed less than $300, most people obtained funds from multiple sources. Only 15 of the 159 people polled used just one small-dollar option; 12 more used multiple options each of which was less than $300; while we do not know the cumulative amount obtained, ***at most***, only a quarter of the people could have needed only $300. (For this purpose, we treated no- or late-pay as a small amount). The three-quarters who we know needed more than $300 were evenly divided between those using a single over-$300 option, those using two or more over-$300 sources, and those mixing small and large amounts.

People prefer finance companies and bank loans; credit cards must be endured

We asked respondents who had used a particular option during their most recent financial shortfall two questions:

1) How fair and reasonable were the terms?
2) How satisfied were they with the option?

Table 9 presents the fairness score and satisfaction score for various credit options where the respondent turned to an institution and obtained assistance at a cost.[14] Scores range from 5 (very fair or satisfied) to 1 (very unfair or dissatisfied). These scores are the mean values for each option.

Bank loans received the highest fairness score and scored among the most satisfying. The highest satisfaction score went to finance company loans, and the lowest to pawnshops. In the MarketSearch study mentioned earlier, respondents also gave finance companies the highest satisfaction ranking and pawnshops the lowest among several "alternative financial services." While we can only conjecture as to why, it is worth noting that finance company loans, most loans against retirement savings, and certain bank loans are the only amortizing, closed-end options on the list.

We also asked people how likely they were to use various options in the future if they needed to borrow $300. The last column in Table 9 presents the percentage of people who said it was "somewhat likely" or "very likely" they would use a particular option in the future. The alternative response was "not likely." This question was asked of the full sample of 401 respondents.

Table 9: Fairness and Satisfaction Scores

	N	Fairness Score	Satisfaction Score	Satisfied-fair gap	Likely to use in the future
Take out a bank loan/line of credit	19	3.79	3.72	-0.07	39%
Borrow from employer	4	3.75	3.50	-0.25	4%
Enter debt negotiation	3	3.67	3.33	-0.34	15%
Borrow from insurance/retirement	14	3.57	3.64	0.07	16%
Bounce checks/use overdrafts	16	3.50	3.37	-0.13	8%
Loan from finance company	5	3.40	3.80	0.40	14%
Seek bankruptcy protection	6	3.17	3.33	0.16	9%
Obtain a pawnshop loan	9	3.14	2.56	-0.58	7%
Receive an early tax refund advance	5	3.00	3.20	0.20	Not asked
Receive a payday loan	6	2.83	3.33	0.50	4%
Use a credit card/cash advance	33	2.82	2.75	-0.07	29%

Although there was some correlation between fairness and satisfaction, satisfaction scores differed from fairness scores for several options. The “satisfied-fair gap” measures this difference. A large positive figure suggests that borrowers derived satisfaction over and above their perception of fairness; For example, finance companies had the highest satisfaction score but a middle-ground fairness score and payday loans had the highest such gap, with a satisfaction score well above its low fairness score. Conversely, a large negative number suggests customers were dissatisfied for reasons beyond their sense of (un)fairness; thus, people who obtained pawnshop loans did not think the terms were particularly unfair but were less satisfied than all other respondent groups.

There tended to be less difference between the satisfaction and fairness scores of the most frequently used options—bank loans, borrowing against retirement, bounced checks, and credit cards. Notably, the most-used option, credit cards, had poor scores on both measures. Respondents saw credit cards as less fair than pawnshops, overdrafts, or bankruptcy—in short, everything but auto title lenders—and neck and neck with payday lenders. On the satisfaction scale, credit cards ranked below auto title lenders and payday lenders and above only pawnshops. Despite these scores, respondents cited credit cards as the second most likely source they would use to borrow $300 in the future.

Our survey found that the overwhelming majority of low- and moderate-income families do not miss payday lending, and that most families use multiple avenues to handle financial hardships. Generally speaking, we found that households more frequently choose lower-cost options to deal with hardships and preferred term loans from banks and finance companies to credit cards and other sources of credit.

Phase II: Focus Groups–A Closer Look at Payday Borrowers

We also wanted to learn more about the experiences of people who had, at some point in the past, turned to a payday lender to make ends meet. We wanted to know more about the circumstances leading to their decision to take out a payday loan, their experiences as a borrower, their reaction to the shuttering of payday lending stores, and how they view their options to manage financial shortfalls.

Prior Research

Payday borrowers represent an estimated 5% of the United States population (Stegman 2007). They typically are from lower- to middle-income households and are more likely to be younger, female, divorced, or separated. Borrowers are also more likely to be high school educated but less likely to have graduated from college. Minorities are over-represented, even after controlling for a number of socioeconomic factors. By definition, payday loan borrowers are banked but often carry small balances.[15]

“What most borrowers have in common is significant credit constraints, including poor and impaired credit histories.”[16] Payday borrowers are about four times more likely to have filed for bankruptcy[17] but there is some evidence that payday borrowing may contribute to bankruptcy.[18]

Payday borrowers are more likely to spend a greater share of their income on consumer debt payments, to revolve credit card balances, be at or near credit limits, and have been turned down for credit or been offered less than the amount requested than the general population.[19] While close to 25% have used a pawnshop, virtually none report considering a pawnshop as an alternative to their most recent loan.[20]

Although in general payday loan borrowers are experienced users of credit, there is mixed evidence as to how well they grasp the terms of payday debt. Generally, survey respondents knew the dollar fee per $100 borrowed but were much less clear on the APR. In one study, 96% of respondents could report the finance charge per $100 borrowed, but only 16% could report an APR, and 60% of those were probably wrong, including 41% who reported an APR below 30%.[21]

Industry-funded surveys report that three-quarters of respondents say they were satisfied with the experience.[22] Users report most satisfaction with the application process and the ability to refinance or renew and most dissatisfaction with cost. Far and away, the single most important reason for using a payday loan was speed and ease. Only 9% said they had no other alternative and only 1% cited greater privacy. Advertisement has the biggest influence on choosing the first payday loan, ahead of referral.[23]

Focus Group Participants

We conducted two focus groups of 10 people each, both held in Charlotte, North Carolina. The participants were all ages and included young, single people, married people with children, divorced parents, and grandparents. Sixty percent of the participants were white, 40% were black, and about 60% were women. Jobs included technician, security guard, and clerical, warehouse, and manufacturing workers. All except three participants, who said their unemployment was temporary, were working full-time. All participants were former or current payday loan customers. Some had taken their last payday loan more than two years previously, prior to payday loans becoming legally unavailable in North Carolina. However, some participants had taken out recent loans, either in South Carolina or over the Internet. Two participants reported taking out a payday loan within the previous month, and one of these was still outstanding.

We divided the participants into two groups: infrequent users of payday loans (five or fewer loans over the previous five years) and frequent users (more than five loans). In North Carolina, when payday lending was authorized, around half of all payday customers took out five or fewer loans, but they generated only 15% of the total loan volume.[24] Customers who took out six or more loans provided the majority of loan volume (85%). There was some blurring of the distinction between our two focus groups, because some participants reported few loans but actually rolled them over a number of times. In their minds each constituted a single, separate loan, although these were actually a series of repeat transactions. In fact, very few participants reported paying off their loan at its first due date. Between the infrequent and frequent payday borrowers, we found some stark differences in attitudes and experiences but some common sentiments.

Focus Group Findings

The opinions we present from these focus groups represent the consensus or majority opinions expressed by participants. Whenever significant variation exists, we present the range of opinions and beliefs expressed. Italicized phrases and remarks in quotations are direct quotes.

A few points are consistent across the spectrum of participants:

- All agreed they had paid what they considered to be an excessively high price for the loan.
- In spite of many reported difficulties, all but one person did pay off the loan.
- They universally called for a more viable credit option for borrowing a small amount of money.

General Views on Payday Lending

The motivations and experiences of infrequent payday loan customers vary significantly compared to frequent users. For example, we started the discussion with a general question, "When I say 'payday loan' what do you think of?" Responses from infrequent borrowers included:

- "Quick way to get money"
- "Money for emergencies"
- "Extra money between paychecks"

More frequent borrowers had very different answers. The first person to speak answered, "Rape…you are down, desperate, need money, and so you go to borrow, and you keep doing it over and over and over again." Other responses included:

- "Addiction"
- "You go in to more debt"
- "When it's due, when you have to repay it…then you take out another"

Why People Go To Payday Lenders

The majority of focus group participants reported that they initially took out a payday loan because they experienced a financial shock, either an unexpected loss of income or extra expense (we call this "setback" driven). These setbacks included car repairs, job loss, reduced work hours, medical bills, annual car insurance payments, or unexpected expenses incurred by a child.

Four of the twenty participants were what we term "lifestyle borrowers;" they used payday loans for non-essential expenses, such as gambling, vacations, or expensive restaurant meals. In general, lifestyle borrowers took out more payday loans more frequently than setback borrowers; all were in the frequent user category.

Occasional borrowers used payday loans to pay for unexpected costs, such as car repairs or medical bills, while many frequent borrowers used payday loans to pay necessary but expected expenses such as housing. Some frequent borrowers viewed payday loans as a kind of supplemental income.

As one participant put it: *"I knew I'd screwed up after I got out; I blame myself."* Overwhelmingly, participants did not blame the lender or the loan but rather themselves for their situation. Most participants were glad they were no longer payday loan borrowers, that they had "learned a lesson," and that they were making efforts to avoid taking another payday loan.

Awareness of Payday Loan Terms

As expected, knowledge about payday loan terms and conditions varied greatly. Everyone agreed on the basic steps of obtaining a loan and the requirement to pay it back in a few weeks (see Appendix). Most also knew that they could roll-over or renew a loan for two additional weeks by paying the fee again. But many participants did not know how to compare the costs and terms of a payday loan to other credit products.

Among infrequent users, understanding varied widely. Several said they did not understand the interest rate, or that they only realized the cost of the loan after they got home. One said that after reflecting on the loan, she felt "like I sold my soul to the devil." On the other hand, several other infrequent borrowers said they understood the interest rate at the time of the loan and accepted the terms. Some participants felt that payday loans were less expensive than pawnshop loans, while others felt pawnshops were the better deal.

The more frequent users had a better understanding of the costs associated with payday loans. Several said they had read the fine print and knew that the APR was in the 400% range. Their attitude was they needed the money. The interest rate, fees, and repayment terms were just features they had to accept rather than features to consider when making a decision. One participant captured what many voiced: "Your mind, it is set; I need the money now…you don't think about the afterwards." Another said, "It is when you have to pay it, that's when you think about it."

Easy to Get In...

"It was quick and easy...real easy."
All participants were attracted to payday loans for the same reason: The loans were private, fast, and above all, easy to obtain. People cited the short application process, no credit check, and the guaranteed acceptance. When asked whether they would have been able to get a payday loan if there had been a credit check, they generally thought not.

"The paperwork was simple. They didn't ask a lot of questions."
Many people also said they appreciated the discretion of a payday loan. One person said that with a payday loan, "there is no family drama;" another said it enabled him to "hide my head." This was a common theme—payday loans could be obtained without family members or bankers finding out; however, participants also reported that the payday loan companies contacted their employers before making the loan. Others said that payday loan companies did not report to credit bureaus, so taking a loan would not affect their credit.

"I didn't have to go through much to get it. I mean, I was in and out of there in about thirty, thirty-five minutes."
Participants said they preferred payday loans because they were faster to get than other loans. For one person, the payday loan shop was "right down the street." A few who got their loans

over the phone or the Internet said the money was in their checking account within one to 24 hours. Some participants said their payday loan company offered them another loan without requiring another application.

"Small amounts"
Many were attracted by the fact that they could borrow small amounts. They felt that lenders such as banks or finance companies would not be willing to loan them only a few hundred dollars.

"The guy I did my business with at that one place, he did not look like your typical lounge lizard."
Finally, several participants mentioned that payday lending shop employees were friendly and personable. This did not necessarily influence their decision to take out a payday loan, but it made them feel more comfortable about doing so. They noted the cleanliness of the stores and the fact that employees remembered their names. Payday loan employees were "non-judgmental," many participants said, while bank employees looked down on low-income people.

*"They always offered me more." "If you need money in the first place and they say, 'Well, here's what you **really** can do', quite naturally your eyes see that."*
Most people borrowed more than they had initially intended to borrow. Many participants told how they ended up getting a larger loan because payday loan employees told them they could. For example, according to one participant, an employee might say, 'Just in case something comes up behind that, you might need more.' One woman said, "You get a little extra," and another added, "To blow."

"I was like 'what? I can do that again? Really? Oh, okay, let me take it back out.'"
Some focus group participants said the loan representative made loans available to previous customers even if they didn't ask for one. One woman said she got e-mails from the Internet loan shop she used letting her know she could get another loan; others got phone calls. Some customers also were offered a small incentive for making referrals.

"Nice people…yea, as long as you came back and paid it off after two weeks and then took out your next one. They're happy you're not one of the ones they have to chase down… I'd always be back so they always liked me."

…But Hard to Get Out

"I even get them calling me asking 'would you like to extend your loan?' and my answer was always 'why yes, I would!'"
Participants were quick to point out that payday features they liked were outweighed by negatives, and sometimes the positives turned into negatives: "It's *too* easy." Several explained that payday loans' easy access became a problem when they started taking out loans on a regular basis. One man said, "Every two weeks I have to run down and get another [loan] before they close. It became a part of my life, until I realized I was paying $45 every two weeks. Then it started to come to me."

"I get happy, but then I realize I'm probably perpetuating the problem…Then reality sets in… I've put myself in another bind again."
Most customers also said that the payday loan delayed rather than resolved the financial problem that led them to take out the loan, or resolved it in favor of another problem. While many reported feeling extreme relief, almost euphoria, upon receiving the loan, they also said reality set in as payday neared. Frequent customers especially said that two weeks later, when the loan was due, their financial situation had not changed and they did not have the money to cover the loan. At first they thought of a payday loan as income or extra money, but later they realized that rather than adding to their income they had just "killed one bill with another." Almost all agreed it was easy to get trapped in a payday loan.

"It is really easy. You just go down and give them another $30 and you have another two weeks to pay it back."
This was a typical response to the question, "Did you find it easy to pay off your loan?" In fact, participants' comments implied that it is very easy to *not* repay a payday loan and instead pay another fee and delay payment for two weeks. They told of lenders giving them grace periods or "holding their check" past the due date to give them time to renew.

"It became a habit."
Focus group participants generally felt that payday loans have some appealing features but that these are outweighed by high fees and a short repayment period. Frequent borrowers said when they took out their initial loan they believed they could pay it back within two weeks, but most rolled over that initial loan several times. Some took as long as a year to finally pay it off.

"I don't know anybody who knew how to work it right, to use it for the main purpose it is set up to be."
Only two of the twenty participants said the payday loan had truly resolved their problem. One man said payday loans improved his situation because he used the money to continue taking out his girlfriend without her knowing he spent much of his income on gambling. The other said the loan's onerous terms had taught him a lesson and led him to fundamentally change his financial management.

Paying off

"I started calculating. I'll never get out of it. If you're already struggling, you'll never come out of it."
One frequent borrower explained, "If you borrow $300 and pay back $45, and you're going in there two times a month, at the end of the year that's $1,180 in interest and you still owe $300. That's what woke me up—$1,180. You could use that for something a lot more important."

"You see yourself in a hole."
Participants said they saw payday loans as a "quick fix." One said it become "more of a burden than a convenience." Four frequent borrowers got money from other sources to pay off their payday loans, including pawnshops, friends and family, and a bank overdraft that was subsequently converted to an installment loan.

"I would come down a level each time I'd go until I paid it all."

When pressed, most said it had been difficult to pay back their loans. Several people said that once they realized how much the cycle cost them, they paid off by “easing out,” taking consecutively smaller loans. Others took part-time jobs or cut back on spending.

“The interest rate is already outrageous.”
Customers felt strongly that the cost was excessive. All except one participant reported paying off every payday loan they took, and they did not see that they posed such a risk as to warrant the fees they were charged, particularly when they had a long track record of paying on time. One contrasted the price of a payday loan to the cost of cashing a check and felt the difference was not justified. Participants found several aspects of payday loans burdensome: They wanted lower interest rate caps and longer repayment schedules with installment payments. Many said they would prefer being able to receive a loan from their employer.

End of Payday Lending

“Thank you Jesus! Yes! Now I can't do it anymore!”
We asked participants if they were aware that payday lending is no longer allowed in North Carolina, and most were. When asked if this was a hardship, both groups had an immediate and strong common reaction: “No, no, no; I think that’s a *good* thing!” Another woman said, “They're there basically to rob people that need money...they're the devil!” Most participants were glad they no longer had the temptation.

However, when asked more abstractly whether “people” should have the right to take a payday loan, all but two agreed that they should. This apparent contradiction highlights the conflict between people’s desire to be protected from what they view as unfair business practices, and their deep sense of independence and accountability. One man voiced this faint praise: “You’re an adult. You signed the contract. They put their terms there. I think it’s shady that they allow it to be that high. They’re preying on people on hard times… But they should be allowed to have a business.”

Participants reported using several different credit alternatives, though no single alternative was widely used. Seven used overdrafts, a few patronized pawnshops, and two took out auto title loans. One resorted to “EZ lease,” in which, she explained, she provided the lender with post-dated checks and serial numbers on several appliances in exchange for cash at a steep finance charge, on terms that earned the comment, “There are worse things.” Two lifestyle borrowers used Internet payday lenders. For the most part, those using South Carolina payday lenders had always used South Carolina lenders.

Others had developed lower-cost strategies. “It aggravated me that I was stupid enough to not ask someone in the family to lend me the money,” one said. And another has learned how to negotiate with bill collectors instead of taking on more new bills.

Some were managing without debt, by changing their spending habits, taking on another job or more hours, or simply doing without. “I’d rather stay home,” one person said. One person had used payday loans to smooth cash flow in her insurance billing business, because her clients, who were doctors, were often slow to pay. She now requires them to pay on time.

Many participants appealed for small-dollar credit options that could ease, rather than increase, financial strain in difficult times. Their attitudes about regulation displayed a lack of clarity about what was and wasn't regulated but also some faith in the capacity of appropriate regulation to protect them. These 20 current and former payday borrowers have much the same views as those expressed by respondents in a much broader survey of North Carolinians' perceptions of financial services: "Findings also identify uncertainty and mixed opinions relative to the state's banking regulations …however, findings identify clear support for regulations and opportunities to strengthen them even more."[25]

Focus Group Conclusion

Experts in behavioral economics argue that situational factors, such as daunting complexity, conveniences or minor obstacles, influence of peers overriding expert advice, can lead us all to make sub-optimal decisions. Because financially constrained individuals have less room for error, poor financial choices—even if driven by apparently modest factors—can have make-or-break consequences.[26] The Consumer Credit Research Foundation found that "simplifications" are an important part of the appeal of payday loans,[27] and our focus group participants echoed that point. The themes of speed, ease, and convenience resound throughout the research and our focus groups, which may partly explain why payday lending appeals to certain consumers, and why, at the same time, it is not sorely missed.

Conclusion

Our research introduces the experiences and opinions of low- and moderate-income North Carolinians and former payday loan users into the debate over consumer protection in the credit market. Most surveyed households consider themselves better off or unaffected by the closing of payday loan stores in North Carolina. The demand for consumer credit remains, but households currently handle financial hardships in a variety of ways. Low- and middle-income households experience financial shortfalls largely because of circumstances beyond their control and typically borrow more than $300 to pay their debts. By and large, they are willing to contribute from their own assets and work with service providers, and they manage and repay a range of debt sources. Thus, in our analysis, the policy decision to ban payday lending was effective because it was a net benefit to households and does not appear to have materially curtailed the availability of credit for these households.

In focus groups, former payday borrowers reported receiving payday loans quickly, easily, and with little review of their ability to repay. Few were able to pay off the easy-to-obtain loans in the timeframe they had expected. Frequent users--those who generated the preponderance of payday transactions--were more likely to abuse the product and borrow repeatedly. Payday loan customers, even those who want to retain the option, wanted a lower APR and longer, amortizing repayment terms, as well as limits on renewals and amounts borrowed. Some of these changes would fundamentally alter the nature and economics of payday loans. Industry "best practices"[28] do not begin to approach the requirements our focus group participants want.

Addressing the Demand for Small and Affordable Consumer Loans

The North Carolina State Employee's Credit Union (SECU) introduced a 12% APR product called the Salary Advance Loan (SALO) in January 2001. With more than 1.3 million members, SECU is the nation's second largest credit union.[29] Typical SALO borrowers earn less than $25,000 per year and have low account balances and low credit scores. Renewal rates are high, with two-thirds of SALO customers taking out a SALO every month, so SECU requires the borrower to deposit 5% of every new SALO into a savings account. In the first five years, SECU reported more than a million loans to more than 50,000 customers; an average annual charge-off, or bad debt expense, of just 0.27%; and $8 million of accumulated savings account balances. SECU calculates it is saving members $33.6 million a year in payday loan fees.[30]

One researcher points out that "depository institutions are able to profitably offer payday loan alternatives…whether they have the will to do so remains to be seen."[31] In our survey, 12% of households experiencing a shortfall took out bank loans, which they ranked as the most fair and second most satisfying source of credit. On the other hand, 10% of households used overdraft loans or bounce protection. Several focus group participants used overdraft loans and viewed the fairness of the charges negatively, particularly when they overdrew their accounts by small amounts: "You're just minus fifty cents, they pop you for twenty-five dollars." Thus, bank products offer both a promise and a potential shortcoming.

This promise is found in the Federal Deposit Insurance Corporation's (FDIC) Affordable Small-Dollar Loan Products Guidelines issued in June 2007, which calls for FDIC-supervised financial institutions to promote an alternative debt product that features affordable rates (with an APR not to exceed 36%) and amortizing payments. The guidelines stress that "excessive renewals of a closed-end product, or the prolonged failure to reduce the outstanding balance on an open-end loan, are signs that the product is not meeting the borrower's credit needs." The guidance also recommends underwriting for ability to repay, incorporating a savings component into the product, working with other organizations, and providing an avenue for financial education. Institutions that pursue such practices can qualify for Community Reinvestment Act credit.[32]

Another bank product, the ubiquitous credit card, was strongly disliked. Respondents in our survey used credit cards more than any other interest-bearing debt product, but the only service rated less satisfying than credit cards was pawnshop and the only one considered less fair was the auto title loan. Similarly, focus group participants were afraid of being misled by credit card companies. These findings are consistent with recent developments: While Congress considers credit card reform legislation,[33] many financially distressed homeowners are falling behind in mortgage payments while keeping their credit cards in good standing.[34] Because the technology, flexibility, and cost structure of the credit card business holds the potential to offer a simple, fair, and repayable debt product, it is particularly regrettable that credit cards received such low marks for satisfaction and fairness.

Finance companies appear to be picking up some business formerly served by payday lenders. Although only a few financially distressed survey respondents named finance companies as a source of credit, finance companies outranked all other options in terms of satisfaction. A tiered rate system allows North Carolina finance companies to charger higher interest rates on the first $600 to $1,000 loaned. Loans under $600 are capped at a maximum of 36%.[35] Payday lenders say they cannot be profitable at that level, but as part of an overall business model that includes larger loans this appears to generate a reasonable return for finance companies. In 2006, North Carolina's 597 finance company offices made 32,586 loans under $600, representing 7% of their borrowers. The average balance was $481. The number of loans under $600 made by finance companies has grown each year since 2002 and is up 37% in four years.[36]

This research suggests that North Carolina households do not miss payday lending and have an array of other strategies to manage financial shortfalls. However, demand remains for alternative sources of small, affordable consumer loans. Our research suggests that payday lending did not fulfill this demand, as few people miss it now that it's gone and most of those affected by the ban consider themselves better off now. What the focus groups want is a product with a lower rate, longer repayment schedule, and installment payments—all core features in the FDIC's Affordable Small Dollar Loan Guidelines. The Office of the North Carolina Commissioner of Banks and others should continue efforts to encourage such products.

Payday Lending Overview

Today's payday lending is a modern version of a practice once known as "salary lending," which dates from the 1800s. By 1907, at least 20% of Americans owed money to salary lenders, with many trapped in what was called "chain debt." Eventually, the excesses of the high-cost credit industry led to the term "loan shark," passage of bankruptcy laws, the emergence of credit unions, and the passage of small loan laws by individual states.[1]

North Carolina's experiment with modern payday lending began in 1997, when lawmakers exempted the practice from the state's small loan usury rules. Except for the period from October 1997 through August 2001, North Carolina's Consumer Finance Act limits the APR on loans under $600 to 36%.[2]

A payday loan is a small, short-term loan on the order of $300 for two weeks made in exchange for a postdated check or withdrawal authorization for the cash received plus fees.[3,4] A composite of loans made in North Carolina in 2000 illustrates a "typical" transaction: The median $244 loan had a median fee of $36 and the majority of loans were due within 8 to 14 days, resulting in a median annual percentage rate (APR) of 419%.[5] A shorter term raises the APR.

According to the industry's trade association, the payday lending industry makes $40 billion in transactions a year.[6] At $15 per $100 borrowed, that amounts to some $6 billion in fees paid by borrowers.[7] While payday loans are available over the Internet, most payday lending is conducted through storefronts, either in stand-alone payday lending stores or in related businesses, such as check cashers and pawnshops. Two years ago, there were more payday lending and check cashing locations nationwide than McDonalds, Burger Kings, Wal-Marts, JC Penneys, Targets, and Sears combined.[8] As more states allowed payday lending, the business evolved from private, local operators to a more organized industry, with a number of large chains controlling a growing share of the market.

Obtaining a payday loan is quick and easy. Payday lenders generally do not check credit reports, and the money is made available almost immediately. But paying off the loan in a fortnight can prove more challenging. Numerous studies show that most borrowers have problems repaying the loans and that re-borrowings (or "roll-overs") are common.[9] The Center for Responsible Lending, a consumer advocacy

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[1] Peterson, Christopher L. 2004. *Taming the sharks. Towards a cure for the high-cost credit market.* Akron, OH: The University of Akron Press.
[2] N.C.G.S. § 53–15. North Carolina Consumer Finance Act. Raleigh, NC: North Carolina General Assembly.
[3] Other terms for payday lending include "deferred deposit" or "deferred presentment" loan.
[4] See Consumer Federation of America http://www.paydayloaninfo.org/index.cfm for additional details.
[5] Stegman, Michael A and Robert Faris. 2003. Payday Lending: A business model that encourages chronic borrowing. *Economic Development Quarterly* 17(1): 8-32. Sage Publications.
[6] Community Financial Services Association of America (CFSA) http://www.cfsa.net/about_payday_advance.html); Accessed September 28, 2007.
[7] While limits vary from state to state, with some states having no limit on payday lending fees charged, fifteen dollars per $100 is a "typical fee" according to King, Uriah, Leslie Parrish and Ozlem Tanik. 2006. *Financial Quicksand: PDL sinks borrowers in debt with $4.2 b in predatory fees every year*. Durham, NC: The Center for Responsible Lending.
[8] Karger, Howard. 2005. *Short changed, Life and debt in the fringe economy*. San Francisco, CA: Berrett-Koehler Publishing.
[9] It is common practice for borrowers unable to extinguish the debt with regular cash flow to push off repayment. These borrowers may simply extend the loan, or do a "back to back" by paying off the old loan and getting another

group, calculates that just 1% of payday loans go to people who take out one loan a year and pay it back on schedule, while 60% go to borrowers who take out more than 12 loans a year; nationwide, the average payday borrower pays $793 to borrow $325.[10] Despite the fact that North Carolina law set out to prevent roll-overs, [11] in 2000, the average North Carolina payday borrower got more than eight loans (from the same store). In that same year, 18% of customers used the same lender more than once per month, and 7% took 20 or more loans from the same lender in the course of a year. [12]

When a borrower does not pay off or extend the payday loan, the lender withdraws funds from the borrower's bank account. If bank funds do not cover the withdrawal, the borrower faces probable bounced check charges along with negative bank history reports, often the very things the borrower was trying to avoid by going to the payday lender in the first place. In 2000, 6% of checks written by North Carolinians to secure payday loans were returned (NSF), but lenders recovered 69% of these amounts and collected more than $2 million in additional fees for NSF checks. Net charge offs were less than 2% of loans advanced.

In 2000, the peak year for which records were kept, the payday loan industry in North Carolina made 3.5 million loans to 413,214 customers, or almost 7% of the state's adult population, assuming that each customer only used one store.[13] But many borrowers go to multiple lenders simultaneously to borrow above statutory limits, or use one payday lender to pay off another. One nationwide survey found that almost half of respondents had used at least two different payday lenders in the prior year, and that 35% of those paid off one lender with an advance from another.[14] If this pattern held in North Carolina, the total number of customers overstates the true customer base by at least 50%.

Ultimately, North Carolina became the first state to close down a once legal payday lending industry. The state allowed the law that authorized payday lending to sunset in 2001. Some payday lending chains continued to operate under partnerships with out-of-state banks, arguing that this arrangement exempted them from North Carolina laws. The North Carolina Attorney General prosecuted one of these chains, Advance America, and the North Carolina Commissioner of Banks ruled against Advance America's continued payday lending in the state. On March 1, 2006, the remaining chains entered consent agreements with the Attorney General, and all stores operated by out-of-state chains were eliminated.[15] Internet payday lending in the state is also subject to North Carolina law, even if the offer comes from outside the state.[16]

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immediately or very soon, sometimes after a legally mandated "cooling off" period. State laws vary with regard to these practices. See Stegman and Faris 2003 for review of studies of payday loan usage.

[10] King, Parrish and Tanik 2006.

[11] An act to regulate check cashing businesses, S.L. 1997-391 Senate Bill 312, General Assembly of North Carolina. (1997).

[12] North Carolina Commissioner of Banks (NCCOB). 2000. *Annual report of check cashing businesses licensed under article 22 of chapter 53 of the North Carolina general statutes fact sheet*. Raleigh, NC: NCCOB. In 2000 in North Carolina, there were 3,469,917 loans made to 413,214 customers for an average of 8.4 loans per customer per store.

[13] Ibid.

[14] Elliehausen, Gregory and Edward C. Lawrence. 2001. *Payday advance credit in America: An analysis of customer demand.* Washington, D.C.: Credit Research Center, McDonough School of Business, Georgetown University.

[15] North Carolina Attorney General (NC A.G.) Press Release. March 1, 2006. *Payday Lending on the Way Out in North Carolina: AG Cooper says major payday lenders agree to stop loans.*

[16] Fox, Jean Ann and Anna Petrini. 2004. *Internet Payday Lending: How High Priced Lenders Use the Internet to Mire Borrowers in Debt and Evade State Consumer Protections*. Washington, D.C.: Consumer Federation of America.

Endnotes

[1] IO Data Corporation. 2002. *North Carolina payday advance customer study: Public report*. Salt Lake City, UT. Prepared for Community Financial Services of America.

[2] One population well represented in North Carolina and receiving special attention from payday lenders, consumer advocates, and policy makers is military families. The state houses five military bases, all in eastern North Carolina, and has the third-largest active military population in the country (Press Release from office of Representative G.K. Butterfield, January 26, 2007 http://www.house.gov/list/press/nc01_butterfield/01262005butterfield onarmedservices.html. Accessed July 5, 2007). In 2006, the Department of Defense reported that payday lenders targeted military personnel because of their youth, inexperience with money management, low savings, steady income, and independence, in addition to the military culture's emphasis on "financial responsibility." The report further found that predatory consumer loans undermine troop morale and readiness and called for policies to protect military families (U.S. Department of Defense. 2006. *Report on predatory lending practices directed at members of the armed forces and their dependents*.). In response, Congress capped rates on consumer loans to military families at 36%, effectively prohibiting payday lending (Welch, William M. 2006. Law caps interest on 'payday advances' to service members. *USA Today.com*, October 1, http://www.usatoday.com/news/ washington /2006-10-17-paydayloans_x.htm. Accessed September 25, 2007), and the Department of Defense issued its final rule on August 31, 2007 (see 32 CFR Part 232 Limitations on Terms of Consumer Credit Extended to Service Members and Dependents; Final Rule http://a257.g.akamaitech.net/ 7/257/2422/ 01jan20071800 edocket.access.gpo.gov/2007/07-4264.htm).

[3] Stegman, Michael A and Robert Faris. 2003. Payday lending: A business model that encourages chronic borrowing. *Economic Development Quarterly* 17 (1):8-32.

[4] We used standard AAPOR formulas, which are available from the authors upon request.

[5] The Center acknowledges Clark and Chase Research of Charlotte, North Carolina, which conducted the survey data collection and facilitated the focus groups.

[6] We compared our sample and the subsample of 159 borrowers having a financial shortfall with overall demographic characteristics for households earning below $45,000 a year in the three MSA's using Integrated Public Use Microdata Series (IPUMS) data for 2006:

	IPUMS 3 MSAs	Full Sample	Shortfall Subsample
Married	45%	26%	27%
Separated/divorced	13%	17%	23%
Widowed	6%	26%	15%
Single	36%	30%	34%
HH w/ children	28%	16%	26%
No children	72%	84%	73%
Own home	69%	71%	58%
Rent home	31%	27%	38%
White	68%	57%	46%
Black	23%	38%	48%

To assess the possibility of bias resulting from the under-representation of married households, the sample was re-weighted to mirror the overall population (this also increased the weight of households with children). We then measured the results for the data shown in Table 2 (awareness of end of payday lending and attitudes toward payday lending) and obtained virtually identical awareness and attitudinal measures using the weighted sample as we did for the unweighted sample with married respondents weighted at 1.73, separated/divorced at .73, widowed at .23, and single at 1.2:

	Full Sample		Shortfall Subsample	
	Unweighted	Weighted	Unweighted	Weighted
Aware payday lending is not allowed	40%	41%	42%	42%
Not Aware	60%	59%	58%	58%
A Good thing	12%	12%	13%	12%
Think payday lending was *A Bad Thing*	88%	88%	87%	88%
Prohibiting payday lending had *no effect* on household	77%	78%	72%	72%
Positive effect	16%	16%	21%	22%
Negative effect	7%	7%	7%	6%

We conclude that the marital status distribution of our sample did not affect the responses to these critical questions.

[7] Chi-square tests significant at the p<.05 level
[8] A sample size of 23 former payday loan customers is insufficient to draw conclusions of statistical significance. However, from a descriptive standpoint it is notable that the numbers follow a pattern similar to the full sample and to the sub-sample of those who had experienced a financial shortfall.
[9] The survey simply asked, "When they were allowed, do you think payday lenders were a good thing or a bad thing?," without qualifying in any way what was meant by good or bad. Respondents were also given the option of "neither," "not sure," or "refused." These were not counted here because we could not know whether they didn't understand the question, had no opinion, or had an opinion that was "unsure."
[10] Fox, Jean Ann, and Anna Petrini. 2004. *Internet payday lending: How high priced lenders use the Internet to mire borrowers in debt and evade state consumer protections*. Washington, D.C.: Consumer Federation of America.
[11] MarketSearch Corporation. 2007. *North Carolina Office of the Commissioner of Banks consumer banking and finance study*. This survey was conducted by MarketSearch for the North Carolina Commissioner of Banks to gage consumer perceptions of financial services and the role of the Office of the Commissioner of Banks.
[12] All the people who received money from friends or family members reported that the money was either a no-interest loan or a gift.
[13] This does not include the 68 people who reported that they did not pay an expense or paid it late, although those people essentially borrowed from the service provider or company to which they owed money. We did not collect data as to the total amounts that went unpaid. In thirteen cases, people were not sure of amounts borrowed and in three, they refused to say.
[14] Options such as using savings or receiving money from family/friends are not represented in the table.
[15] See Stegman, Michael A. 2007. Payday lending. *Journal of Economic Perspectives* 21(1):169-190 for a review of research findings.
[16] Stegman and Faris 2003, 9
[17] Stegman 2007
[18] Skiba, Paige Marta, and Jeremy Tobacman. 2007. Measuring the individual-level effects of access to credit: evidence from payday loans. Working paper.
[19] Elliehausen, Gregory, and Edward C. Lawrence. 2001. *Payday advance credit in America: An analysis of customer demand*. Washington D.C.: Credit Research Center, McDonough School of Business, Georgetown University.
[20] In Skiba and Tobacman's 2007 analysis of 145,000 applicants for payday loans from a Texas payday/pawn shop chain over a four year period, a quarter of all the payday applicants also used the lender's pawn services, but once an applicant obtained the first payday loan, the likelihood of using the pawn services fell by almost half, while those who were denied were more likely to pawn. Those who pawned did so with some repetitiveness, but not as much as the payday borrowers and for far smaller amounts (4.5 times at an average of $88 versus 8.8 times for the payday customers). More than half of all pawn loans ended in default. But those who received payday loans were more likely to declare bankruptcy within two years of receiving their first payday loan. Although there is some anecdotal evidence that payday lending has cut into the pawnshop business, research to date suggests that there is limited overlap between pawn customers and payday borrowers. The Texas study 25% overlap likely captured the "upper bounds," since the enterprise provided both products under one roof. Elliehausen and Lawrence (2001) found that 23% had pawned in the previous five years, but that less than 1% had considered pawning before obtaining their most recent advance. Likewise, virtually none of the North Carolina payday borrowers surveyed by Io Corporation even considered using a pawn shop, and fewer than 3% considered a car title loan.

[21] In Elliehausen and Lawrence (2001), 78% of respondents reported receiving APR information, and only 20.1% of those could report what APR was disclosed.
[22] The share of customers who said they were satisfied in various surveys is 75% (Elliehausen and Lawrence 2001), 75% (IO Data Corporation 2002), and 77% (Cypress Research Group. 2004. *Payday advance customer satisfaction survey*. Shaker Heights, OH. http://www.cfsa.net/customer_demand.html. Accessed July 3, 2007).
[23] Cypress Research Group 2004, Elliehausen and Lawrence 2001, Io Data Corporation 2002.
[24] North Carolina Commissioner of Banks (NCCOB). 2000. *Annual report of check cashing businesses licensed under article 22 of chapter 53 of the North Carolina general statutes fact sheet*. Raleigh, NC: NCCOB.
[25] MarketSearch 2007, 11
[26] Bertrand, Marianne, Sendhil Mullainathan and Eldar Sharif. 2006. Behavioral economics and marketing in aid of decision making among the poor. *American Marketing Association*. 25(1): 8-23.
[27] Brown, William O., Jr., David W. Findlay, Thomas E. Lehman, Michael T. Maloney, James W. Meehan Jr. 2004. *Payday lending: A practical overview of a growing component of America's economy*. Consumer Credit Research Foundation, 2 Available at http://www.cfsa.net/downloads/payday_lending.pdf.
[28] The trade association, the Community Financial Services Association of America (CFSA), requires its members to abide by a set of best practices. These can be found on their website, www.cfsa.net/industry_best_practices.html. As of October 1, 2007, the list included: full disclosure including fees and APRs, compliance with the law, truthful advertising, encouraging consumer responsibility, limiting rollovers to lesser of 4 or the state limit, a one-day right of recision, using legal collection practices, not threatening or pursuing criminal action against customers for non-payment, self-policing, supporting balanced legislation, offering extended repayment plans to customers who are unable to repay under their original contract, a special best practices for loans to active duty military customers, offering internet loans only in states where licensed and in compliance with that state's laws unless those laws are federally preempted, and display of the membership seal.
[29] National Credit Union Administration (NCUA) *2007 Directory of Federally Insured Credit Unions* (http://www.ncua.gov/data/directory/2007/CUDirectory07.pdf).
[30] Stegman 2007 and State Employees Credit Union (SECU). 2006. Press Release. *SECU's Alternative Program Saves Salary Advance Members $2.8 million each month*. February 22, 2006.
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fil07050.html. Accessed September 28, 2007.
[33] Kaper, Stacy. 2007. An unlikely supporter of credit card reform. *American Banker* 172 (160):1-3. Maloney fleshes out card agenda. *American Banker* 172(150):19.
[34] Associated Press. 2007. Debt-laden homeowners save plastic first. September 12, 2007.
http://ap.google.com/article/ALeqM5hve_-EFatN9j8qKbLTB80zgyeQwQ. Accessed September 17, 2007.
[35] N.C.G.S. § 53–15. North Carolina Consumer Finance Act. Raleigh, NC: North Carolina General Assembly.
[36] The figures used to calculate the growth since 2002 were provided by the Office of the North Carolina Commissioner of Banks. Figures are adjusted by removing all loans of one company that was effectively operating as a payday lender and went out of business in 2006. This one entity drove small loan volume up disproportionately and overstated the actual growth of small-dollar lending by consumer finance companies.

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