USING ADVERTISEMENTS TO DIAGNOSE BEHAVIORAL MARKET FAILURE IN THE PAYDAY LENDING MARKET

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Payday and auto title loans have caused heated debate among policymakers, academics, and consumer and industry groups across the country. The majority of consumers using these short-term, small-dollar, high-cost loans are lower-income Americans.[1] One side of the debate argues consumers' use of short-term loans is rational because borrowers need access to credit and lack superior alternatives.[2] The other side argues that lenders are exploiting consumers' systematically poor decision making.[3]

This Article employs a novel research method to assess which side is right. By focusing attention on the advertisements that payday and title lenders use, it offers new perspectives on whether consumers who take out these loans are acting rationally or myopically. To do so, I offer the first comprehensive empirical study of advertisements for payday and title loans. I report on research I conducted that coded information on advertisements at 189 payday and title lending storefronts and 27 websites. Using the advertisements to diagnose behavioral market failure, I find evidence that firms use advertising to exploit the ways in which payday and title lending customers deviate from the rational actor model.

A rich description and analysis of the content of payday and title lending advertising enable us to assess new proposed regulations for payday and title lending introduced by the Consumer

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1. Jim Hawkins, *Regulating on the Fringe: Reexamining the Link Between Fringe Banking and Financial Distress*, 86 IND. L.J. 1361, 1394, 1362 (2011).

2. *See, e.g.*, Edward C. Lawrence & Gregory Elliehausen, *A Comparative Analysis of Payday Loan Customers*, 26 CONTEMP. ECON. POL'Y 299, 315 (2008).

3. *See, e.g.*, Ronald J. Mann & Jim Hawkins, *Just Until Payday*, 54 UCLA L. REV. 855, 881 (2007).

Financial Protection Bureau ("CFPB") in March 2015.[4] In addition to critiquing the proposed regulations, I offer a policy suggestion aimed at facilitating meaningful price competition in payday and title lending markets in hope of fixing an important behavioral market failure.

INTRODUCTION

With the federal government, states, and municipalities across the country reconsidering payday and title lending laws, these loans have become a hotly contested issue.[5] Payday loans are short-term, small-dollar, high-interest loans.[6] Borrowers, who are usually lower-income Americans with poor credit histories, take out loans until their next payday, usually less than two weeks away, and pay annual interest rates that are often more than 400%.[7] Title loans are similar in duration and are slightly less expensive, but they are secured by the borrowers' vehicles as collateral for the loan.[8] As just one example of the governmental interest in these loans, the CFPB is currently considering expansive federal regulation of these industries for the first time.[9]

The controversy over payday loans has generated a substantial amount of econometric research analyzing the net welfare effects of payday lending.[10] Law review articles abound.[11] Title lending has

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4. *Factsheet: The CFPB Considers Proposal to End Payday Debt Traps*, CONSUMER FIN. PROT. BUREAU 1 (Mar. 26, 2015), http://files.consumerfinance.gov/f/201503_cfpb-proposal-under-consideration.pdf [hereinafter *Factsheet*].

5. Andrew R. Johnson, *States Sharpen Payday-Loan Scrutiny*, WALL STREET J. (Sept. 25, 2013, 8:01 PM), http://wsj.com/articles/SB10001424052702304795804579097582440694994.

6. Hawkins, *supra* note 1, at 1394.

7. AMANDA LOGAN & CHRISTIAN E. WELLER, CTR. FOR AM. PROGRESS, WHO BORROWS FROM PAYDAY LENDERS? AN ANALYSIS OF NEWLY AVAILABLE DATA 1–2 (2009).

8. Elizabeth Renuart & Diane E. Thompson, *The Truth, the Whole Truth, and Nothing but the Truth: Fulfilling the Promise of Truth in Lending*, 25 YALE J. ON REG. 181, 197 (2008).

9. *Factsheet*, *supra* note 4.

10. John Caskey summarizes much of the literature in John P. Caskey, *Payday Lending: New Research and the Big Question* 1 (Research Dep't, Fed. Reserve Bank of Phila., Working Paper No. 10-32, 2010), http://ssrn.com/abstract=1696019. For a few examples of more recent analyses, see generally Neil Bhutta et al., *Payday Loan Choices and Consequences*, 47 J. MONEY CREDIT & BANKING 223 (2015); and Neil Bhutta, *Payday Loans and Consumer Financial Health* (Fed. Reserve Bd. Fin. & Econ. Discussion Series, Working Paper No. 2013-81, 2013), http://www.federalreserve.gov/pubs/feds/2013/201381/201381pap.pdf.

11. *See e.g.*, Oren Bar-Gill & Elizabeth Warren, *Making Credit Safer*, 157 U. PA. L. REV. 1 (2008); Richard R.W. Brooks, *Credit Past Due*, 106 COLUM. L. REV. 994 (2006); Ryan Bubb & Richard H. Pildes, *How Behavioral Economics Trims Its Sails and Why*, 127 HARV. L. REV. 1593 (2014); Sheila R. Foster,

created a substantially smaller literature,[12] but some recent work discusses the relationship between title loans, bankruptcy, and financial well-being.[13] Both sides in the debate over payday and title loans make claims about the rationality (or irrationality) of consumers in these markets.[14] None of the literature on either market, however, has harnessed the power of advertising to reveal market failures.

Firms spend substantial amounts of money on advertising to consumers,[15] and this holds true in payday and title lending markets as well.[16] Researchers can learn about what firms believe about consumers' values and thought processes by examining advertisements.[17] Some advertisements contain information that rational actors would value, such as information about the price of a good or service. But advertisements also contain material aimed at exploiting systematic mistakes that consumers make when evaluating specific products, such as advertisements that focus consumers' attention on short-term gains as opposed to long-term costs. Companies use focus groups and other consumer research to assess how to advertise most effectively.[18] Thus, how firms advertise is a reliable guide to whether consumers are making mistakes. As economists Xavier Gabaix and David Laibson argue,

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Breaking Up Payday: Anti-Agglomeration Zoning and Consumer Welfare, 75 OHIO ST. L.J. 57 (2014); Christopher L. Peterson, *Usury Law, Payday Loans, and Statutory Sleight of Hand: Salience Distortion in American Credit Pricing Limits*, 92 MINN. L. REV. 1110 (2008).

12. Jim Hawkins, *Credit on Wheels: The Law and Business of Auto-Title Lending*, 69 WASH. & LEE L. REV. 535, 538 (2012) ("[L]ittle empirical work has been done to understand the central questions policymakers need answered in order to craft optimal title lending laws.").

13. *See, e.g.*, Kathryn Fritzdixon, Essays on Consumer Finance: Topics in Auto Title Lending 2 (May 2015) (unpublished Ph.D. dissertation, Vanderbilt University), http://etd.library.vanderbilt.edu/available/etd-03292015-223029/unrestricted/Fritzdixonrev.pdf ("[A]ccess to title lending has no effect on the measures of financial hardship.").

14. *Compare* Hawkins, *supra* note 12, at 556 (arguing that title lending customers are overly optimistic), *with* TODD J. ZYWICKI & ASTRID ARCA, MERCATUS CTR., THE CASE AGAINST NEW RESTRICTIONS ON PAYDAY LENDING 2 (2010) (arguing that consumers have "carefully weighed all of their options and chosen the best alternative they can afford" and are "well informed about the cost of these loans").

15. *See, e.g.*, Kyle Bagwell, *The Economic Analysis of Advertising*, *in* 3 HANDBOOK OF INDUSTRIAL ORGANIZATION 1701, 1704 (Mark Armstrong & Robert Porter eds., 2007) (observing that both General Motors and Proctor & Gamble spent over $3 billion on advertising in 2003).

16. *See infra* notes 37–39 and accompanying text.

17. *See generally* Jim Hawkins, Exploiting Advertising (unpublished manuscript) (on file with author).

18. *See generally* EDWARD F. MCQUARRIE, THE MARKET RESEARCH TOOLBOX: A CONCISE GUIDE FOR BEGINNERS (1996) (explaining both why companies use market research and the various techniques they employ to attain that research).

"[o]ptimizing firms exploit myopic consumers through marketing schemes that shroud high-priced add-ons."[19]

If advertising supplies information that a rational actor would value, there is good evidence that the market is functioning efficiently as firms believe that consumers' true, rational preferences are driving the market. If, on the other hand, advertising serves to exploit the systematic mistakes that consumers make in the market, then it is likely that the market is experiencing a behavioral market failure.[20] Behavioral market failures occur when consumers' systematic mistakes about products or services cause them to misperceive the true cost or value of the product or service.[21]

This Article uses payday and title lending advertising to detect and diagnose behavioral market failures in these markets. Based on an empirical study I did of the advertisements displayed at 189 payday and title lending storefronts and on 27 websites, I offer the first comprehensive empirical account of what attributes payday and title lenders advertise. Using that information, I can determine the extent to which companies believe consumers are acting in the market with bounded rationality. I argue that payday and title lending customers likely suffer from myopic preferences and are likely overly optimistic about how quickly they will repay their loans.

The Article proceeds as follows: Part I describes the methodology for my payday and title lending advertisement study; Part II presents my descriptive findings; and Part III analyzes the advertisements. I find evidence of behavioral market failure—firms do not advertise pricing information, but do exploit borrowers' impatience by focusing on the speed of the transaction and frame transactions to focus borrowers' attention on short-term teaser rates while obscuring the total costs of the loans.

Finally, Part IV discusses the policy implications of the study. It describes and assesses the proposed regulations that the CFPB released in March 2015. I argue that the CFPB's current proposed regulations are misguided in part because they do not address the fundamental problem with payday and title loans—high prices. I argue that policymakers, including the CFPB, should instead require companies to prominently post pricing information for the actual costs of loans. More controversially, I argue that Congress should jettison the requirement that lenders present prices only as annual percentage rates because this requirement hinders price competition in the market.

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19. Xavier Gabaix & David Laibson, *Shrouded Attributes, Consumer Myopia, and Information Suppression in Competitive Markets*, 121 Q.J. ECON. 505, 505 (2006).

20. OREN BAR-GILL, SEDUCTION BY CONTRACT: LAW, ECONOMICS, AND PSYCHOLOGY IN CONSUMER MARKETS 2 (2012).

21. *Id.*

I. METHODOLOGY

To study payday and title lending advertising, I gathered information from storefront advertisements (i.e., the signs on physical locations themselves) in Houston, Texas, and from lenders' websites. Most advertising content analyses are of television commercials and magazines, but some content analysis articles use the content of storefront advertisements.[22] In at least one other low-income market, research demonstrated a link between the existence of storefront advertising and product demand.[23] Storefronts are important sources of advertising content in this market; some lenders only advertise on storefronts since they rely on drive-by traffic,[24] and past research has found that many borrowers learn about stores by seeing storefront signs.[25] Signs on storefronts are also significant because lenders sometimes do not have any additional information inside the store.[26] Websites are important because one-third of payday loans are purely online transactions.[27] Even for borrowers who intend to go into stores, many have access to the Internet for information—77% of adults making less than $30,000 a year use the Internet.[28]

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22. *See, e.g.*, Karen Glanz et al., *Operation Storefront Hawaii: Tobacco Advertising and Promotion in Hawaii Stores*, 11 J. HEALTH COMM.: INT'L PERSP. 699 (2006) (analyzing store-based advertisements for tobacco products at stores throughout Hawaii); Andrew B. Seidenberg et al., *Storefront Cigarette Advertising Differs by Community Demographic Profile*, 24 AM. J. HEALTH PROMOTION 26 (2010).

23. Jennifer Cantrell et al., *Marketing Little Cigars and Cigarillos: Advertising, Price, and Associations with Neighborhood Demographics*, 103 AM. J. PUB. HEALTH 1902, 1902 (2013) (explaining that cigarette advertising was greater in minority and low-income neighborhoods and that those neighborhoods had higher sales).

24. Nathalie Martin & Ozymandias Adams, *Grand Theft Auto Loans: Repossession and Demographic Realities in Title Lending*, 77 MO. L. REV. 41, 58–59 (2012) (finding that of the fifty-eight title lending stores in their study, ten were not in the Yellow Pages or on the Internet).

25. In a survey I conducted with two economists in 2012, 47.45% (n=186) of the over 450 title lending customers we surveyed learned about the lender they selected by seeing the lender's store signs. Kathryn Fritzdixon, Jim Hawkins & Paige Marta Skiba, *Dude, Where's My Car Title: The Law, Behavior, and Economics of Title Lending Markets*, 2014 U. ILL. L. REV. 1013, 1058 (2012).

26. Creola Johnson, *Payday Loans: Shrewd Business or Predatory Lending?*, 87 MINN. L. REV. 1, 35 (2002) ("[Seventy-three percent] of the payday lenders surveyed during the information-gathering stage did not have brochures about payday loans available for potential customers to peruse.").

27. THE PEW CHARITABLE TRS., FRAUD AND ABUSE ONLINE: HARMFUL PRACTICES IN INTERNET PAYDAY LENDING 3 (2014), http://www.pewtrusts.org/~/media/Assets/2014/10/Payday-Lending-Report/Fraud_and_Abuse_Online_Harmful_Practices_in_Internet_Payday_Lending.pdf.

28. *Internet User Demographics*, PEW RESEARCH CTR., http://www.pewinternet.org/data-trend/internet-use/latest-stats/ (last visited Feb. 16, 2016).

Texas is an ideal location to study payday lending advertising because there are relatively few restrictions on lender behavior, so firms can structure advertisements as they please within some minor guidelines. In Texas, payday and title lending companies operate as credit service organizations that locate lenders for borrowers and guarantee borrowers' repayments to the lender, so they are not subject to usury caps.[29] In other states, usury caps might skew the bases on which lenders compete for business.[30] Texas has passed several disclosure laws that affect website advertising, including requirements that websites contain specific pieces of information.[31] As I discuss the types of advertisements in Part IV, I note where these disclosure requirements might skew companies' advertising choices. Despite being a good location for studying this market, Houston is not necessarily nationally representative as each state (and even municipality) has different regulations, so this represents a limitation on my research design.

A. Storefronts

I compiled a list of all of the storefronts in Houston by using the Texas Office of Consumer Credit Commissioner ("OCCC") website's database of all licensed credit access businesses.[32] A search engine allows the user to limit results to only stores in specific cities and then generate a spreadsheet with the companies' names and license numbers. Using this information, an assistant also located the storefront's owner and address using the Texas OCCC website. This database may miss some lenders who are operating illegally in Texas and fail to register with the OCCC,[33] but lenders have strong incentive to register since failure to do so is a criminal offense.[34] Thus, this approach captures the vast majority of lenders in Houston.

I recorded the content of advertisements on storefront signs by having six research assistants visit 189 payday and title lending storefronts between September 14, 2014 and October 30, 2014.

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29. *See* Hawkins, *supra* note 12, at 577–78 (outlining Texas law).

30. *Id.* at 603 ("[L]enders will alter the transaction to account for price caps.").

31. *See* TEX. FIN. CODE ANN. § 393.222(a) (West Supp. IV 2014) (requiring payday and title lenders to provide a schedule of the fees the lender charges, the name and address of the Texas OCCC, and a notice explaining that payday and title loans are only meant to meet short-term cash needs).

32. *Advanced Search*, TEX. OFF. OF CONSUMER CREDIT COMM'R, https://alecs.occc.texas.gov/ (last visited Feb. 16, 2016).

33. TEX. FIN. CODE ANN. § 393.101 (West 2006); *see also, e.g.*, *In re* Zuniga, 332 B.R. 760, 785–87 (Bankr. S.D. Tex. 2005) (finding—among other violations of Texas law—that a credit services organization failed to register as required by statute, and requiring the organization and its principal to appear in court and show cause why they should not be sanctioned).

34. FIN. § 393.501.

These assistants photographed all of the signs on the windows of the storefronts and any other signs in the immediate area related to the lender. Then they typed out the textual content of each advertisement in a Microsoft Excel spreadsheet. As a way to assess accuracy, I looked at a substantial number of the pictures to make sure the text was correctly added to the spreadsheet. I conducted a training session on how to code the advertisements, and the assistants followed a detailed protocol, noting in the spreadsheet whether the storefronts had seventeen different types of advertisements. To minimize interrater reliability concerns, I read through the spreadsheet's text to recheck coding decisions.

Throughout this Article, I generally refer only to the actual storefronts we visited. However, in an attempt to reflect the actual number of stores different companies have in Houston, I weighted the data by number of Houston stores. Of the 488 storefronts in Houston in the Texas OCCC database, we visited 38.7% (n=189). By visiting locations, we discovered that twenty-five stores no longer exist, leaving 463 storefronts in our dataset. We visited every storefront if a company had less than ten storefronts, but for larger lenders, I selected a random collection of ten of the company's stores. For weighting purposes, I averaged the information from the ten stores we photographed and filled in the remainder of the spreadsheet to match those averaged results. I recognize that ten is not a representative sample of, for instance, one hundred stores, so my approach is not truly representative. However, weighting the data might be of interest, so I include it with that caveat.

B. Websites

In addition to coding information from storefronts, I also coded advertisements from lenders' websites. I did simple Internet searches to find the websites of companies identified in the Texas OCCC list of storefronts. If I could not find a storefront's website, I called the lender and asked for the website's address. Thirty of thirty-seven companies have active websites, representing 98.70% (n=457) of the market by storefront. After I eliminated websites from lenders who were no longer operating in Houston, twenty-seven websites remained.

In compiling information about advertisements from websites, I ignored websites that were merely lead generators.[35] This type of website gathers information from potential borrowers and passes it on to actual lenders.[36] The lenders themselves do not control the advertising content on lead generation websites, and these websites are much more fluid than the actual lenders' websites, so I excluded them from my study.

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35. THE PEW CHARITABLE TRS., *supra* note 27, at 5.
36. *Id.*

For each of the websites I identified, research assistants and I coded forty-one pieces of information from the websites. We coded what types of advertisements were present, logged price information, and recorded the race and gender of pictures of customers on the homepages.

In the following two Parts, I report the findings of this empirical research and analyze the advertisements we discovered.

II. THE CONTENT OF PAYDAY LOAN ADVERTISING

Advertising plays an important role in the payday lending business, as it does in other markets supplying goods and services to low-income Americans.[37] In the United Kingdom, one study found that payday lending advertising on television increased 64% every year from 2008 to 2012.[38] In 2012, television viewers in the United Kingdom saw payday loan advertisements an average of 152 times.[39]

And, like in other markets, payday lending advertisements matter because most payday lending locations have multiple competitors close by[40] and consumers do deliberate about their decision. As two Federal Reserve economists recently observed: "Although the need for the payday loan was generally urgent, many payday loan customers exhibited some signs of deliberation in their decision. Forty-six percent of customers reported that they considered another source before obtaining their most recent payday loan."[41]

In addition to payday loan advertising's role in shifting the demand curve in the market, policymakers,[42] consumer advocates,[43]

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37. *See* Marianne Bertrand et al., *Behavioral Economics and Marketing in Aid of Decision Making Among the Poor*, 25 J. PUB. POL'Y & MARKETING 8, 8 (2006) ("On the one hand, marketing has been used profusely and effectively by for-profit firms and, at least on occasion, will have contributed to making the lives of the poor even poorer.").

38. BUS., INNOVATION & SKILLS COMM., PAYDAY LOANS: SEVENTH REPORT OF SESSION, 2013–14, HC 789, at 22 (UK), http://www.publications.parliament.uk/pa/cm201314/cmselect/cmbis/789/789.pdf.

39. *Id.*

40. Steven M. Graves, *Landscapes of Predation, Landscapes of Neglect: A Location Analysis of Payday Lenders and Banks*, 55 PROF. GEOGRAPHER 303, 314–15 (2003).

41. Thomas A. Durkin & Gregory Elliehausen, Assessing the Price of Short-Term Credit 20 (Nov. 6, 2013) (unpublished manuscript), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2402197.

42. *See, e.g.*, James R. Barth, Jitka Hilliard & John S. Jahera, Jr., Banks and Payday Lenders: Friends or Foes? 2 (Oct. 3, 2014) (unpublished manuscript), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2505036 ("Senator Sherrod Brown, at a recent Senate Banking Committee hearing, said '. . . he was concerned that payday companies are marketing their high-cost loans to the very people who can least afford them . . . .'"); Stefania Seccia, *Burnaby Moves to Limit Payday Loan Shops*, VANCOUVER 24 HOURS (May 26,

reporters,[44] and academics[45] cite such advertising as a justification for restricting payday loans, so advertisements are an important part of the debate about the net welfare effects of payday lending. The most immediate way policymaking might implicate advertising is the CFPB's new regulations of the payday loan industry.[46] One commentator, for instance, has argued that advertising is a factor that makes the choice to use a payday loan and the resulting injury "unavoidable" as required by the statute empowering the CFPB.[47]

2015, 3:29 PM), http://vancouver.24hrs.ca/2015/05/26/burnaby-moves-to-limit-payday-loan-shops (noting that the city's planning and development committee chairwoman, who supported zoning regulations on payday lenders, had seen an advertisement for a payday lender taking security interests in cars); Matthew Zeitlin, *Montel Williams Will Stop Advertising Payday Loans in New York*, BUZZFEED NEWS (Mar. 10, 2015, 12:34 PM), http://www.buzzfeed.com/matthewzeitlin/montel-williams-will-stop-advertising-payday-loans#.dmOl1xY0 (reporting a statement by Ben Lawsky, the head of New York's Department of Financial Services, in which Lawsky justified a settlement with a payday lender in part because the lender used advertising with Montel Williams as a "trusted celebrity endorser").

43. *See, e.g.*, Frank Chung, *Consumer Groups Slam 'Irresponsible' Payday Lending Ads on Youth Channels*, NEWS.COM.AU (Apr. 23, 2015, 4:48 PM), http://www.news.com.au/finance/money/consumer-groups-slam-irresponsible-payday-lending-ads-on-youth-channels/story-fnagkbpv-1227316636592 ("Consumer advocates have called for tougher restrictions around payday lending advertising following a new wave of ads targeting young people and those in financial hardship.").

44. *See, e.g.*, Jeremy Lee, *Advertising's Moral Dilemma: Why Agencies Should Take the High Ground and Not the Wonga*, THE DRUM (May 27, 2015, 11:20 AM), http://www.thedrum.com/opinion/2015/05/27/advertisings-moral-dilemma-why-agencies-should-take-high-ground-and-not-wonga (criticizing an advertising agency's relationship with "payday loan operator Wonga" because of an advertisement campaign involving "that grotesque puppeteer's geriatric ménage à trois – Betty, Earl and Joyce – preying on the vulnerable and the desperate in a 'light-hearted' and morally dubious but apparently entirely legal way"); Rohan Pearce, *ASIC Gets Google's Help to Monitor Payday Lenders*, COMPUTERWORLD (June 3, 2015, 12:59 PM), http://www.computerworld.com.au/article/576519/asic-gets-google-help-monitor-payday-lenders/ ("'We are looking . . . at surveillance and enforcement and significant action against payday lenders, both in their advertising and their conduct,' ASIC's chairperson Greg Medcraft told a Senate Estimates hearing today."); Mark Sweney, *Kerry Katona Payday Loan Ad Banned for Being Irresponsible*, THE GUARDIAN (May 8, 2013, 2:54 AM), http://www.theguardian.com/media/2013/may/08/kerry-katona-payday-loan-ad ("The appearance of the former Atomic Kitten singer in the TV ads has sparked criticism since they debuted in January.").

45. *See, e.g.*, Robert W. Emerson, *Franchisees in a Fringe Banking World: Striking the Balance Between Entrepreneurial Autonomy and Consumer Protection*, 46 AKRON L. REV. 1, 18 (2013) ("Perhaps fringe bankers' marketing campaigns, coupled with their arguably unconscionable interest rates and targeting of low-income individuals, furnish additional grounds for scrutiny.").

46. The CFPB has announced its intention to implement rules governing payday loans. *See Factsheet*, *supra* note 4.

47. Creola Johnson, *America's First Consumer Financial Watchdog Is on a Leash: Can the CFPB Use Its Authority to Declare Payday-Loan Practices Unfair, Abusive, and Deceptive?*, 61 CATH. U. L. REV. 381, 419 (2012) (explaining

Another author has suggested directly that the CFPB could regulate payday lending advertisements.[48] All of this makes it important for us to understand what kind of advertising tactics payday and title lenders actually use.

The literature on payday lending makes a variety of claims about payday lending advertising, but, in general, many important empirical questions about payday lending advertising remain unanswered. This Part discusses the themes in existing scholarship on payday loan advertising. Then, I report the types and frequencies of advertisements that I discovered through my study of payday lending advertisements in Houston. This Part is important both because it offers the first comprehensive study of payday loan advertising in the United States and because it lays the foundation for using advertisements to detect behavioral market failure. In order to assess payday lending advertising and to determine whether it exploits behavioral biases, we need an accurate view of how lenders advertise.

A. The Existing Literature on Payday Lending Advertisements

Academic work in the United States makes a variety of claims about what payday lending advertisements say, but no studies approach the topic systematically. Typically, existing articles rely on just a few examples of advertisements. Some articles make general comments about payday loan advertising, noting it is deceptive in general[49] or in specific ways, such as making loans appear to be sanctioned by the government.[50]

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that the "lack of choice is understandable" because of, among other things, "the millions of dollars spent on advertising by payday lenders").

48. Adam Mayle, Note, *Usury on the Reservation: Regulation of Tribal-Affiliated Payday Lenders*, 31 REV. BANKING & FIN. L. 1053, 1069 (2012) ("In theory, the CFPB could do much to regulate payday lenders. . . . [T]he CFPB could . . . regulate company advertising.").

49. Stephanie Ben-Ishai, *Regulating Payday Lenders in Canada: Drawing on American Lessons*, 23 BANKING & FIN. L. REV. 323, 328 (2008) (criticizing payday lenders' "misleading advertising"); Megan S. Knize, *Payday Lending in Louisiana, Mississippi, and Arkansas: Toward Effective Protections for Borrowers*, 69 LA. L. REV. 317, 330 (2009) (stating that some payday lenders use "misleading advertisements about the cost of credit"); Heather L. Petrovich, *Circumventing State Consumer Protection Laws: Tribal Immunity and Internet Payday Lending*, 91 N.C. L. REV. 326, 327 (2012) ("Deceptive advertisements targeted at desperate consumers frequently occur in the payday lending industry because of the large profits companies generate from these abusive and harmful tactics.").

50. Michael A. Satz, *How the Payday Predator Hides Among Us: The Predatory Nature of the Payday Loan Industry and Its Use of Consumer Arbitration to Further Discriminatory Lending Practices*, 20 TEMP. POL. & C.R. L. REV. 123, 133–34 (2010) ("These [deceptive 'affinity marketing'] techniques include placing advertisements in private publications, such as *Army Times*, which many service members perceive to be official military publications. The advertisements contain official looking seals designed to emulate military seals

In addition to these general observations, commentators make claims concerning payday loan advertising about the *transaction process*. Payday lenders, they assert, focus on quick and easy cash[51] and on how the loans are convenient.[52] Additionally, lenders emphasize that they perform no credit checks and require little documentation.[53]

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and are often distributed by retired service members hired by payday lenders to sell loan services to military members. These affinity marketing techniques lead military service members to believe mistakenly that the loans and products offered by the payday lenders are endorsed or vetted by the military." (footnotes omitted)).

51. Emerson, *supra* note 45, at 10 ("[M]ost of the advertisements for these fringe lenders focus on the quick and easy cash aspect . . . ."); Johnson, *supra* note 26, at 9 ("Payday lenders advertise that consumers can obtain, in minutes, payday loans without hassles or credit checks."); Michael Kenneth, *Payday Lending: Can "Reputable" Banks End Cycles of Debt?*, 42 U.S.F. L. REV. 659, 669 (2008) ("Unlike qualifying for other forms of credit, qualifying for money is easy and fast—just as the advertisements say . . . ."); Deanne Loonin & Elizabeth Renuart, *The Life and Debt Cycle: The Growing Debt Burdens of Older Consumers and Related Policy Recommendations*, 44 HARV. J. ON LEGIS. 167, 181–82 (2007) ("Lenders market the payday loan as a quick and easy way to get cash until the next payday."); Nathalie Martin, *1,000% Interest—Good While Supplies Last: A Study of Payday Loan Practices and Solutions*, 52 ARIZ. L. REV. 563, 610 (2010) ("[Q]ualifying for money is easy and fast—just as the advertisements say . . . ."); Amy J. Schmitz, *Females on the Fringe: Considering Gender in Payday Lending Policy*, 89 CHI.-KENT L. REV. 65, 70 (2014) ("Lenders advertise payday loans as small-dollar, short-term means for obtaining fast cash to get through a financial emergency."); Jessie Lundberg, Comment, *Big Interest Rates Under the Big Sky: The Case for Payday and Title Lending Reform in Montana*, 68 MONT. L. REV. 181, 208 (2007) ("Payday and title lenders advertise their loans as 'easy money' . . . ."); Shane M. Mendenhall, Note, *Payday Loans: The Effects of Predatory Lending on Society and the Need for More State and Federal Regulation*, 32 OKLA. CITY U. L. REV. 299, 305 (2007) ("Payday lenders often advertise that borrowers can obtain a payday loan within minutes without hassles or credit checks."); *see also* Emerson, *supra* note 45, at 18–19 (analyzing one advertisement's claim that "the use of a payday loan service allows borrowers to save money, save their credit, and save face").

52. Brian Galle & Manuel Utset, *Is Cap-and-Trade Fair to the Poor? Shortsighted Households and the Timing of Consumption Taxes*, 79 GEO. WASH. L. REV. 33, 74 (2010) (noting that one of the "important characteristics" of payday lenders is that "their location and advertisement makes them very convenient").

53. Ben-Ishai, *supra* note 49, at 331 ("Many payday lenders advertise that they do not perform a credit check."); Brooks, *supra* note 11, at 1007 ("Payday loans generally do not involve credit checks."); Johnson, *supra* note 47, at 425–26 ("Non-bank payday lenders advertise that they do not perform credit checks and that consumers can obtain a loan with as little documentation as a driver's license, a pay stub, and a checking-account statement."); Creola Johnson, *Congress Protected the Troops: Can the New CFPB Protect Civilians from Payday Lending?*, 69 WASH. & LEE L. REV. 649, 696 (2012) ("Payday lenders advertise that consumers can get a loan within minutes without undergoing a credit check."); Nathalie Martin & Koo Im Tong, *Double Down-and-Out: The Connection Between Payday Loans and Bankruptcy*, 39 SW. L. REV. 785, 792 (2010) ("In fact, payday lenders advertise that unlike banks, they provide pre-

There are also claims about how lenders promote the *loans themselves.* Some articles note that lenders discuss pricing information,[54] while others say advertising does not discuss pricing information.[55] Commentary also asserts that lenders advertise low introductory pricing[56] and that companies focus on dollar prices and not annual percentage rates ("APR").[57]

Finally, existing work makes a variety of claims about what payday lending advertising says loans should be used for. Articles note that lenders promote loans as: short-term products only;[58]

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approved loans without a credit check to people with bad or no credit."); Diane Hellwig, Note, *Exposing the Loansharks in Sheep's Clothing: Why Re-Regulating the Consumer Credit Market Makes Economic Sense*, 80 NOTRE DAME L. REV. 1567, 1585 (2005) ("Payday lenders advertise that a job and a checking account are all that is needed to obtain same-day cash . . . ."); Zoë Elizabeth Lees, Note, *Payday Peonage: Thirteenth Amendment Implications in Payday Lending*, 15 SCHOLAR 63, 81 (2012) ("Lenders advertise that payday loans are a fast and easy way to get a loan, especially for those with 'bad' credit."); Mendenhall, *supra* note 51, at 305.

54. Daniel A. Edelman, *Payday Loans: Big Interest Rates and Little Regulation*, 11 LOY. CONSUMER L. REV. 174, 175 (1999) ("Generally, companies that make payday loans do not advertise the annual percentage rates. Instead, they advertise that the loan[s] cost a specific dollar amount."); Hawkins, *supra* note 12, at 559 ("Title lenders' advertisements confirm the importance of price in competition. Some lenders emphasize cost in their advertisements: '[Y]ou're also certain you're getting the lowest guaranteed interest rates anywhere in Texas on your car title loans! To go from a high-interest short period to a low-interest long period, you can always have your car title loan refinanced with us.' Some companies even make cost comparisons for customers between themselves and other companies." (footnote omitted)).

55. Johnson, *supra* note 26, at 32 (reporting that the lenders in her survey "fail[ed] to advertise the cost of credit using APRs").

56. *See* Lees, *supra* note 53, at 81.

57. Paulina E. Davis, *Racism, Capitalism, and Predatory Lending: How the U.S. Government's Failure to Regulate the Disproportionate Negative Effects of Payday Lending in Black Communities Violates the International Convention on the Elimination of All Forms of Racial Discrimination*, 4 HUM. RTS. & GLOBALIZATION L. REV. 61, 80 (2011) ("[L]enders will advertise only the flat dollar amount charged per $100 borrowed by the consumer without explaining that an annual percentage interest rate is applied to the loan or that the interest compounds when a loan is repaid with another payday loan."); *see also* Kenneth, *supra* note 51, at 660 ("The fee on a payday loan is usually 15–20% of the base amount, or, as it is usually advertised, $15 or $20 per $100 borrowed.").

58. Linda R. Crane, *Checking Out of the Exception to 3-104: Why Parties Should Be Able to Negotiate Whether Checks Should Be Payable on Demand*, 3 COLUM. J. RACE & L. 73, 91 (2013) ("Payday lenders frequently advertise their loan products as 'short-term' . . . ."); Michael A. Garemko III, Note, *Texas's New Payday Lending Regulations: Effective Debiasing Entails More Than the Right Message*, 17 TEX. J. C.L. & C.R. 211, 223 (2012) ("It may be at work in the payday lending market as well because the loans are advertised as short-term loans . . . ."); Katherine Houren, Note, *Achieving the American Dream in Debt? Why the USA Patriot Act Puts Undocumented Immigrants at Risk for Abuse by the Payday Loan Industry*, 15 WASH. & LEE J. C.R. & SOC. JUST. 561, 568 (2009)

solutions to emergencies;[59] or, on the opposite end of the spectrum of possible uses, means for vacations.[60]

In the United Kingdom, where payday lending is a £2.2 billion industry,[61] policymakers have studied payday lending advertising and concluded that it can be misleading, support irresponsible lending practices, and influence children.[62] On the final point, for instance, a survey reported:

> [Fourteen percent] of parents of under-10s, when they have said, "No, you cannot have your toy," or whatever they have asked for, have had a payday loan company quoted to borrow the money from. [Thirty percent] of under-10s, in a poll of their parents that we have done on the website, are joking about these slogans, and laughing and repeating slogans of payday lenders.[63]

Similarly, academic commentary in the United States has claimed that lenders use gimmicks and cartoons to draw people in.[64]

Yet in the United States, unlike in the United Kingdom, no administrative body or academic study has approached the issue seriously. The next Subpart offers the first systematic empirical evidence of what payday and title lenders actually advertise.

B. An Empirical Examination of Payday Lending Advertisements in Houston, Texas

As described above, we recorded information about payday and title lending advertising on storefronts and websites.[65] In this Subpart, after presenting the data in summary form and making

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("[T]he industry advertises payday loans as short-term solutions to emergency liquidity problems . . . .").

59. Schmitz, *supra* note 51, at 70; Houren, *supra* note 58, at 569 ("[T]he advertized [sic] purpose of the loan [is] to help individuals with emergency expenses.").

60. Kenneth, *supra* note 51, at 672 ("CFSA's recent television ad campaign urging responsible use of payday loans shows a diverse group of people with car trouble and medical emergencies."); Lundberg, *supra* note 51, at 205 ("Payday and title lenders actually advertise heavily that their loans will enable borrowers to take vacations with their friends, pamper themselves, or splurge on gifts or other purchases.").

61. BUS., INNOVATION & SKILLS COMM., *supra* note 38, at 3.

62. *Id.* at 19–22.

63. *Id.* at 21 (quoting Martin Lewis, owner of moneysavingexpert.com).

64. Nathalie Martin & Joshua Schwartz, *The Alliance Between Payday Lenders and Tribes: Are Both Tribal Sovereignty and Consumer Protection at Risk?*, 69 WASH. & LEE L. REV. 751, 762–63 (2012) ("[G]immicks abound in payday loan advertising. The idea is to attract new customers but to rely heavily on repeat business. One payday lender uses stripper Bridget the Midget as its mascot in order to demonstrate that the loans are for 'short' term use." (footnote omitted)).

65. Research materials from this study, hereinafter collectively referred to as "Study Documents," are on file with the author.

two general comments, I describe three major categories of advertising—advertising about the transaction process, loan attributes, and uses for loans.

The storefronts had, on average, 4.91 advertisements each. This is not very many advertisements in general, and each advertisement was typically a sign with just one major idea on it expressed in a few words. Some lenders had no sign advertisements. Thus, for most potential features that a lender could advertise, a relatively small number of firms would do so on their storefronts. (So, for instance, to say that half the lenders' storefronts talked about the speed of the loan seems at first glance to be a low number, but, in reality, it is very high given the constraints on sign space.) For websites, however, lenders do not have such limitations, so firms generally mentioned more positive attributes of their loans and the lending experience.

As a preliminary matter, unlike in the United Kingdom, advertising aimed at children does not seem to pervade the advertising on websites and storefronts. Only 4 of 27 websites (representing 8.64%, or 40 of 463 storefronts) had advertisements aimed at children, including cartoon images or costumes of a kangaroo, a piggy bank, a cowboy, and a cardinal. We visited 164 stores and found that only 4.88% had advertisements targeting children (or 4.54% of the 463 stores in Houston at the time as a weighted amount).

On the other hand, advertising does seem to target minority groups. We found advertising that was specifically geared to minority groups—mostly advertisements in Spanish—on 77.32% of storefronts (63.41% of those we actually observed). For instance, one storefront advertisement read, "Prestamos Sobre El Titulo De Tu Auto. . . . Sin Credito Necesario. Facil y Rapida Aprobacion."[66] We coded this advertisement as targeting Hispanics. In our examination of websites, 40.74% (or 66.51% weighted by market share) had more pictures of consumers from minority groups than pictures of white customers.

Table 1 summarizes the types of advertising claims made on storefronts and websites. For both storefronts and websites, I first present the actual observations we made—the storefronts we physically photographed and the websites we viewed. Then, I weight both the storefronts and the websites to reflect the total market. Thus, if a large lender with a hundred stores talked about the speed of getting the loan, the first column only reflects the ten instances where we actually saw that advertising, but the second column treats it as a hundred instances to reflect my approximation of the presence of this advertising in the total market. The table depicts the same approach for websites.

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66. Study Documents, *supra* note 65, Storefront Observation 175.

TABLE 1: SUMMARY OF ADVERTISING CONTENT ON LENDERS STOREFRONT SIGNS AND WEBSITES

Advertising Content	**Percentage of Storefronts Actually Visited (n=164)**	**Weighted Percentage of Storefronts (n=463)**	**Percentage of Websites (n=27)**	**Weighted Percentage of Websites (n=463)**
Speed of Getting Loan	50.00	54.21	96.30	99.78
High Loan Amounts	48.78	47.08	74.07	81.64
Simple Loan Application Process	31.71	43.41	92.59	97.41
Pay Off Other Lenders	28.05	27.00	14.81	2.16
No Credit Check/Bad Credit OK	21.34	20.73	77.78	97.19
Low Prices	15.24	10.58	48.15	36.50
Teaser Rates	12.20	15.77	18.51	17.49
Best Practices/Trade Association	8.54	9.72	22.22	43.63
Exact Price of Loan	6.71	4.32	85.19	87.90
Loans Are for Frivolous Expenses	4.27	6.48	3.70	0.65
Confidential Process	3.66	3.46	59.26	90.93

Title Loan Customers Get to Keep Car	1.94[67]	0.88[68]	86.36[69]	92.44[70]
Loans Are for Emergencies	1.22	2.16	55.56	44.71
Special Deals for Repeat Customers	0.61	0.22	11.11	13.82
Loans Are Meant to Be Short-Term	*	*	70.37	73.65

* did not code for variable on these observations

1. Advertising About the Transaction Process

The speed of getting money from the lender was the most important attribute, by a significant margin, that payday and title lenders advertised.[71] Only one of the twenty-seven websites that I reviewed did not mention speedy turnaround as one of the lender's features. Websites touted that consumers could "receive funds on the spot,"[72] get cash "speedy fast,"[73] and have "access to quick cash to help you make ends meet."[74] Websites publicized the lenders' abilities to deliver "a Loan Decision instantly"[75] or approve loans "within minutes."[76] Similarly, storefront advertisements promised "money in minutes,"[77] "Fast Transaction Times,"[78] "5 Min Approval,"[79] and even "instant cash."[80]

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67. I limited the denominator to firms that offered title loans, so some companies were excluded. So for the storefronts we visited, three of 155 storefronts both offered title loans and had advertising that mentioned borrowers would keep their vehicles.

68. n=4 of 454 storefronts.

69. n=19 of 22 websites.

70. n=428 of 454 storefronts.

71. My results are even more pronounced than a study in the United Kingdom that found that thirty out of fifty websites emphasized the speed of payday loans over the cost. BUS., INNOVATION & SKILLS COMM., *supra* note 38, at 6.

72. Study Documents, *supra* note 65, Website Observation 22.

73. Study Documents, *supra* note 65, Website Observation 17.

74. Study Documents, *supra* note 65, Website Observation 20.

75. Study Documents, *supra* note 65, Website Observation 3.

76. Study Documents, *supra* note 65, Website Observation 4.

77. Study Documents, *supra* note 65, Storefront Observation 335.

78. Study Documents, *supra* note 65, Storefront Observation 235.

79. Study Documents, *supra* note 65, Storefront Observation 399.

80. Study Documents, *supra* note 65, Storefront Observation 176.

Another characteristic of the transaction process that lenders' advertising emphasized was the easy application process. Only two websites lacked claims that the application process was "Easy and Convenient"[81] or that the application was "short."[82] Websites contained language explaining exactly why the process was so easy:

> We live and work in the same communities we serve, so we always strive to treat our customers with the respect they deserve. It's easy to get started and our representatives will gladly answer any questions you may have about your loan inquiry. Our loan representatives are always ready to help, so don't hesitate to reach out to us.[83]

Predictably, fewer storefronts put messages about the application process on their limited signage, but many firms featured signs describing how the company "Make[s] It Easy"[84] or has an "Easy One-Time Application."[85]

Another important part of selling the transaction process was lenders' representations that they would not perform a credit check or that having bad credit was not a barrier to getting a loan. When the websites were weighted to approximate how much of the overall market the website represented based on storefronts, 97.19% of the market's websites contained statements about ignoring bad credit scores. That means that borrowers looking on a website for a loan from just 13 of the 463 stores in Houston would not see this advertising. Websites have the ability to explain in greater detail the motivation behind emphasizing the lack of a credit check or requirement of good credit: "When it comes to finance and money, we believe that past downfalls should not determine the rest of your life. . . . A title loan is an easy way to get cash using your car title instead of your credit score. If you're worried about your past finance pitfalls, don't be."[86] The absence of traditional credit checks was a relatively prominent selling point on many storefront advertisements as well, often stating things like "No Credit Needed"[87] or "No Credit Required."[88] Even in these terse advertisements on signs, lenders recognized the concern among borrowers that they would be rejected for the loan: "We Say Yes," one large lender's sign said.[89]

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81. Study Documents, *supra* note 65, Website Observation 4.
82. Study Documents, *supra* note 65, Website Observation 12.
83. Study Documents, *supra* note 65, Website Observation 10.
84. Study Documents, *supra* note 65, Storefront Observation 24.
85. Study Documents, *supra* note 65, Storefront Observation 314.
86. Study Documents, *supra* note 65, Website Observation 7.
87. Study Documents, *supra* note 65, Storefront Observation 175.
88. Study Documents, *supra* note 65, Storefront Observation 314.
89. Study Documents, *supra* note 65, Storefront Observation 344.

A final attribute of the transaction process that played a role on websites, especially if measured as a percentage of the entire market, was lenders' claims that the transaction would be confidential. Most often the advertisements simply offered assurances of "Confidential Transactions"[90] and that "transactions are 100% confidential."[91]

2. Advertising About the Attributes of the Loan Itself

The most prominent assertion firms make about the loans they offer is that they will give high loan amounts. Almost 50% of storefronts and websites representing 81.64% of the market had advertisements to this effect. We coded advertisements as offering high loan amounts if either the advertisement directly made that claim (e.g., "We loan more"[92]) or if the advertisement stated how much money the lender would give (e.g., "Cash Advances & Title Loans . . . . Get $100 To $20,000 Today").[93]) We construed advertisements stating the amount the lender would give as selling the lenders' willingness to give high loan amounts because these advertisements invariably stated the lender would give loans "up to" various amounts, suggesting the upper limit was the amount that the lender thought was important.

The second most common attribute that lenders advertised was low prices. Not to be confused with information about the actual price of loans, these advertisements claimed that lenders offer low prices, appearing on 15.24% of the storefronts we viewed and 36.30% of the websites (weighted by market share). Advertisements claimed that "We beat competitors' rates,"[94] that lenders offered "Rates up to 50% less!,"[95] and that lenders even made a "better deal promise."[96]

A subtler way that lenders appeared to advertise low prices was by offering to pay off borrowers' loans with other lenders. While not directly a claim about price, these advertisements indirectly offer price competition among firms, and they were surprisingly common: 28.05% of the storefronts we visited made such claims. These advertisements made statements like: "Title Loans[:] We Pay Off Competitor Loans"[97] and "We'll buy out your current title loan."[98] Some made the offer by differentiating the lender's product in some way, such as "LOAN$. Are You Trapped In A 30 Day Loan? Up To

90. Study Documents, *supra* note 65, Storefront Observation 314.
91. Study Documents, *supra* note 65, Website Observation 15.
92. Study Documents, *supra* note 65, Storefront Observation 480.
93. Study Documents, *supra* note 65, Storefront Observation 314.
94. Study Documents, *supra* note 65, Storefront Observation 308.
95. Study Documents, *supra* note 65, Website Observation 14.
96. Study Documents, *supra* note 65, Storefront Observation 431.
97. Study Documents, *supra* note 65, Storefront Observation 176.
98. Study Documents, *supra* note 65, Storefront Observation 398.

12 Months To Pay!"[99] Finally, for some advertisements, the offer to pay off a competitor's loan was explicitly linked to price: "[I]f you already have a title loan with another company, we'll pay off your title loan and cut your rate in the process."[100] Another website echoed this same approach: "We offer the most competitive rates on the title of your vehicle. We'll beat any rate; just bring proof you've been offered a lower rate on a similar title loan. If you already have a Title Loan or Title Pawn payment, ask [our company] about paying it off."[101]

One relatively common way that lenders communicated limited price information was by offering a discount on the borrower's first loan ("Up to $500 off First Loan"[102]) or by offering the first loan for free ("We pay off auto title loans—Free 30 days"[103]). These types of rates are called teaser rates in consumer credit literature. With credit cards, for instance, lenders offer an introductory interest rate for a set period of time to entice borrowers to open a credit card account, and then after that period expires, the rate jumps to a higher amount.[104]

Fewer companies provided information about the exact price of a loan on storefront advertising, and all of the displayed information was inaccurate. Only 6.71% (n=11) of the storefronts we visited stated the price of the loan, and this number includes two storefronts of a company that advertised "0% interest loans on select products,"[105] although this advertisement most likely is just a teaser rate. The remaining nine storefronts were all with the same company, and the advertisement of the price stated an inaccurate price in large font with the correct price in extremely small font. The advertisement stated in large font: "Title Loans As Low As 8%." Then, in very small font, it stated:

> Annual Percentage Rate ('APR') for title loans is based on loan amount, fees, and interest charged and the term. For example: for a loan amount of $500.00 payable in 14 days with interest at 10% per annum, the amount financed is $533.00 (loan amount of $500.00 + Title Transfer Fee of $33.00) and the Finance Charge is $42.04 (Interest amount of $2.04 and CAB fee of $40.00). In this example the APR is 205.64% and total of payments is $575.04. See inside store for details.[106]

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99. Study Documents, *supra* note 65, Storefront Observation 336.
100. Study Documents, *supra* note 65, Website Observation 7.
101. Study Documents, *supra* note 65, Website Observation 38.
102. Study Documents, *supra* note 65, Storefront Observation 245.
103. Study Documents, *supra* note 65, Storefront Observation 406.
104. *See* RONALD J. MANN, CHARGING AHEAD: THE GROWTH AND REGULATION OF PAYMENT CARD MARKETS 5, 172 (2006) (recommending a ban on teaser rates because they exploit "consumer short sightedness").
105. Study Documents, *supra* note 65, Storefront Observation 176.
106. Study Documents, *supra* note 65, Storefront Observation 231.

This price advertisement violates the Truth in Lending Act, which requires that lenders state price information for credit products as annual percentage rates.[107] The regulations implementing the Act state: "[A]n advertisement shall not state any other rate, except that a simple annual rate or periodic rate that is applied to an unpaid balance may be stated in conjunction with, but not more conspicuously than, the annual percentage rate."[108] Thus, the only storefront that provided exact price information did not provide accurate information, as least under the rule of the Truth in Lending Act.

Many websites had exact price information, but Texas law mandates that lenders put a fee schedule on their websites,[109] so the inclusion of price information may merely reflect compliance with the law. Although many websites accurately disclosed APRs, like the storefronts, some websites violated the Truth in Lending Act. For instance, one website presented interest rates but not annual rates: "We charge our fee as follows: 29.9% on loans of $0 to $999 . . . ."[110] Additionally, two websites presented finance charges as dollar figures without also stating an APR.[111]

Finally, in addition to displaying information about the amount and price of loans, some firms promoted themselves as member of trade associations. Of the storefronts we observed, 8.54% had advertising to this effect, and 43.63% of the market's websites did. Some trade associations require members to post the trade association information,[112] but despite the requirement, firms used their membership as a selling point. One website attempted to ease borrowers' apprehensions: "If you have concerns about taking a payday loan, don't worry. [Our company] is an industry leader and a founding member of the Community Financial Services Association, which promotes responsible lending practices and monitors consumer protection. And we'll be here for you every step of the process."[113] On storefronts, we mostly found simple statements like "CSAT Member Consumer Service Alliance of Texas."[114]

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107. Truth in Lending Act, 15 U.S.C. § 1664(d) (2012) ("If any advertisement to which this section applies states . . . the dollar amount of any finance charge . . . , then the advertisement shall state all of the following items . . . (3) The rate of the finance charge expressed as an annual percentage rate.").

108. 12 C.F.R. § 226.24(c) (2014).

109. 7 TEX. ADMIN. CODE § 83.6003(b)(1) (2015).

110. Study Documents, *supra* note 65, Website Observation 19. This format violates 12 C.F.R. § 226.24(d).

111. Study Documents, *supra* note 65, Website Observation 6, Website Observation 28. These advertisements violate 15 U.S.C. § 1664(d).

112. *Best Practices for the Payday Loan Industry*, CMTY. FIN. SERVS. ASS'N OF AM., http://cfsaa.com/Portals/0/Members/CFSA_MembershipKit_BestPractices.pdf (last visited Feb. 16, 2016).

113. Study Documents, *supra* note 65, Website Observation 13.

114. Study Documents, *supra* note 65, Storefront Observation 144.

Title lenders promoted title loans by noting that borrowers could keep their cars while the lender had a security interest in the vehicles, a message that was especially prominent on title lenders' websites. Only 1.94% of title lender storefronts had advertisements like "Fast and Easy: Auto Title Loans; You keep your car."[115] On the other hand, 92.44% of title lenders' websites (weighted to represent the entire market) made this claim. Websites explained: "You get to keep driving your vehicle, and you'll get your title back once your last payment has been made."[116]

Surprisingly, given the importance of repeat customers in the market,[117] not many advertisements offered special deals to repeat customers. Less than 1% of the storefronts advertised special deals, and only 13.82% of the websites for the market promoted these programs.

3. Advertising about Uses for the Loans

The final type of advertising discussed how borrowers could use loan proceeds. In line with criticism of payday lending, some advertisements suggested frivolous uses for loan proceeds. Only 4.27% of the storefronts we visited had such suggestions, and less than 1% of the websites measured by market share. One storefront suggested that borrowers should "Celebrate Birthdays With Extra Cash."[118] One of the few websites promoting loans for frivolous uses suggested the company could help borrowers if they were "suffering from seasonal expenses like holiday bills . . . ."[119]

Websites were much more likely to suggest that loans are intended for emergencies—44.71% if the websites are weighted to reflect market share. Many websites, over 70%, included language suggesting that payday and title loans are meant to be short-term solutions to liquidity problems. The inclusion of this language on the websites most likely reflects the statutory requirement in Texas that websites include this language;[120] in reality, it is surprising that the number of websites stating that loans are meant to be short term is not higher. Yet, despite the statutory requirements, some discussions of emergency uses for loans seem voluntary on the part of lenders. For instance, one lender noted:

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115. Study Documents, *supra* note 65, Storefront Observation 480.

116. Study Documents, *supra* note 65, Website Observation 7.

117. *See* Mark Flannery & Katherine Samolyk, *Payday Lending: Do the Costs Justify the Price?* 6 (Ctr. for Fin. Res., Fed. Deposit Ins. Corp., Working Paper No. 2005-09, 2005) ("[R]epeat borrowers . . . generate store profits by contributing to loan volume.").

118. Study Documents, *supra* note 65, Storefront Observation 294.

119. Study Documents, *supra* note 65, Website Observation 38.

120. TEX. FIN. CODE ANN. § 393.222(a)(1) (West 2006).

> A short-term loan from [our company] can help you pay for emergencies such as car or household repairs, medical bills or other surprise expenses. . . . there's no need to worry about whether your loan will be approved. At [our store], nearly all loans are approved. Your friends at [our store] are here to help when you need it most.[121]

Thus, lenders appear to use the urgent need for loans to promote loans "[b]ecause some things can't wait until payday."[122]

This Part offers new evidence about exactly what lenders advertise. As Table 1 indicates, lenders promote payday loans on a variety of bases, and I have grouped those bases under three categories—advertising about the transaction process, the loan's attributes, and uses for the loans. The next Part uses these categories to assess whether payday and title lending markets are suffering from behavioral market failures.

III. USING PAYDAY AND TITLE LENDING ADVERTISEMENTS TO DETECT BEHAVIORAL MARKET FAILURE

This Part analyzes payday and title lending advertisements to diagnose behavioral market failures in these markets. After performing a traditional content analysis of the advertisements in Subpart A, I use Subpart B to attempt to articulate a rational choice explanation for a variety of types of advertisements. For some of the types of advertisements I discuss, the information presented supplies information a rational actor would value. For other types, however, it is extremely difficult to articulate why a rational actor would care about the information in the advertisements. In those cases, I look to principles from behavioral economics to explain the existence of the type of advertisements. If the advertisements only make sense in light of specific behavioral biases consumers might possess, then I conclude that firms are attempting to exploit these biases.

A. Content Analysis of Payday and Title Lending Advertising

Diagnosing behavioral market failure through advertisements requires first performing what advertising scholars call a "content analysis" of the advertisements, which involves analyzing the textual or visual material in an advertisement.[123] Typically in the economic and advertising literature, content analysis has focused on

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121. Study Documents, *supra* note 65, Website Observation 21.

122. Study Documents, *supra* note 65, Website Observation 2.

123. *See* Avery M. Abernethy & George R. Franke, *The Information Content of Advertising: A Meta-Analysis*, 25 J. ADVERT. 1, 1 (1996); Alan Resnik & Bruce L. Stern, *An Analysis of Information Content in Television Advertising*, 41 J. MARKETING 50, 51 (1977).

whether an advertisement is informative or persuasive.[124] Informative advertising helps consumers make more intelligent buying decisions, typically by providing information about the price, quality, and availability of a product or service.[125] Persuasive advertising, on the other hand, produces product differentiation where no real differences exist by, for example, creating brand loyalty where the brand is functionally irrelevant.[126] Beginning with a 1977 article by Alan Resnik and Bruce Stern, advertising researchers have used relatively consistent criteria to assess whether advertising is informative or merely persuasive.[127] Resnik and Stern deemed an advertisement informative if it presented information on any of the following topics: "1. Price or Value, 2. Quality, 3. Performance, 4. Components or Contents, 5. Availability, 6. Special Offers, 7. Taste, 8. Packaging or Shape, 9. Guarantees or Warrantees, 10. Safety, 11. Nutrition, 12. Independent Research, 13. Company-Sponsored Research, 14. New Ideas."[128] Researchers have repeatedly applied this approach over the past thirty-five years, including in current advertising research.[129]

The initial step in assessing advertising for evidence of behavioral market failure is to determine whether advertisements contain informative or merely persuasive content. Persuasive content, by its very definition, does not generally present information that informs a purely rational consumer, so determining that an advertisement is persuasive is a strong proxy for concluding that rational choice theory will not explain its existence.[130]

To perform a content analysis of the storefront advertisements, I considered an entire storefront as a single advertisement. Most of the other content analyses in the advertising literature consider

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124. Justin P. Johnson & David P. Myatt, *On the Simple Economics of Advertising, Marketing, and Product Design*, 96 AM. ECON. REV. 756, 766 (2006).

125. Bagwell, *supra* note 15, at 1718; Resnik & Stern, *supra* note 123, at 50–51; *see also* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 765 (1976) ("Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price. So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable.").

126. Bagwell, *supra* note 15, at 1705–06.

127. Resnik & Stern, *supra* note 123, at 51 (setting out fourteen criteria of informative advertising); *see also* Abernethy & Franke, *supra* note 123, at 2.

128. Resnik & Stern, *supra* note 123, at 51.

129. *See, e.g.*, B.S. Bodla & Saloni Pawan Diwan, *Investigating the Congruence Among the Positioning Strategies of Three Indian Car Brands*, 3 J. BRAND STRATEGY 373 (2015).

130. *See* Bagwell, *supra* note 15, at 1705–06.

television commercials or magazine advertisements,[131] so treating a storefront as an advertisement is a better approximation of the number of words and ideas present.

I deemed payday or title lending advertising as informative under the Resnik-Stern fourteen prong rubric if it stated the exact price of the loan (because it falls under the Resnik-Stern rubric prong of "price"[132]), if it offered a teaser rate ("price" and "special offer"), if it mentioned a trade association ("quality"), if it stated that no credit check is required ("availability"), if it stated that high loan amounts are given ("content"), or if it stated that the lender offers special deals for repeat customers ("special offer").[133]

If the storefront or website advertising only promoted other attributes, then I coded it as lacking informative content. Some of these advertisments I deemed merely persuasive because they attempted to differentiate their company on a specious basis since all firms were homogenous regarding the advertised attribute.[134] For instance, numerous companies claimed they kept consumer information confidential, but that claim is not an actual basis for product differentiation because all financial providers have to keep their customers' information private under state and federal law.[135] Also, I did not consider other advertisements informative because they did not help consumers make more intelligent buying decisions, as the definition of informative advertising requires.[136] Advertisments touting the speed of the process, the simple application process, and the low price all lack informational content because they do not generally offer specific content to support their claims (unlike advertisements for high loan amounts where dollar amounts are often listed). Also, I did not code any advertisements

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131. *See* Abernethy & Franke, *supra* note 123, at 15 (examining study of fifty-nine prior articles on content analysis and finding that fifty-six involved magazines and forty-four involved television commercials).

132. *See* Resnik & Stern, *supra* note 123, at 51.

133. *Id.*

134. Karl-Erik Warneryd, *Advertising and Consumer Behavior*, *in* HANDBOOK OF BEHAVIORAL ECONOMICS 111 (Benjamin Gilad & Stanley Kaish, eds. 1986) (noting that markets with homogeneous products require advertising that differentiates products, but in reality, the advertising cannot and merely sells an image); *see also* Bagwell, *supra* note 15, at 1724 ("As Marshall explains, some advertising is combative, acting to redistribute consumers among brands. If the real differences between brands are modest, then combative advertising may be excessive.").

135. As one example of such regulation, see *Privacy Rule Handbook*, FED. DEPOSIT INS. CORP., https://www.fdic.gov/regulations/examinations/financialprivacy/handbook/ (last updated Jan. 25, 2001) ("The privacy rule prohibits a bank from disclosing an account number or access code for credit card, deposit, or transaction accounts to any nonaffiliated third party for use in marketing" and "provision[s] under a State law that provide[] greater consumer protection than provided under the GLBA privacy provisions will supercede the Federal privacy rule.").

136. Bagwell, *supra* note 15, at 1718.

stating uses for the loan proceeds as providing information about the loan because borrowers are generally free to use the loans for whatever purpose they want.

I searched the storefront advertising and website advertising to see how many observations (i.e., stores or websites) met at least one of the Resnik-Stern criteria. For the websites, I did not deem the website to contain informative advertising simply because it stated the exact price since Texas law requires the advertiser to post this information, so firms did not voluntarily provide it.[137] Like Resnik and Stern's work and its progeny, I did not evaluate the truthfulness of any statement in making this evaluation.[138]

In terms of the storefront advertising, 155 of the stores that we actually visited had at least one advertisement, and I only consider those stores in this analysis. Of those 155, 74.84% (n=116) had at least one advertisement with at least one of the Resnik-Stern criteria.[139] In terms of websites, twenty-seven firms in the study had websites, and 88.89% (n=24) of the websites had information about one of the topics I identify as meeting the Resnik-Stern criteria.[140]

Compared to television commercials and even magazine advertisements, both storefronts and websites had similar levels of informative advertising content. While different studies have found different levels of informative advertising, one meta-analysis of fifty-nine articles found that 70.92% of 34,258 television advertisements in those studies qualified as informative[141] and 88.57% of 33,352 magazine advertisements had at least one informative cue.[142] Thus, on this metric, payday lending advertising fares relatively well. The real test, therefore, is what sort of information is communicated.

B. Explaining Types of Advertisements

This Subpart focuses on four types of advertising content and struggles first to offer a rational choice explanation for the existence of each type of content. If that is unsatisfactory, I assess whether an explanation based on behavioral economics is superior.

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137. TEX. FIN. CODE ANN. § 393.222 (West Supp. IV 2014). For another example in the advertising literature of the same methodical choice and rationale, see Charles S. Madden et al., *Analysis of Information Content in U.S. and Japanese Magazine Advertising*, 15 J. ADVERT. 38, 39 (1986).

138. Resnik & Stern, *supra* note 123, at 51.

139. If I eliminate advertisements that only contain statements that high loan amounts are given, which critics might say does not present any specific information, then 44.52% (n=69) of stores had at least one type of information from criteria.

140. Again, if I exclude websites mentioning only that high loan amounts are given, 77.78% (n=21) of websites are informative.

141. Abernethy & Franke, *supra* note 123, at 9 tbl.1.

142. *Id.*

1. Advertising Speed

The most common type of advertisement was about the speed of the transaction. Consumers are assured they will get cash almost instantly. Would a rational actor value this alacrity?

In some situations other than payday and title lending, consumers certainly cite speed as a reason for engaging in a transaction.[143] There is even evidence that some people selecting financial service providers indicate the speed of the transaction is an important consideration.[144]

The evidence on consumers' reported preferences is mixed for payday lending. Some evidence suggests payday and title loan consumers do not appear to turn to these types of products as opposed to banks for speed. The Federal Deposit Insurance Corporation ("FDIC") asked consumers in its 2013 National Survey of Unbanked and Underbanked Households why they were unbanked.[145] Of the unbanked in the FDIC's survey, 57.5% said they did not have enough money to have a bank account, 34.2% said they distrusted banks, and 30.8% said they disliked unpredictable fees.[146] Only 12.5% gave "other" as a reason, which could include speed, making the speed of transactions at best a minority outlier as a reason for not being with a bank.[147]

More specifically, prior research reveals that the vast majority of title lending customers, upon reflection, stated they did not pick their lender based on the speed of the transaction. In a survey of over 450 borrowers, Kathryn Fritzdixon, Paige Skiba, and I found that only 13.83% (n=56) of borrowers reported that they picked the specific lender at all because "[they] could get the money more quickly here," even though they could list multiple reasons for picking the lender.[148]

On the other hand, however, a survey by the British Competition and Markets Authority found that 74% of the respondents said that the speed of getting the money was very or

143. *E.g.*, Jennifer Rowley, *Retailing and Shopping on the Internet*, 6 INTERNET RES. 81, 88 (1996) (reporting that shoppers cite speed of the transaction as a reason for shopping on the Internet).

144. H. Saduman Okumus, *Interest-Free Banking in Turkey: A Study of Customer Satisfaction and Bank Selection Criteria*, 26 J. ECON. COOPERATION AMONG ISLAMIC COUNTRIES, no. 4, 2005, at 51, 61 ("[T]he three most important bank selection criteria were: the provision of a fast and efficient service; the bank's reputation and image; and confidentiality of the bank.").

145. *See* FED. DEPOSIT INS. CORP., 2013 FDIC NATIONAL SURVEY OF UNBANKED AND UNDERBANKED HOUSEHOLDS 6 (2014), https://www.fdic.gov/householdsurvey/2013report.pdf.

146. *Id.*

147. *Id.* at 7 fig.ES.3.

148. Fritzdixon, Hawkins & Skiba, *supra* note 25, at 1056 app. A.

extremely important.[149] Other factors were also considered very or extremely important by a majority of respondents, but speed was at the top of the list.[150] Despite the survey responses, however, the Authority did not consider speed to be a factor that payday lenders in the United Kingdom compete over,[151] casting doubt on whether it really drives competition in that market.

Regardless of whether people report valuing speed after the fact, the question remains whether a rational actor would care about a lender's speed. In evaluating this question, it is important to keep in mind that within the payday lending industry, the differences in speed are not substantial. Lenders generally turn loans around quickly, so speed could only possibly be a competitive advantage to the extent that lenders are competing with banks.

One possible reason that speed is especially important in this context is the purposes for which people use these loans. If the reasons people take out loans indicate that the money is indeed needed instantaneously, then the advertising about speed makes sense.

Several sources have recorded why people take out payday loans. In a 2009 survey, the FDIC found that 38% of those who had used pawn loans, payday loans, and rent-to-own services used the proceeds for basic living expenses, 15.4% used the proceeds to make up for lost income, 7.4% used the proceeds for house repairs or purchasing an appliance, 6.2% used the proceeds for special gifts or luxuries, 4.5% used the proceeds for car repairs, 2.3% used the proceeds for medical expenses, and 1.6% used the proceeds for school or childcare, while 22.9% gave some other reason.[152] In a 2012 survey of auto title loan borrowers, researchers found that 20% of borrowers used the proceeds for rent/mortgage, 18.67% for utilities, 17.11% for car repair, 13.33% for gifts, 7.78% for medical expenses, 6% for business expenses, 3.33% for education, and 37.78% for "other."[153] Finally, the Pew Charitable Trusts' survey of payday borrowers found that 53% of borrowers used the money to pay a regular expense (like utilities, car payments, credit card bills, or prescription drugs), 16% used it to pay an unexpected expense, 10% used it to pay rent or a mortgage, 8% used it to pay for something

149. COMPETITION & MKTS. AUTH., PAYDAY LENDING MARKET INVESTIGATION: FINAL REPORT 151 (2015), https://assets.digital.cabinet-office.gov.uk/media/54ebb03bed915d0cf7000014/Payday_investigation_Final_report.pdf.

150. *Id.*

151. *See id.* at 153 (concluding that there are three key areas particularly important to customers where non-price-related competition may take place: (a) access to credit; (b) repayment flexibility; and (c) customer service).

152. FED. DEPOSIT INS. CORP., FDIC NATIONAL SURVEY OF UNBANKED AND UNDERBANKED HOUSEHOLDS 42–43 (2009), https://www.fdic.gov/HOUSEHOLDSURVEY/2009/full_report.pdf.

153. Fritzdixon, Hawkins & Skiba, *supra* note 25, at 1036 tbl.7.

special, 5% used it for food, and 7% said "other" or that they did not know.[154]

While some of these reasons indicate that time may be of the essence in obtaining a loan, many are not associated with extreme time pressure or requiring cash instantly. For instance, most utility bills cannot be paid instantaneously even if the borrower obtains the cash that quickly. Rent and mortgage payments typically have grace periods even if the borrower waits until the end of the cycle to make the payment. Most obviously, gifts, except in the tumultuous early stages of a relationship, are rarely an emergency. Thus, based on the reasons people give for needing the money, it does not appear that these loans are peculiarly urgent such that a borrower could not wait one hour instead of ten minutes. Moreover, even if people generally have a preference for shorter transaction times (especially if one works on an hourly basis), it is not clear why these lending transactions are uniquely focused on time. For instance, companies selling love seats do not advertise, "you will be out of the store within 10 minutes."

Having failed to articulate a plausible rational choice explanation, we must see if principles from behavioral economics can explain advertising the speed of the transaction. A compelling behavioral explanation of payday advertising's near obsession with speed is that myopic consumers are thought to be impatient. As Oren Bar-Gill explains, "People are impatient, preferring immediate benefits even at the expense of future costs. Myopia is attributed to the triumph of the affective system, which is driven primarily by short-term payoffs, over the deliberative system, which cares about both short-term and longer-term payoffs."[155] Advertisements emphasizing "fast cash" exploit this impatience, framing the transaction manipulatively. By focusing on the immediacy of the cash, these advertisements obscure detrimental aspects of the loan, such as the high cost, the risk of defaulting, and—in the case of title lending—the possibility of losing one's car.[156] Thus, because rational choice theory cannot explain the prevalence of advertisements about the speed of the transaction while behavioral economics can, I conclude that payday and title lenders use

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154. THE PEW CHARITABLE TRS., PAYDAY LENDING IN AMERICA: WHO BORROWS, WHERE THEY BORROW, AND WHY 14 exhibit 4 (2012), http://www.pewtrusts.org/~/media/legacy/uploadedfiles/pcs_assets/2012/PewPaydayLendingReportpdf.pdf.

155. BAR-GILL, *supra* note 20, at 21–22.

156. *See* Patricia A. McCoy, *A Behavioral Analysis of Predatory Lending*, 38 AKRON L. REV. 725, 731 (2005) ("[P]redatory lenders go to extreme lengths to frame their loans as gains and to obscure potential losses. Gains are portrayed not only as fast cash, but also as fast cash in the tens of thousands of dollars. Losses, on the other hand, are obscured . . . . Left unsaid, or buried in fine print, is the fact that predatory loans are high-stakes ventures, with potential catastrophe looming down the road. The effect is to create the impression of huge, immediate gains offsetting small, eventual losses.").

advertisements about speed to prey on cognitive defects in consumers.

2. Advertising Loan Size

A large number of advertisements focused on the size of loan the company was willing to give. There are several plausible reasons rational actors would value high loan values in these transactions, although they differ based on the type of loan. In title lending transactions, borrowers use their car title as collateral, they put their vehicle at risk, and more specifically, they put any equity they have in their vehicle at risk. In most cases, despite the fact that a lender only loans a fraction of the value of the vehicle, the borrower will not get any surplus from the sale of the vehicle if he or she defaults on the loan. While state laws almost always require that lenders return surpluses,[157] the sales of cars that title lenders have repossessed do not usually generate enough to pay off the loan principle, any accrued interest, and the costs from repossessing and selling the car.[158] Thus, a borrower's only opportunity to protect any equitable interest in the car is at the point of lending.[159] A rational actor would accurately consider the risk of repossession and the risk of losing the equity in the vehicle and therefore would value higher loan amounts.

For payday borrowers, rational actors would value high loan amounts because their other sources of credit are constrained, so they want as much credit as they can get. As Subpart III.B.3 below notes, many payday borrowers do not have access to other sources of credit at the time they take out a payday loan.[160] Economists Will Dobbie and Paige Marta Skiba empirically demonstrate that payday-lending customers are more credit constrained than credit card users or even than others in financial distress:

> Using our regression discontinuity strategy, we find that a $50 increase in payday credit leads to a $19.73 to $22.02 increase in average loan size. Thus, payday borrowers borrow 39 to 44 cents per additional dollar of credit. These estimates are larger than previous findings using data from different types of debtors, likely reflecting the fact that payday borrowers are particularly credit constrained. For example, the typical credit-card holder consumes 10 to 14 cents out of every additional

157. For a few examples, see IDAHO CODE § 28-46-508(2) (2013); MISS. CODE ANN. § 75-67-411(1), (5) (2009); UTAH CODE ANN. § 7-24-204 (LexisNexis 2006).

158. Hawkins, *supra* note 12, at 551–52.

159. Most borrowers do not have to worry if their loan is too large and the sale leaves a deficiency because most title lenders do not seek deficiency judgments from borrowers either because the law, for example, section 28-46-508(2) of the Idaho Code, or their business practices prevent it. Hawkins, *supra* note 12, at 552.

160. *See infra* notes 165–67 and accompanying text.

> dollar of credit, while the typical financially constrained household consumes 20 to 40 cents out of every additional dollar in tax-rebate amount.[161]

Payday lenders are, almost by the nature of the product, making risky loans, so they ration the amount of credit they are willing to give. Instead of offering lower loan amounts, the lender could increase the interest rate to reflect the higher risk for a specific borrower, but usury limits often prevent that approach.[162] Even where usury limits do not, rationed borrowers—even rational ones—likely care more about the amount of the loan than the cost, so firms compete on this basis.

In addition to desiring high loans because of credit constraints, a rational borrower might want a high loan amount to decrease the odds of defaulting. In the same analysis, Dobbie and Skiba show that a hundred-dollar increase in loan size to a payday-lending customer decreases the likelihood of default by 2.8 to 3.8% (which represents a 22 to 35% reduction from the mean default rate in their sample).[163] One explanation for this strange outcome might be that higher loan amounts permit the borrower to solve the problem that created the need for the loan. A $300 loan may not be enough to cover all of the checks that a consumer wrote and to thereby avoid multiple overdraft charges, but $500 might actually solve the emergency situation causing the borrower's financial distress.

Thus, rational payday and title loan borrowers would want to go to companies that give higher loan amounts, so rational choice theory explains why many firms advertise high loan values.[164] These advertisements do not indicate behavioral market failure.

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161. Will Dobbie & Paige Marta Skiba, *Information Asymmetries in Consumer Credit Markets: Evidence from Payday Lending*, AM. ECON. J.: APPLIED ECON., Oct. 2013, at 256, 268.

162. *E.g.*, COLO. REV. STAT. § 5-3.1-105 (2015).

163. Dobbie & Skiba, *supra* note 161, at 257–58. Skiba put the finding in more straightforward terms in a news interview about the article: "[W]hen people are allowed to borrow larger amounts, it actually helps them to repay the loan rather than renewing it a bunch of times and then eventually defaulting." Colleen Creamer, *Payday Loans: Taking the Good with the Bad*, NASHVILLE LEDGER (Aug. 19, 2011), http://www.tnledger.com/editorial/Article.aspx?id=54496.

164. In my prior work on title loans, borrowers we surveyed did not report selecting their title lender because of the high loan amounts offered. *See* Fritzdixon, Hawkins & Skiba, *supra* note 25, at 1055. Only 5.93% (n=24) selected "loan amount" as the reason they selected this lender. *Id.* However, other evidence suggests that firms do compete for customers on this basis in fringe credit markets. *See, e.g.*, Hawkins, *supra* note 12, at 558 n.91 (reporting interviews with title lenders in which lenders claimed to compete on loan amount); Glen Tenney, The Effects of Government Regulation on Competition and Supply in the Pawn Industry: A Quantitative and Qualitative Study 14 (Aug. 2004) (unpublished Ph.D. dissertation, Touro University International), http://cot.gbcnv.edu/~tenney/FinalDissertation.pdf ("Another possible margin is the percentage of the collateral value that is loaned. Especially when interest

3. Advertising No Credit Check

It is not difficult to understand why a rational actor, in the economic position of a payday or title lending customer, would value firms' promises not to perform credit checks. Most of these customers have bad credit scores and have been turned down recently by a traditional creditor. Economists Neil Bhutta, Paige Marta Skiba, and Jeremy Tobacman detail how payday lending consumers are in significant financial distress when they look for a payday loan.[165] Almost 80% of the payday loan applicants in their study had no credit available on credit cards,[166] had at least one account that was at least thirty days delinquent, and had "average and median credit scores . . . below 520, whereas the average and median scores in the general population are 680 and 703, respectively."[167] Thus, for people with bad credit scores who need credit, advertising explaining that no credit scores are required is compelling.

The primary objection to classifying this advertising as informative is derived from the fact that no payday lenders do credit checks, so this might be fictitious product differentiation and not informative at all.[168] Yet, to the extent that lenders are competing with banks, credit unions, or other credit providers, such as department stores, the promise not to check a borrower's credit does provide product differentiation because these other creditors all consider traditional credit scores in making loan decisions.[169] Thus, because payday and title lending borrowers have poor credit scores and payday and title lenders do not check traditional credit scores, this type of advertising would appeal to a rational payday and title lending borrower and is not evidence of behavioral market failure.

4. Advertising Price

The greatest evidence of behavioral market failure in payday and title lending markets is advertising about price. In addition to discussing the lack of advertisements about the exact cost of these

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rates are limited by law, the loan/value ratio may be the primary method by which pawnbrokers compete with each other.").

165. Bhutta et al., *supra* note 10, at 223.

166. *Id.* at 224.

167. *Id.* at 233. *See also* Ronald J. Mann, *Do Defaults on Payday Loans Matter?* 14–15 (Columbia Law and Economics Working Paper No. 509, 2014) (using a different data set from Bhutta, Skiba, and Tobacman and noting that "the mean borrower's score of 578 places the typical borrower squarely in the 'F, High Risk' group, which roughly includes the bottom quintile by creditworthiness of the population").

168. *See supra* note 53 and accompanying text.

169. In contrast, advertisements that promise to keep borrower information confidential do not demonstrate any true product differentiation because all potential lenders are bound by laws requiring confidentiality. *See* 15 U.S.C. § 1681 (2012).

loans, I describe how teaser rates likely aim at exploiting borrowers' unrealistic optimism.

a. Exact Prices

Information about the exact price of a payday or title loan is the quintessential example of information that a purely rational actor desires.[170] Thus, the advertisements we observed with specific price information on their face indicate that payday lending is a functioning market.

However, a closer look at the data suggests two concerns. First, the absence of price information in most storefront advertising is problematic since price is the most salient dimension of many consumer transactions.[171] As Robert Pitofsky has observed, "[M]arket failure occasionally leads to the absence of key product information. Moreover, consumers deceived or exploited through ignorance of key data—for example, when they purchase unreasonably costly funeral services or insurance because comparative price data is not available—have no practical recourse to relief in the courts."[172] Additionally, arguments against regulation in consumer credit markets often seem to assume, contrary to my findings, that pricing information is readily available.[173] All of that said, my results for payday lending at storefronts are not atypical. In one meta-analysis of other studies, the authors found that 9.71% of television advertisements and 25.61% of magazine advertisements had price information.[174]

The larger concern is the accuracy of the pricing information. All of the storefront advertisements that presented exact price information presented inaccurate information, at least as determined by federal law. Even those most in favor of regulation-free credit markets condemn fraudulent advertising.[175]

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170. Howard Beales et al., *The Efficient Regulation of Consumer Information*, 24 J.L. & ECON. 491, 492 (1981) ("Information about price, quality, and other attributes allows buyers to make the best use of their budget by finding the product whose mix of price and quality they most prefer.").

171. Oren Bar-Gill, *Bundling and Consumer Misperception*, 73 U. CHI. L. REV. 33, 45 (2006).

172. Robert Pitofsky, *Beyond Nader: Consumer Protection and the Regulation of Advertising*, 90 HARV. L. REV. 661, 686 (1977).

173. Richard A. Epstein, *The Neoclassical Economics of Consumer Contracts*, 92 MINN. L. REV. 803, 809 (2008) ("My position, as articulated in prior articles, rests on several assumptions. First, the voluntary actions by individual consumers and their advisors, as well as by competitive sellers, tend to close an information gap in credit card and other markets with standardized products. Incidentally, in preparing this Article, I took a look at many retail websites on a variety of industries and came away with the clear impression that pricing clarity is more widespread now than it has ever been." (footnote omitted)).

174. Abernethy & Franke, *supra* note 123, at 9 tbl.1.

175. *See* Epstein, *supra* note 173, at 807 ("Information breakdown comes in all forms, from deliberate fraud to inadvertent mistake. Without question the

Thus, while advertisements with pricing information are without question informative to a rational actor, the absence of accurate prices at any storefront is troubling.

Behavioral economics offers a superior explanation for the absence of pricing information or for the deceptive pricing information. Gabaix and Laibson have shown that firms will shroud undesirable characteristics while highlighting desirable characteristics for customers.[176] No scholarship argues that payday and title lending prices are low or that customers like paying these fees,[177] so pricing information appears to be a prime candidate for shrouding. The near absolute absence of pricing information exemplifies Gabaix and Laibson's theoretical observation.

In a move similar to the idea of shrouding, behavioral economists also argue that borrowers have limited attention, so firms frame transactions to point away from negative attributes of a product or service.[178] In a classic example, two scientists instructed people viewing a short film to count the number of times that a basketball is passed between players wearing white shorts and to ignore the players wearing black shorts. For nine seconds of the video, a lady wearing a gorilla suit appears on the screen, but around half the study participants did not see her because their limited attention was fixed on the task of counting.[179] Payday and title lending advertisers focus borrowers attention on a variety of

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first order of public business is the control of fraud, which is limited in scope and serious in consequences."); *see also* Richard Craswell, *Regulating Deceptive Advertising: The Role of Cost-Benefit Analysis*, 64 S. CAL. L. REV. 549, 584 (1991) ("Indeed, if nothing would be lost by prohibiting such a claim, the cost-benefit analysis would almost surely argue in favor of prohibition.").

176. *See supra* note 19 and accompanying text.

177. Even otherwise positive perspectives on payday lending admit that the fees are very high. *See, e.g.*, Robert L. Clarke & Todd J. Zywicki, *Payday Lending, Bank Overdraft Protection, and Fair Competition at the Consumer Financial Protection Bureau*, 33 REV. BANKING & FIN. L. 235, 247 (2013) (recognizing "the high cost of payday loans").

178. *See, e.g.*, Dee Pridgen, *Sea Changes in Consumer Financial Protection: Stronger Agency and Stronger Laws*, 13 WYO. L. REV. 405, 418 (2013) (giving the example of home loans where borrowers experiencing information overload may only consider the closing costs and initial monthly payments because these terms are more salient than the overall cost of the credit); Lauren E. Willis, *Decisionmaking and the Limits of Disclosure: The Problem of Predatory Lending: Price*, 65 MD. L. REV. 707, 767 (2006) ("Information overload has been grossly used to describe a number of different phenomena. First, the quantity of information presented or for which the consumer must search can be daunting. Because the costs of complete information search and processing seem too high, the consumer may not even try. Second, processing too much information can cause the consumer to lose track of some of that information or to fail to encode all of the information, when memory and attention become overloaded. . . . Third, too much information can lead a consumer to conserve effort by examining only a few aspects of a decision, and these may turn out to be the wrong aspects for good decisionmaking . . . ." (footnotes omitted)).

179. DANIEL KAHNEMAN, THINKING: FAST AND SLOW 23–24 (2011).

other attributes of the loan, fourteen that we recorded, causing borrowers to fail to appreciate the true cost of the credit.

Behavioral economics also explains why many storefront advertisements just mention "lower" prices without providing the exact price. Borrowers use heuristics or mental short-cuts when evaluating different products and services, and "[s]tudies indicate that consumers may remember price relations rather than absolute prices and that they rely on price information in the store for making price comparisons."[180] Thus, instead of focusing attention on the APR or cost per hundred dollars borrowed, payday and title firms' advertising likely creates a price heuristic in which customers just remember that one firm has "lower" prices than the competition.

b. Teaser Rates

In the same way that exact prices are the quintessential type of advertising that rational choice theory explains very well, a teaser rate is the patron saint of behavioral economics. When a lender entices borrowers with low upfront costs and then raises the price over time, behavioral economics argues that they are preying on borrowers' overly optimistic predictions for their own futures.[181] Borrowers mispredict the overall cost of the credit because they mispredict how they will use the credit.[182]

The classic example is credit cards: firms offer 0% interest rates for six months (followed by a 20% interest rate forever after). Borrowers optimistically think they will only incur finance charges during the six months but in fact pay interest at a much higher rate after the six-month term is up.[183] For payday and title loans, critics argue that the products themselves (and especially teaser rates)

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180. Warneryd, *supra* note 134, at 115.

181. For just a few of many examples, see Jean Braucher, *Form and Substance in Consumer Financial Protection*, 7 BROOK. J. CORP., FIN. & COM. L. 107, 124 (2012) ("Disclosure also fails to work because consumers mispredict their own future use of credit; creditors, meanwhile, make a science of studying consumers and adapting to their patterns, pricing low what consumers are currently paying attention to while charging high prices for things consumers do not believe they will use but which they later end up using."); Pridgen, *supra* note 178, at 419 ("Another well-known behavioral tendency of most consumers is to be overly optimistic about the future. Thus, when faced with a contract disclosure that rates or payments are likely to go up at a future point in time, many consumers will optimistically assume that real estate prices will also go up, or that their own incomes will rise, so that future penalties, balloon payments, or the inability to pay higher payments will not be a problem. This type of unrealistic optimism or wishful thinking can lead consumers to make choices that are not necessarily in their own self-interest." (footnote omitted)).

182. BAR-GILL, *supra* note 20, at 11 ("[P]rice misperception is a function of misperceived per-use prices or misperceived use levels.").

183. Eric A. Zacks, *Unstacking the Deck? Contract Manipulation and Credit Card Accountability*, 78 U. CIN. L. REV. 1471, 1481–82 (2010).

create a debt trap for borrowers who think they will pay the loan off quickly but actually take a very long time to pay it off.[184] Borrowers incur high charges each time they have to rollover the loan, so every two-week or one-month period.[185] This is likely the most common objection to payday lending.[186]

In the advertisements for payday loans, there were teaser rates present in many companies' storefront and website advertisements. Rational choice theory could explain the rates if borrowers only used payday and title loans for one loan period and then paid it off. If borrowers quickly repaid loans, the first loan rate would be germane in a rational search for the loans.

However, most consumers do not pay off loans quickly. Estimates vary, but the CFPB studied more than twelve million payday loans over a year-long period and found that four out of five payday loans were rolled over at least once, and 22% of loans were rolled over seven times before being paid off.[187]

But even though people roll over loans at a high frequency, it does not prove that they believed that they would only keep the loan for one loan period. Some research indicates that consumers are not overly optimistic. Ronald Mann surveyed borrowers at the time they took out a payday loan and then tracked their actual progress in paying off the loan.[188] He found that "more than half of borrowers expect that they will need to continue to borrow for additional pay cycles" and that "most borrowers finally repay their loans and are free of debt within two weeks of the date they predicted on the date of the loan."[189] Comparing survey responses from title lending borrowers to the general population, Fritzdixon, Skiba, and I found that title lending borrowers were mildly overly optimistic in their predictions of their own repayment.[190] Other than these two studies, however, the majority of the literature points to

184. *See generally* Karen E. Francis, Note, *Rollover, Rollover: A Behavioral Law and Economics Analysis of the Payday-Loan Industry*, 88 TEX. L. REV. 611 (2010) (discussing the "debt trap" that many real-world borrowers experience).

185. *Id.* at 612.

186. *See* Jim Hawkins, *The Federal Government in the Fringe Economy*, 15 CHAP. L. REV. 23, 71 & n.274 (2011) (reporting that "numerous sources described payday loans as a debt trap"); *see also* DONALD P. MORGAN & MICHAEL R. STRAIN, FED. RES. BANK OF N.Y., PAYDAY HOLIDAY: HOW HOUSEHOLDS FARE AFTER PAYDAY CREDIT BANS 1–2 (2008).

187. OFFICE OF RES., CONSUMER FIN. PROT. BUREAU, CFPB DATA POINT: PAYDAY LENDING 4, 6, 11 (2014), http://files.consumerfinance.gov/f/201403_cfpb_report_payday-lending.pdf.

188. *See* Ronald Mann, *Assessing the Optimism of Payday Loan Borrowers*, 21 SUP. CT. ECON. REV. 105 (2014).

189. *Id.* at 109.

190. Fritzdixon, Hawkins & Skiba, *supra* note 25, at 1042.

overoptimism in the payday lending market as a serious issue.[191] "Empirical work exploring links between optimism and borrowing has just begun,"[192] so the question is still open.

My research on advertising and teaser rates contributes to the growing empirical assessment of optimism. Even if Mann is correct that some borrowers can accurately guess how long they will keep out their loans, teaser rates lack a rational choice explanation. They are short-term price cuts for borrowers who believe they will have the product long term. My work adds another layer of evidence that firms believe that at least some borrowers are overly optimistic or overly fixated on initial pricing and will be enticed into taking out loans and keeping them out for longer periods of time. The presence and prevalence of teaser rates indicate that some payday and title lending borrowers are not acting rationally.

IV. POLICY RESPONSES

By exploiting the information in payday and title lending advertising, we can assess the need for regulation in these markets and proscribe specific forms of intervention to ameliorate behavioral market failure. The CFPB is poised to intervene in this market, and this study of payday lending advertisements can aid us in evaluating the likelihood of the CFPB's proposed regulations succeeding. This Part first discusses the CFPB's proposed regulations. Based on my analysis of payday and title lending advertisements, I argue that the CFPB's proposals are misguided because they do not deal with the fundamental problem of the high cost of the loans and attempt to limit loan size despite the importance of this term in the competitive structure of these markets. Next, I suggest alternative regulations aimed at mitigating the behavioral biases we discovered by studying payday and title lending advertisements and at reinforcing rational market mechanisms. Specifically, I argue that states or the CFPB should require lenders to display price information prominently on storefront advertising and on websites.

A. The Consumer Financial Protection Bureau's Proposed Regulations

The CFPB's proposed regulations of payday and title loans constrain lenders on the front end of lending by establishing underwriting requirements and on the back end by limiting lenders' collection activities. This section summarizes the CFPB's proposed

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191. *See, e.g.*, Bar-Gill & Warren, *supra* note 11, at 44; Alan M. White, *Behavior and Contract*, 27 LAW & INEQ. 135, 159 (2009); Francis, *supra* note 184, at 629–30.

192. Jonathan Zinman, *Consumer Credit: Too Much or Too Little (or Just Right)?*, 43 J. LEGAL STUD. S209, S223 (2014).

rules and critiques them in light of this Article's analysis of payday and title lending advertisements.

1. A Description of the CFPB's New Approach to Payday and Title Lending Regulation

In March 2015, the CFPB announced its intention to regulate payday and title lenders.[193] While this move is just the first step in actually promulgating regulations,[194] the CFPB offered detailed descriptions of regulations that it intends to impose on these two markets,[195] so it is likely the final rules will resemble these proposals.[196] As summarized by the CFPB, its proposed regulations work through prevention and protection.

The *prevention* piece involves requiring lenders to verify that a borrower has the ability to repay the debt if the loan is for less than forty-five days, including payday and title loans.[197] Verifying that a borrower has the ability to repay a loan would include determining that "the consumer has sufficient income to repay the loan after satisfying major financial obligations and living expenses. In making the ability-to-repay determination, lenders would have to verify and consider the consumer's income, major financial obligations, and borrowing history."[198] If the borrower had taken out one or two loans in the sixty days prior to applying with the lender, the CFPB would presume the borrower lacked the ability to repay a new loan unless the lender documented a change in circumstances.[199] If the borrower had taken out three loans in the last sixty days, the lender could not extend another loan.[200]

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193. *See Factsheet*, *supra* note 4.

194. SMALL BUS. ADVISORY REVIEW PANEL FOR POTENTIAL RULEMAKINGS FOR PAYDAY, VEHICLE TITLE, AND SIMILAR LOANS, CONSUMER FIN. PROT. BUREAU, OUTLINE OF PROPOSALS UNDER CONSIDERATION AND ALTERNATIVES CONSIDERED 6 (2015), http://files.consumerfinance.gov/f/201503_cfpb_outline-of-the-proposals-from-small-business-review-panel.pdf [hereinafter OUTLINE] ("[T]he Panel process is only one step in the full rulemaking process.").

195. *See generally id.* (describing the CFPB's intended regulations on payday, vehicle title, and similar loans).

196. Christopher K. Odinet, *Payday Lenders, Vehicle Title Loans, and Small-Value Financing: The CFPB's Proposal to Regulate the Fringe Economy*, 133 BANKING L.J. 263, 286 (2015).

197. *See* OUTLINE, *supra* note 194, at 7 ("[T]he Bureau is considering proposals to require lenders to determine a consumer's ability to repay covered short-term loans.").

198. *Id.* at 7–8.

199. *Id.* at 8 (explaining that there would be a presumption against the consumer's ability to repay two or more outstanding short-term loans, but the lender could overcome the presumption by verifying a change in circumstances).

200. *Id.* (noting that there would be a presumption against a borrower's ability to repay three, sequential covered short-term loans and that the lender would have to wait to extend further loans to the borrower).

As an alternative to this procedure for establishing that the borrower has the ability to repay the loan, lenders could offer installment plans if the borrower and loan meet specific criteria.[201] These criteria include things related to the borrower, such as the lender verifying the borrower's income and credit history and establishing that the borrower does not have another payday loan out at the time.[202] Additionally, the loan transaction itself must meet criteria: the loan cannot exceed $500 or require a non-purchase-money security interest in a vehicle.[203] The proposed regulations create this second option as a "safe harbor" that allows lenders to filter loans into these specific requirements and avoid subjective judgments about a consumer's ability to repay.[204]

Similar rules would govern loans for more than forty-five days if the loan's interest rate is more than 36% annually and if the loan is secured by a non-purchase-money security interest in a vehicle or if it entitles the lender to access to a deposit account.[205]

On the *protection* side of the proposal, the CFPB proposes to limit the debt collection activity of payday and title lenders. Specifically, the CFPB's proposal requires lenders to notify borrowers before accessing their bank accounts for collection activity, and it would limit the manner and timing of accessing bank accounts.[206] First, the proposed rules require lenders to notify borrowers in writing three days before "each lender-initiated attempt to collect payment from a consumer's checking, savings, or prepaid account."[207] Second, the rules would prohibit lenders from attempting to collect from a consumer's account after two consecutive attempts to collect failed.[208] The only way a lender could continue to collect by directly accessing a consumer's account would be to obtain a new authorization from the consumer.[209]

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201. *See id.* at 8, 18 (describing the alternative loan option and its requirements).

202. *Id.* at 17 (listing in detail the required criteria).

203. *Id.* (explaining the loan's required structural limitations).

204. *See* Odinet, *supra* note 192, at 274 (describing the safe harbor screening provisions and stating that the lender would not have to "assess the borrower's ability-to-repay").

205. *See* OUTLINE, *supra* note 194, at 19 (describing the "covered longer-term loans").

206. Odinet, *supra* note 196, at 282–84 (describing the rules in detail).

207. OUTLINE, *supra* note 194, at 28.

208. *Id.* at 30 ("After two consecutive attempts to collect payment fail, the lender would be prohibited from using any authorization it has at the time to make additional payment attempts on the loan.").

209. *See id.* ("[A] lender could obtain a new authorization from the consumer after hitting the cap . . . .").

2. Problems in the CFPB's Model for Regulating Payday and Title Lending Markets

In a recent article, I argued that the CFPB's proposed regulations would cause consolidation in the market and benefit larger lenders while harming lower-income consumers.[210] In that article, I found that larger lenders were more likely to charge higher interest rates and more likely to target minorities in their advertisements.[211]

This Subpart offers an additional critique of the CFPB's proposals for regulating title lending and then uses this Article's analysis of payday and title lending advertisements to assess the CFPB's approach. First, the CFPB lacks empirical justification for regulating title lending because it has not performed any independent research on title lending. Second, applying my analysis of advertisements shows that the CFPB's attempt to correct a serious problem in the market—pricing misinformation—through an ability-to-repay requirement is problematic. Additionally, the CFPB's focus on loan size is misguided because of the importance of loan size for competition in these markets as seen in advertisements.

a. The Lack of Independent Research on Title Loans

A major flaw in the CFPB's proposed regulations is the CFPB's failure to use its own research to justify regulating title lending. The CFPB has published no independent analysis of title lending. Moreover, several important claims the CFPB makes about title lending are either unproven or disproven by existing research. This lack of original empirical evidence to support its proposed regulations is particularly troubling because the CFPB treats title loans as more dangerous than payday loans. For instance, title loans are specifically excluded from the "safe harbor" when a lender is evaluating a consumer's ability to repay.[212] And title loans are specifically included in the longer loans that the CFPB's proposed regulation will cover.[213]

While the CFPB studied the payday lending market in great detail,[214] the CFPB has not publicly taken any steps to learn about

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210. *See* Jim Hawkins, *Are Bigger Companies Better for Low-Income Borrowers?: Evidence from Payday and Title Loan Advertisements*, 11 J.L., ECON. & POL'Y 303, 304 (2015) (stating that the CFPB's regulations will advantage large lenders and shut down small businesses).

211. *See id.* at 4, 325 (stating that a higher percentage of large companies charge the highest interest rates and "are more likely to have storefront advertisements aimed at racial minorities than small companies").

212. *See* OUTLINE, *supra* note 194, at 7–8.

213. *Id.* at 19.

214. *See* OFFICE OF RESEARCH, *supra* note 187, at 4. The CFPB draws on its payday lending research to justify its proposals, but it has no research on title

title loans independent of existing research. Despite the CFPB's claim that it is "[d]rawing on its research, market monitoring, supervisory, and enforcement experience,"[215] the CFPB has not published any of this information in conjunction with title lending. In its press release discussing the proposed regulations, the CFPB notes that it is concerned with lenders "holding a security interest in a vehicle as collateral,"[216] but it provides no empirical basis for the concern because it has done no independent research. Similarly, while the CFPB staff estimated the effects of regulation on payday lenders,[217] the CFPB could not perform a simulation to estimate the effects of the regulations on title lenders because it does not have any data to analyze.[218]

The CFPB's press release does give reasons for its concern about title lending, but none of these reasons are substantiated by existing research, and some are contradicted by existing work. First, some of the CFPB suggestions are true but not inherently problematic. The CFPB notes that consumers with title loans are "vulnerable to . . . vehicle repossession," and it argues that in title loan transactions, "consumers may lose control over their financial choices and these longer-term loans can turn into debt traps."[219] These observations are true, but the same concern applies for every car loan in America. Without evidence that lenders abuse the right to repossess in title lending markets, the CFPB's claim proves too much because it would enable the CFPB to jump into any vehicle lending market merely because it involves secured financing.

The CFPB's full proposal asserts that title lenders do not currently consider a borrower's ability to repay the title loan because the lenders know they can repossess the vehicle to satisfy the debt.[220] The CFPB notes, "Other small entities, such as some vehicle title lenders or some lenders operating online, may not currently obtain or verify income information on any loans."[221]

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lending on which it can rely. OUTLINE, *supra* note 194, at 10 ("The Bureau's findings through its research and market monitoring underscore the risks to consumers from these various practices and features of short-term loans. In April 2013, the Bureau published initial findings on consumer use of short-term payday loans and deposit advance products . . . .").

215. OUTLINE, *supra* note 194, at 3.

216. *Factsheet*, *supra* note 4.

217. OUTLINE, *supra* note 194, at 40–46.

218. *Id.* at 41 ("However, vehicle title loans could not be originated pursuant to the alternative requirements. The estimates presented here on the impacts on lenders that make loans under the alternative requirements are therefore not relevant to evaluating the impacts on vehicle title lending.").

219. *Factsheet*, *supra* note 4.

220. OUTLINE, *supra* note 194, at 3 ("When lenders obtain non-purchase money liens on consumers' vehicles or the right to collect repayment from consumers' accounts or paychecks, lenders have less incentive to carefully underwrite the loans . . . .").

221. *Id.* at 35.

Interviews with title lenders, however, report that they do currently consider borrowers' abilities to repay the debt.[222] The requirement of being able to repay the loan makes sense because lenders report that they do not generally profit from repossessing vehicles.[223] The average size of a title loan is around $700, making the collateral worth $1,400 at the time of the loan if we assume lenders give around half the value of the vehicle.[224] The average cost of repossessing and selling a vehicle is $500,[225] meaning that for many vehicles, lenders will make no profit from repossessing.[226] Thus, the market already provides a strong incentive to verify the borrower's ability to repay the loan. The CFPB's concern that lenders might not verify income is theoretical, not grounded in fact.

Another key problem that the CFPB speculates may be occurring is title lenders repossessing consumers' vehicles because their loans are unaffordable.[227] The risk of losing a vehicle is particularly troubling to consumers, the CFPB claims, because "consumers face a greater risk that they will lose their transportation to work."[228] There are data on both of these questions, and in both cases there is insufficient evidence to conclude that repossession in general is a serious concern or that people losing their transportation to work is commonplace. On the first issue, several states report how many title-loan relationships are generating defaults, and from 2004 to 2010 in six such states, the repossession rates ranged from 0.01% in Oregon to 13.06% in Tennessee.[229] On the second issue of borrowers losing their means of getting to work, a study of over 450 borrowers found that only 14.86% of borrowers had no other means of getting to work.[230] Thus, while both repossession and losing one's transportation to work are theoretically worrisome, empirical evidence suggests neither are the commonplace occurrences that the CFPB envisions.

Alternatively, the CFPB worries that consumers might be prioritizing payments for title loans over payments for essential goods and services. The proposal explains:

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222. Hawkins, *supra* note 12, at 544–45.
223. *Id.* at 551–52.
224. *Id.* at 546.
225. *Id.* at 551.
226. *Id.* at 552 ("Thus, it appears that most loans are not, under the technical definition of the word, oversecured.").
227. OUTLINE, *supra* note 194, at 3 ("The Bureau is concerned that unaffordable loans cause substantial injury to consumers by spurring extended sequences of reborrowing, bank account fees and closures, vehicle repossessions, collections, and various other harms.").
228. *Id.* at 3–4.
229. Hawkins, *supra* note 12, at 565 tbl.2.
230. Fritzdixon, Hawkins & Skiba, *supra* note 25, at 1038 & tbl.8.

> Fear of repossession may cause the consumer to prioritize payment on that loan over fulfilling her other financial obligations, helping to ensure that lenders will be repaid even if the consumer lacks the ability to repay the loan while also meeting her other financial obligations. These practices, in conjunction with a loan payment that exceeds a consumer's ability to repay, leave the consumer unable to meet her other financial obligations and living expenses.[231]

The CFPB certainly might be right about this concern, but I know of no empirical evidence supporting it. In a very small survey, I asked consumers if they would prioritize making their title loan payment over paying for other essential purchases or payments if they did not have enough money. Only 5.71% (n=2) stated they would pay their title loan before their rent or mortgage payment, 5.71% (n=2) before their utilities, 11.43% (n=4) before their groceries, and 11.43% (n=4) before their medical bills.[232] The study was so small that it is hardly evidence that borrowers will not prioritize servicing their title loans, but no other research has addressed the issue. Thus, the CFPB's apprehension is purely theoretical.

In summary, the CFPB has done extensive, independent research on payday loans, but it has not performed such research on title loans. The two are not the same. The borrowers are different,[233] the loan durations are different,[234] the consequences of default are different,[235] the interest rates are different,[236] the underwriting requirements are different,[237] and the state of empirical research is different.[238] Even if the CFPB's research has

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231. OUTLINE, *supra* note 194, at 9; *see also id.* at 22 ("With vehicle title loans, the lender's security interest in the consumer's vehicle provides a strong incentive for repayment (as well as providing the lender with a security interest in property with resale value). This security interest may induce a consumer to repeatedly reborrow or to default on other obligations in order to avoid putting her means of transportation at risk.").

232. Hawkins, *supra* note 12, at 568 tbl.3.

233. *See, e.g.*, Hawkins, *supra* note 210, at 325 tbl.6 (depicting differences in the number of different racial groups' uses of payday and title lending).

234. Payday loans are typically for less than two weeks. *See* Martin, *supra* note 51, at 564. However, title loans are most often for one month. *See* Fritzdixon, Hawkins & Skiba, *supra* note 25, at 1014–15.

235. Hawkins, *supra* note 1, at 1388 ("Two important characteristics set pawn and auto title loans apart from other sources of credit—the amounts of the loans are usually quite small and customers have an escape hatch if they cannot pay off the loan.").

236. Hawkins, *supra* note 210, at 318.

237. *See* OUTLINE, *supra* note 194, at 3–4.

238. *See supra* Subpart IV.A.2.a. For instance, as one crude measurement, a search of "payday-loans" on Westlaw on October 19, 2015 yielded 6,437 documents in secondary sources, whereas a search of "title-loans" generated less than half that number—3,061 results.

justified its involvement in the payday lending market, that does not mean that its research findings translate to title lending.

b. The Proposed Regulations Against the Backdrop of Advertisements

The proposed regulations reflect concern about one important behavioral market failure identified by the analysis of advertisements in this Article—consumers' misperception of the true price of loans because of their failure to either know the true cost or accurately estimate their own use of the product. The CFPB explains that many borrowers renew their loans "with successive finance charges eventually eclipsing the original loan amount, before they are able to retire their debt."[239] As I discuss in Part III, a significant number of firms advertise teaser rates that prey on borrowers' overoptimism, and virtually no companies attempt to provide exact pricing information in their advertisements.[240] In the final analysis, price is the fundamental justification for regulating payday and title lending.[241]

The issue is whether the CFPB's proposed regulations fix this behavioral market failure. On the one hand, by preventing lenders from making loans to borrowers who have renewed loans twice in the past, the proposed regulations would stop repeated rollovers that rack up fees. The proposed regulations do not, however, help people make better decisions about the lowest-cost alternative. As I documented, storefront advertising does not present information about the cost of payday and title loans. Regulating underwriting decisions will not make price information more readily available for consumers as they consider different lenders. Moreover, the ability-to-repay rules do not actually lower the APR on payday and title loans. The CFPB's ability to fix the high cost of high-cost loans is severely limited because Dodd-Frank specifically forbids the CFPB from placing a usury limit on loans.[242] The ability-to-repay rules attempt to circumvent this restriction by making lending to high-risk borrowers impossible through more strenuous underwriting requirements.[243] The success of this approach, however, may be

239. OUTLINE, *supra* note 194, at 9.

240. *See supra* Part III.

241. *See generally* Hawkins, *supra* note 12 (arguing that price provides a legitimate justification for regulating title lending).

242. 12 U.S.C. § 5517(o) (2012) ("No provision of this title shall be construed as conferring authority on the Bureau to establish a usury limit applicable to an extension of credit offered or made by a covered person to a consumer, unless explicitly authorized by law." (footnote omitted)).

243. Mary C. Nicoletta, Note, *Proposed Legal Constraints on Private Student Lenders*, 68 VAND. L. REV. 225, 251 (2015) (describing the CFPB's mortgage rule requiring proof of an ability to repay as "a veiled usury law" because "the rule functionally caps both the total amount borrowed and interest rates on an individual basis").

limited since the rules will also likely push smaller lenders out of these markets, leaving larger lenders who typically charge higher rates to borrowers.[244] A more straightforward approach to fixing misperceptions about pricing would be to require that firms accurately advertise their prices. In the next Subpart, I outline my suggested regulation to correct this behavioral market failure.

My study of advertising indicates that the CFPB's proposed regulations miss the mark in their focus on loan size as a requirement for a loan being within the safe harbor provisions. In order for a loan to qualify as being exempt from a determination that the borrower has an ability to repay, the loan must be, among other things, for less than $500.[245] The fact that so many lenders advertise the high loan sizes they offer indicates that firms believe borrowers value high loan amounts.[246] My analysis of these advertisements demonstrates that borrowers' interest in loan size is rational.[247] Thus, by restricting loan size, the CFPB's proposal restricts an important characteristic that many borrowers rationally value. Instead of attempting to indirectly affect loan pricing and to change other attributes of these loans, the next Subpart outlines a regulatory proposal in line with the analysis performed in this Article.

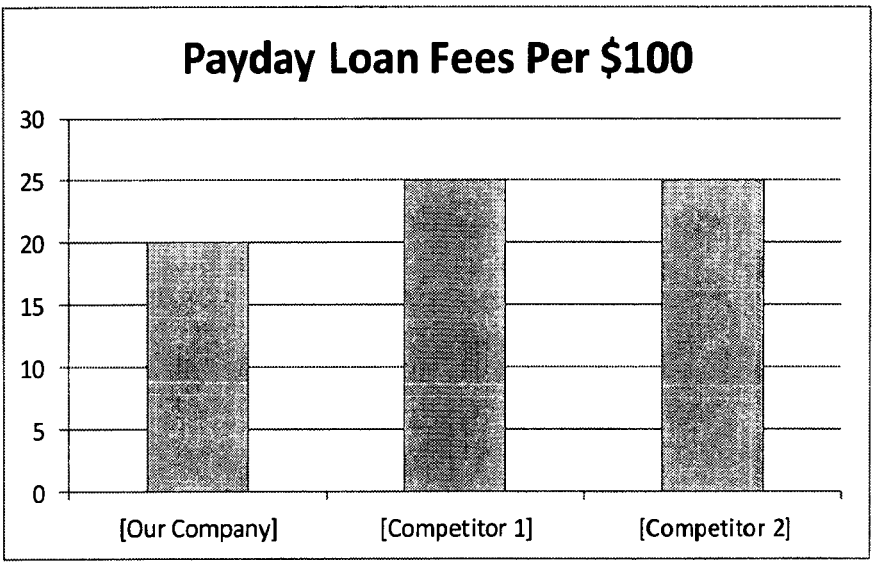
B. Toward Regulation Informed by Advertisements: Mandating that Firms Advertise Price

With information gleaned from advertisements, researchers and policymakers can generate policy responses to observed market failures in payday and title lending markets. Given the utter failure of payday and title lenders to provide accurate pricing information in advertising, policymakers should conclude that laws or regulations should require that payday and title lending companies provide exact prices in all advertisements. Texas law requires that lenders post exact price information on their websites.[248] The result is that unlike storefronts, where no advertisement provided accurate exact prices, over 85% of websites stated the exact price to take out a loan. Even with high levels of noncompliance (roughly 15% of lenders), this regulatory intervention has dramatically increased the informative content in website advertising. Payday and title lending websites in Texas strongly outperform other advertising in including price information. Recall that only 9.71% of television and 25.61% of magazine advertisements had this information in one analysis.[249] The ultimate result for consumers in this market is that

244. Hawkins, *supra* note 210, at 303.
245. OUTLINE, *supra* note 194, at 17.
246. *See* Study Documents *supra* note 65.
247. *See* Study Documents *supra* note 65.
248. TEX. FIN. CODE ANN. § 393.222(a)(1) (West Supp. IV 2014).
249. Abernethy & Franke, *supra* note 123, at 9 tbl.1.

there is substantial price differentiation in Texas, with payday loan interest rates ranging from 277% APR to 891% APR in my sample. This price differentiation is unique to Texas. In other states, lenders charge the highest rate allowed by law.[250]

As an alternative mechanism for increasing advertisements about price, Congress could exempt payday and title loans from the requirement that all prices be presented as annual percentage rates.[251] One payday lender in Houston had a chart on its website that engaged in explicit price comparison. It was similar to the one I created below:[252]



This graph is illegal under the Truth in Lending Act,[253] but it engages in the exact type of price comparisons that policymakers want in advertisements.

Requiring lenders to use APRs may discourage advertising price because the interest rate appears very high when measured annually, despite the fact that the loan is not generally kept out for anywhere near a year.[254] On the other hand, lenders might be

250. *See, e.g.*, *Fact Sheet: How State Rate Limits Affect Payday Loan Prices*, THE PEW CHARITABLE TRS. (Apr. 10, 2014), http://www.pewtrusts.org/en/research-and-analysis/fact-sheets/2014/04/10/how-state-rate-limits-affect-payday-loan-prices ("The four largest payday lenders in the United States charge similar prices within a given state, with rates set at or near the maximum allowed by law. But in states with higher or no interest rate limits, the same companies charge comparable borrowers far more for essentially the same small-loan product.").

251. 15 U.S.C. § 1664(d)(3) (2012).

252. Study Documents, *supra* note 65, Website Observation 28.

253. 15 U.S.C. § 1664(d).

254. Durkin & Elliehausen, *supra* note 41, at 4.

incentivized to post a fixed-dollar amount to engage in price competition if the law permitted them to do so. Research has also shown that payday lending consumers consider the cost of the transaction in terms of finance charges and not APR, so abandoning APR might enable firms and consumers to connect with more accurate price information as well.[255]

Unlike the CFPB's focus on ability to repay, these two suggestions are aimed at the fundamental problem of payday loans—the high costs. The CFPB cannot enact usury laws to limit interest rates, but nothing prevents the CFPB from requiring firms to present pricing information to consumers.

CONCLUSION

This Article uses advertising in payday and title lending markets to establish ways in which consumers are likely making systematic mistakes as they evaluate these loan products. Based on a study of advertisements in Texas, I conclude that there is evidence that borrowers are overly optimistic and impatient as they consider whether and where to take out payday and title loans. Moreover, consumers are insufficiently concerned with obtaining accurate price information. One policy reform aimed at correcting this final market failure is to require that companies advertise prices for their loans.

Using advertisements to diagnose behavioral market failure, this Article offers new evidence on whether consumers in the payday and title lending markets are rational and provides insight into how to effectively correct consumer mistakes.

255. *Id.* at 19.