Taskforce on Federal Consumer Financial Law

Draft : **Competition and Financial Consumer Protection**
And appendices
Dodd-Frank Act and Enumerated Statutes on Competition /
History of Competition and Credit

Commented [VF(1]: Task Force Staff:
Here are general overall comments for this chapter:
- Check the tone for [mis]alignment with the Director's messages and priorities
- Provide fact-based support rather than opinion/personal commentary
- Add citations when making otherwise unsubstantiated assertions
- Consider striking text or footnotes that rely on sources that are from "interested" parties, or which are not peer-reviewed academics articles, from government publications, etc.
- Recognition of historical references (such as history and impact of slavery, federal government role in redlining, etc).
- Clarify where a statement is opinion as compared to fact.
- Include references to the Bureau's UDAAP enforcement and supervisory efforts; our unfairness work strikes us as being particularly relevant to a discussion of competition.

[redacted]

Introduction

In the United States, consumers acquire goods and services in markets. Most familiar are retail markets, where consumers shop for the necessities and comforts of life, from groceries to garments to housing to health care. Less visible are intermediate markets through which the streams of commerce flow as natural resources and human talent are transformed into finished products and services. Every exchange along the way holds the potential to ~~increases value, but it also holds the potential to~~ add~~s~~ a cost to that commerce. The availability and affordability of everything that consumers buy depends not just on the expense of making and improving it, but also on the efficiency and effective regulation of every market through which it passes.

Efficient markets need not look alike. Exchanges as different as weekend farmers' markets, multilevel shopping malls, and worldwide electronic exchanges can all be effective means of matching buyers and sellers. Indeed, the variety of shapes, sizes, and dynamics that markets assume reflects adaptability to the preferences of their participants, another indicator of efficiency. For all the differences, however, efficient markets do have two characteristics in common. ~~The Efficient Market Hypothesis (EMH) posits that i~~In every efficient market, one can expect to find ~~there is~~ competition and credit. In the field of economics, that expectation is part of the Efficient Market Hypothesis (EMH).[1]

~~Intuition and experience agree with economic theory~~EMH ~~adherents believe~~posits that markets work best for buyers when they can choose among competing sellers. The same holds true for sellers seeking buyers. A market does not work for a trader who cannot find anyone willing to transact business at any price. Not much better is the market where buyers find just one vendor or sellers encounter only a single customer. A market cannot even begin to work for people who have value to exchange but are excluded from participating. Marginalized groups gain nothing from markets that are not open to them. These situations are examples of market failures. It is ~~only~~ ~~often, though not always true,~~ ~~may be that~~ when a market attracts buyers and sellers in sufficient numbers to compete for the patronage of one another, and it is open to all who are willing and able to trade, that it is most likely to ~~will~~ reward them with ~~hh~~fair value in exchange for what they

~~[1] While this may hold true for some markets, there are many exceptions.~~

bring to trade. ~~One notable exception to this theory however is the inclusion of marginalized groups in the free market, for example, the inclusion of racial and ethnic minorities applying for consumer credit.~~

For consumers, access to fair and high quality credit is the key to the marketplace. ~~They~~ Consumers rarely come prepared to barter goods or services in exchange for something they want to buy. Instead, they come with financial instruments that merchants will accept. Those instruments are a form of credit. Without personal credit or currency (the credit of a separate trusted source) that vendors will accept, consumers cannot obtain the goods and services that the most efficient and competitive markets might offer.

Financial services – the means by which people spend, save, and borrow – reach consumers through markets as well, and the same factors of efficiency and failure apply. A financial market is not working if people who can afford financial instruments cannot acquire them, because the market is closed to them or has failed - for~~. For~~ example, when minority borrowers struggle to access credit for which they are qualified. Nor is it working when providers of financial services can escape the discipline of competition and charge premiums for the services that are available. Expensive, ~~and~~ ineffective, or discriminatory financial instruments extract a toll on every transaction in which they are involved.

Consumer protection can enhance the performance of markets and the quality of the goods and services exchanged in them. Deception, ~~and~~ abuse, and discrimination are antithetical to efficient markets, all of which rely on voluntary and informed exchange to produce the best outcomes. Law enforcement that suppresses misappropriation, extortion, discrimination, and other acts of malfeasance therefore improves market performance. It is the goal of consumer protection to prevent this behavior, and to remedy the injuries that occur when such practices ~~harm consumers~~occur.

Consumer protection can also reduce the impediments to market performance that stem from mistakes and confusion. Because uncertainties and misunderstandings can accompany transactions, especially those that span months or years, a well-functioning market relies on rules and procedures that deal with consumer understanding, ~~,~~unanticipated mistakes, economic distress, and contractual breaches in an efficient manner. Such rules and procedures are an important component of effective consumer protection.

With potential hazards coming in many forms from many sources, no single measure can protect consumers from them all. Likewise, no single solution can remedy every injury that consumers may suffer. Accordingly, a robust regime of consumer protection deploys a combination of approaches and measures. The Dodd-Frank Act gave the Bureau a full complement of consumer protection tools, and these are described in other chapters. This chapter concerns a tool that is often overlooked in discussions of consumer protection and the Bureau's powers – the preservation of competition.

Before the Dodd-Frank Act laid out the powers of the Bureau, the statute described the purpose of the agency and objectives Congress intended it to pursue. A single sentence stated the purpose:

> The Bureau shall seek to implement and, where applicable, enforce Federal consumer financial law consistently for the purpose of ensuring that all consumers have access to markets for consumer financial products and services and that markets for consumer financial products and services are fair, transparent, and competitive.[2]

Elaborating on that purpose is a set of Objectives, each of which, implicitly or explicitly, gives a role to competition:

> The Bureau is authorized to exercise its authorities under Federal consumer financial law for the purposes of ensuring that, with respect to consumer financial products and services—
>
> **(1)** consumers are provided with timely and understandable information to make responsible decisions about financial transactions;
>
> **(2)** consumers are protected from unfair, deceptive, or abusive acts and practices and from discrimination;
>
> **(3)** outdated, unnecessary, or unduly burdensome regulations are regularly identified and addressed in order to reduce unwarranted regulatory burdens;
>
> **(4)** Federal consumer financial law is enforced consistently, without regard to the status of a person as a depository institution, in order to promote fair competition; and
>
> **(5)** markets for consumer financial products and services operate transparently and efficiently to facilitate access and innovation.[3]

These objectives rest on the proposition made explicit in the purpose of the Bureau – that competition is ~~fundamental toone~~ a principle component of consumer protection~~.~~ along with fairness and transparency. The first ~~two~~ objectives is~~are~~ to ensure the flow of information that enables consumers to choose wisely among competing alternatives. The second objective is to use the Bureau's regulatory powers to protect consumers from unfair, deceptive or abusive acts and practices, ~~and~~ to protect consumers from discrimination, ~~which is defined in the Dodd Frank Act~~ and to provide fair, equitable, and

[2] 2 U.S. Code § 5511 (a).
[3] 12 U.S.C. § 5511(b).

~~ensure fair and~~ non-discriminatory access to credit for consumers and communities. The third objective, reducing unwarranted regulatory burdens, removes unnecessary costs, which can impede competition from smaller companies and raise prices beyond consumers' reach. With respect to the fourth objective, the Congressional call for enforcement that gives no advantage to any sector could not be a clearer mandate for fair competition among financial service providers. As for the fifth, the goal of preserving markets that facilitate access and innovation refers to the most recognized aspect of effective competition – expanding quantities and access, lowering costs of goods and services. This objective also highlights one of the most dynamic aspects of competition in the financial sector. Major advances in the history of consumer finance have been marked by ~~certain~~ innovations that made credit more convenient, more accessible, and less expensive to many.

In emphasizing the importance of competition to the mission of financial consumer protection, Congress drew upon a consensus that has enlightened trade regulation for centuries. The consensus includes a large body of academic research conducted in the 1970s, a century of Federal economic policy, and a ~~comprehensive assessment of consumer finance~~report drafted by a commission Congress created fifty years ago, the National Commission on Consumer Finance (NCCF)[4]. After two years of research into ~~virtually every~~somes aspect of consumer finance, the Commission ~~concluded~~ reported in its introductory letter that "a truly competitive consumer credit market, with adequate disclosure of relevant facts to an informed consuming public, together with legislation and regulation to eliminate excesses, will foster economic growth and serve to optimize benefits to the consumer."[5] These benefits ~~did~~ need not come at the expense of consumer protections. To the contrary, explained the Commission, "Painful as competition may be for the participants, it provides the ultimate protection for most consumers~~. . . . There are problem areas where competition under current laws, is ineffective. In particular, the problem of low income consumers living in low income areas requires special attention..~~"[6] In the consumer credit marketplace, with the information mandated by the Truth in Lending Act, NCCF favored competition as the "best means to assure that most consumers pay a fair price for their credit services." Competition under current law ineffective in some areas, the NCCF concluded, particularly in addressing the problems of low-income consumers living in low income areas. That required special attention.

Commented [NA(4R3]: Hi Bill – I just got internet access back. I've updated the document to this point to match the progress you made on the other.

Commented [VF(3]: To clarify that some innovations have not made credit more convenient or accessible for certain consumer segments.

Commented [VF(5]: This letter serves as the introduction to the NCCF report.

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[4] 220.15.4 Records of the National Commission on Consumer Finance (History: Authorized by the Consumer Credit Protection Act (82 Stat. 164), May 29, 1968, to evaluate the consumer finance industry, in particular consumer credit arrangements. Activated by Presidential announcement, November 7, 1969, with first meeting held December 11, 1969. Chaired by law professor Robert Braucher, November 7, ~~1~~1969-January 21, 1971; and attorney Ira M. Millstein, January 22, 1971-December 31, 1972. Terminated upon submission of final report, December 31, 1972, published as Consumer Credit in the United States.) *See* https://www.archives.gov/research/guide-fed-records/groups/220.html.

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[5] Ira M. ~~M~~Milstein, Letter to the President and Congress, December 31, 1972.

[6] REPORT OF THE NATIONAL COMMISSION ON CONSUMER FINANCE, CONSUMER CREDIT IN THE UNITED STATES, 214 (Dec. 1972).

"Accordingly, the Commission urges as its first choice the adoption of state laws designed both to assure fair treatment of all consumers and to give all credit grantors equal opportunity to compete. Failing this, the Commission's second choice is to urge Federal legislation to accomplish this goal."[7]

~~The Report supported its conclusion with the observations that competition enhances consumer welfare more effectively than any other influence on commercial behavior, and is "the best regulator of the consumer credit marketplace."[8] Accordingly,~~ Likewise, the Commission envisioned an important role for antitrust enforcement, which should be "particularly alert to the dominance of consumer credit markets by a few firms, by barriers to entry, and to restrictive arrangements in the credit industry."[9] Antitrust enforcement could not be expected, however, to remove competitive impediments that were anchored in regulation. The Commission therefore advocated the repeal of laws that fixed rates or ~~prohibited~~ restricted services that consumers could access in competitive markets, and it urged the removal of legal barriers segregated financial institutions into sectors and prevented lenders in one from serving borrowers in another.[10]

That competition is critical to consumer protection was neither novel nor controversial when the Commission espoused the idea in 1972. The best-selling economic textbook of the time (indeed of all time) was teaching the same lesson to college students and demonstrating how that lesson applied to credit markets.[11] Professor Paul Samuelson, who had won the Nobel Prize in Economics in 1970, explained in his text that year how competition can empower borrowers to obtain credit "at the cheapest possible terms" just as it allows shoppers to get the best prices from butchers.[12] He had made the same point to the Massachusetts legislature in 1969, when he testified on the proposed Uniform Consumer Credit Code:

> A great deal of practical experience has accumulated among our various states and from careful comparisons across countries, to show that the consumer is most improved by effective…competition so that a range of alternatives are open to each consumer and so that each lender knows that his monopoly power to exploit the needy borrower is severely limited by these alternative opportunities. The

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[7] *Id.* at 4.
~~[8] Id. at 4~~
[9] Id. at 3
[10] Id.
[11] PAUL SAMUELSON, ECONOMICS, 8th Ed. 578-79 (1970). The remarkable popularity of the textbook is reported in Elzinga, Kenneth G., *The Eleven Principles of Economics*, SOUTHERN ECONOMIC JOURNAL, 58:4, 861–79 (1992).
[12] Id., at 579.

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Commented [VF(9]: Recommend NOT citing to this author in a Bureau publication, given his overt gender bias.

Worth noting this about the author:

In the new edition there will be the customary questions at chapter's end, but many extra credit questions as well for honor students. "The girls at Sweet Briar won't be able to do them," said the author, "but honor students at Princeton will."

[HYPERLINK "https://www.nytimes.com/1970/02/05/archives/economics-samuelson-8th-ed.html"]

Commented [MW(10R9]: Good point, of which I was unaware. Looking into the incident, I see Samuelson's apology and his contributions awareness of bias. I don't think he should be persona non grata. See. Roger E. Backhouse & Béatrice Cherrier (2019): Paul Samuelson, gender bias and discrimination, The European Journal of the History of Economic Thought, DOI: 10.1080/09672567.2019.1632366
To link to this article: https://doi.org/10.1080/09672567.2019.1632366

Formatted: Font: Italic, Complex Script Font: Italic same principles have been found to prevail in the market for small loan finance as in the markets for the necessities of life.[13]

Like the NCCF, Samuelson did not expect competition to address all the problems of consumers and society. In a nod to acknowledging the areas where pure free market competition might be less effective, in his eighth edition of this textbook, ~~Samuelson~~ he added two additional chapters: 1) "Economic Inequality: Poverty, Affluence, and the Quality of Life" and 2) "Economic problems of Race and the Cities."[14]

Samuelson was far from the first economist to recognize the importance of competition, its role in protecting consumers, and its application to finance. Similar observations can be found in the work of Adam Smith, often regarded as the original free market economist.[15] In a treatise he published in 1776, *The Wealth of Nations*, Smith observed that the market, like an "invisible hand," would direct sellers' self-interest to the service of buyers.[16] His prediction came with a critical caveat, however. The market had to be competitive for buyers to benefit from the invisible hand. Smith concluded that the best incentive to keep a seller honest and fair was the fear of losing customers to a competitor. That was the "real and effectual discipline" that "restrains his fraud and corrects his negligence."[17] And to Smith there was no question whether the principle applied to financial firms. Competition among banks, he said, "obliges all bankers to be more liberal in their dealings with their customers, lest their rivals should carry them away. In general, if any branch of trade, or any division of labor, be advantageous to the public, the freer and more general the competition, it will always be more so."[18]

By 1972, a consensus had formed among economists as to the circumstances that advance competition and the conditions that impede it. The Commission drew upon this consensus and applied the analytical framework to the observations and data from remote and then-recent history of credit markets. For the most part, the conditions that qualified as catalysts of competition and contributors to consumer welfare remain recognized as factors that contribute today.[19] By the same token, the obstacles identified as

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[13] Statements of Former Senator Paul Douglas and Professor Paul Samuelson on the Uniform Consumer Credit Code to the National Conference of Commissioners of Uniform State Laws, January 29, p. 8 (1969).

[14] Israel Shenker, *Book Review of 'Economics,' Samuelson*, 8th ed., New York Times, Feb. 5, 1970.

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[15] See SAMUELSON (1970), *supra* note 8, at 1. The coincidence of Smith's publication with another notable event in 1776, the Declaration of Independence, was not by chance, said Samuelson: "[P]olitical freedom from the tyranny of monarchy was closely related to the emancipation of free-market pricing from the interfering hand of state regulation."

[16] ADAM SMITH, WEALTH OF NATIONS, 14 (1776). Smith also recalled the butcher in explaining the working of a free market. In one of the most famous passages from the treatise, he wrote, "It is not from the benevolence of the butcher, the brewer, or the baker, that we expect our dinner, but from their regard to their own interest."

[17] Id., at 129.

[18] Id., at 313 (Smith also explained how competition encouraged prudence, and in a premonition of modern concerns about institutions too big to fail, hypothesized how competition could diminish the risk of financial system failures.)

[19] See, e.g. American Bar Association, *Antitrust Law Developments, 8th ed.* (2017) (surveying literature and cases).

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impediments to competition and costs to consumers have been found again and again in markets across the economy. Those circumstances and their effects – both favorable and unfavorable – will be the focus of this chapter.

Nothing in the fundamentals of financial markets suggests they would suffer from a lack of competition. The principal resources – financial and human capital, communication and information technology – are readily available and highly mobile. Financial intermediaries need offices, of course, but not the massive mines and factories of heavy industry to extract raw materials and process them into finished goods. Transportation costs are miniscule for both the inputs that the institutions acquire and the outputs they deliver; funds of any amount can move cheaply and easily to most of the population.

To be sure, financial intermediation – from the acquisition of capital to the delivery of services – requires efficient organizations, talented personnel, and sophisticated business models. Institutions with expertise~~,~~ and scale are more likely to succeed in obtaining capital at low costs and offering financial services on attractive terms.[20] Some services require national and global networks to be feasible and desirable, and some regions present challenges for the delivery of services. Above all, a reputation for integrity and reliability is a critical credential in financial affairs, and a history of honorable behavior confers credibility. Successful incumbents are likely to have advantages over newcomers.

But incumbents with advantages over newcomers are neither unique to financial services nor incompatible with competition. Companies can multiply and industries can grow even when economies of scale and venerable reputations give advantages to familiar firms. Nowhere has this been more evident than with consumer credit, which has seen a proliferation of new lenders and new products, aggregate growth, adaptation of market leaders, and decline or departure of companies that could not keep pace with the others. These are the hallmarks of competitive markets.

Notwithstanding propitious conditions and encouraging indications of competition in credit, the NCCF identified numerous problems that prevented financial markets from performing as effectively as a competitive market would be expected to do. As decribed below, ~~mong~~ the impediments ~~to competition~~included ~~were~~ various forms of restrictive licensing, limitations on services that companies could provide, geographical and sectorial barriers between institutions, and other conditions that made credit needlessly expensive to some and entirely unavailable to others. Some of the impediments were imbedded in regulation and legislation. Others stemmed from perceived anticompetitive behavior in the industry.

Commented [VF(13]: This is an opinion that does not acknowledge lack of access to technology, broadband, cell phone service in rural parts of the US; see FTC works to address broadband inadequacy.

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[20] A study performed for the Commission noted relatively modest scale economies for loan offices. CR 286, n.3. See Chapter 4 of this report for a discussion of economies of scale in finance.

These concerns warrant reexamination. If such conditions persist today, they could be thwarting or diminishing the forces that would otherwise have given consumers the benefits of better rates, greater access, and more services that robust competition can deliver.~~[21] Collectively, they could have imposed significant costs on consumers.~~ The chapter will first review the Commission's findings and recommendations on the state of competition in consumer finance and consider some of the costs that competition could have averted. Then the chapter describes the evolution of credit markets since the Commission's report and assesses trends that help explain the competitive circumstances consumers face today in credit markets. In the course of the discussion, ~~Finally,~~ the chapter identifies measures that could improve the quality, quantity, and affordability of financial services available to consumers.

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Credit and Competition in the Post World War II Economy

Commented [FP(18]: Suggest adding discussion about the impact of discrimination on the functioning of markets. For example, it the noteworthy discrimination in FHA loans fueled inefficiencies including homeownership gaps that persist to this day.

The end of ~~the war~~ World War II and the revival of the consumer economy marked the period that occupies most of Commission's analysis of credit and competition. Defining the terms of that analysis, the Commission resorted to a familiar definition: "when the number of sellers is so large and entry is so easy that no seller has power over price," competition could be expected, but not guaranteed, to make credit affordable and available.[22] A competitive market could be expected to lower prices to the lowest level consistent with covering production costs and profitability just sufficient to bring capital into the industry. Credit availability was measured by "the degree to which creditors are willing to provide credit at the free market rate in a world without imperfections."[23] In other words, the Commission viewed competition to have the most potential to offer the lowest rates for consumers and achieve the greatest access to credit in a perfect world. The Report then assessed the state of that competition and whether it was delivering the expected results.

~~In most respects, the~~ The Commission found varying degrees of competition in consumer finance ~~to be working well~~ markets in the early 1970s. Interest rates appeared to respond to supply and demand, and consumers seeking credit generally could obtain it at market rates. But the Commission also found differences in access and variations in rates across

Commented [VF(19]: Fact or opinion? ECOA was enacted because credit was not accessible to large segments, including women

~~[21] Many of the conditions and controls have been the subject of lobbying, litigation, or legislation. Arguments for the conditions have ranged from appeals for safety and stability to complaints about unfair competition. Whatever the rationale, when competitors in a segment mount campaigns to insulate themselves from competition, it suggests that profits will flow to them if they prevail, and it is therefore worthwhile to assess whether those profits stem from diminished competition that imposes costs on consumers.~~

[22] Id. at 109.

[23] Id. at 112-13 (In an ideally competitive market, rates reach competitive equilibrium levels through a series of adjustments by suppliers of various credit offers to various risk classes of consumers.' These rates are high enough to cover costs and enable creditors to earn a normal return on invested capital. Creditors are willing to extend any amount of credit to qualified borrowers at such rates, and the situation can be characterized as one of full availability.)

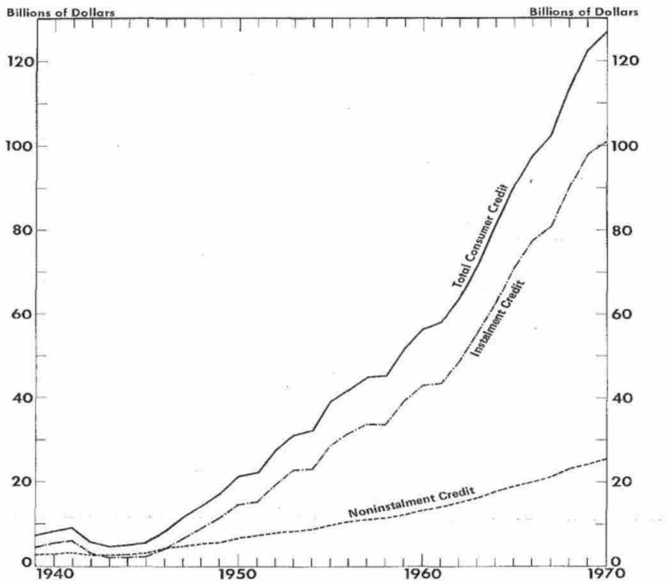
states and sectors. Depending on where consumers lived or borrowed, some paid higher rates and borrowed less, while others enjoyed lower rates and borrowed more – . ~~The~~ disparities that could not all be attributed to capital costs other fundamentals. More~~Howeo~~over, when credit was expensive and rare, it often coincided with indications of competitive shortcomings. ~~The Commission described what it perceived as the more significant successes and shortcomings.~~

National Trends

In a national overview of consumer credit, the Commission focused on different sectors of financial service providers. Some sectors had consolidated, some had disaggregated, and others had seen cycles of both. Overshadowing all the sectoral analysis was the dramatic growth in sources of consumer finance. A chart in the Report displayed the trends in consumer credit broken down by repayment methods, either "installment" or "noninstalment," the latter including single payment loans, nonrevolving credit, money owed to service providers, and similar debts, and the growth took a dramatic upward turn in 1945, as did the US economy that grew at its fastest sustained pace in a century between 1950 and 1973:[24]

[24] C.I. Jones Stanford GSB, *The Facts of Economic Growth,* in HANDBOOK OF MACROECONOMICS, Volume 2A Exhibit 2 -1, at 9 (2016), available at [HYPERLINK "http://dx.doi.org/10.1016/bs.hesmac.2016.03.002"], NBER, available at [HYPERLINK "http://web.stanford.edu/~chadj/facts.pdf"].

CONSUMER INSTALMENT AND NONINSTALMENT CREDIT OUTSTANDING, 1939-1970



Among the factors ~~Ff~~Fueling this growth were tens of thousands of potential competitors in the business of making loans to a population that was ~~consumers~~booming, urbanizing, and challenging the customs and restrictions that society had long imposed. Some 13,600 commercial banks held over $50 billion in consumer credit in 1970, more than any other segment and about 40 percent of the total outstanding in the United States.[25] Finance companies – about 3,700 in 1965, operating out of an estimated 13,000 to 14,000 offices – accounted for the second largest portion, with 30 percent of the consumer credit outstanding. Outnumbering both banks and finance companies were 23,650 credit unions, although their share of credit outstanding came in lower, at 12 percent in 1970. Probably more numerous than any other sources were retailers, who held about 14 percent of consumer credit outstanding as the 1960s ended, but a precise tally of their number was not available.[26] Outside these main categories, other lenders (such as savings and loan associations and mutual savings banks) amounted to about 1.5 percent of the credit outstanding.[27]

Commented [FP(20]: A suggested edit to account for other factors that may have contributed to this growth (e.g., Population growth? Women entering the workforce? Other drivers?).

[25] Id. at 8.
[26] Id. at 11
[27] Id.

Dollar volumes of the holdings of these sectors reflected the dramatic growth of installment credit outstanding – from under $15 billion to over $100 billion – over the two decades ending in 1970.[28] Banks and finance companies each held more than twice as much as all the institutions combined just twenty years earlier. Credit unions and retailers each held almost as much as the entire amount outstanding in 1950.

Exhibit 2-4 of the Commission's Report showed the volumes and shares of installment debt[29] by institutional sectors in 1950 and 1970.

Amounts outstanding
(Dollar amounts in millions)

	December, 1950		December, 1970	
	Amount	*Percent*	*Amount*	*Percent*
Commercial banks	$5,798	39.4	$41,895	41.4
Finance companies	5,315	36.1	31,123	30.8
Credit unions	590	4.0	12,500	12.4
Miscellaneous[a]	102	0.7	1,546	1.5
Retail outlets	2,898	19.7	14,097	13.9
Totals	$14,703	100.0	$101,161	100.0

[a]Miscellaneous lenders include savings and loan associations and mutual savings banks.
Details may not add to totals because of rounding.

Source: Board of Governors of the Federal Reserve System.

Aggregate growth bodes well for competition, as it is easier for new companies to enter and small rivals to thrive in a market that is expanding. Customers in a market for the first time – like the early automobile buyers choosing between Ford and GM – are less likely to have developed loyalty to an established firm. And entry itself can accelerate the expansion of a market, as new companies and smaller rivals hustle to establish themselves and grow their businesses.

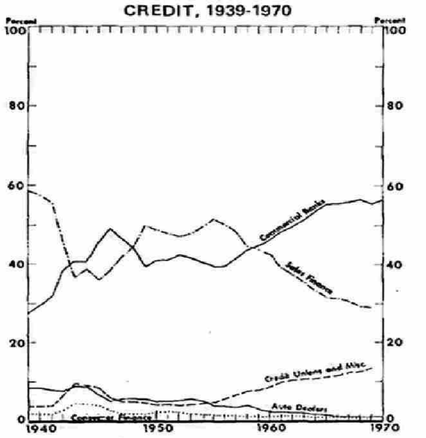
One indicator of competition is the volatility of market shares of the sellers in a market, as credit unions, finance companies, commercial banks, and Morris Plan Banks had demonstrated before the War. Changing shares can reflect rivalry among firms already within a market, entry of new firms into the market, and innovation that disrupts historic patterns. When established firms charge more than necessary to cover the costs of providing the goods and services they sell, the resulting profits invite entry by others. Inferior quality, untapped innovation, and poor service are other signals that alert existing and potential competitors to the prospect of ~~extraordinary~~ rewards for anyone who can

[28] See Table 2-1 in CICO Chapter 2 for a longer series.
[29] NCCF *supra* note 64 at 11.

improve upon the status quo. New entrants and opportunistic rivals empower consumers to discipline companies who do not perform. Such discipline can manifest itself in the movement of consumers from one seller to another, in the movement of companies to into and out of a market, and in the revitalization of underperforming incumbents. In markets where consumers can shift their allegiance, market power is unlikely to persist for long, if it arises at all.

The Commission tracked shares of the institutional sectors that held consumer credit in the decades ending in 1970. At first glance, shares appeared relatively stable. Banks, with 31 percent in of installment credit 1970, had added two percentage points to their 1950 share of 29 percent. Finance companies and retailers lost about five and six points from their 1950 shares of 36 percent and 20 percent, respectively, while credit unions added eight points, impressive growth on a percentage basis, given the 4 percent that the sector held at the beginning of the period. Still, credit unions remained in fourth place among the four main categories of consumer lenders on a national basis.

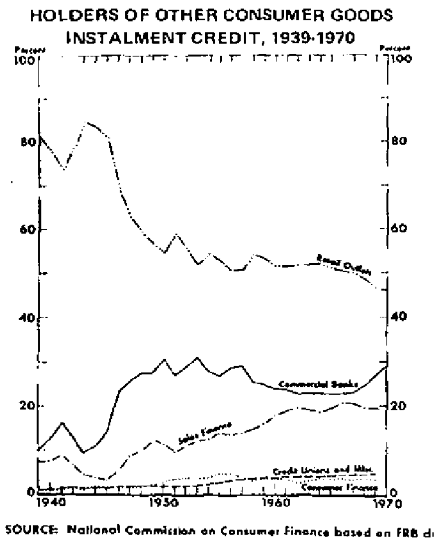
HOLDERS OF AUTOMOBILE INSTALMENT CREDIT, 1939-1970

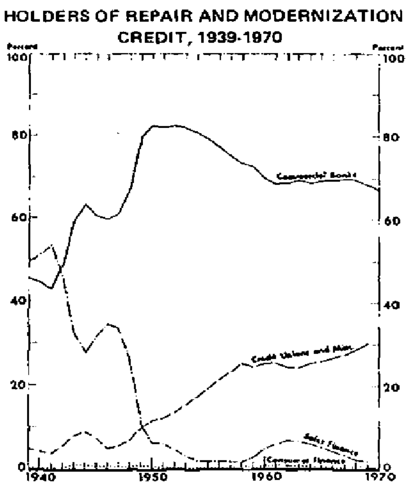


The picture changes dramatically when these sectors are examined more closely. In loans for automobiles, home appliances, and home improvement – rapidly growing industries in the post-war economy – institutions gained and lost shares to an extent that belied the seeming stability of their positions at the beginning and end of the period. For example, sales finance companies (many affiliated with automobile industry) dominated lending for vehicles in 1940, with almost 60 percent of the credit outstanding, twice the share of commercial banks.[30] The lead did not last long. In just a few years, banks bypassed finance companies and were making about half the overall lending for autos in the late forties. Finance companies recovered just as quickly, overtaking banks and maintaining the lead source of auto loans for most of the fifties. But as the sixties loomed, banks once again had resumed their growth, finishing the decade with almost twice the share of their chief rivals. By 1970, in a much larger market, banks held almost 60 percent of the auto installment credit, twice as much as the finance companies. It was also in the late fifties and sixties that credit unions grew steadily. Over 30% of their loans in 1971, amounting to more than $3 billion, financed auto purchases.[31] Meanwhile, the small share attributable to auto dealers nearly disappeared.

[30] NCCF (1972), *supra* note 64, Exhibit 2-5 of the Commission's report illustrated these shifts.
[31] NCCF (1972), *supra* note 6, at 12.

In the market where consumers sought to finance expensive purchases of appliances, furniture and other items at retail stores, the retailers themselves began the period with a seemingly commanding lead over the other sources of credit, only to take a precipitous fall. In the early forties, retailers held more than 80 percent of installment credit in this category. By 1970, their share had dropped below 50 percent. Commercial banks and sales finance companies more than doubled their shares over the same period, reaching about 25 percent and 20 percent, respectively.[32]





In one category of credit the segment leader virtually disappeared. Sales finance companies held half the outstanding credit for modernization and repair in the early 1940s. Banks were a close second, with credit unions far behind. By 1970, sales finance companies' share was approaching zero. Banks and credit unions each had added 25 points to their 1940 shares and finished the period with almost all the loans for these home improvement projects. Credit unions grew six-fold, from about five percent to 30 percent.[33]

With different types of institutions vying for the same types of loans, and sectors

[32] Id.
[33] Id.

taking substantial shares from other sectors, competition was obviously crossing institutional lines. Inside the sectors, the forces the firms faced were likely more turbulent still. New entrants would have posed constant threats to established institutions. According to NCUA, federal credit unions numbered nearly 6,000 in 1952.[34] The Commission tallied over 23,000 (likely state and federal) in 1972.[35] Between 1950 and 1970, banks added roughly 20,000 branches. Bank credit cards were growing even more rapidly in 1970. At the end of 1967, 390 banks reported some $800 million in credit-card debt outstanding.[36] Three years later over 1,200 banks, still a minority, reported $3.8 billion. Consumers were flocking to new products, new companies, and new offices. Incumbents could not afford to be complacent if they wanted to keep account holders from taking their business elsewhere.

Given the rapid expansion of credit over this period, shrinking shares still may have signified growth, albeit slower growth, but some sectors declined absolutely despite the expansion. Consumers, in numbers large enough to double or decimate sectors in the course of a decade or two, were rewarding companies that offered attractive terms and penalizing those who compared poorly. Later, this chapter describes how the ongoing rivalry among existing lenders and the entry of new sources of consumer credit continued to produce dramatic changes in the nature and structure of the sector since the Commission's report.

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Differences Among Institutions and States

If national numerosity alone determined competition, then the thousands of credit sources and their churning market shares might indicate that the balance of power in these markets favored consumers, not lenders. But national trends do not reflect the conditions an individual borrower might face. The markets for most consumer financial services were local or regional in the decades the Commission studied. Retailers offering attractive charge accounts in ~~h~~Pittsburg or banks with low interest rates in Philadelphia were unlikely to help consumers in Chicago.[37] By the same token, consumers shopping for cars anywhere would have found credit cards and home improvement loans to be poor substitutes for auto loans. To be sure, a customer might have been able to buy an appliance or roof repair on credit in order to set aside cash for a car, but such substitution is less convenient than choosing among competing auto lenders. For reasons such as

[34] *See*, *Historical Timeline,* NATIONAL CREDIT UNION ASSOCIATION, available at [HYPERLINK "https://www.ncua.gov/about-ncua/historical-timeline"]. Those entrants either brought new customers to consumer finance or took business from other credit unions or financial institutions. Most likely the newcomers did both.
[35] NCCF (1972), *supra* note 4, at 8.
[36] Id. at 12.
[37] Even commercial customers tended to bank locally, as the Supreme Court observed in an antitrust case that had found New York to be in a different banking market from Philadelphia in 1963. United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963)

these, nationwide tallies of financial providers, aggregate shares of debt outstanding, and may not reveal the vigor of competition or the alternatives available when customers are looking for credit.

The Commission, recognizing that the relevant competition occurred in geographic markets smaller than the entire United States and in product markets narrower than all consumer credit, focused on differences among cities and states, and within sectors, in its analysis of concentration and performance.[38] Geography was typically broken down by states. Lines of business were defined by categories of credit – including automobile loans, retail installment credit, and installment credit for other consumer goods (or OCG) – and comparisons of access and rates in different states. For each category, the Commission assessed quantitative and qualitative evidence bearing on competition. The quantitative factors included structural characteristics – primarily the numerosity and concentration of lenders. Among the qualitative factors were conditions allowing or impeding entry into credit markets, caps on interest rates, and business practices that could restrict competition. These circumstances were checked for potential effects on rates of interest and availability of loans.

Automobiles – The Commission's cross-sectional analysis of lending in different states found both evidence of competition and indications of market power. In automobile loans, for example, "quantities of credit extended vary inversely with market power" (measured by market concentration of banks).[39] Also evident was a predictable corollary of lower quantities: where quantities fell, rates rose. The analysis revealed significant correlations between bank concentration and interest rates that car buyers paid across a broad spectrum of states. A comparison of states at the high and low ends of the spectrum exposed the potential costs of the disparities. Consumers who lived in states where banks were fewer ~~with~~ (i.e. more concentrated) ~~banks~~ paid an average premium of about 70 basis points, and they paid this premium whether they borrowed from banks or borrowed from dealers who then sold the loans to the banks.[40]

The difference in interest rates coincided with larger differences in the behavior of borrowers. A significant segment of consumers paid another premium when they took out auto loans in concentrated states, because when banks made fewer loans, dealers filled the gap. In less concentrated states, banks were the leading source of loans, by a wide margin. Direct bank loans accounted for 42 percent of financed sales, almost doubling the 24 percent of the sales financed by dealers (who then sold the loans to banks or finance companies). Where banks were more concentrated, the shares reversed; sales financed by dealers (and indirectly financed by banks) outnumbered sales directly financed by the banks themselves. Dealers extended 37 percent of bank-financed loans, while banks

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[38] See, e.g. NCCF (1972), *supra* note 6, at 138.

[39] *Id* at 112 ~~NCCF (1972), *supra* note 4, at 112~~ (In addition, in "all but a few states, rate ceilings are inconsequential as a determinant of the market rate.")

[40] ~~*NCCF (1972), supra note 4*~~*Id.*~~,~~ at 122.

handled 23 percent directly. In other words, dealers' share of bank-backed financing grew by half, while direct bank lending dropped by almost the same proportion, in concentrated states. For consumers, the shift to dealer financing may have had a greater impact than the rise of bank rates in concentrated states, since dealers charged APRs about two points above banks' direct rates across all states.

The practical significance to consumers of 70 basis points ~~or~~ and 2.7 percentage points can be illustrated by considering the effects of those premiums on total payments for a typical 1970 auto loan in today's dollars. An increase of 70 basis points – the direct-loan premium that Commission attributed to market power – would cost the consumer an extra $200 over three years in 2020 dollars for the median loan.[41] An additional 2.7 percentage points – the difference between rates paid by direct borrowers in competitive states and indirect borrowers in concentrated states – would generate extra interest payments of $900 in inflation-adjusted dollars over the life of a three year loan.[42]

It is conceivable, of course, that the consumers who borrowed from dealers would not have qualified for average bank rates, and that some consumers probably preferred to pay for the convenience of borrowing at the dealer. But such explanations do not explain such wide disparities in bank shares and dealer shares of credit extended across states. There is no reason to expect borrowers seeking more convenience or presenting greater risk would cluster in the states where fewer banks charged higher rates.

The Commission cautioned that other factors may have confounded the results.[43] ~~Today, for example, we know that women and minority consumers are often charged rates up to XX basis points higher than white men.~~ For example, some of the low-concentration states had lower statutory rate ceilings, high-concentration states often allowed branch banking, and higher costs may have explained some of the interest-rate variations. Thus, even though the reported correlations between concentration of banks and the borrowing patterns were statistically significant, the Commission noted that concentration "does not inevitably result in anticompetitive behavior, nor does branch banking inevitably result in high concentration."[44]

Second, the concentration levels the Commission observed were relatively low, even in the states that fell into the highly concentrated category. In those states, the four largest

Commented [SS(25]: Not sure if you used basis points or percentage to calculate differences below. If used basis points then need to redo the calculations.

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[41] The premium calculation assumes a loan of $3,000 in 1970 amortized over three years. Adjusted for inflation, $3,000 in 1970 is $20,000 in 2020. The median auto loan in 1971 was $3048, with a maturity of 34.5 months [NCCFR at 15; CPI Inflation Calculator, [HYPERLINK "https://www.in2013dollars.com/us/inflation/1970?amount=3000"].]
[42] The calculation assumes a $3,000 loan amortized over three years in 1970.
[43] NCCF (1972*), supra* note 64, at 122-23.
[44] Id. at 123. (Developments described later in this chapter reveal that the Commission's concern about branch banking was misplaced.)

banks on average accounted for 64 percent of the money lent to finance automobile purchases. Thus, more than a third of the loans were made by at least three other banks, and likely more.[45] ~~Intuition suggests that seven or more competitors would be enough to engage in effective competition.~~ Academic research and antitrust enforcement generally agree.[46]

Third, as the Commission observed, concentration alone does not confer market power, if smaller competitors and new entrants can take business away from established companies that charge monopoly prices. High prices are signals to current and future rivals that ~~extraordinary~~ profits are available in a market. Dominant firms need rivals constrained and entry impeded if they are to succeed in reaping the rewards of market power. In some cases, they enjoyed those conditions, and still do. These are addressed after a review of the other forms of credit in the Commission's report.

Qualified conclusions about the correlations between concentration and competition were warranted. First, as the Commission noted, correlation does not indicate causation. Second, statistical significance does not equate to explanatory power. And third, the quality of the data was questionable. Important measures that were not included could have confound the results, and aggregate data that was used could be a poor proxy for conditions in local market. A study published in 1975 tested the structure-performance hypothesis with more refined data, and it stressed the importance of qualifying the conclusions. Focusing on local markets for installment loans, Beigley and McCall found statistically significant relationships between market power and various measures of concentration, but that the relationships were not "of a magnitude to be of great operational significance in determining a bank's market power."[47]

Financing Retail Goods – ~~the~~For category of other consumer goods (those mostly bought at retailers), the effect of rate restrictions made credit markets difficult for the Commission to assess.[48] Interest rates varied little from state to state for revolving credit. Rates hovered around 18 percent, not necessarily because of competitive conditions, but due to common usury limits. The rate caps made it difficult to disentangle the effects of

[45] For the remainder to be accounted by three banks, each would have had a 12 percent share. If they were not equal in size, and it is rare to find such parity, then the number of additional competitors had to be greater than three.
[46] See, e.g. Thomas Kauper, *The "Warren Court" and the Antitrust Laws: Of Economics, Populism, and Cynicism*, MICHIGAN LAW REVIEW, Vol. 67, No. 2, pp. 325-342 (Dec., 1968); Orley Ashenfelter, Daniel Hosken and Matthew Weinberg, *Did Robert Bork Understate the Competitive Impact of Mergers? Evidence from Consummated Mergers*, THE JOURNAL OF LAW & ECONOMICS, Vol. 57, No. S3, (August 2014), pp. S67-S100.
[47] Beighley and McCall, *Market Power and Structure and Commercial Bank Installment Lending*, JOURNAL OF MONEY, CREDIT, AND BANKING (1975).
(Market power was measured by the Lerner price-marginal cost index, and concentration was measured by inequalities among individual bank market shares, market shares of the leading bank groups, and numbers of commercial banks.)
[48] NCCF, *supra* note 6 at 126.

Formatted: Font: Italic, Complex Script Font: Italic competition from the effects of rate ceilings. Where rate ceilings were high or nonexistent, competition kept rates below the ceilings~~,.~~[49] but where ~~Competition took other forms in retail credit. Where rate~~ ceilings were relatively low, ~~however,~~ the Commission detected excess demand for credit; consumers were unable to obtain loans at rates they would have been willing to pay.[50]

Convenience was an important factor for consumers when financing retail purchases. Credit granted at the point of purchase was more attractive than the option of going elsewhere for the funds to buy an expensive appliance or piece of furniture, and consumers took advantage of the opportunity. Banks and credit unions combined for less than 10 percent of such purchases.[51] Location was an obvious advantage for retailers, who did not face as much competition from other sources as, for example, auto dealers did.

Higher concentration among retailers was associated with fewer goods financed at stores, but retailer concentration varied relatively little from state to state – significantly less than in the banking sector. In the more concentrated category were states where four stores averaged two thirds of sales, meaning more than two (likely many more, since they were smaller) made up the remainder. In less concentrated states, the top four retailers still exceeded half of all sales. The varying concentration levels did not signify competitive concerns to the NCCF. It ~~Markets with competitors numbering six, seven, and more are generally regarded as unlikely to suffer from market power. Indeed, the Commission~~ recognized that the retail sector was highly competitive, given that it was a business easy to enter and exit, with a history that frequently displayed both.[52]

How much consumers actually paid for retail credit was difficult to measure, because interest rates were not the only means by which retailers could recover their costs. If a store could not raise the rate on charge accounts because of an interest cap, it could raise the prices of the goods financed. The Report cited research showing that appliance prices in a market with low rate caps were about 5 percent higher than in nearby markets with high or no caps.[53] For customers, increased cash prices indicated that everyone might have been paying interest, whether they purchased with credit or cash. Consumers who paid in cash may have subsidized those who paid with credit.[54] The Commission worried that such a subsidy would have amounted to a regressive transfer from poorer to

[49] ~~Id. at The Commission looked for large variations in price or supply, which could indicate varying levels of competition, but did not find them in states with high ceilings. 124-25.~~
[50] Id. at 124-25.
[51] NCCF (1972), *supra* note 4, at 126.
[52] NCCF (1972), *supra* note 4, at 106.
[53] NCCF (1972), *supra* note 4, at 106.
[54] Id. at 107.

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wealthier consumers, since cash buyers would include those who could not qualify for charge accounts.[55]

Finance Companies and other sources – Finance companies confronted a wide variety of competitive conditions from state to state, and consumers' fortunes in the sector reflected those variations. Loans were more readily available from finance companies where economies were stronger, concentration was lower, and the companies enjoyed lower labor costs. As in retail revolving credit, competition kept rates below the legal caps in many markets, and credit was widely available in them. But again, the effects of competition on interest rates themselves were difficult to assess because usury limits in some markets often controlled rates that lenders could charge, and the volume of credit demanded at those rates exceeded the volume available. Perhaps for that reason, the correlations between concentration levels and rates were weak, and again the Commission noted that confounding factors may have explained the associations.

Market restrictions across sectors – Across all the sectors, the Commission found ~~most serious~~ disparities in consumers' access to affordable credit ~~were~~ associated with restrictions that directly impaired competition. Where the Commission found concentration, it often found barriers to entry and restrictions on credit practices. Restrictive Convenience and Advantage (C&A) licensing, for example, was associated with reduced availability of loans and increased concentration of finance companies.[56] They were 50 percent more concentrated where entry was impeded, so the entry barriers could explain the observed correlations between concentration and consequences. The Commission recognized that c~~C~~oncentration may have been a consequence, rather than a cause, of restrictions on competition, just as high interest rates and reduced availability of credit appeared to have been.[57] As the Commission characterized the record:

> There is ample evidence indicating that competition is impaired in a number of states by a variety of conditions affecting all of the major types of consumer credit. A common structural condition of these markets is that they tend to be highly concentrated and difficult for newcomers to enter because of relatively slow growth in demand for credit, or legal restrictions on entry, or some other impediment or combination thereof. By comparison many other state markets appear to be fairly competitive, a judgment which is indicated not only by the existence of contrasting structural conditions but also by related measures of better performance.[58]

Commented [FP(32]: Citation? Suggested edit to clarify that this is still quoting from the Commission's report, which focused on competition and not other barriers to credit access, such as discrimination.

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[55] Id. ([T]he burden of subsidy falls primarily on cash buyers, some of whom may have been unable to obtain credit. Thus state laws that put the price of credit below competitive rates are forcing both the wealthy and the less affluent, who do not use or cannot obtain credit, to subsidize the use of credit by others.")
[56] Id. at 130-31.
[57] See, e.g. Id. at 136.
[58] Id. at 136

Consumers suffered costly consequences in states that protected financial institutions from competition. Different ceilings for different lenders created market segments that allowed a few firms to dominate without fear of encroachment from other segments. For example, Commercial banks in New York were confined to a maximum rate of 11.6 percent, which prevented their entry into "the $500-loan market served by consumer finance companies at 24.8 percent."[59] The Commission noted that borrowers "would have been significantly better off if banks had always been able to charge the same rates permitted licensed lenders." How significant is apparent from a conversion of the amounts into current dollars. Inflation since 1970 has turned the purchasing power of $500 into $3,400 today.[60] Expressed in 2020 dollars, the difference in interest rates (24.8 instead of 11.6) could have cost borrowers as much as an extra $260 in interest payments on a one-year loan.[61] The disparity would have been greater for loans of longer maturities and for borrowers who would have qualified for lower rates at the banks. It would have been less for borrowers who got better deals at finance companies and those who would not have qualified for the better bank rates.

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Banks, for their part, enjoyed protection from finance companies. For example, reported the Commission, "licensed lenders in New York may lend no more than $1,400 to any one borrower, whereas banks may make consumer loans as high as $5,000." Banks could make loans between those amounts without worrying about competition from finance companies. The segmentation created by these restrictions that separated classes of credit grantors, the Commission said, was "blatantly anticompetitive."[62]

The consumers who ~~bore~~ suffered the most serious may ~~or~~harm may not have been those who paid the higher rates. ~~At least they got loans.~~ Where rate caps were low and entry restrictions high, lenders rationed loans and turned away applicants. By the Commission's measure, in states with both types of restrictions, people took out fewer loans and smaller loans – about two-thirds as much overall – while rejection rates were almost half again as high as those in states with easier entry.[63] Applicants had little more than a fifty-fifty chance to get a loan in states that regulated rates and entry. The odds were two-to-one in consumers' favor in less restrictive states. Where entry was restricted but rate ceilings were relaxed, rejection rates for credit applicants still rose and the average size and number of loans still lagged, but not by as much. Adverse consequences

Commented [ML(35]: Were consumers chances impacted by factors like gender or ethnicity? Basically the statement makes me wonder if all groups of consumers were having the same experience or if some groups were have worse experiences in these environments/

[59] Id. at 238.
[60] Inflation conversion from Saving.org, available at [HYPERLINK "https://www.saving.org/inflation/"].
[61] At 24.8 percent, interest payments would have added up to $475 instead of $215 for the lower rate. A precise comparison would take into account the added expenses of administering smaller loans and poorer credit records of finance-company customers, but it is difficult to dismiss the conclusion that they paid a great deal for the restrictions placed on banks. Interest calculations from Saving.org, at [HYPERLINK "https://www.saving.org/calculators/loan-calculator"].
[62] NCCF (1972*), supra* note 4, at 94.
[63] NCCF (1972*), supra* note 4, at 131.

of entry barriers thus occurred in states regardless of rate ceilings; only the extent of the damage differed.[64]

Regulations limiting entry and access were not, however, the only source of competitive impairment in the credit sector, the Commission believed. It was concerned with private threats to competition as well. Accordingly, the Report called for vigorous antitrust enforcement against restraints of trade, and it identified practices that should be investigated:

> Although almost obvious, the Commission recommends that antitrust policy, both Federal and state, be alert to restrictive arrangements in the credit industry. Any hint of agreement among lenders as to rates, discounts, territorial allocations, and the like must be vigorously pursued and eliminated.[65]

The Antitrust Division of the Department of Justice? ~~the~~and the Federal Trade Commission have challenged and eliminated many agreements among competitors that could have restricted competition. But many such agreements are beyond their reach. Some of the "blatantly anticompetitive" restrictions that the NCCF identified are also the most enduring, because the antitrust -are laws typically exempt from prosecution restraints that governments authorize. Against such restraints, advocacy for competition and consumers remains the primary approach for the antitrust enforcers, and the combination of enforcement and advocacy has been effective at "eliminating anticompetitive barriers to competition…and providing consumers with the information they need to take advantage of a competitive marketplace.[66]

Restricted competition can be beneficial for the financial institutions, the Commission recognized, because market power meant stability and profitability of the insulated incumbents. Stability and profitability appealed to financial authorities as well, but the Commission criticized regulators for "excessive concern…for the protection of the profitability of existing bank institutions" and disagreed that the restraints served the

[64] NCCF (1972*), supra* note 4, at 132.
[65] NCCF (1972*), supra* note 4, at 138
[66] United States, THE INTERFACE BETWEEN COMPETITION AND CONSUMER POLICIES, Contribution to the Global Forum on Competition, OECD (2008) The Antitrust Division of the Justice Department theand Federal Trade Commission explained: "Because the "state action doctrine" in United States law protects state laws from antitrust challenge in most cases, the FTC and DOJ have focused their efforts on competition advocacy [arguing] that consumers are better protected when they can choose between high cost/high service and low cost/low service providers rather than requiring them to pay for services they may not want or need." Available at [HYPERLINK "http://www.oecd.org/unitedstates/39915760.pdf"].

"needs and convenience" of the public."[67] In the judgment of the Commission, allowing "domination by relatively few firms" of affected markets was not worth the costs.

The Commission could have framed its conclusion more directly in terms of effects on consumers. When regulators allow the welfare of the banks to outweigh the interests of consumers, those who are supposed to benefit from oversight instead pay its costs.[68] For consumers who could get credit despite unfavorable conditions, the costs were higher rates and smaller loans. For consumers who could not, the costs came in the form of doing without the goods or services, or intergenerational accumulation of wealth that credit would have made available. The most desperate consumers, not infrequently consumers who faced discrimination in an unregulated market, found a third way – doing business with illegal lenders. It was well known in the decades the Commission studied that "consumer lending was a standard business activity of criminal organizations operating in many major metropolitan areas across the United States."[69] Restricting legitimate competition sometimes simply sends it to the underworld, where consumer protection depends on the rules and remedies of juice loans and enforcers.

Numerous findings from the Commission's assessment of competition bear on the potential for discriminatory practices by lenders. Already noted was the analysis of access in the Report, which found that restrictions on competition frequently reduced the availability of credit, leading to rationing that presumably excluded borrowers of lesser means and lower credit scores. In the data, the Commission looked specifically for indications of gender discrimination and found widespread evidence of it.[70] The Commission also conducted some research on ~~examined the data for signs of~~ racial discrimination but the evidence it collected was too limited ~~was unable~~ to ~~find sufficient evidence to~~ draw reliable conclusions.[71] Elsewhere this report (see Chapter 10) considers more recent information on discrimination. Later this chapter considers competition and access in modern credit markets.

~~Despite TtThese findings led the Commission to edfavor increased competition "as the best means to assure that most consumers pay a fair price for their credit services."~~ To improve competition the Commission proposed a menu of policy changes that would expand consumers' choices and advocated regulations that could improve the wisdom of

[67] NCCF (1972), *supra* note 4, at 137.
[68] Id.
[69] THOMAS A. DURKIN, GREGORY ELLIEHAUSEN, MICHAEL E. STATEN, AND TODD ZYWICKI, CONSUMER CREDIT AND THE AMERICAN ECONOMY 362 (2014).
[70] NCCF (1972), *supra* note 64, at 160 (For a review of the role women played a prominent role in consumer credit markets from medieval times to the nineteenth century, see the Appendix.)
[71] NCCF (1972), *supra* note 64, at 153-55~~Ch. 8~~.____

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those choices.[72] To implement its recommendations, the Commission recommended that legislators, regulators, and enforcers strive to design and implement a sound competition policy for consumer credit. The goals of that policy should be these:

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- Promoting and maintaining competition among numerous sources of credit. Competition is the key ingredient "of a finance industry capable of providing an adequate supply of credit at reasonable rates"
- Assuring "access *by all* to these alternate sources"
- Preventing "excesses which the "system" may invoke against the borrower."[73]

Among all the available means to improve competition, the Commission concluded that enhancing the ability of potential competitors to enter credit markets would be the most effective policy. In his communication to the President and Congress, the Commission Chairman explained:

> As to our conclusion that free and fair competition is the ultimate and most effective protector of consumers, we have recommended the elimination of restrictive barriers to entry in consumer credit markets by permitting all creditors open access to all areas of consumer credit. We have urged the entry of savings and loan associations and mutual savings banks into the consumer credit market. We have recommended prohibitions on acquisitions that would eliminate potential competition or that would substantially increase concentration in state or local credit markets. We have also urged that rate ceilings which constrain the development of workably competitive markets be reviewed by those states seeking to increase credit availability at reasonable rates.[74]

Thus, the critical prescription for competition in the postwar period was to preserve the competitive dynamic that had characterized credit markets in the first half of the twentieth century. The NCCF recognized that this recommendation would not address all problems in credit markets, including access by marginalized groups~~However, this policy choice came with a substantial cost: a lack of widespread discrimination againstaccess to credit for women, and no evidence that and minority consumers were being treated fairly~~. Markets that were open to entry and free of constraints that prevented companies from challenging one another were perceived~~, at the time,~~ to be the most likely to remain competitive and protect consumers.

[72] NCCF (1972*), supra* note 64, at 214, See, e.g Ch. 10. The requirements of the Truth in Lending Act and specific protections for vulnerable consumers –
[73] NCCF (1972*), supra* note 64, at 2 (emphasis in original).
[74] NCCF (1972*), supra* note 4, at iii.

Competition in Credit, 1970 - 2020

The Commission devoted a chapter of its report to predictions of the future of consumer credit. Not surprisingly, many of those predictions failed to capture the nature and size of the markets in which credit is exchanged today. For example, the Commission anticipated, "With a slowdown in the rate of increase in consumer credit and with fewer additions to the types of goods and services financed, credit grantors in the future are relatively more likely to rely on price competition than on nonprice competition."[75]

Fortunately for consumers, the future exceeded expectations. Price competition continued to reduce costs of credit, but the most remarkable developments in competition came from new products and services. Among the aspects of nonprice competition the Commission did not predict was the rise of automatic teller machines (ATMs), although the first one had made its appearance in the US in 1969 (two years earlier in the UK),[76] let alone banking by computers and smart phones, still far in the future. For virtually every consumer in 1970, withdrawing cash meant going to the bank. Obtaining a loan meant visiting a lender. Getting competing quotes meant visiting several sources. Advertising might help start a search, but narrowing options on the internet was unheard of. The Commission did foresee the growing use of bank-issued credit cards and the value they would deliver to an increasingly mobile population. It did not predict the extent of the growth, or the effect it would have on the competition for consumer credit. Inconceivable at the time was a vast market for consumer finance that involved no visit to any location or meeting with any individual.

As for overall growth, the figures in Table 2-1 and 2-2 of Chapter 2 reveal that consumer credit outstanding has increased *thirty-fold* since the Commission's Report.[77] Most of that growth has come from financial services and technologies that were nonexistent or insignificant in 1970. And a good portion of that growth reflects more consumers participating, both absolutely and proportionately, in legal credit markets today than in 1972.

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[75] NCCF (1972*), supra* note 4, at 203

[76] Linda Rodriguez ~~This day in history, HISTORY.COM, available at~~ [HYPERLINK "https://www.history.com/this-day-in-history/first-atm-opens-for-business" \l ":~:text=On%20September%202%2C%201969%2C%20America's,to%20conduct%20basic%20financial%20transactions."]McRobbie, The ATM is Dead. Long Live the ATM!, Smithsonian Magazine, January 8, 2015. [HYPERLINK "https://www.smithsonianmag.com/history/atm-dead-long-live-atm-180953838/"].

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[77] To be precise, the Commission predicted that the *rate* of the growth of credit would decline after 1970, and that turned out to be correct. The amount of credit outstanding was so small in 1940 that the $100 billion increase through 1970 represented a slightly higher annual rate than the $4 trillion increase since 1970.

The structure of the consumer finance sector appears to have changed significantly in the fifty years since the Commission's report. At first glance, the traditional sources of credit show consolidation:

- The number of FDIC Insured banks dropped from more than 13,000 to less than 5,000 in 2018.[78]
- Federally Insured Credit Unions numbered about 5,200 in the final quarter of 2019[79] The Commission had tallied over 23,000 in 1972.
- Finance companies, which the Commission estimated at 3,700, have no authoritative census but may have doubled to around 7,800.[80]

Dollar volumes and shares of consumer credit from Table 2-1 in Chapter 2 of this Report allow for comparisons of the major sectors around the time of the Commission's Report to those today. The following table highlights the institutional types then and now:

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Consumer Credit by Type of Holder					
	Billions	Percent	Billions	Percent	Excluding Government
Year	1975	1975	2019	2019	2019
Depository Institutions	$116	56.0%	$1,771	42.3%	61.7%
Finance companies	$33	15.9%	$537	12.8%	18.7%
Credit unions	$26	12.6%	$482	11.5%	16.8%
Nonfinancial business	$33	15.9%	$40	1.0%	1.4%
Pools of securitized assets		0.5%	$14	0.3%	0.5%
Federal government		0.0%	$1,319	31.5%	------

[78] *Annual Historical Bank Data*, FDIC available at [HYPERLINK "https://banks.data.fdic.gov/explore/historical?displayFields=STNAME%2CTOTAL%2CBRANCHES%2CNew_Char&selectedEndDate=2018&selectedReport=CBS&selectedStartDate=1934&selectedStates=0&sortField=YEAR&sortOrder=desc"]

[79] *NCUA Quarterly Reports*, available at [HYPERLINK "https://www.ncua.gov/newsroom/press-release/2020/ncua-q1-2020-state-credit-union-data-report-now-available"] (In the eight years from December 2011 and December 2019, 1,800 credit unions exited the business.) CUNA estimated about 5,500 at the end of 2019, down from 11,000 in 1999. *See Monthly Credit Union Estimates*, June 2020. [HYPERLINK "https://www.cuna.org/uploadedFiles/Global/About_Credit_Unions/CUMonthEst_Jun20.pdf"].

[80] One investors' service reported 7,800, *see United States Finance Companies,* CRUNCHBASE [HYPERLINK "https://www.crunchbase.com/hub/united-states-finance-companies"]. The industry trade association has 440 members, *see AFSA Membership,* AMERICAN FINANCIAL SERVICES ASSOCIATION, available at [HYPERLINK "https://afsaonline.org/about-afsa/afsa-membership/"].

Nonprofit and ed. inst.		0.0%	$28	0.7%	1%
	$207	100%	$4,191	100%	100%

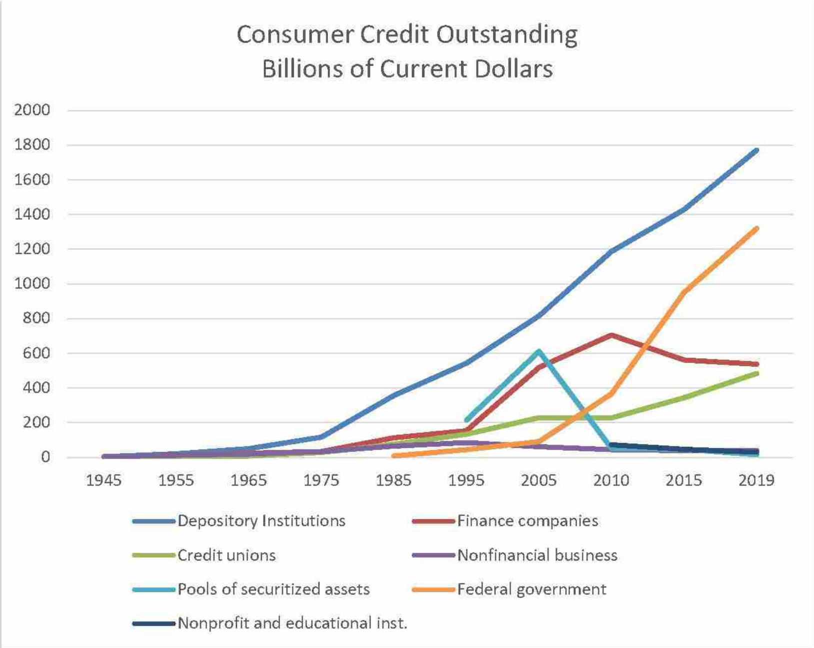
The table reveals an apparent drop in the shares of major types of institutions. For depository institutions (banks, savings, etc.) holdings dropped from 56 percent in 1975 to 41 percent in 2019 (close to their share of in 1972). Finance companies and credit unions also lost share over the period, although their declines since 1975 appeared to be more modest. The share loss of nonfinancial businesses accelerated, dropping from about 16 percent to little more than a single point in 2019.

Declining shares of the top three sources should be viewed in the light of the increase in consumer credit overall and the emergence of the Federal government as a major holder. As shown in the final column of Table __, i~~I~~t was the growth of government-held student loans that reduced the shares of the other sources despite the dramatic growth of the private sector. The Federal government did not hold enough credit to warrant tracking at the time of the Commission's Report, and its share still rounded to zero in 1975. Today, the government is the second largest creditor of consumers, after depository institutions. If its holdings were subtracted from the table, the shares of the traditional institutions would all increase by half. Banks (and savings institutions) would rise to around 60 percent, while finance companies and credit unions would approach 20 percent apiece, all above their shares in the early 1970s.

Commented [FP(42]: Citation?

Expanding aggregate credit has translated into increased holdings for each of the major sectors since 1975. Even nonfinancial institutions, with one tenth of their 1975 share, hold more dollars of consumer credit than they did forty-five years ago (although adjusting for inflation would show a decline). Finance companies and credit unions have reached about half a trillion dollars, while depository institutions are well above a trillion.

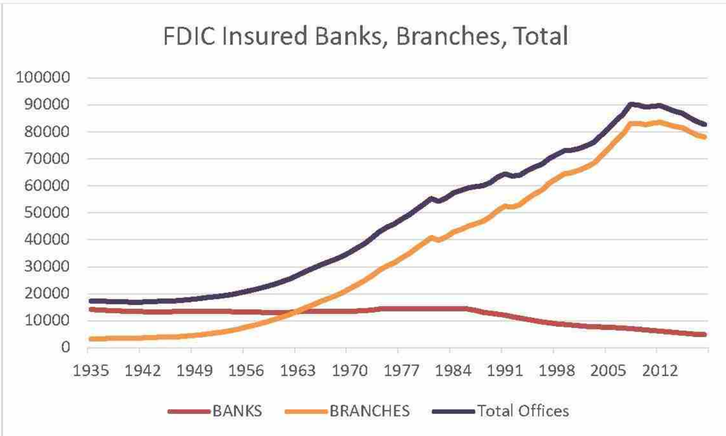
Although less severe than the wide shifts in the first half of the century, the variations apparent in the chart continue to suggest inter-sector competition. Some sources of credit have nearly vanished. For example, pools of securitized assets rose from miniscule levels and fell back just as quickly in less than two decades. Banks and credit unions continued their long rise. The latter are now closing in on finance companies, whose shares have fallen over the last ten years. Figure __ [Consumer Credit Outstanding] shows these trends.



A closer examination reveals forces that have reshaped each sector, and how competition has evolved. Institutions have entered, exited, repositioned, and fought within and across sector borders

Banks

Growing aggregate shares combined with stable or declining numbers of institutions imply that concentration in consumer credit has increased above the levels the Commission observed. It is a matter of simple arithmetic. Fewer institutions will account for higher percentages of the whole. Beneath the aggregates, however, is a different picture. While the number of banks did drop by half, the number of branches tripled, from about 25,000 in 1972 to 78,000 today, putting the number of total offices above 80,000. Although the count of total bank offices has declined slightly from its peak of about 90,000 in 2008, the proliferation of outlets remains near historic highs. The chart below illustrates the trends.[81]



Overall, the trends show that headquarters of financial institutions have declined while total storefronts have expanded, and for consumers, the storefronts matter. Like gas stations and grocery stores, local offices vie for the consumer's business.

Competition in the banking sector is monitored by both the Department of Justice and the Federal Reserve, which share responsibility for reviewing potential competitive effects of bank mergers.[82] To facilitate that effort the Fed collects and publishes structural data on banks and thrifts in markets across the United States. Concentration is measured by an index, called the Herfindahl Hirschman Index, or HHI, which can range from near zero for a market with thousands of small competitors to 10,000 for a market dominated by

[81] *Annual Historical Bank Data*, FDIC available at [HYPERLINK "https://banks.data.fdic.gov/explore/historical?displayFields=STNAME%2CTOTAL%2CBRANCHES%2CNew_Char&selectedEndDate=2018&selectedReport=CBS&selectedStartDate=1934&selectedStates=0&sortField=YEAR&sortOrder=desc"]. The same source shows the number of federally insured S&L's declining from over 3,500 to less than 700 between 1984 and 2018.

[82] For a description of the reviews, See DEPARTMENT OF JUSTICE AND FEDERAL TRADE COMMISSION, HORIZONTAL MERGER GUIDELINES, (2010), available at [HYPERLINK "https://www.justice.gov/atr/horizontal-merger-guidelines-08192010"], for a description of the criteria used in evaluating mergers, and DEPARTMENT OF JUSTICE, Bank Merger Competitive Review -- Introduction and Overview (1995) (currently under review), available at [HYPERLINK "https://www.justice.gov/opa/pr/antitrust-division-seeks-public-comments-updating-bank-merger-review-analysis"]

one company. The Fed gives close scrutiny to mergers that would significantly increase the index in any market to levels of 1,800 or higher.[83] Mergers that do not move concentration above the threshold and small mergers above it, but which do not significantly change concentration, typically do not raise concerns. Consumers have plenty of options at HHI levels around 2,000.

A few examples of larger and smaller markets illustrate the conditions at different points on the HHI scale. The market that includes Houston, Texas has an HHI near 2,300, indicating concentration above the threshold of scrutiny. Yet the market has 92 commercial banks, which suggests that customers have a plethora of choices. It is because the top four banks have around 70 percent of total deposits that the HHI is relatively high. Columbus, Ohio has a level around 2,100, reflecting 48 banks and 9 thrifts.[84] In Fargo, North Dakota, were the level is just under 1,800, customers can choose from 34 banks. El Paso, Texas, with a similar HHI, hosts 14 banks.

Larger markets can accommodate more banks and tend to generate lower scores. The New York City market, for example, with an HHI of 1300, contains 170 banks and 45 thrifts. Chicago, where customers can find 135 banks and 24 thrifts, has an HHI around 950. Even in small metropolitan areas, however, concentration typically remains below 2,000 on the HHI scale. The following chart shows average indexes by size of SMSAs, from the smallest areas to the largest in the Fed's database. Concentration remains below 2,000 for banks and thrifts in most markets.

Commented [SS(43]: You mention at the beginning of the paragraph that DOJ and FR reviews these mergers but you do not describe DOJ analysis either in text or footnote. You could drop in the footnote references to the DOJ criteria of concentration. Also, does the Fed use a delta at all? The DOJ concentration criteria rely not only on the HHI but also the Delta. If Fed uses a delta it would be good to mention at least in a footnote.

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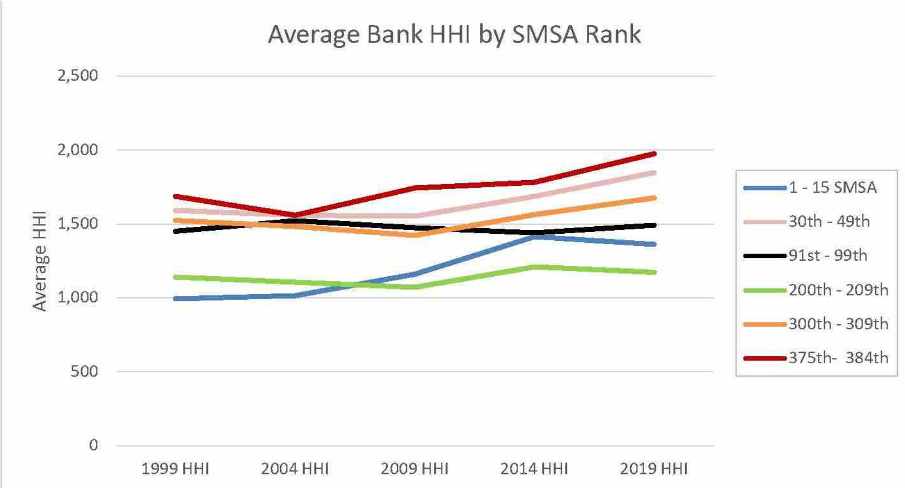
[83] The Herfindahl Hirschman Index (or HHI), which is the sum of the squares of the percentage shares of the companies in a market. For example, ten companies, each with a share of 10 percent, would result in an HHI of 1,000. The square of 10 is 100, and 100 added ten times equals 1,000. A market comprising five firms of equal size yields an HHI of 2,000 (20 squared x 5). Branches are aggregated by institution, not counted invidually. See, e.g., *Competitive Analysis and Structure Source Instrument for Depository Institutions*, ST. LOUIS FED, available at [HYPERLINK "Https://Cassidi.Stlouisfed.Org/Index"].

[84] Thrift institutions are discounted by 50% in HHI calculations, in light of their more limited services compared to banks. *See How do the Federal Reserve and the US Department of Justice, Antitrust Division, analyze the Competitive of mergers and acquisitions under the Bank Holding Company Act, the Bank Merger Act, and the Home Owners' Loan Act; FAQs,* BOARD OF GOVERNORS OF THE FEDERAL RESERVE BOARD, available at [HYPERLINK "https://www.justice.gov/sites/default/files/atr/legacy/2014/10/09/308893.pdf"]



[85]

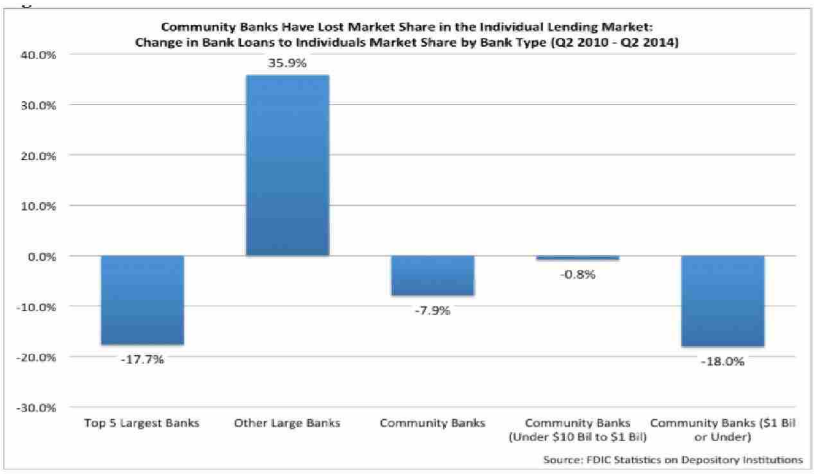
Some indications of the future of competition in banking may be evident from the trends in concentration. Figure ___ shows that in both the larger and smaller markets, concentration was relatively stable between 1999 and 2009, but then rose noticeably in the five years between 2009 and 2014. Over the last five years the rise reversed in some of the largest markets but has continued in smaller population centers.

Within the largest metropolitan markets, the trends in consolidation are unlikely by themselves to suggest potential anticompetitive effects. Banking in big cities has become more concentrated, but not to the point that raises risks that competition may be suffering. On the other hand, the smaller markets have reached levels that suggest further consolidation could face resistance from competition authorities – if that consolidation occurs by merger. There is little the ~~competition~~ authorities can do to prevent concentration from increasing by attrition, for example when a bank simply exits a market. Both consolidation and attrition are occurring in small markets.

[85] Source: FDIC's Summary of Deposits, Market Share Reports, available at , [HYPERLINK "https://www7.fdic.gov/sod/sodMarketBank.asp?barItem=2"].

1-15 Avg Population	7,240,113
32-49 Avg Population	1,591,927
90-99 Avg Population	622,387
200-210 Avg Population	224,861
300-310 Avg Population	134,483
376-384 Avg Population	67,358

An insight into how the changes in concentration can affect the consumer market was described in a 2015 study on community banks.[86] The authors cited Bureau research that had found community banks "can be a lifeline to hardworking families paying for education, unexpected medical bills, and homes."[87] Business pressure, however, was causing these banks to pull back from consumer lending and focus on commercial loans to local companies. Small banks, research has found, have a comparative advantage over large institutions by virtue of the closer customer relationships that the local setting allows. Despite the advantage, the prospects for those banks remain in doubt as well. A chart from the study depicts a shift in lending to individuals from 2010 to 2014; small community banks' lending declined the most:[88]



The Chairman of the FDIC described the disconcerting trend:

[86] Marshall Lux, *The State and Fate of Community Banking February 9, 2015*, M-RCBG ASSOCIATE WORKING PAPER SERIES, No. 37 (2015) available at [HYPERLINK "https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/files/Final_State_and_Fate_Lux_Greene.pdf"]

[87] Id. (CITING CONSUMER FINANCIAL PROTECTION BUREAU, COMMUNITY BANKS AND CREDIT UNIONS, [HYPERLINK "http://www.consumerfinance.gov/small-financial-services-providers/"] (accessed January 10, 2015))

[88] Id., Figure 12, at 19.

> Small banks like these are slowly disappearing from America's landscape. Today, 627 counties are only served by community banking offices, 122 counties have only one banking office, and 33 counties have no banking offices at all.[89]

It bears repeating that market structure is merely the beginning of a competition analysis. Factors other than concentration can elevate or alleviate initial concerns that the measure of firms in a market may raise. In sectors where competitors can increase capacity quickly, as is the case in consumer credit, concentration exaggerates the significance of large firms and underestimates the importance of small firms. Dominant lenders cannot raise rates and count on small competitors to empty their inventory of loans. Another ambiguity in bank indexes stems from their units of measurement. In the Fed statistics, HHIs are based on total deposits, which are at best loosely correlated with the various financial services that banks and thrifts provide.[90] Because banks can readily reallocate funds from one investment to another – for example from business finance to consumer credit or from mortgages to auto loans – their ability to compete for consumers is not tied tightly to their total assets. As described earlier, banks facing diminished commercial demand during the Great Depression opened new consumer credit departments, emulating smaller finance companies that were expanding their own operations. These dynamic factors mean that concentration measures do not fully capture the competitive threat that small rivals or small operations present to established institutions. The structure of a market at any given moment provides a helpful context to an assessment of competition, concentration is insufficient alone to support conclusions about competition.

After identifying the contours of a market and the ~~qualifying the~~ participants in it, a competition analysis typically turns to the conditions of entry. Consolidation, decline, and even the failure of firms may have little impact on competition if new companies can fill the voids left by companies that decline or depart. Finance companies that opened offices a century ago while authorities were closing others illustrated this phenomenon. Mutual savings banks, which were slow to innovate and have declined as a result, offer another

[89] Jelena McWilliams, *BankThink/We can do better on de novos*, AMERICAN BANKER, December 06, 2018, [HYPERLINK "https://www.americanbanker.com/opinion/fdic-chairman-jelena-mcwilliams-we-can-do-better-on-de-novos"]. The NCCF voiced similar concerns when it recommended research to examine "the adequacy of competition in isolated communities – so called "one-bank" towns – to determine whether residents in those areas obtain adequate amounts of consumer credit at reasonable prices." NCCF, *supra* note 6 at 166.

[90] A Fed study noted that "HHI is a measure of concentration for the base good, a bank account measured by deposits, and less of a measure of competition for the aftermarkets. Since most bank fees stem from aftermarket good purchases, the standard relationship between concentration and…fees need not apply." *See* Robert M. Adams, *Bank Fees, Aftermarkets, and Consumer Behavior,* FINANCE AND ECONOMICS DISCUSSION SERIES (2017), available at [HYPERLINK "https://www.federalreserve.gov/econres/feds/files/2017054pap.pdf"].

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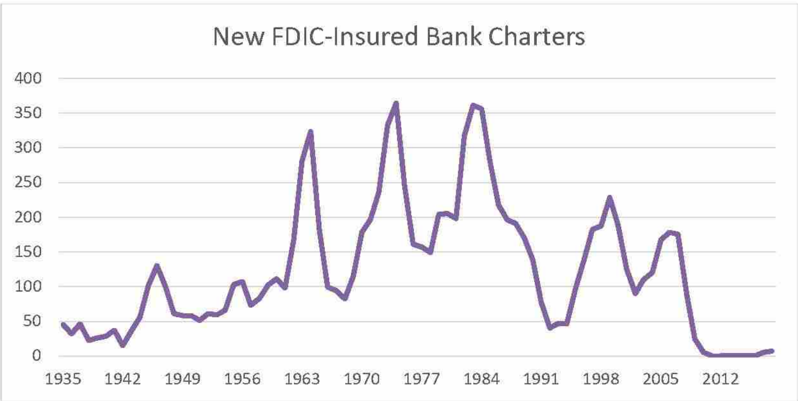
Formatted: Font: 10 pt, Italic, Complex Script Font: 10 pt, Italic example.[91] Competitive analysis must therefore consider conditions of entry, as it is a powerful antidote to anticompetitive performance and unsatisfied demand.

Here the evidence is disconcerting for the banking sector. As is apparent in the trends of new charters for FDIC-insured banks, entry of banks has dropped to the lowest levels in eighty years. After averaging over a hundred a year from 1960 to 2010 – often exceeding two hundred and more – roughly two charters a year have issued in United States since 2010. The phenomenon could be driven by diminished interest in entering the sector, higher costs of doing so, or a combination of both. It may be that an FDIC-insured charter is not as important an asset as it once was in the provision of financial services. If so, that could explain a declining demand for the charters. An alternative hypothesis is that insured banks remain an important component in the competitive environment, but that entry has become so costly that efficient providers are discouraged from taking the opportunity. The most recent data suggest a rise in new banks applying for FDIC the last few years, with the annual openings averaging half a dozen in the 2017 to 2019. The pace prompted the Chairman of the FDIC to observe that "never before has the level of new banks been so low for so long — only two new startup banks opened between the end of 2010 and the end of 2016, and just 11 have opened since the end of 2009, most in the past 18 months."[92]



One more charter could have changed the concentration of depositories dramatically. Walmart has long struggled, without success, to enter the sector for years. In the 1990s, it tried to become a thrift holding company, which would have allowed it to open in thousands of American stores. The Bank Holding Company Act restricted companies

[91] WADHWANI (2011), *supra* note 65, citing reluctance to introduce new products and expand across state lines.
[92] McWilliams (2019), *supra* note 126.

engaged in nonbank businesses from owning banking subsidiaries, but the option for Walmart to own a subsidiary operating a thrift had a venerable precedent; it was the model that Ford Motor Company, Household International, and Sears Roebuck had used to offer financial services to their customers. Before Walmart could execute the plan, Congress passed the Gramm-Leach-Bliley Act of 1999, blocking the move.

A decade later, Walmart tried again, taking advantage of another innovation from the early twentieth century. It obtained a charter to operate an industrial loan company (or ILC, like the institutions that once focused on blue collar customers). Those charters allowed a commercial entity to own a financial institution that could take deposits and make loans. This time the FDIC blocked the move by denying Walmart deposit insurance, the application for which was "fiercely opposed" by bank lobbies.[93] At public hearings before FDIC, the American Banking Association (ABA) complained, "Wal-Mart has begun testing full-service Wal-Mart money centers for using stored-value cards, debit cards and ATMs. It is also rolling out its Money Center Express machines, which will permit customers to use credit or debit cards in a wide variety of ways."[94]

The competition that the ABA opposed did not materialize. The FDIC imposed a moratorium on all ILC applications for deposit insurance in 2006. Walmart withdrew its application in 2007. Any prospect of reconsideration, for Walmart or another company like it, was suspended in 2010, when Dodd-Frank imposed a three-year moratorium on deposit insurance for any new industrial loan company. The moratoriums are typically justified as measures to assess and improve safety and soundness, but there is little evidence that ILCs present more risk than commercial banks, and little dispute that competitor protection plays a role.[95] As the Congressional Research Service put it:

> Certain observers, including community banks, have concerns over whether purely commercial or purely banking organizations would be able to compete with combined organizations that could potentially use economies of scale and funding advantages to exercise market power.[96]

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[93] See, Lawrence J. White, *Walmart and Banking: It's Time to Reconsider,*" MONEY AND BANKING (May 15, 2017), available at [HYPERLINK "https://www.moneyandbanking.com/commentary/2017/5/13/walmart-and-banking-its-time-to-reconsider"].

[94] *Banks fight Wal-Mart's application for bank charter*, ATM MARKETPLACE, (April 20, 2006) [HYPERLINK "https://www.atmmarketplace.com/news/banks-fight-wal-marts-application-for-bank-charter/"]

[95] See. E.g., Barth, James R. & Sun, Yanfei, 2020. "Industrial banks: Challenging the traditional separation of commerce and banking," The Quarterly Review of Economics and Finance, Elsevier, vol. 77(C), pages 22

[96] Congressional Research Service, "Banking Policy Issues in the 116th Congress" February 21, 2019, https://fas.org/sgp/crs/misc/R45518.pdf.

With four thousand stores, many of which serve customers who are more likely to be unbanked or underbanked, located in communities where banks are more likely to be scarce, Walmart was not able to surmount the barriers to entry that banks had persuaded regulators to build around their business. Despite the disappointment, Walmart does offer a limited variety of financial services, including smart phone checking with affiliated institutions, but as of 2014, the stores do not present the bundle of services available at a typical bank or thrift. Consumer Reports compared Walmart's services to a bank and rated the bank superior.[97] Academic research described below finds that branch banks bring valuable benefits to underserved areas and populations. The costs to consumers of the barriers that Walmart could not overcome are likely significant.

Resistance to new entry has not abated. After FDIC approved deposit insurance applications for a payment company and a student loan servicer, bank associations and advocacy groups petitioned Congress to reinstate Dodd-Frank's three-year moratorium on ILC charters. The threat they cited was not the brick and mortar that Walmart had brought to rural counties, but technology that is becoming available everywhere: "In the era of dominant Big Tech, we should be cautious before giving technology companies even greater reach into the economic life of Americans by allowing them to own banks."[98] As ever, entry, the dynamic process that has driven much of the competition in the financial sector, is in jeopardy.

Better data, more sophisticated statistical techniques, and improvements in economic analysis enable more direct assessments than the Commission could make of the intensity of competition. The banking sector is especially amenable to analyses that go beyond inferences drawn from differences in concentration across states. Numerous studies of bank competition have been published in recent years, the results of which indicate a business where competition has been keen. Reviewing the literature in 1994, Shaffer found that most U.S. banking markets "behave quite competitively at the bankwide level, even where highly concentrated," although there may be some exceptions in some individual product lines, such as consumer deposit accounts.[99]

In a recent study that tracked the performance of the banking sector from 1984 to 2016, Mendenhall found that its performance exceeded competitive equilibrium levels.[100] He found output of the banks to be "supercompetitive," greater than that expected from competitive markets, and competition did not suffer from the trend of increasing

[97] *Should Walmart be your next bank?* CONSUMER REPORTS (2014) [HYPERLINK "https://www.consumerreports.org/cro/magazine/2014/11/should-walmart-be-your-bank/index.htm"].
[98] Letter from the Bank Policy Institute, Center for Responsible Lending, Independent Community Bankers of America, to the Honorable Mike Crapo, et al. (July 29, 2020)(The two companies were Square and Nelnet.).
[99] Sherill Shaffer, *Bank Competition in Concentrated Markets*, BUSINESS REVIEW (February 1994).
[100] Slade Mendenhall, *Commercial Bank Competition, Riegle-Neal, and Dodd-Frank,* SSRN (2017), available at [HYPERLINK "https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2967998"].

concentration. To the contrary, the evidence pointed toward improving competition. For example, the spread between cost of funds and interest charged actually declined, from 3.3 percent at the beginning of the of the period studied to 2.9 percent at the end.

Most of the competition studies assess banks' overall business, which includes both commercial and consumer lines. Commercial customers are well equipped to impose competitive discipline; they can take their business anywhere in the country and to sources overseas. Whether consumers realized the benefits of competition that these studies have found requires examination of the services they purchase in the market.

There is no question that consumer choices have expanded since the time of the Commission's Report. Already mentioned are the branches, which grew by the tens of thousands, brought banking to underserved communities, and moved banks closer to consumers in larger markets. Beyond brick and mortar, innovation has provided a growing volume and variety of banking services. The ~~Automatic Teller Machine~~ATM first appeared in 1969. Now ubiquitous, these outlets have grown to an estimated 470,000 in 2018.[101] Banks were the original owners and proprietors of ATMs. Today, fewer than half are bank machines; the remainder are operated by independent companies. Whether owned by the user's bank, another bank, or nonbank institution, ATMs connect consumers with their banks and many of the services their banks provide. Among the aspects that distinguish independent ATMs: they are more likely to locate in areas with higher unemployment, lower incomes and lower housing values. Like the consumer lenders of a century ago, independent institutions have found a profit opportunity in bringing ~~brought~~ financial services to communities where banks are relatively rare.[102]

These developments were made possible by changes in the legal environment of consumer finance, and some of the changes track the recommendations in the Commission's Report. Restrictions the Commission criticized have been amended, repealed or rendered obsolete. Antitrust enforcement has reduced anticompetitive practices. The developments are especially relevant to barriers between institutional segments, geographic markets, interest rate flexibility, loan availability, and lender and servicer performance~~, and discrimination among borrowers~~.

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The opening of geographic markets and the competition between institutions would have been impossible without legal reforms of the sort that the Commission advocated. Pivotal events included a Supreme Court decision in 1978, Marquette Nat. Bank v. First of Omaha Svc. Corp., which settled the question as to which state laws would apply to

[101] LIAN AN, CHRISTOPHER BAYNARD, CHIRADIP CHATERJEE, CHUNG-PING A LOH, THE LOCATIONAL STUDY OF ATMS IN THE U.S. BY OWNERSHIP (2018), available at [HYPERLINK "http://www.akleg.gov/basis/get_documents.asp?session=31&docid=22687"]

[102] And the higher transaction fees that independents charge have inspired efforts to cap them. Id.

interstate banks, the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, which lifted restrictions that states had imposed on banks crossing borders, and the Gramm-Leach-Bliley Act of 1999, which expanded the financial services banks could offer.[103] The reduction of these barriers unleashed the proliferation of branches described above, as banks quickly crossed the borders that previously had confined them.

A summary of the literature on barriers and whether their relaxation affected competition in banking found that the spread of branches had been painful for some local banks, especially in rural areas, but beneficial for consumers.[104] Empirical analysis documented some of the effects on access to credit:

> We first establish the positive effect of interstate branching deregulations on the density of bank branches in poor counties. We find that the density of bank branches increases by around 30% in poor counties after a state fully deregulates.
>
> Second, we show that interstate branching deregulation is associated with a significant drop in the rate of unbanked households among low-income populations. [Illustrative is] the change in the likelihood of holding a bank account in the years before and after deregulation relative to a control group of states that do not deregulate. We observe a significant increase in the share of banked households following deregulation.[105]

Another study found similar effects. Branches that spread after banks were allowed to cross state lines reduced the percentage of unbanked populations in poor communities.[106] The effect was stronger for populations that were likely to be rationed by banks, "such as African American ~~black~~ households ~~living~~ in ~~"~~high racial ~~'~~bias~~"~~ states, or for households living in rural areas where branch density is initially low."

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Legislation and regulations that increase costs or reduce opportunities can compound the challenges facing institutions on the margin of profitability. Considering pressure on banks and credit unions in smaller communities, the US Treasury identified potential effects:

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[103] Marquette Nat. Bank v. First of Omaha Svc. Corp., 439 U.S. 299, 99 S. Ct. 540; 58 L. Ed. 2d 534 (1978) (interpreting the National Bank Act of 1864); H.R.3841 - Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, 103rd Congress (1993-1994).
[104] Robert M. Adams and Dean F. Amel, *The Effects of Past Entry, Market Consolidation, and Expansion by Incumbents on the Probability of Entry,* FINANCE AND ECONOMICS DISCUSSION SERIES (2007), available at [HYPERLINK "https://www.federalreserve.gov/pubs/feds/2007/200751/200751pap.pdf"]
[105] Bank Branch Supply and the Unbanked Phenomenon, available at [HYPERLINK "https://pdfs.semanticscholar.org/e9b6/f210629419b5ec6f53f8227448a29dae61f0.pdf?_ga=2.249876995.461538237.1596483228-41928408.1596483228"]
[106] Claire Celerier and Adrien Matray, "Bank Branch Supply and the Unbanked Phenomenon," Draft, October 17, 2016

> Community financial institutions' business models have come under pressure from a slow economic recovery and low interest rate environment, additional competition (e.g., internet banks and nonbank lenders), and added compliance costs from new regulations. Together such factors have contributed to a difficult operating environment and the ongoing consolidation of smaller banks and credit unions.…The impact of consolidation has been particularly profound on smaller banks as the number of institutions with assets less than $100 million declined by 85% between 1985 and 2013. Similarly, the total number of credit unions in the country has declined…, with the impact mostly concentrated among smaller credit unions. Feedback provided to Treasury suggests that the cumulative effects of regulatory requirements weigh heavily on community banks and credit unions.[107]

The concerns expressed by the Treasury are reflected in the findings of academic research. Lux summarized research that found bank consolidation increasing after regulatory and legislative changes made operations more costly.[108] Researchers were typically careful to note the difficulty of finding causal links between events and subsequent developments, but the number of studies finding correlations between different regulatory initiatives and changes in banking markets led the author to suggest that regulation was causing consolidation.

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Dodd-Frank was expected to raise compliance costs, and those costs could have disproportionately burdened small banks. A 2014 survey reported that over a quarter of banks with less than $10 billion in assets planned to hire new compliance or legal personnel, while over a third of banks had already hired new staff to deal with new CFPB regulations.[109] A Minneapolis Fed study that year identified the personnel costs of complying with regulations at banks with less than $50 million in assets. Lux described the findings and a Fed Governor's reaction:

> At these institutions, the study found that hiring two additional personnel reduces median profitability by 45 basis points, resulting in one-third of these banks becoming unprofitable. As Fed Governor Tarullo has noted, "Any regulatory requirement is likely to be disproportionately costly for community banks, since

[107] US TREASURY, A FINANCIAL SYSTEM THAT CREATES ECONOMIC OPPORTUNITIES - BANKS AND CREDIT UNIONS, 56-57 (2017). Available at [HYPERLINK "https://www.treasury.gov/press-center/press-releases/Documents/A%20Financial%20System.pdf"] (footnotes omitted).
[108] Marshall Lux, *The State and Fate of Community Banking February 9, 2015*, M-RCBG ASSOCIATE WORKING PAPER SERIES, No. 37 (2015) available at [HYPERLINK "https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/files/Final_State_and_Fate_Lux_Greene.pdf"].
[109] Hester Peirce, Ian Robinson & Thomas Stratmann, *How Are Small Banks Faring under Dodd-Frank?* WORKING PAPER 14-05, THE MERCATUS CENTER AT GEORGE MASON UNIVERSITY (February 2014).

the fixed costs associated with compliance must be spread over a smaller base of assets."[110]

Enough time has elapsed since Dodd Frank to observe more direct evidence of theits effects on competition, allowing analysts to examine whether the Governor's concerns were justified. Buchak, et al. attributed about 60 percent the growth of nonbank mortgage lending to increased regulation that banks faced between 2007 and 2015.[111] Mendenhall examined the effects of two major reforms – the Riegle-Neal Act and the Dodd-Frank Act. For a measure of competition, Mendenhall used the spread between cost of funds to banks and interest charged to customers, and he found that the spread dropped (bank competition clearly increased) after Riegle-Neal had allowed interstate banking. The spread continued to shrink after Dodd-Frank added regulatory costs, although the findings with respect to the latter were ~~only~~ marginally significant.[112] The author noted that competition might have been even more robust in the last decade without Dodd-Frank, but they could only surmise. Nonetheless, the most recent evidence indicates competition continues to constrain the rates banks can charge.

Commented [FP(47]: Suggested tweak to balance the tone.

Never far from the subject of competition in financial markets is the question whether competition is consistent with safety and soundness.[113] On one hand is the concern that competition will cause banks to make excessively risky loans. On the other is the ~~expectation~~ hope that competition will better serve consumers.

Empirical research offers some insight. For example, one study found that "increased competition induces banks to become more specialized and efficient" but also induces banks to extend credit to riskier borrowers and suffer higher default rates. However the author did not reach a definitive conclusion as to soundness. Her qualified conclusion was that that the competition was "possibly creating a less stable financial system."[114]

Another study found that in competitive mortgage markets, local banks lowered their lending standards by twice as much as those in concentrated markets, but the pressure did

[110]Daniel Tarullo, *Speech at the Federal Reserve Bank of Chicago Bank Structure Conference* (May 8, 2014)).
[111] Greg Buchak, Gregor Matvos, Tomasz Piskorski, Amit Seru, *Fintech, Regulatory Arbitrage, and the Rise of Shadow Banks* (March 2018) NBER Working Paper No. 23288, [HYPERLINK "https://www.gsb.stanford.edu/faculty-research/working-papers/fintech-regulatory-arbitrage-rise-shadow-bank"]. (Regulation included capital requirements and litigation. Thirty percent of the growth was attributed to technology.) See also, Consumer Bankers Association, Comment Letter in Response to Request for Information to Assist the Taskforce on Federal Consumer Financial Law (June 1, 2020) https://beta.regulations.gov/comment/CFPB-2020-0013-0089, (playing field tilted against traditional banks).
[112] Mendenhall (2017), *supra* note 135.
[113] The debate was joined by Adam Smith in 1776. (See appendix.)
[114] Gissler, et al., *The Effects of Competition in Consumer Credit Markets, WP 12-24*, CONSUMER FINANCE INSTITUTE (2018), available at [HYPERLINK "https://doi.org/10.21799/frbp.wp.2018.24"].

not appear to affect standards at national banks.[115] Implications about soundness were accordingly qualified.

A third study found that both national and local banks reacted to changes in competitive conditions.[116] Using the event of OCC's preemption of state regulations, the authors compared mortgage lending in formerly restrictive states to lending in states that had imposed more limited rules. After the lifting of restrictions, national banks increased originations of riskier loans – for example with deferred amortization or interest-only payments. Local banks followed suit, but only in counties where OCC banks were more concentrated. The changes resulted in lower interest rates for some borrowers and new credit to borrowers would not have qualified for mortgages before the regulatory change.

Easing standards does not necessarily imply imprudent lending. Loans may be just as sound even though extended to applicants who may not have qualified under stricter standards, if the more accessible standards are based on superior efficiency and risk assessment. Competitive discipline can instill both, as one study found. It analyzed direct evidence of prudential concerns and found competition positively correlated with financial stability.[117] Banks in competitive states were less likely to be targeted for regulatory enforcement and less likely to fail. Banks facing more competition earned lower interest margins, made fewer high-risk investments, had lower profitability, and held less cash and Tier 1 capital than banks facing less competition.[118]

Commented [FP(48]: Citation?

For these reasons, the implications of consolidation continue to merit careful consideration. Competition could be a cause, a consequence, or both, of consolidation. Likewise, consolidation could be salutary, neutral, or deleterious to competition. It is important to detect the distinctions and directions of causation, if any, in order to avoid false diagnoses and prescriptions that could fail to remedy problems or, worse, exacerbate them. It is even more important to discern as directly as possible the intensity and effect of competition itself, and to assess the external conditions that can affect it.

[115] Xiaochen Feng, *Bank Competition, Risk Taking and their Consequences: Evidence from the U.S. Mortgage and Labor Markets*, IMF Working Papers (2018), available at [HYPERLINK "https://www.imf.org/en/Publications/WP/Issues/2018/07/06/Bank-Competition-Risk-Taking-and-their-Consequences-Evidence-from-the-U-S-46034"]
[116] Di Maggio, Kermani, and Korgaonkar, *Partial deregulation and competition: Effects on Risky Mortgage Origination*, MANAGEMENT SCIENCE (2019). 10.1287/mnsc.2018.3060 [HYPERLINK "https://www.researchgate.net/profile/Sanket_Korgaonkar2/publication/327834191_Partial_Deregulation_and_Competition_Effects_on_Risky_Mortgage_Origination/links/5ba80a8b45851574f7e19b11/Partial-Deregulation-and-Competition-Effects-on-Risky-Mortgage-Origination.pdf"]
[117] Akins et al. *Bank Competition and Financial Stability: Evidence from the Financial Crisis. Journal of Financial and Quantitative Analysis*, 1-28 (2016). [HYPERLINK "https://doi.org/10.1017/S0022109016000090"].
[118] Id.

Credit Unions

As for credit unions, despite the shrinkage of Federally Insured entities to 5,200, the Bureau of Labor Statistics counted 17,000 total establishments in 2019, much closer to the 1972 tally in the Commission's Report.[119] Like banks, credit unions have increased lending significantly over the last fifty years, even though the number of institutions has dropped. And as with banks, a simple institutional census of credit unions underestimates their competitive presence. Branching has kept the number of offices near their 1970 levels, and credit unions have become closer alternatives to banks and thrifts for consumer services. Credit unions take deposits, lend to consumers, issue cards, and finance purchases. Not surprisingly, studies find evidence of this competition in the rates that the institutions charge when they operate nearby one another. One study found that when credit unions were more prevalent in a market, credit card loan rates fell.[120] Another study, looking at regulation that allowed credit unions to compete more closely with banks, found that the increased competition was especially beneficial for low-income borrowers.[121] The cost of borrowing fell, banks became more efficient, and both banks and nonbank lenders extended more credit to riskier borrowers.

By the critical measure of the price of services, credit unions often beat banks, as they did when the Commission studied the sector fifty years ago. Interest rates on credit cards averaged between 11 and 12 percent at credit unions, lower than average bank-card rates.[122] Other loans tend to be cheaper at credit unions as well. These advantages help explain why credit unions have seen their holdings of consumer credit grow faster than banks. Membership in credit unions passed million?120 million members in 2019, an increase of about 50 million in twenty years.[123]

Some sizeable differences in the institutions play a role in the competition between the sectors. In credit unions' favor is their tax status. They are non-profit entities, owned by

[119] Bureau of Labor Statistics, Quarterly Census of Employment and Wages, available at [HYPERLINK "https://data.bls.gov/cew/apps/table_maker/v4/table_maker.htm" \l "type=1&year=2019&qtr=4&own=5&ind=522130&supp=0"]
[120] Feinberg, R., *Credit Unions: Fringe Suppliers or Cournot Competitors?* REVIEW OF INDUSTRIAL ORGANIZATION, 20(2), 105-113, (2002).
[121] Gissler, et al (2018), *supra* note 147.
[122] *Credit Union and Regional Bank Credit Cards*, CREDITCARDS.COM, available at [HYPERLINK "https://www.creditcards.com/credit-union/"]. (The biggest advantage of a credit union credit card? It likely has significantly lower interest, possibly even offering rock-bottom interest on cash advances. In November 2018, the average interest rate offered by credit unions for credit cards was 11.1%, a steady figure over the last 10 years. That compares to the national average rate of 17.08% in March 2020."); See, also, [HYPERLINK "https://www.spglobal.com/marketintelligence/en/about/"].
[123]Monthly Estimates, CUNA.ORG (June 2020) available at [HYPERLINK "https://www.cuna.org/uploadedFiles/Global/About_Credit_Unions/CUMonthEst_Jun20.pdf"].

their members, and therefore have lower tax expenses. In banks' favor is scale. They hold three times as much consumer credit on average as credit unions do, and credit unions are restricted to the consumer channel. The limitation means that commercial banks have the benefit, and of course bear the risk, of other holdings as well. Credit unions tend to be more regional and limited to members of identified organizations, although they do vary in size and geography. Large credit unions operate through branches, ATMs, and online across the country.

Banks and credit unions routinely measure themselves against one another. The institutions conduct annual surveys, which make headlines in the trade press. The most recent survey released by the American Bankers Association announced that for the first time, banks had beaten credit unions in customer satisfaction scores. The headline read, "Banks Outpace Credit Unions in Consumer Satisfaction."[124] It was the first time in the history of the survey that banks had won the competition. They did especially well with consumers' ratings of staff, mobile apps, and speed of in-branch transactions. The best of all were regional and community banks, which outscored nationwide banks. While these results support the proposition that banks and credit unions compete closely with one another, they also demonstrate that the bundle of services that both institutions provide, from personal relations to branch locations, gives them a significant advantage in retaining customers. Consumers may change credit cards, open new accounts elsewhere, or shop nationwide for loans and mortgages, but the established relationships with banks and credit unions are not often abandoned.

Competition between banks and credit unions is also apparent in the rivalry of their respective organizations. The two sectors are frequently at odds over public policies that treat them differently. Bankers' associations have opposed allowing credit- union acquisitions of banks, expanding credit- union loans to businesses, and other extensions that threaten traditional bank services.[125] The banking sector criticizes as unfair the tax advantage of credit unions and cites it as a justification to limit their activities. Credit unions ~~chafe under~~object to restrictions such as caps on commercial lending, which would allow them to enter more areas of competition with banks. It is not necessary to take a position on these arguments to conclude that the debate itself reveals potential competition between the two sectors. Evidence discussed below reveals other aspects of

[124] *Banks Outpace Credit Unions in Consumer Satisfaction*, ABA BANKING JOURNAL (2019), available at, [HYPERLINK "https://bankingjournal.aba.com/2019/11/banks-outpace-credit-unions-in-consumer-satisfaction/"].
[125] *See*, e.g. Melissa Angell, *Banks decry CU lobbying while beefing up own during coronavirus,* AMERICAN BANKER (May, 18, 2020), available at [HYPERLINK "https://www.americanbanker.com/creditunions/news/banks-decry-cu-lobbying-while-beefing-up-own-during-coronavirus"]; *see also* Carrie Hunt, *The difference between banks and credit unions could not be clearer*, THE HILL, (February 5, 2019), available at [HYPERLINK "https://thehill.com/opinion/finance/428546-the-difference-between-banks-and-credit-unions-could-not-be-clearer"]..

~~sectors' rivalry—potential that has not been fully realized or battle between the sectors would not be worth waging~~. The barriers against credit-union expansion harken back to those that the Commission deemed anticompetitive fifty years ago.

Finance Companies

Finance company establishments numbered just under 16,000 in 2019[126] – ahead of the 13,000 to 14,000 offices estimated by the Commission in 1970. For decades, with portfolios of direct and indirect loans, finance companies comprised the second ~~most important~~ largest sector of nonmortgage consumer credit. They offer a variety of loans for the same purposes that send~~s~~ consumers to banks, credit unions, and retail lenders.[127] Although this sector has lost share to banks and credit unions since 1972,[128] it does not appear to be in ~~a secular~~ decline. To the contrary, according to a report from Experian, finance companies are the fastest growing source of consumer credit, having increased by 50 percent in the last five years. For 2019, the report estimated that 11 percent of the population held 34.8 million different accounts and 6 million new accounts at finance companies.[129]

Innovation is driving this growth. According to the Experian report, fintech lenders, continuing to offer new products and experiences, "have more than doubled their market share of unsecured personal loans in the past four years, from 22.4% in 2015 to 49.4% in 2019…."[130] By 2022, they are expected to increase those loans by another 50 percent. Whether Fintech lending meets the expectations of the analysts, its competitive presence is unquestionably established, and the comparative advantage of offices and branches is declining.

Although the sources of personal loans are new, consumers' borrowing patterns are familiar. A 2019 Experian survey of consumers reported that 28 percent had used their personal loans for large purchases, 26 percent for debt consolidation, 17 percent for home improvements, and 9 percent to refinance existing debt.[131] In one important respect,

Commented [VF(49]: Is this conclusion fact or opinion? Citation?

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Commented [MW(51R50]: Big green book - DESZ,

Commented [VF(52]: What does this mean?

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126 BUREAU OF LABOR STATISTICS, QUARTERLY CENSUS OF EMPLOYMENT AND WAGES (2019, available at [HYPERLINK "https://data.bls.gov/cew/apps/table_maker/v4/table_maker.htm" \l "type=1&year=2019&qtr=4&own=5&ind=522291&supp=0"]

127 DURKIN et al. (2014), *supra* note 107, at 25.

128 Statistical Release, Finance Companies (June 2020), available at [HYPERLINK "https://www.federalreserve.gov/releases/g20/current/g20.pdf"].

129 Matt Tatham, *Personal Loan Debt Continues Fast-Paced Growth*, EXPERIAN, October 14, 2019, available at [HYPERLINK "https://www.experian.com/blogs/ask-experian/research/personal-loan-study/"].

130 Id.

131 Stefan Lembo Stolba, "Survey: Consumers Want Personal Loans for Large Purchases and Debt Consolidation, September 16, 2019, [HYPERLINK "https://www.experian.com/blogs/ask-experian/survey-consumers-want-personal-loans-for-large-purchases-and-debt-consolidation/"].

consumers clearly have gained on past generations. The average annual percentage rate of 9.4 percent in 2019 was less than half the finance-company rates the Commission observed in 1972 (when prime rates were comparable). APRs found in this survey beat the rates that the Commission found credit unions and banks charging fifty years ago.[132] Credit union members in 2019 still cited better rates as a reason for borrowing there.

Like banks and credit unions, finance companies range from smaller, local establishments to cross-country networks. Many, including industry leaders, extend credit entirely online. They offer personal loans, mortgages, auto loans and other types of credit. Banks regard them as attractive acquisitions. In September 2020, the appeal of finance-company acquisitions was reported in the American Banker, which revealed that "card networks, along with PayPal and Citi, are responding to competition from the likes of Affirm, Afterpay and other "buy now, pay later" lenders. Should traditional credit card lenders be worried?"[133] The answer to this rhetorical question was not necessary to report. For personal finance loans at least, product distinctions do not raise a high barrier between the sectors. Enthusiasm among banks for finance-company acquisitions remains high, and the reason is the ability of finance companies to take business away from other types of institutions.

In short, the border between banks and finance companies does not appear to be a natural barrier. A century ago, banks began to open consumer-finance divisions and offer products that emulated finance-company loans. In 1972, the Commission reported on banks' buying finance companies for the same reason. Acquisitions, rather than internal growth, became a more attractive way to compete because regulations prevented banks from offering the terms that finance companies could offer. Today, the finance-company sector remains an inviting business for entry from the banking sector.

Competition in Credit from the Consumer's Perspective Competition for the Borrower

Consumers are constantly shopping for credit. They open two hundred million accounts on average every twelve months, while they close another two hundred million. This turnover represents over a quarter of all accounts outstanding. In 2020, they held about 500 million credit card accounts, 100 million auto loans, 75 million mortgages and about 20 million home equity lines of credit. Their holdings amounted to $14.35 trillion in the third quarter of 2020, about twice the level of 2003 as Figure XX shows.[134]

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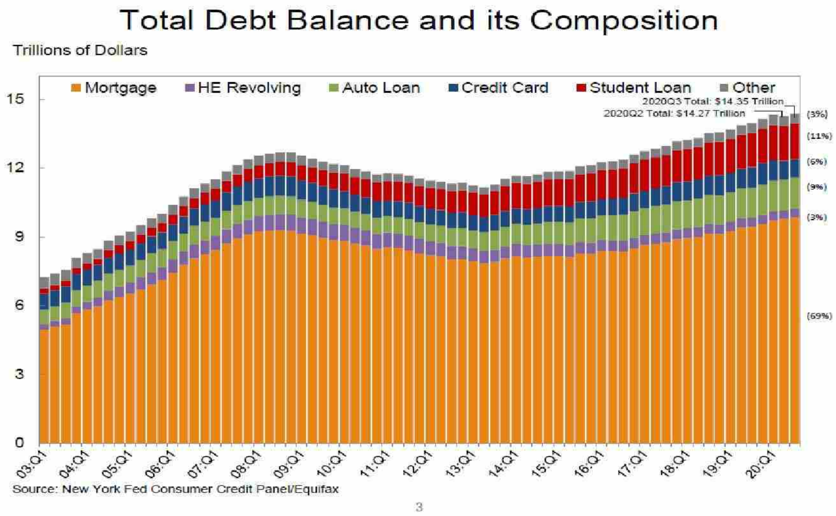
[132] NCCF (1972*), supra* note 4, at 128. (In 1972, credit unions charged - 11.76%, banks - 13.04%, and finance companies - 25.88%. The prime rate fluctuated around 5% in both 1972 and 2019.)
[133] Kevin Wack, *Why Visa and Mastercard are suddenly keen on installment lending*, AMERICAN BANKER, (September 02 2020), available at [HYPERLINK "https://www.americanbanker.com/tag/consumer-lending"]
[134] NEW YORK FED, QUARTERLY REPORT ON HOUSEHOLD DEBT AND CREDIT, 20 20:Q3 (November 2020) [HYPERLINK "https://www.newyorkfed.org/medialibrary/interactives/householdcredit/data/pdf/HHDC_2020Q3.pdf"].

Figure XX



The assessment of competition typically begins with a definition of the market, which means taking the perspective of ~~customers~~ consumers and determining what they would regard as suitable substitutes for a product or service they desire.[135] Because financial services facilitate the consumption of something else, demand for those services is shaped by the ultimate purposes a consumer has in mind. Chapter 3 explains that for both borrowing and saving, a significant consideration is the time horizon – how long a consumer wants the use of a loan or when a consumer wants to retrieve funds deposited for future spending. Short-term loans and time deposits are more likely to be the leading options for consumers with temporary needs or seasonal shopping. Longer terms likely work better for home mortgages and retirement savings. Other aspects of a financial transaction bear on substitutability as well. Price, convenience, and customer service may make dissimilar products more or less appealing to a shopper with a particular purpose in mind. When significant time is not involved, for example when financial services simply facilitate payments the most important features are likely to be reducing the costs and enhancing the efficiency of transactions.

Consumers use some financial services that they do not choose directly. While they select their lenders and depository institutions, the services they ~~they consumer~~consume

[135] The process of market definition is described in merger guidelines issued by enforcement agencies. See DEPARTMENT OF JUSTICE AND FEDERAL TRADE COMMISSION, HORIZONTAL MERGER GUIDELINES, (2010), available at [HYPERLINK "https://www.justice.gov/atr/horizontal-merger-guidelines-08192010"].

include components that the vendor has chosen. Just as a car owner may not know who produced the mechanics or body parts of automobile she has just ~~purchased,~~purchased~~;~~, borrowers may not be aware of the companies who sell services that support a loan they have just taken out. A borrower does not select the credit reporting agency that provides information on his credit history or the loan servicer who collects payments. Nonetheless the costs and quality of these services affect the price and availability of the loan. Accordingly, the chapter will consider competition in services provided in markets where financial institutions shop.

There are few (if any) clear distinctions among the lengths that loans can run. Some credit needs expire in days, while others may extend for weeks, months, or years. Likewise, some credit products are designed for shorter or longer periods, while others can meet needs of almost any duration. Terms, of course, are not determinative. A longer loan at a lower rate may be a good substitute for a shorter loan at a higher rate. Accordingly, a competitive analysis should not conclude until ~~all potentially relevant~~the most determinative aspects of financial services are taken into account.

Because credit is fundamentally about accelerating or postponing purchases – whether ~~,~~ for emergencies that require immediate payment, home prices that exceed available cash, saving for retirement, or myriad other decisions – this analysis will begin with the time dimension and then consider the other factors. The analysis will consider three general categories – short-term, medium-term, and long-term credit. We expect to find that borrowers in the market for short term credit will look at products designed to meet those needs. A loan to repair the car until the next paycheck will likely come from a short-term or medium-term source. A loan to finance a house or car purchase will likely come from a provider of multi-year loans. Within each category, the analysis will consider the offers available to consumers and the competition among providers extending those offers. It is possible that the evidence will reveal that some products within each group do not compete in all respects with one another, and equally conceivable that the products in some groups compete with other products outside the groups.

Commented [VF(53]: Suggest rewording because it reads as though consumers have a choice when they may not (i.e., credit for medical/health care); also, does this sentence incorporate credit for education? Or credit to build intergenerational wealth?

Even within the groupings, different products offered by different institutions may be sufficiently distinct that they do not compete meaningfully with one another. As the Commission observed, loans from remote sources may not provide a competitive constraint on convenient outlets, even when the loans may have similar features. Second mortgages can and do finance car purchases, for example, but the vast majority of cars are financed by automobile loans.[136] Consumers can and do reallocate debt by delaying a payment to one creditor to obtain funds for another purpose, but those options may

[136] 85% of new cars; 55% of used cars financed, *see* Melinda Zabritski, *State of the Automotive Finance Market*, EXPERIAN, Q4 (2019), available at [HYPERLINK "https://www.experian.com/content/dam/marketing/na/automotive/quarterly-webinars/credit-trends/2019-q4-state-of-the-automotive-finance-market.pdf"].

impose greater costs. In most cases, however, the leading edge of competition will come from providers more closely situated within categories.

Financial services can be customized in numerous ways~~are among the most customized products or services that consumers acquire~~. Terms depend on the information that both borrowers and lenders bring to the transactions, their respective bargaining skills, economic expectations, credit history, and attitudes toward risk. All these contribute to an assessment of the likelihood that the borrower will repay the loan. Because borrowers vary widely on that spectrum, and because financial services are personal transactions, terms and services can be tailored to individual borrowers.

The most important influences on affordability and availability are the credit histories and credit scores of borrowers. Although several scores are available (the market for credit scoring is discussed below), the ~~The~~ most frequently used measure is a FICO Score from the Fair Isaac Corporation. The tables below list consumers within each FICO group. Creditors are more likely to lend and more likely to give favorable terms to consumers in better risk categories. Borrowers with poorer FICO grades will find fewer choices in the marketplace. Borrowers with the poorest scores or insufficient credit history to generate any score at all, will have even fewer choices.

According to one study, about a third of Americans have a FICO® Score below 669, often considered "subprime" scores by lenders, and about half of them are classified as "very poor" (although that lowest category is no longer publicized). For comparison, the 67 percent of consumers who hold credit cards and the 62 percent who have retailers' cards have average scores in the low 700s.[137]

Table XX(place side by side)

Commented [FP(54]: The presence of robust secondary markets likely contradicts this characterization. Investors prefer pools of readily-classified loans with the standardization of mortgage loans via GSE selling/servicing guides as a prime example. Most lenders don't customize products but rather use standard pricing sheets, and offer specific loan products with set terms that have tranches based on the borrower's credit score, DTI, etc.

Commented [FP(55]: Later in this chapter you note the near monopolistic presence of the Fair Isaac Company's score, and the challenges that it may present re: competition. I suggest indicating that point here and noting that a longer discussion follows.

For that longer discussion, I recall some evidence in the wake of the 2008 recession indicating that while FICO scores may be fairly accurate risk predictors for credit card applicants, they are far less accurate in other sectors such as mortgage. Suggest incorporating that point in the later discussion of FICO.

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Commented [FP(57]: To the point in the previous comment: yet there may be creditworthy borrowers in this segment.

[137] Matt Tatham, *2019 Consumer Credit Review*, EXPERIAN, (January 13, 2020) (The average credit card debt for Americans reached $6,194 in 2019, as balances increased 3% compared with 2018, according to Experian data. The average FICO® Score for consumers with a credit card is 727, and 67% of Americans carried a credit card in 2019. [HYPERLINK "https://www.experian.com/blogs/ask-experian/consumer-credit-review/"].

Percent of Americans by FICO© Grades and Scores 2019[138]		
FICO Grade	Score	Share of Total
Poor	300-579	16%
Fair	580-669	18%
Good	670-739	21%
Very good	740-799	25%
Exceptional	800-850	20%

Retail Credit Product Groupings		
Short Term	**Medium Term**	**Longer Term**
Pawns / Title Loans	Credit Cards	Auto Loans
Small Dollar Loans Payday Loans	Installment loans	Installment loans
Overdraft Protection	Overdraft Line of Credit	Mortgages
Credit Cards		

Credit scores rise with the age of consumers. A breakdown by cohorts was reported by Experian, using VantageScore – a joint product of the three national credit bureaus, which is comparable to the FICO score. For Gen Z the average is 656, Gen Y – 658, Gen X – 676, Boomers – 716, and the Silent Generation – 729.[139] In other words, two generations of Americans have yet to raise their cohorts' average credit risk to good or better, and of course every generation has at any time some members struggling with credit status. Because below-average grades limit borrowers' options in the market for financial services, the competition they encounter can vary substantially.

Short-term loans – overdrafts, payday loans, pawnshops, personal loans

Most borrowers need not look for short term loans, because they have alternatives available from numerous sources, and can tap them as easily as swiping a credit card. Anyone who has a credit card can obtain an advance for fifteen days, a few months, or a few years, and people with FICO scores in the mid-600s or above can typically qualify for cards. Their options for short-term loans are virtually unlimited.

For consumers with the lowest scores or thinnest files, however, the options are more likely limited to short-term, small-dollar loans. ~~The poorest credit risks~~Low-income and thin-file consumers, like their predecessors a century ago, often unbanked or

[138], *MyFICO*, FICO, available at [HYPERLINK "https://www.myfico.com/credit-education/credit-scores"].
[139] Stefani Wendel, *State of Credit 2020: Consumer Credit During COVID-19*, EXPERIAN. Available at [HYPERLINK "https://www.experian.com/blogs/insights/2020/10/state-credit-2020/"]. VantageScore breaks the bottom range into two categories – deep subprime (or bad credit) from 300 to 499 and poor credit from 500 to 600.

underbanked, may have to choose among the lenders who specialize in short-term credit. These are the businesses that make installment loans, pawn loans, vehicle title loans, and payday loans. As noted in Chapter 3, these products together amounted to about $75 billion in recent years, a small fraction of the $4 trillion in consumer debt outstanding. Similarly small is the proportion of households using these loans; it is under two percent for each type.

Nonetheless, the providers are abundant, counting in the tens of thousands, and the sector is sometimes criticized for being *too* competitive. A common comment about the estimated 18,000 payday lenders is that they are more ubiquitous than McDonald's or Starbucks.[140] Indeed, a payday loan office requires less capital and fewer employees than a typical McDonalds restaurant~~. However, regulatory restrictions have eliminated~~impeded~~ entry where it might have occurred by imposing interest rate limits that make such loans unprofitable even at the modest cost of a strip-mall storefront.~~ Restrictions aside, entry barriers would be nonexistent, which explains why the number of providers, like their counterparts in the early twentieth century, remains high.

In addition to payday lenders, borrowers with few other options have access to some 10,000 pawnshops according to the National Pawnbrokers Association. Significant overlaps exist in product characteristics and prices among pawnshops, payday lenders, and overdraft protection services. Some research has found rates to be comparable,[141] which suggests the three may be in one market. A study of alternatives to payday lending in Ohio, after legislation capped payday rates at 28 percent caused them to shut down, found that pawnshop licenses grew by 97 percent.[142] Discussed later in this chapter, the ability of banks to compete for small-dollar, short-term loans has been hampered by regulations discouraging such loans and limiting overdraft charges. P2P, friends and family ~~and personal networks~~ may be available to consumers who cannot access banks and finance companies,[143] but these informal sources are ~~too new and too difficult to measure~~beyond the scope of this chapter~~ to allow for confident predictions~~.

Commented [FP(58]: Add citations. Suggest deleting the assertions in the middle sentence; they appear to contradict the other sentences.

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Commented [VF(61]: Opinion or fact? Citation?

[140] Tim Ranzetta, *Which business has the most physical locations in the US: McDonald's, Payday Lenders, or Starbucks?*, NGPF (2019), [HYPERLINK "https://www.ngpf.org/blog/question-of-the-day/qod-which-business-has-the-most-physical-locations-in-the-us-mcdonalds-payday-lenders-or-starbucks/"]

[141] Not found in the resources reviewed to date is an accounting for the cost of convenience of the three options. Payday convenience for example, may be worth more than the difference interest payments, while security forfeitures, if factored into interest rates, would increase borrowing costs at pawnshops.

[142] Stefanie R. Ramirez, Payday-loan bans: evidence of indirect effects on supply. Empir Econ 56, 1011–1037 (2019). [HYPERLINK "https://doi.org/10.1007/s00181-018-1447-2"] (Licenses for small-loan companies increased by over 150%.)

~~143~~

On the question whether payday loans compete with other types of loans, Durkin, et al. report that significant interinstitutional competition arose after the relaxation of rate ceilings and other restrictions in the 1980s and 1990s.[144] Evidence for that competition was described in a 2013 article:

> Competition benefits consumers in the alternative consumer credit markets just as it does in any other market, providing consumers with the opportunity for lower prices, innovation, and higher-quality service. Although prices seem high for both payday loans and overdraft protection, there is no evidence that either product generates sustainable economic profits (as opposed to normal economic returns). Payday loan prices generally reflect underlying risk and operating costs. There is no evidence of supranormal economic (or monopoly) returns to firms in the payday lending industry, indicating the competitive nature of the market. Barriers to entry in the payday lending market appear to be low.[145]

Competition between payday lenders and less expensive sources of credit might be more robust, but for barriers that have prevented entry into the payday space. In 2003, OCC discouraged banks from offering short-term, small-dollar loans. When banks tried to compete anyway, for example by offering overdraft protection, the Fed restrained those efforts with additional restrictions in 2009. The effects were immediate, according to Evans, Litan, and Schmalensee, who found, "within days" of the Fed's announcement of its new overdraft rules, banks started scaling back access to ~~free~~ checking accounts, which meant diminished availability of credit services associated with them, such as deposit advance~~imposed new fees, and eliminated services for consumers~~.[146]

Commented [VF(62]: Citations?

Commented [FP(63]: Suggest replacing this with a small dollar credit product such as deposit advance. It's not clear how "free checking" is a form of short-term, small-dollar lending.

Still, banks have demonstrated that entry is difficult to suppress in markets where consumers are paying high prices. Community banks and credit unions have offered variations of payday loans for several years, and more recently, large banks have introduced similar products. Since 2018, US Bank has offered loans of $100 to $1,000 at fixed fees of $12 to $15 per $100, and Bank of America is currently rolling out a plan with a $5 flat fee for loans of $100 to $500. Both plans allow three months to repay. APRs on these loans depend on their duration, since quicker repayments raise rates, but borrowing costs over three months can translate into substantial savings over payday and other small-dollar loans – about 70% for US Bank and 6-30% for Bank of America, compared to an average of 90% for installment loans under $1,500 and 400% for a

[144] DURKIN et al. (2014), *supra* note 107, at 506-509.
[145] Clarke and Zywicki, Payday Lending, Bank Overdraft Protection, And Fair Competition At The CFPB, REVIEW OF BANKING & FINANCIAL LAW, Vol. 33, No. 1, pp. 235-281, at 258 (2013).
[146] Id. at 263 (citations omitted).

typical payday loan.[147] Some banks still offer overdraft protection and direct-deposit-advance products that may compete with small-dollar lending.[148] Consumers who opt in to such services tend to be credit constrained: compared to others, they have lower credit scores, are less likely to have a general-purpose credit card, and more likely to have low limits on cards they do have.[149] Payday borrowers display similar profiles. In markets where banks offer these products, borrowers may benefit from the additional competition. And some credit unions offer payday alternative loans, or PALs, which typically run for longer terms at lower rates.[150]

Online information available to consumers suggests that pawns, personal loans, and payday loans may be alternatives to one another. According to Credit Karma, the average pawnshop loan is $150, and pawnshops are no longer confined to inconspicuous storefronts and strip malls. Online sites will pawn items worth hundreds (or, they claim, millions) of dollars. For consumers considering a pawnshop, however, Credit Karma, a marketer that combines advertising with advice, suggests peer-to-peer options, negotiating extensions with current creditors, and approaching neighbors and friends. In a clue that a payday loan is another alternative to these sources, Credit Karma cautions against it because they are "terribly costly."[151] With the advice comes advertising for numerous short-term and medium-term loans for the consideration of the potential payday shopper. Information about products and providers eager to offer them is plentiful on the site, one of many that borrowers can check for alternatives to payday loans.

Payday loans and similar products may be costly, but cost depends on context and by itself reveals little about competition. McDonalds and Starbucks charge more for food and drink than other chains, but ~~much~~ less than full-service restaurants, ~~all~~ most of which

[147] See, e.g. Lisa RowanForbes , "New Small-Dollar Loans From Bank Of America Offer Alternative To Expensive Payday Loans," Forbes Advisor Oct. 14, 2020, [HYPERLINK "https://www.forbes.com/sites/advisor/2020/10/14/new-small-dollar-loans-from-bank-of-america-offer-alternative-to-expensive-payday-loans/?sh=6b89ae892306"].

[148] CFPB, CFPB STUDY OF OVERDRAFT PROGRAMS: A WHITE PAPER OF INITIAL DATA FINDINGS (June 11, 2013), available at [HYPERLINK "https://files.consumerfinance.gov/f/201306_cfpb_whitepaper_overdraft-practices.pdf"]. ("Between 20% and 27% of accounts opened in 2011 had one or more overdraft or NSF transaction. …Between 13.5% and 27.8% of accounts with at least one overdraft or NSF transaction had at least 10 such transactions.")

[149] CFPB, DATA POINT: FREQUENT OVERDRAFTERS (Aug. 4, 2017), available at [HYPERLINK "https://www.consumerfinance.gov/documents/5126/201708_cfpb_data-point_frequent-overdrafters.pdf"].

[150] Liz Weston and Amrita Jayakumar, *What Is a Payday Alternative Loan?* NERDWALLET (December 3, 2019) available at [HYPERLINK "https://www.nerdwallet.com/article/loans/payday-alternative-loan-pal"]

[151] Anna Baluch, "*Is a pawn shop loan a good idea for quick cash*?" Credit Karma, *?* CREDIT KARMA (Updated July 19, 2019,), available at [HYPERLINK "https://www.creditkarma.com/personal-loans/i/pawn-shop-loans/"].

contend with constant competition.[152] No restaurant, however, ~~no~~ would make economic sense to consumers as a sole source for food or coffee. By the same token, a hotel room not make sense as a year-long residence, even though competition and depressed travel has pushed the average nightly rate down to $100 in the U.S. in 2020. A $100 nightly rate is a bargain by historical standards, but it translates into an annual cost of $36,500, quite expensive for a studio apartment without a kitchen. Paying seemingly exorbitant annual costs of an occasional product or service does not necessarily indicate misguided consumers or malfunctioning markets.

Surveys of payday loan borrowers conducted by The Pew Charitable Trust and Advance America (~~,~~ one of the country's largest payday lenders), found that ~~they~~ consumers would and do consider various options to obtain short-term credit, including skipping payments to existing creditors, borrowing from family, overdrawing their bank account, and taking out a small-dollar loan.[153] Academic research described in Chapter 10 has found that bans on payday loans cause customers to shift to these options; and in states that ban the loans consumers also cross borders to borrow if neighboring states permit them.[154] That consumers resort to these options does not itself indicate that they are all good substitutes. When a service is unavailable altogether, consumers may settle for inferior options they would not have chosen in a competitive market. A survey commissioned by the industry lends some support to the superiority of payday loans over their closest alternatives. Almost 75 percent of the small-loan or payday borrowers surveyed said they could not find an alternative when they took out their last loan.[155] These are borrowers who either had reached their credit limits or could not secure credit cards, installment loans, second mortgages and other loans offering more attractive terms. For people in these circumstances today, like the small-dollar borrowers of a century ago, competition within the sector ~~may be the last line of~~ can offer consumer protection, and ~~available.~~ ~~Fortunately for consumers,~~ innovation could dramatically reshape competition in the sector. B~~In addition to the b~~anks' continue to ~~latest efforts to~~ enter the space, and nonbank payment systems are beginning to bridge the gap between credit invisibles and ~~the~~ financial institutions that can lend at much lower costs. These developments are described at the end of the chapter.

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Commented [ML(67)]: This does not mention or address the issue frequently raised by advocates about the excessive fees and rates that often lock a payday borrower into a lengthy high cost cycle they can't get out of, where what they were looking for was a simple short tern solution.

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152 See, e.g. Andrea Marie Leschewski and Dave D. Weatherspoon, Fast Food Restaurant Pricing Strategies in Michigan Food Deserts, International Food and Agribusiness Management Review Volume 17 Special Issue A, 2014, (surveying literature).

153 See, e.g. The PEW Charitable Trusts, *Payday Lending in America: Who Borrows, Where They Borrow, and Why*, (2012) , available at [HYPERLINK "https://www.pewtrusts.org/en/research-and-analysis/reports/2012/07/19/who-borrows-where-they-borrow-and-why"]; Advance America, *Release, 92% of Borrowers Choose Payday Loans Over Competing Credit Products*https://www.advanceamerica.net/news/92-of-borrowers-choose-payday-loans-over-competing-credit-products.

154 See, e.g. Ramirez, *supra* note 178.

155 *Payday Borrowers Are Far More Favorable Toward and Informed About Payday Loans than Voters without Payday Loan Experience*, PR NEWSWIRE, March 14, 2016, [HYPERLINK "https://www.prnewswire.com/news-releases/new-survey--payday-borrowers-are-far-more-favorable-toward-and-informed-about-payday-loans-than-voters-without-payday-loan-experience-300235446.html"]

Medium Term Credit – Credit Cards, Lines of Credit, Installment Loans

For consumers who are considered good to excellent credit risks, the marketplace for financial services is vast, including multiple medium-term credit instruments, and it is this category that has been the largest contributor to the growth of nonmortgage consumer credit held by banks. Credit cards account for most of that growth. At the time of the NCCF's report, revolving credit at retailers far exceeded the amount on bank cards. Today the positions are reversed. Numerous factors explain these trends, starting with convenience. Consumers who once carried cards for gas stations, department stores, travel companies, and specialty retailers have gradually lightened their load of plastic to a few favorites – commonly including a bank card that could substitute for the other accounts.

Consumers open about six million credit card accounts a month, and the vast majority of those originations by dollar volume come from consumers with good and better credit scores. According to CFPB data, subprime consumers (with scores below 620) originate less than a billion dollars of credit card debt a month, while near-prime consumers (620-659) open about $1.5 billion. Together they account for less than a ten percent of the $30 billion that consumers rated at prime and above (660 and up) open up on new cards.[156]

Most of the products in this category can substitute for products in the other two. Consumers who qualify for any of the medium-term loans are likely to be sufficiently creditworthy to avail themselves of any of the other medium-term short-term options as well. Marketing makes it clear that banks and finance companies are competing across their sector boundary and offering consumers alternatives to credit-card debt. Comparative advertising is often an indication of products that are likely substitutes for one another, and such advertising is plentiful. As an example, one of the top online lenders makes an appeal to card holders that leaves little doubt that an installment loan is an alternative to credit card balances:[157]

[156] CFPB, Borrower Risk Profiles, [HYPERLINK "https://www.consumerfinance.gov/data-research/consumer-credit-trends/credit-cards/borrower-risk-profiles/"].

[157] Rocket Loan Home Page, [HYPERLINK "https://www.rocketloans.com/"] Accessed on September 3, 2020.

ROCKET Loans Sign In

Rocket Loans Personal Loan		High-Interest Credit Cards	
Loan Amount	$10,000.00	Loan Amount	$10,000.00
Monthly Payment	217.42	Monthly Payment	217.42
Origination Fee	500.00	Origination Fee	N/A
Interest Rate	11.00%	Interest Rate	12.99%
APR	13.26%	APR	16.00%
Time to Pay Off	5 years	Time to Pay Off	6 years
Finance Charge	$3,545.45	Finance Charge	$5,594.23
	-$2,548.78 Less in interest		+$2,548.78 More in interest

It is conceivable that a comparison of alternative sources of credit could determine that credit cards would not qualify as a market solely on the basis of consumer demand for loans. Nonetheless because bank cards have gained such a large share of consumer credit, it is useful to consider the competition just among credit cards. Different cards offer a wide variety of interest rates and other terms. Cards from credit unions routinely offer better rates. The industry makes hundreds of millions of offers a year, enticing consumers to try new cards with lower fees, lower interest rates, more bonuses, and other attractive features. Merchants still take advantage of the opportunity at checkout to offer charge accounts. Consumers routinely acquire new cards to pay off more expensive debts, New credit cards have represented about a third of the 200,000 new accounts opened in recent years.[158] Medium-term credit is a thriving marketplace with myriad options for consumers.

Commented [MW(68]: "Supra" reference in note needs to be fixed.

Installment Loans

The National Installment Lenders Association (NILA)stresses differences between installment, payday, and title loans – an indication of competition across the short-term and mid-term categories of credit:

> These products are about as different as two products could be. [P]ayday companies do not test the ability to repay the loan from cash flow…loans are typically of two weeks or one month's duration, and are payable in one lump sum….Data on these loans is not accepted by any major credit bureau. By contrast, Traditional installment lenders do test

[158] Credit card openings from CFPB, *see Consumer Credit Trends Credit Cards*, available at [HYPERLINK "https://www.consumerfinance.gov/data-research/consumer-credit-trends/credit-cards/origination-activity/"]. All account openings from New York Fed (2020), *supra* note 168.

> the ability to repay, and the loans are payable in equal installments of principal and interest, giving the borrower a clear and manageable roadmap out of debt. Installment loans are reported to the credit bureaus, enabling responsible borrowers to build or repair their credit."[159]

Credit Karma – a news cite and search engine for credit services returns four companies with eleven options to an inquiry for a personal loan.[160] The APRs for a shopper (presumably anonymous and unscreened) ranged from 18% to over 30%. Clicking a link for a lender allows one to apply for a loan. The ease of searching for loans, comparing offers, and securing funds with an online session, at rates approximating credit card rates, is an indication of competition, especially for those consumers with lower credit scores and in need of short-term cash.

That installment loans attract multiple grades of borrowers and multiple sources of lenders suggests that they present alternatives for consumers considering many purposes. Characterized by one study as credit for the non-prime working classes, but better risks than payday borrowers, the business has grown dramatically. Non-prime borrowers owe an estimated $50 billion on installment loans, borrowed from lenders that have avoided the public opprobrium and regulatory backlash that payday lenders have attracted.[161]

The actual interest rates that consumers pay will depend on whether they avail themselves of the benefits of competition. As is the case in any market, prices, terms, and conditions vary, and the variations can reflect competition, as consumers do not have identical preferences. Some consumers may be sufficiently satisfied with their lender that they prefer not to shop around, even though they might find themselves paying higher APRs than those who compare. Lending Tree, a company that facilitates loan shopping, surveyed personal loans available to borrowers with different credit scores. The difference between the minimum and maximum rates exceeded 8 percentage points for borrowers in all categories – from subprime to excellent scores. On an average 3-year loan of about $10,000, that difference translated into over $1,600 in extra payments, even for the best credit risks.[162]

Table YY

Shopping Around for Personal Loans

[159] National Installment Lenders Association, *Fundamentals,* available at [HYPERLINK "https://nilaonline.org/fundamentals/"] (internal notations deleted).
[160] Credit Karma, available at [HYPERLINK "https://www.creditkarma.com/shop/personal-loans" \l "newloans"]
[161] Profile from Payments Journal, *The Ugly Side of Lending: Online Installment Loans* [HYPERLINK "https://www.paymentsjournal.com/the-ugly-side-of-lending-online-installment-loans/"]
[162] Kat Khoury , *LendingTree Study: Shopping Around for Personal Loans Can Save Consumers 35%,* (June 27, 2018). [HYPERLINK "https://www.lendingtree.com/personal/lendingtree-study-shopping-around-for-personal-loans-can-save-consumers-35/"].

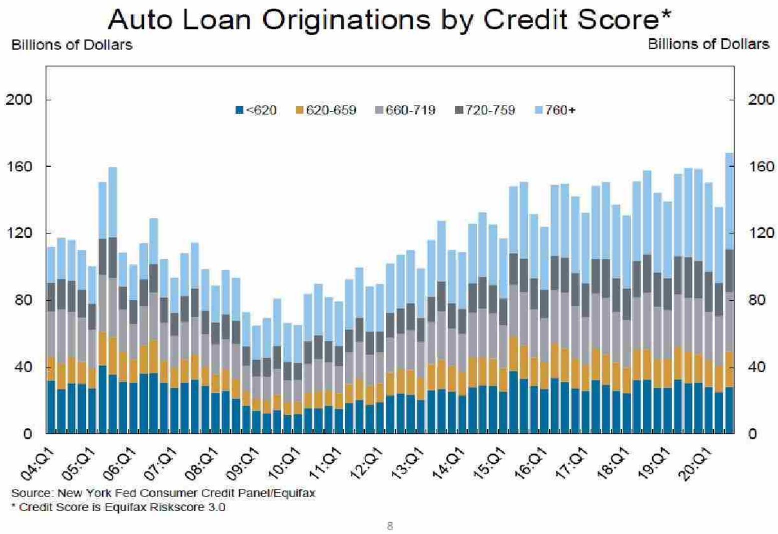
Difference in Loan Term Offers for the Average 3-Year Personal Loan ($10,328) May 2018									
	Average APR Offers			Monthly Payments			Total Payments Over 3 Years		
Credit Score Range	Minimum	Maximum	Spread	Minimum	Maximum	Spread	Minimum	Maximum	Spread
640 - 679	24.46%	33.01%	8.55%	$408	$456	$48	$14,678	$16,404	$1,726
680 - 719	17.19%	26.02%	8.83%	$369	$416	$47	$13,291	$14,984	$1,694
720 - 759	10.69%	19.97%	9.28%	$337	$384	$47	$12,118	$13,812	$1,695
760+	7.55%	16.38%	8.82%	$322	$365	$44	$11,575	$13,141	$1,566
All Borrowers	*18.51%*	*27.30%*	*8.79%*	*$376*	*$423*	*$47*	*$13,538*	*$15,239*	*$1,701*

Long Term Products – Automobiles and Mortgages

Lending for automobile purchases was found competitive by the Commission in 1970, and it appears to be so today. Auto loans may constitute a relevant market, given the maturities and securities involved. Car buyers may cross sector borders and borrow funds from other sources of secured loans (such as second mortgage lenders), but unsecured loans are likely to be significantly more expensive than a loan backed by the security of a lien on the vehicle. Auto loans can come from banks, credit unions, thrifts, manufacturers, and the dealers themselves (although auto dealers typically act as middlemen for other institutions that provide credit).

Although consumers with poor credit can find lenders willing to finance auto purchases, two thirds of those loans are taken out by consumers with credit scores of 660 and above, the proportions have remained relatively constant in the last decade, as Figure XX shows.[163]

[163] New York Fed (2020), *supra* note 168.



Auto loans, like installment loans, depend in part on the shopper to determine what ~~he or she desires~~they desire. Surveys reflect consumers have abundant choices for auto credit, and they express varying interest in different aspects of those options. In 2015, roughly half of them shopped around for financing,[164] while the other half chose the convenience of one-stop shopping at the dealer. A 2019 survey reported by FICO Decisions found similar results, and asked consumers about their loans or leases.[165] Eighty percent of the respondents negotiated terms – the most important of which were the monthly payment amount (cited by 92%), the length of the loan (90%), and the APR (87%), Ninety percent of the respondents felt they received good (53%) or excellent (36%) deals on their loans or leases. Ten percent regarded their deal as poor (8%) or felt cheated (2%). Two thirds of the respondents reported that the level of financing had some or a great deal of their selection of the vehicle make, model, or dealership. The bottom line from the survey, according FICO's summary:

> At the end of the day, US consumers want speed, convenience, fairness, and value. They dislike lengthy paperwork. They want to be treated as individuals, and they want to complete the transaction on the channel that works best for them.

[164] CFPB, CONSUMER VOICES ON AUTOMOBILE FINANCING, 8 (2016).
[165] Micah Dubois, *2019 Global Consumer Survey of Vehicle Finance Perception*, FICO BLOG (March 2019), available at [HYPERLINK "https://www.fico.com/blogs/2019-us-consumer-survey-vehicle-finance-perceptions-5-takeaways"]

> Some prefer the convenience of going online, some appreciate the one-stop shopping you can get at a dealership, and others like and trust their bank and prefer to go there.

Some academic studies that have focused on the effects of borrower qualifications and demand characteristics have found that opportunities for exploiting customers arise in the personal negotiations that attend an automobile purchase. One study concluded that consumers are more sensitive to maturity and payment size than the interest rate, which means that some end up paying higher rates than others, despite similar credit qualifications.[166] A 2010 study of negotiations for auto loans found that search costs, incomplete information, and distaste for bargaining leave consumers worse off.[167] The authors estimated that better-informed consumers captured 15% of the average dealer margin from selling an automobile. ~~Nonetheless a substantial group of consumers did not arm themselves withhave access to the information that would have saved them that moneyWhether and to what extent the results stemmed from aversions to negotiating was beyond. In this respect, the scope offindings are consistent with the study, buthigher APRs at dealers than at banks, which the persistently higher dealerNCCF found. Comparison shoppers got lower rates for auto loans cited in the Commission's report suggests that consumer preferences may have played a role.; customers who preferred convenience paid more.~~ Nonetheless a substantial group of consumers did not access the information that would have saved them that money. Comparison shoppers got lower rates and customers who preferred convenience paid more.[168]

Consumers paying different interest rates on auto loans have been the subject of numerous studies and proposals. A Bureau initiative would have capped the mark-ups that dealers could add to the rates banks charge them.[169] A recent article in the Georgetown Law Journal proposes a three-day cooling off period before consumers would be allowed drive a dealer-financed car off the lot, unless they have first shopped for direct sources of credit.[170] Proposals such as these often underestimate or overlook entirely the ability and desire of consumers to take advantage of competition, for a wider set of options. Both the FTC and CFPB have interviewed consumers for their perspectives on financing, and consumers explained why they had agreed to the terms

Commented [MW(70R69]: Alex, a cite to this would be very handy. Is there a convenient one?

Commented [NA(71R69]: Bill – I spoke with Jean at length about this and she offered the compromise suggestion I show here, and further adds that there is no additional citation that she's aware of that will really work to the previous points.

Commented [FP(69]: This strikes me as speculative. Suggest instead citing the Bureau's enforcement and supervisory work to address discriminatory auto loan pricing.

166 Bronson Argyle, Taylor Nadauld, Christopher Palmer, *Monthly Payment Targeting and the Demand for Maturity,* NBER Working Paper No. w25668 19 (March 2019).
167 Economics of Auto Loans, *see* Scott Morton, F., Silva-Risso, J. & Zettelmeyer, F. *What Matters in a Price Negotiation: Evidence From the U.S. Auto Retailing Industry*. QUANT MARK ECON, 9, 365 (2011), available at [HYPERLINK "https://link.springer.com/article/10.1007/s11129-011-9108-1"]
168 For more on competition in automobile credit, see the discussion of access and inclusions in Chapter 10.
169 See Chapter 10 for a discussion of this policy and its effects.
170 Adam Levitin, *The Fast and the Usurious: Putting the Brakes on Auto Lending Abuses*, THE GEORGETOWN LAW JOURNAL, Vol. 108:1257 (2020).

they took.[171] Some consumers simply did not like to bargain. Others thought their credit scores left them with little choice at the time. However, consumers who thought their rates were too high had not given up on improving them; they frequently said they intended to refinance. Those with marginal credit scores wanted to make some payments and improve their credit scores before they sought better rates. Whenever they might reenter the market, those seeking to improve their deals will find dozens of options available from numerous creditors, often marketed by online guides listing the top choices along with calculations of how much consumers can save.[172] The availability of these options and their value to consumers should be considered in any cost-benefit analysis of policies that mandate behavior, restrict choices, or fix terms at dealerships. FICO's survey asked consumers what the ideal automotive buying and financing experience would be for them. The word that they used more than any other in their answers (except for "Car") was "Easy."

The longest terms that consumers consider for loans are typically in mortgages for the homes they buy. Recent studies of mortgage loans describe an unconcentrated sector experiencing dynamic activity and compressed profits. Independent mortgage bankers are gaining market share, and profit margins are declining across the board, according to one study.[173] A Note by economists at the Fed found the relevant markets for mortgages to be nationwide and mortgage rates to be unrelated to local concentration, which itself was low in most areas, if location had mattered.[174] Consumers do not place much importance on the location of a mortgage lender, according to the Fed's Surveys of Consumer Finances, and over half of the mortgages are originated by nonlocal lenders. Perhaps most striking about the state of competition in the mortgage market is that nonbank companies have displaced banks sources as the leading lenders. The trends are shown in Figure XX, where banks' share of mortgage originations fell from around 70 percent in 2005 to less than 50 percent in 2017.[175]

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[171] CFPB, CONSUMER VOICES ON AUTOMOBILE FINANCING, (2016); JOINT STAFF REPORT OF THE BUREAU OF ECONOMICS AND BUREAU OF CONSUMER PROTECTION, AUTO BUYER STUDY: LESSONS FROM IN-DEPTH CONSUMER INTERVIEWS AND RELATED RESEARCH (2020), available at [HYPERLINK "https://www.ftc.gov/system/files/documents/reports/auto-buyer-study-lessons-depth-consumer-interviews-related-research/bcpreportsautobuyerstudy.pdf"]

[172] *See, e.g., 10 Best Auto Loan Refinancing Lenders of December 2020*, NERDWALLET, "Refinancing an auto loan could lower your rate and monthly payment, saving you hundreds of dollars a year," [HYPERLINK "https://www.nerdwallet.com/best/loans/auto-loans/refinance-car-loan"].

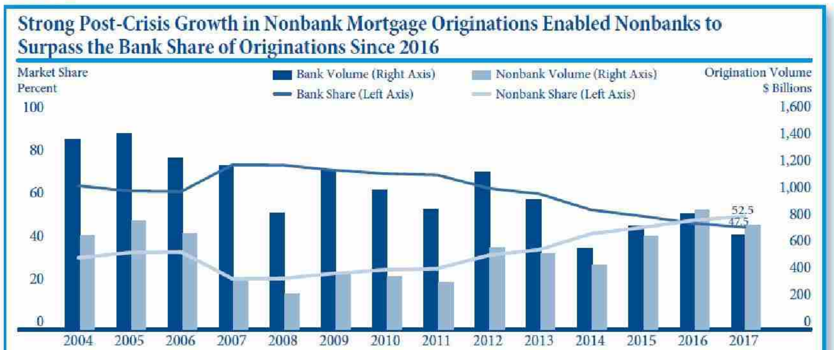
[173] Michael Fratantoni, *Mortgage Market Dynamics: Competition and Evolution,* THE JOURNAL OF STRUCTURED FINANCE, 24 (4) 34-42 (Winter 2019), available at, [HYPERLINK "https://jsf.pm-research.com/content/24/4/34"].

[174] Dean Amel, Elliot Anenberg, and Rebecca Jorgensen, *On the Geographic Scope of Retail Mortgage Markets,* FEDS NOTES(June 15, 2018)

[175] Kayla Shoemaker, *Trends in Mortgage Origination and Servicing: Nonbanks in the Post-Crisis Period*, FDIC QUARTERLY, Vol 13, No 4 (2019).

Figure XX

Chart 2



Source: FDIC analysis of Home Mortgage Disclosure Act data.
Notes: Nonbanks include all Department of Housing and Urban Development reporters. Banks also include credit unions and their affiliates. Data are limited to single-family residential mortgage originations, defined as first-lien purchase or refinance loans secured by an owner-occupied, 1–4 family unit, site-built property.

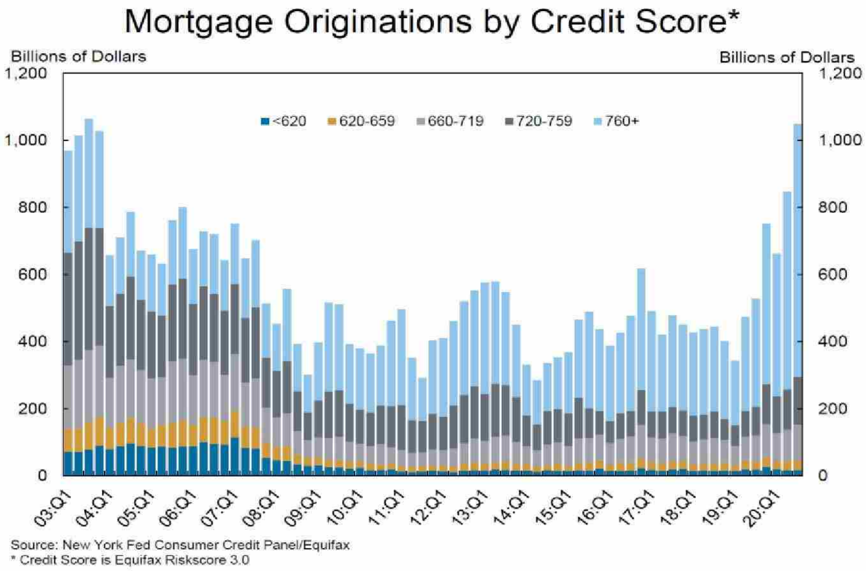
New entrants have been very successful taking shares from incumbents in mortgage markets. This manifestation of competition, according to a report in the FDIC Quarterly, “helped to spur technological innovation beneficial to lenders, servicers, and consumers. Most nonbanks were new to mortgage origination and servicing and built their processes and platforms from the ground up using many technological innovations.”[176]

Annual CFPB Reports track the developments in detail. In 2019 the largest originator of home purchase and refinance loans in the country was an online company, and 15 of the top 25 are independents, which originated more than half the mortgages in the top 25[177] Eight large banks, a credit union and an affiliated mortgage company rounded out the top tier. Twenty--five lenders in a national market would suggest a low level of concentration even if they accounted for the entire market; in fact, the top 25 do not account for half of all originations. In short, mortgage lenders compete in a market that appears to be competing vigorously both among institutions and across institutional lines.

In order to benefit from this competition, consumers need to qualify for mortgage loans in the first place. Borrowers with credit scores between 350 and below 659 accounted for about $15 billion in monthly originations at the end of 2018, while borrowers at 660 and above took out $130 billion a month.[178] Having a credit history that yields a good score is the key that unlocks this market for consumers. Figure XX shows originations by credit

[176] Id. at 64.
[177] CFPB, DATA POINT: 2019 MORTGAGE MARKET ACTIVITY AND TRENDS, Table 11 (June 24, 2020).
[178] CFPB, *Borrower Risk Profiles*, https://www.consumerfinance.gov/data-research/consumer-credit-trends/mortgages/borrower-risk-profiles./.

score since 2003.[179] In recent years, borrowers with scores above 720 account for the vast majority of loans.



Services that Consumers Do Not Purchase Directly

A common question about competition is whether consumers can expect to benefit from it if they are not directly deciding which goods or services they acquire. Customers choose their bank or their lender, but they do not typically choose the suppliers and agents that their institutions enlist to provide the package of services associated with the savings, payments, and loans that consumers seek. In this respect, the markets for financial services differ little from most other markets. An average automobile, for example, consists of about 30,000 parts from hundreds of suppliers.[180] Auto manufacturers have an incentive to get those parts at competitive prices and acceptable quality. The manufacturer who fails will either absorb higher expenses or lose customers who can find lower prices and better quality in the showroom of a competitor. Even a monopolist in control of the entire industry would prefer to maximize the margin it can

[179] New York Fed (2020), *supra* note 168.
[180] Ben Foldy, *Auto-Parts Suppliers Teeter as Car Production Halts,* Wall Street Journal, April 2, 2020.

achieve between the costs it incurs and prices it charges, although more competitive consumer markets intensify the incentive for firms to minimize costs and enhance quality. Thus, the benefits of competition (or the costs of market power) should not be expected to evaporate because customers are not choosing every aspect of the item they are acquiring. This chapter next considers competition in several services that financial, rather than consumers, typically buy.

Information – Credit Reports and Credit Scores

A consistent theme that runs through the history of credit is the importance of information. For the creditor, information about the borrower governs whether to lend and how much to charge. For the borrower, information about creditors is the catalyst that triggers competition among them.

Credit Reports

The Bureau described the functions and importance of credit reporting industry in a 2012 Review:

> In most of the markets for consumer credit, including credit cards, auto loans, mortgages, and student loans, lenders use credit reports as part of their evaluation of a consumer's application for credit. Companies use credit reports and credit scores derived from the information in credit reporting files to assess a consumer's likelihood of repaying the loan.… Underwriting processes stipulated by the FHA, VA, Fannie Mae, and Freddie Mac require mortgage lenders to obtain credit reports from a nationwide credit reporting agency (the NCRAs) before these federal agencies and government-sponsored enterprises will insure, guarantee, or purchase their loans. For each of these forms of credit and origination channels, credit reports are used by lenders to help set interest rates and other key credit terms, or determine whether the consumer is offered credit at all. Of 113 million credit card and retail card accounts, auto loans, personal loans, mortgages, and home equity loans originated in the United States in 2011, the vast majority of approval decisions used information furnished by credit reporting agencies.[181]

Before credit reports were widely available and inexpensive, information was a competitive advantage for creditors with repeat business. Merchants were pioneers of credit, thanks to their familiarity with customers. Human relationships help explain the rise of immigrant banks, credit unions, Morris Plan Banks, and other institutions that

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[181] CFPB, KEY DIMENSIONS AND PROCESSES IN THE U.S. CREDIT REPORTING SYSTEM: A REVIEW OF HOW THE NATION'S LARGEST CREDIT BUREAUS MANAGE CONSUMER DATA (2012), available at [HYPERLINK "https://files.consumerfinance.gov/f/201212_cfpb_credit-reporting-white-paper.pdf"].

thrived when commercial banks concentrated on the needs of companies and wealthy clientele. Neighborhood finance companies and pawnbrokers in the early twentieth century had similar advantages over the lending societies and larger institutions in city centers.

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The advantages of repeat business continue to accrue today. A recent report concluded that payment activity generated roughly 90 percent of banks' useful customer data and advised banks to leverage the information in support of their other businesses.[182] Another study demonstrated that banks can mitigate risk on their customers' credit cards by using information from their other accounts. [183] A banking relationship – with its steady stream of deposits, payments, balances and other data – generates a wealth of information for a bank that other lenders and card issuers do not have.

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Regardless of its relationship with a customer, a lender or merchant will see only a fraction of the economic activity of a prospective borrower, and millions of credit decisions are made without the benefit of any prior relationships. For these reasons, the demand for information on creditworthiness has supported a thriving market of credit reporting agencies since before the Civil War. Credit reporters, including the predecessors of Dunn & Bradstreet, were big businesses in the middle of the nineteenth century, although their reporting focused on commercial loans.[184] By the 1920s, the expansion of consumer credit generated sufficient demand to support a market for information about them.

By 1972, as the NCCF observed, credit-reporting on consumers was also a big business. Indeed, the NCCF worried that providers of credit information might need to be regulated as public utilities, given the costs of computer processing and data storage. The theory was that competition would be no more likely to work in credit reporting than in telephone service; one company per region would be more efficient.[185] Technology

[182] ~~,~~McKinsey & Company, *Global Payments Report 2019: Amid sustained growth, accelerating challenges demand bold actions* (2019), available at https://www.mckinsey.com/~/media/mckinsey/industries/financial%20services/our%20insights/tracking%20the%20sources%20of%20robust%20payments%20growth%20mckinsey%20global%20payments%20map/global-payments-report-2019-amid-sustained-growth-vf.ashx

[183] Sumit Agarwal, Souphala Chomsisengphet, Chunlin Liu, Changcheng Song, Nicholas S.Souleles, *Benefits of relationship banking: Evidence from consumer credit markets*, JOURNAL OF MONETARY ECONOMICS Volume 96, Pages 16-32 (June 2018), available at [HYPERLINK "https://www.sciencedirect.com/science/article/abs/pii/S0304393218300928"].

[184] See Appendix B for more on the origins of credit reporting and competition.

[185] It appears to the Commission that in the long run the credit reporting industry has the ingredients of a public utility. It is as uneconomical to have three credit bureaus in town as it is to have three telephone companies. The necessity for accurate and comprehensive credit data, tile technology, the mobility of the population, and the emergence of the multiparty credit card · all argue for a single credit reporting agency for each metropolitan area linked with similar agencies throughout tile nation." NCCF (1972*), supra* note 4, at 213.

proved the Commission wrong, both for telephones and for credit reports. Advances in processing and reductions in the cost of data have opened opportunities for competition to work in the sector. How well competition has worked is another question that merits consideration.

With respect to the collection and reporting of information, the performance of the sector has generated mixed reviews and frequent complaints. A 2012 Federal Trade Commission study found that 26 percent of consumers surveyed had identified potentially material errors in their credit reports. When the errors were corrected, half of those consumers (13 percent of all surveyed) saw a change in their credit score, and nearly half of the changes were enough to improve the terms they could get for loans.[186] The Commission conducted a follow-up study in 2015, and it found that two thirds of the consumers who had disputed information in their reports were still in their disputes. This prompted the recommendation that the CRAs improve their dispute-resolution procedures.[187] At the Bureau, credit and consumer reporting generate the most complaints of any ~~category~~industry, twice as many as debt collectors, and four times as many as credit cards in 2019.[188] CRAs responded to 97 percent of complaints the Bureau forwarded to them in 2019, and about 90 percent of the cases were closed by the end of the year. Consumer lawsuits have resulted in revised reporting practices. For example, CRAs have removed potentially unreliable sources like tax liens, civil judgments, and recent medical bills.[189]

In the context of 1.3 billion monthly tradelines coming in from 10,000 sources and populating files on over 200 million consumers, the numbers of complaints about inaccuracies may reflect a sector performing well or revealing room for improvement. Inaccuracies are inevitable, and the sheer volume of data means that even a vanishing fraction of errors will add up to large absolute numbers that could affect millions of reports. As the FTC studies and Bureau reports show, consumers have procedures available to correct errors.

What is missing from these large databases may be more revealing about the state of competition in the sector. In 2010, 26 million consumers (11 percent of the adult population) had no credit records at the NCRAs. They were "credit invisible." Another

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[186] FTC, *In FTC Study, Five Percent of Consumers Had Errors on Their Credit Reports That Could Result in Less Favorable Terms for Loans*, February 11, 2013, available at [HYPERLINK "https://www.ftc.gov/news-events/press-releases/2013/02/ftc-study-five-percent-consumers-had-errors-their-credit-reports"]
[187] Id.
[188] CFPB, CONSUMER RESPONSE ANNUAL REPORT (2019), available at [HYPERLINK "https://files.consumerfinance.gov/f/documents/cfpb_consumer-response-annual-report_2019.pdf"].
[189] FDIC, *New Standards for Credit Report Accuracy May Help Consumers,* FDIC CONSUMER NEWS (Winter 2018), available at, [HYPERLINK "https://www.fdic.gov/consumers/consumer/news/cnwin18/creditreports.html"].

19 million (8.3 percent) had credit files that were too thin to generate a reliable credit score.[190] The proportions of thin and missing credit files are higher among ~~blacks~~African Americans, Blacks, Hispanics, and ~~residents of poorer neighborhoods~~consumers living in low-income areas. It well recognized that se so-called ""credit ~~'~~ ~~are~~invisibles" are engaged in economic activity that generates useful information on creditworthiness. ~~Their~~ The problem is that much of the information is not reaching the NCRAs, so it is not generating reports that could put millions of consumers on the path to better credit.[191] Much of the information in NCRA files come from a concentrated collection of sources. As of 2012, ten institutions were furnishing most of the data that each bureau collected, and sixty percent of the information in their files came from retail and network-branded credit cards.[192]

Untapped information, or alternative data, appears to be an opportunity that competitors would seize to gain an advantage in the marketplace. Indeed, innovation is occurring on this front. Each of the NCRAs has acquired capacity to collect alternative data not typically furnished, such as rental and short-term loan payments.[193] These alternative data have the potential to build credit histories for consumers who are invisible or have thin files with disproportionately negative information.[194] Whether the better innovation will reward the Bureau that offers it will offer insights into competition in the marketplace for credit information.

That some competitive improvement in basic reports might be attainable is suggested by the competitive structure and dynamics in the sector. Three firms dominate the collection and reporting of traditional consumer information, Experian, Equifax, and TransUnion. For general credit decisions, ~~customers~~ lenders typically purchase reports on consumers from all three ~~on behalf of consumers~~CRAs, diminishing the incentive of any one to underbid or outperform the others. For the lender, a second or third report about a borrower can be expected to unearth some marginal information that the first one or two

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190 OFFICE OF RESEARCH, CFPB, DATA POINT: CREDIT INVISIBLES (2015), available at [HYPERLINK "https://files.consumerfinance.gov/f/201505_cfpb_data-point-credit-invisibles.pdf"]. *See* chapter 10 for more recent data.

191 *CFPB Explores Impact of Alternative Data on Credit Access for Consumers Who Are Credit Invisible,*" (February 16, 2017), available at [HYPERLINK "https://www.consumerfinance.gov/about-us/newsroom/cfpb-explores-impact-alternative-data-credit-access-consumers-who-are-credit-invisible/"]; CFPB, Becoming credit visible JUN 07, 2017, available at [HYPERLINK "https://www.consumerfinance.gov/data-research/research-reports/cfpb-data-point-becoming-credit-visible/"].

192 CFPB, CREDIT REPORTING WHITE PAPER (2012), available at, [HYPERLINK "https://files.consumerfinance.gov/f/201212_cfpb_credit-reporting-white-paper.pdf"].

193 Steven Menendez, *Now wanted by big credit bureaus like Equifax: Your 'alternative' data,*" FAST COMPANY (April 6, 2019), available at [HYPERLINK "https://www.fastcompany.com/90318224/now-wanted-by-equifax-and-other-credit-bureaus-your-alternative-data"]. .

194 *See* Chapter 10.

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did not contain, but the benefit of that additional information is not likely to be large, so the marginal report will command a correspondingly marginal price. Many more alternative ~~data brokers~~consumer reporting agencies also operate in this space.

It is in specialized applications, typically involving expensive transactions, that competition intensifies, because lenders pay premiums to CRAs for reports that are customized to the lenders' markets. Alternative data that could create distinctions among basic reports may create opportunities for rivalry among CRAs to break out. Those opportunities may have a better chance of realization if the industry and the GSE's consider whether the benefits of tri-merged reports exceed their costs. The Urban Institute has suggested that bi-merge or single score regimes could enhance competition.[195]

Credit Scores

While the national credit reporting market would be considered highly concentrated, the structure of the market does not approach the concentration that characterizes the provision of credit scores. The dominant provider of credit ratings, Fair Isaac Corporation, boasts that its FICO Score has been used in 90% of lending decisions. It cites a release from the Mercator Advisory Group,[196] which reported:

> New research from Mercator Advisory Group has found that in the United States, FICO® Scores were in 2016 used in more than 90% of lending decisions, including credit cards, mortgages, and automobile financing. In addition, Mercator performed a study of the frequency in 2016 and 2017 of FICO Score usage in the securitization process for U.S. asset-backed securities (ABS) backed by automobile leases, credit cards, prime auto loans, and subprime auto loans. *The study found that ABS securitizations in those four verticals almost universally cite the FICO Score.*

A 90 percent share of a market is considered a monopoly. By itself, a monopoly does not suggest a failure of competition, because a dominant firm could be the result of a

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195 A bi-merge or a single score regime would have two immediate benefits, according to the Institute: " First, such a move would give score providers an incentive to compete for lender business—either through better pricing or superior products and services—and second, the cost of origination could be marginally reduced, as fewer scores would need to be purchased and paid for." Karan Kaul and Laurie Goodman, *The FHFA's Evaluation of Credit Scores Misses the Mark*, URBAN INSTITUE (March 2018, available at [HYPERLINK "https://www.urban.org/sites/default/files/publication/97086/the_fhfas_evaluation_of_credit_scores_misses_the_mark_0.pdf"].

196 Mercator Advisory Group, *Scores Used in Over 90 of Lending Decisions According to New Study* (February 2018), available at [HYPERLINK "https://www.mercatoradvisorygroup.com/Press_Releases/FICO%C2%AE_Scores_Used_in_Over_90__of_Lending_Decisions_According_to_New_Study/"] (emphasis added)

competition in which it has won its share by dint of superior performance. However, dominance of this durability does not appear often and stands in contrast to the category shares of commercial credit ratings services,[197] Moreover, litigation involving Fair Isaac and potential entrants into the credit scoring business casts doubt on explanations based on the superiority of the FICO Score.

A potential contender to Fair Isaac developed an alternative to the FICO Score over a decade ago but has failed to gain share. Litigation over the efforts has uncovered evidence of entry barriers. In 2006, the NCRAs formed a joint venture to introduce VantageScore, and offered it to key lenders at a reduced price to build momentum for the alternative to the FICO score. Fair Isaac sued the joint venture and Experian that same year, alleging that the NCRAs had violated antitrust laws by forming it, that they had infringed its trademark by using a score that ranged from 300 to 850, and that Experian had falsely advertised its proprietary credit score by saying it was the "same type that lenders see." The litigation lasted five years, until Eighth Circuit affirmed a summary judgment in 2011 that the joint venture had not violated the antitrust laws by introducing VantageScore and had not infringed on the trademark. The Court also affirmed a jury verdict that Fair Isaac had obtained the trademark by deceiving the US Patent and Trademark Office.[198] As for the advertising, the Court agreed that the advertising was not literally or implicitly false. "Consumers purchasing Experian's PLUS Score are seeing a credit score of the "same type" that lenders see, namely a score indicative of how lenders would assess an individual's creditworthiness."[199]

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The 2011 ruling did not dent the dominance of the FICO score and did not end the legal disputes regarding Fair Isaac's business practices. In more recent litigation, customers of credit ratings alleged that Fair Isaac used exclusionary agreements in order to maintain a monopoly~~federal district~~.[200] One federal district court has ruled ~~, Fair Isaac Corporation v. Trans Union, LLC,~~ that Fair Isaac's contracts prohibiting CRAs from selling ratings and penalizing customers for buying them were adequate to support allegations of illegal

[197] See, e.g. Staff of the U.S. Securities and Exchange Commission, *Annual Report on Nationally Recognized Statistical Rating Organizations*, (January 2020) at 10, for NSRO volumes in various categories.

[198] Fair Isaac Corporation, et al v. Experian Information Solutions, et al, 332 F.3d 1150 (8th Cir. 2011).

[199] Id. at 17 [**need F 3d page**].

[200] Peter Strozniak, *Credit Unions Sue FICO for Alleged Antitrust Violations,* CREDIT UNION TIMES (May 12, 2020) [HYPERLINK "https://www.cutimes.com/2020/05/12/credit-unions-sue-fico-for-alleged-antitrust-violations/?slreturn=20201015230658" \l ":~:text=Three%20credit%20unions%20are%20suing%20the%20Fair%20Isaac,which%20harmed%20businesses%20and%20led%20to%20higher%20prices"]; Holmes CountyBank and Trust Company v. Fair Isaac Corporation, N.D. IL Case: 1:20-cv-03395, available at https://classactionsreporter.com/wp-content/uploads/Fair-Issac-FICO-Credit-Scores-Antitrust-Compl.pdf.

monopolization.[201] The court also held that VantageScore's ads some similar to those at issue in the Experian case and others claiming superiority over FICO Scores could not be expected to deceive consumers. In addition to the private litigation, the Antitrust Division of the Department of Justice has opened an investigation, into "potential exclusionary conduct" on the part of Fair Isaac.[202]

Entry into the credit rating business has been hindered by government policy and actions. FHFA, Fannie Mae, Freddie Mac, and CFPB have favored the dominant supplier. Until recently a prerequisite for selling a loan to a Government Sponsored Entities was a FICO Score, which gave Fair Isaac a virtual lock on mortgage markets and an implicit endorsement that would be difficult for potential entrants to overcome. Another obstacle facing the most likely entrants was the CFPB, which sued the NCRAs for making essentially the same advertising claims that the Eight Circuit had ruled were neither literally or implicitly false in the Experian case.[203] Since the cases settled, the record does not reveal whether the Bureau's case would have met the same fate as Fair Isaac's rejected efforts to prevent the NCRAs from advertising the VantageScore. There can be little doubt that the effect of the repeated challenges to the advertising discredited information about alternatives to FICO Scores in the marketplace. Experian paid a $3 million dollar penalty to the Bureau.

More recently, the FHFA and GSEs have lowered a major impediment to entry in the credit rating business. FHFA issued a final rule in 2019 that allows the GSEs to qualify other ratings supporting mortgages they purchase.[204] The process is now underway, but it is too soon to estimate the effects of the new policy. Decisions of the GSEs can influence lending beyond the mortgages they purchase, but a level playing field for credit rating services will depend on the resolution of disputes over other potential barriers that may favor the dominant provider. However, if the services in other markets (and the custom services provided by the suppliers in this market) are an indication, credit scoring has room for more than one methodology and more than one provider. Exclusionary

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[201] Fair Isaac Corporation v. Trans Union, LLC, 1:2017cv08318 - Document 97 (N.D. Ill. 2019).
[202] [HYPERLINK "https://www.politico.com/news/2020/03/13/justice-fair-isaac-antitrust-129204"] *FICO Statement Regarding Antitrust Investigation* (March 15, 2020), available at [HYPERLINK "https://www.fico.com/en/newsroom/fico-statement-regarding-antitrust-investigation"].
[203] See, Consent Order, /Experian Holdings, Inc. et al. File No. 2017-CFPB-0012 at paragraph 16 (alleging this claim was deceptive "See the same type of information that lenders see see when assessing your credit….") *See* also, CFPB, *CFPB Orders TransUnion and Equifax to Pay for Deceiving Consumers in Marketing Credit Scores and Credit Products; Credit Reporting Companies Misstated the Cost and Usefulness of the Credit Scores and Products They Sold, Lured Consumers into Costly Recurring Payments* (Jan 03, 2017).
[204] Federal Housing Finance Authority, Validation and Approval of Credit Score Models Final Rule (8/16/2019) available at [HYPERLINK "https://www.fhfa.gov/SupervisionRegulation/Rules/Pages/Validation-and-Approval-of-Credit-Score-Models-Final-Rule.aspx"].

agreements and advertising restraints, whether privately assumed or officially imposed, give cause for concern about competition in this service that is critical to consumer credit.

As the courts weigh the merits of competitive practices in the markets for credit information, the markets themselves face disruption as potential entrants from the technology sector take advantage of data from their own customer relationships. The Bank for International Settlements (BIS) sees preliminary indications that big-tech firms are threatening both banks and CRAs:

> [B]ig techs can have a competitive advantage over banks and serve firms and households that otherwise would remain unbanked. They do so by tapping different but relevant information through their digital platforms. For example, Ant Financial and Mercado Libre claim that their credit quality assessment and granting of loans typically involve more than 1,000 data series per loan applicant. Recent BIS empirical research also suggests that big techs' credit scoring applied to small vendors outperforms models based on credit bureau ratings and traditional borrower characteristics (Box III.B). All this could represent a significant advance in financial inclusion and help improve firms' performance.[205]

Encouraging as it may be, there is little likelihood that these innovations will become acceptable alternatives to the current third-party credit reports and scores. Maintaining competition among the current providers will remain critical to consumers. Also important will be market conditions that allow providers to compete and encourage lenders to drive competition.

Loan Servicing

Loan servicing – communicating with borrowers, processing payments, and managing expenses related to a loan – is an important component of consumer credit. For loans that last months and years, these services define the relationship between the debtor and the creditor, even though in many cases, the institution that originates a loan does not remain the creditor and is not the entity that services it. Mortgages, which account for the largest portion of consumer debt, are most likely to be serviced by third parties. According to a review of trends in mortgage origination and servicing in the *FDIC Quarterly,* nonbanks accounted for 42 percent of the loans serviced by the top 25 servicers, up from 4 percent in 2008. The nonbank mortgage servicers gained their market share largely by purchasing the rights to service existing mortgages.[206]

[205] BIS, *ANNUAL ECONOMIC REPORT 2019*, 65 (2019) (internal citations omitted), available at [HYPERLINK "https://www.bis.org/publ/arpdf/ar2019e.htm"]. .
[206] Shoemaker, *supra,* note 210.

The growth of third-party mortgage servicing is an illustration of the forces that cause markets to emerge and the benefits that competition can deliver. Mortgages in 2019 cost about $150 per year to service, if they were performing according to their terms, while servicing a mortgage that was not performing cost about $2,000 per year.[207] These costs were $59 and $482, respectively, in 2008, rising to $181 and $23,86 at their peaks in 2015. Servicing costs are factored into the pricing of a loan. Inefficient servicing will add needless premiums to the fees or interest rates that consumers pay.

Behind the rising costs were the new processes mandated by regulations and increased legal exposure as litigation mounted over servicing disputes. Banks were less efficient at managing the former and sought to avoid the risk of the latter. Nonbank servicers had cost advantages due to specialization and the use of technology. As the FDIC report put it, "The technical expertise and innovation of many nonbank servicers is said to have helped them to be leaders in customer experience and process efficiency. And nonbanks reportedly have lowered delinquency and default rates by using technology to educate borrowers, streamline processes, and make loan modification processes efficient and effective."[208] A significant advantage of an efficient market for mortgage servicing is that banks and smaller lenders remain in the origination market, sustaining competition there,

One respect in which loan servicing can differ from the parts embedded in other companies' products is that the quality of servicer's performance becomes obvious quickly and reflects on the originator. That reflection is likely to affect the originator's business. A report by the Bureau found that borrowers' priorities in choosing a lender or broker included the relationship that the borrower expected to have with the lender.[209] More than half of the borrowers responding to the National Survey of Mortgage Originations responded that a prior relationship and a local branch were important when picking a lender. Almost three quarters of the consumers with small servicers said so. Given the importance of that relationships, it is no surprise that numerous ratings and assessments of servicers are available to lenders and consumers, from commercial

[207] Michael Fratantoni, *WHY HAVE BANKS STEPPED BACK FROM MORTGAGE SERVICING?,* International Banker, September 2, 2020.
[208] Id. at 61 (citing Marshall Lux and Robert Greene, "What's Behind the Non-Bank Mortgage Boom?" Harvard Kennedy School, June 2015:5, https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/working.papers/42_Nonbank_Boom_Lux_Greene.pdf.).
[209] CFPB, *Data Point: Servicer Size in the Mortgage Market*, (November 2019), available at https://files.consumerfinance.gov/f/documents/cfpb_2019-servicer-size-mortgage-market_report.

sources like J.D. Power,[210] and government sponsored entities like Fannie Mae.[211] In a message for lenders, an article reporting the J.D. Power results relayed a consumer comment that captured the essence of the study: "Communicate…. The customers that you are ignoring now will NOT be returning customers!"[212] An ad for the top-rated company appeared alongside the article. Creditors in need of better loan service than they can provide internally (or than they are getting from their current servicer) have options in the marketplace.

Debt Collection

The incentives for seeking efficiency and quality in loan servicing may be more attenuated when it comes to debt collection. A lender may have less interest in preserving an ongoing relationship with a borrower who has been referred to a debt collection agency.[213] A Bureau survey published in 2017 found high proportions of consumers responding that debt collectors were using tactics that companies cultivating relationships would avoid – such threatening consumers, calling consumers at inconvenient times and failing to honor requests to stop contacts. Avoiding such practices is also fundamental to compliance with debt-collection laws, but enforcement reports from both the Bureau and the FTC contain numerous cases of collectors who did not measure up to standards.

It is another question, however, whether competition can play a role in helping or hindering consumers' experiences and compliance with the law. On this issue, the evidence suggests that it can. Incentives remain for creditors to find debt collectors that are more likely to improve the consumer experience, the performance of loans, and legal compliance. The demand for improvements along these metrics is apparent in numerous reports and rankings of the "best" debt collection agencies[214] and in offers from experts and consultants proposing good business practices for the collection industry. A study

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[210] See, e.g. J.D. Power, *COVID-19 Pandemic Increases Customer Expectations of Mortgage Servicers, J.D. Power Finds*, (July 30, 2020);

[211] Fannie Mae, *STAR Program 2020 Reference Guide,* Available at [HYPERLINK "https://singlefamily.fanniemae.com/servicing/star-program"].

[212] Clayton Jarvis, *Digging into J.D. Power's mortgage servicer satisfaction study*, MPA Mag, (August 3, 2020), available at https://www.mpamag.com/news/digging-into-j-d--powers-mortgage-servicer-satisfaction-study-229563.aspx.

[213] This theory is often cited in support of rules to prevent abusive collection tactics. See, e.g. CFPB, *Debt Collection Practices (Regulation F) Final Rule; Official Interpretation,* at 473 ("Consumers do not choose their debt collectors, and, as a result, debt collectors do not have the same incentives that creditors have to treat consumers fairly."), (footnote omitted). See generally, Zywicki, Todd J., *The Law and Economics of Consumer Debt Collection and Its Regulation* (September 9, 2015). George Mason Legal Studies Research Paper No. LS 15-17, George Mason Law & Economics Research Paper No. 15-33, Available at SSRN: https://ssrn.com/abstract=2658326 or http://dx.doi.org/10.2139/ssrn.2658326.

[214] See, e.g., Donna Fuscaldo, *The Best Collection Agency Services of 2021*, business.com (Dec 07, 2020), available at https://www.business.com/categories/best-collections-agency-services/.

commissioned by FICO, for example, concluded with this advice: "Institutions that are beginning to implement this more customer-centric approach—or at least beginning to plan for such an evolution—will be well-positioned to reap the benefits of a continued customer relationship and more effective collections."[215]

The role of competition in achieving legal compliance is also apparent in the demands creditors make of debt collectors. A Bureau study in 2016 reported that large agencies generated most of the activity in the sector, with the top 300 companies of the 4,000 taking around two thirds of industry revenue.[216] Large creditors typically use large agencies, and often more than one at a time. These creditors shift accounts from one agency to another, limit the collection tactics that agencies can use, and frequently audit the agencies' performance. Smaller creditors, which use smaller agencies, were less likely to follow these practices. Collection agencies that do not comply are likely to lose business to their competitors. Evidence that the agencies take the competitive threat seriously comes from the existence of yet another market – the consultants and technology vendors that offer services to comply with legal obligations.[217]

In short, the incentives to enhance consumer satisfaction need not be obvious or immediate, and the objectives may be largely limited to legal compliance concerns. but effective competition in efficient markets can improve consumer protection.

Payment Services

In 1972, the most elementary financial transaction meant a trip to a teller. In that respect, the experience fifty years ago did not differ from the beginning of the twentieth century (except that for most consumers the teller would have been in an institution other than commercial bank). Today, consumers no longer need to travel to a bank, a branch, or even an ATM to access sophisticated financial services. According to the American Bankers Association,[218] 70 percent of U.S. consumers used a mobile device to manage their bank account at least once in September 2019, and a third of U.S. adults used a

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[215] Aite Group, *Beyond the Call Center: Emerging Strategies for Collecting Consumer Debt*, (March 2019), at 21, available at [HYPERLINK "https://www.fico.com/sites/default/files/2019-05/20190301%20FICO%20debt%20collection%20white%20paper%20FINAL.pdf"].

[216] CFPB, Study of third-party debt collection operations, (July 2016), available at https://files.consumerfinance.gov/f/documents/20160727_cfpb_Third_Party_Debt_Collection_Operations_Study.pdf

[217] See, e.g. Experian, Fair Debt Collection Practices Act (FDCPA) and Large Debt Collection Participants, available at [HYPERLINK "https://www.experian.com/regulatory-compliance/consumer-information/fdcpa-and-large-debt-collection-participants"].

[218] American Bankers Association, *Survey 95 Percent of Consumers Give High Marks to Digital Banking*, (November 13, 2019), available at [HYPERLINK "https://www.aba.com/about-us/press-room/press-releases/Survey-95-Percent-of-Consumers-Give-High-Marks-to-Digital-Banking"]

mobile app to make a payment or transfer money in the year. More often than not, the app they chose did not come from their bank. Payment volume on PayPal and Venmo outpaced activity on the banks' apps. Apple Pay and Starbucks were also well established as alternative payment providers. The advent of these technologies is allowing a new type of bank to enter the market, a bank without any physical retail locations. One survey estimated that 30 percent of the US population either has opened or plans to open an account at an online-only bank.[219]

Competition authorities and experts have examined payment systems and expressed concern that the markets have not kept up with the demands of consumers. The OECD, for example, published the results of a 2012 roundtable on competition and payment systems.[220] The assembly saw need for improvement but was uncertain about how to proceed:

> The ongoing shift from cash and paper towards electronic payment systems potentially brings large economic benefits. But card payments in particular have remained expensive for merchants, and regulation may have unintended consequences. There is no consensus among economists and policymakers on what constitutes an efficient fee structure for card-based payments, and it is not clear if payment competition might do the trick. Regulation should be geared towards removing barriers of entry in payment markets and banning merchant (pricing) restrictions. The discussion reviewed recent countries' experiences on developments regarding all non-paper based forms of payment such as debit and credit cards, and E-payments (through internet, mobile phones etc.). Many members are investigating these markets, and EU jurisdictions are implementing the EU payments service directive, which aims to provide a single market for payments.

Some of those investigations had already resulted in numerous enforcement actions and a wide array of judicial decisions. In the United States, credit cards were found to constitute relevant markets for the payment services they provide in 2001, when a court held that Visa and MasterCard had restrained competition with contracts that excluded card issuers like Discover and American Express from those markets, and ordered an end to the exclusion..[221] In 2004, retailers brought a class action to recover allegedly excess

[219] Liz Knueven, *Online banking isn't just for millennials anymore — it's quickly becoming the norm,* BUSINESS INSIDER (Nov 14, 2019), available at [HYPERLINK "https://www.businessinsider.com/personal-finance/online-banking-gaining-popularity-united-states"].

[220] OECD POLICY ROUNDTABLES, COMPETITION AND PAYMENT SYSTEMS (2012) available at [HYPERLINK "http://www.oecd.org/competition/PaymentSystems2012.pdf"]

[221] United States v. Visa USA, Inc., 163 F. Supp. 2d 322 (S.D.N.Y. 2001) ("The proof demonstrates that [Visa and Mastercard] do weaken competition and harm consumers by: (1) limiting output of [rival] cards in the United States;

swipe fees from Visa, Mastercard and affiliated banks, The class and the defendants settled last year for $5.5 billion, although some retailers opted out to pursue separate relief.[222]

As the retailers' case was pending, the Department of Justice brought another case against Visa and Mastercard, as well as American Express. The government alleged that the companies had prevented merchants "from rewarding consumers when they use less expensive credit cards to make a purchase," and inhibited "merchants' ability to reduce card acceptance costs, and therefore their retail prices to consumers." [223] Visa and MasterCard settled, agreeing to allow merchants to offer discounts, rebates, or discounted products and services to consumers for using other networks, lower-cost cards, or other forms of payment. American Express, however, chose to litigate, and its practice of preventing merchants from steering consumers to credit cards with lower fees was held to be a legitimate form of competition by the Supreme Court, which reasoned that although Amex's business model may have increased prices to consumers, it had "spurred robust interbrand competition, had "increased the quality and quantity of credit-card transactions," and had not prevented Visa, MasterCard, or Discover "from competing against Amex by offering lower merchant fees or promoting their broader merchant acceptance," [224] The growth of credit card usage influenced the decision, as did the shares of the major players. Visa, Mastercard, and Discover were accepted at 50 percent more locations and together processed almost three times Amex's transaction volume. Four justices dissented, reasoning that transaction platforms could violate the antitrust laws if buyers alone suffered adverse effects.[225]

While contentions over the practices of payment platforms generate debate, the growth of rival payment systems indicates that innovation in payment systems could change the markets dramatically. The evidence from mobile payments shows how quickly new

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(2) restricting the competitive strength of [rivals] by restraining their merchant acceptance levels and their ability to develop and distribute new features such as smart cards; (3) effectively foreclosing [rivals] from competing to issue off-line debit cards…, and (4) depriving consumers of the ability to obtain credit cards [with] different qualities, characteristics, features, and reputations.).

[222] *See* Generally, *Payment Card Interchange Fee Settlement Official Court-Authorized Settlement Website*, [HYPERLINK "https://www.paymentcardsettlement.com/en/Home/FAQ" \l "faq7"].

[223] Department of Justice, *Justice Department Sues American Express, Mastercard and Visa to Eliminate Rules Restricting Price Competition; Reaches Settlement with Visa and Mastercard* (October 4, 2010), [HYPERLINK "https://www.justice.gov/opa/pr/justice-department-sues-american-express-mastercard-and-visa-eliminate-rules-restricting"].

[224] Ohio v. American Express Co., 585 U.S. __,_ (2018) (The state of Ohio was also a party.)

[225] Id. (Breyer, J. dissenting.)

methods can catch on. When banks in Singapore introduced a new mobile payment technology, researchers found:

> In the first year subsequent to the QR code introduction, the number of consumers who signed up (used) mobile payment increased by 53.8% (304%). The average monthly growth rate of mobile payment's share of total consumer spending also rose from 7.1% in the year before the technology shock to 21.1% in the year after.[226]

Innovations in payment systems are coming from outside the banking sector as well. Consumer banking services have attracted interest from leading tech companies like Facebook and Google. Facebook has been exploring the establishment of a global financial system with a new crypto currency,[227] while Google is reportedly planning new checking account offerings, in partnership with banks, according to Business Insider.[228]Google sees advantages in the customer bases that banks have, as well as in their experience "navigating the regulatory complexities of the banking sector…."

If the regulatory challenges can be overcome, BIS sees significant competition coming from the technology sector:

> Big techs' low-cost structure business can easily be scaled up to provide basic financial services, especially in places where a large part of the population remains unbanked. Using big data and analysis of the network structure in their established platforms, big techs can assess the riskiness of borrowers, reducing the need for collateral to assure repayment. As such, big techs stand to enhance the efficiency of financial services provision, promote financial inclusion and allow associated gains in economic activity.[229]

Echoing an objective of the Bureau, BIS advised regulators to ensure a level playing field between big techs and banks.

An example of the transformative potential of new entry comes from China, where Ant Group, a digital payment platform, has become a major lender of short-term debt.

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[226] Sumit Agarwal, Wenlan Qian, Yuan Ren, Hsin-Tien Tsai, and Bernard Yeung, *The Real Impact of FinTech: Evidence from Mobile Payment Technology* (October 2020). Available at [HYPERLINK "https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3556340"]
[227] Mike Isaac and Nathaniel Popper, *Facebook Plans Global Financial System Based on Cryptocurrency*, NEW YORK TIMES, June 18, 2019, available at [HYPERLINK "https://www.nytimes.com/2019/06/18/technology/facebook-cryptocurrency-libra.html"].
[228] Gregory Magana, *Google is planning to break into banking with new checking account offerings,* BUSINESS INSIDER, Nov 14, 2019, [HYPERLINK "https://www.businessinsider.com/google-will-begin-offering-checking-accounts-2019-11"]
[229] BIS (2019), *supra* note 233, at 55.

According to the Wall Street Journal, "In the span of a year, Ant Group Co. originated loans to half a billion people in China and accounted for nearly a fifth of the country's outstanding short-term consumer debt as of June."[230] The company has enlisted 100 banks, from rural houses to national institutions, to originate the loans, although it holds some of the debt itself and sells some to investors. The information that Ant has gained from its users' payment activity has given it an advantage over the banks that rely on third-party credit reports and ratings. According to the Journal, Ant's typical customer "has unmet consumption demand due to the lack of a credit card or insufficient credit limits …. Individuals born after 1990 make up half of the customers for nonbank consumer financing companies…[231] A national banker acknowledged to the Journal that banks do not have access to the information or the risk models that Ant has accumulated and developed to assess these borrowers. The competition spurred by Ant's entry into the market has given millions of consumers – credit invisibles and thin files – access to credit.

The sequel to Walmart's struggle to compete with banks has begun in the United States. Among the major players this time will likely be Fintech companies that did not exist when Walmart launched its first campaign. The reaction that the Square and Nelnet charters provoked and the resistance to allowing big tech near banking is unlikely to fade. Indeed, Ant's IPO has been postponed due to regulatory hesitation in China, and regulators in the states have opposed OCC's move to issue charters to fintech companies that do not take deposits. The head of the Conference of State Bank Supervisors dismissed the argument advanced by OCC that businesses operating on a global scale should not need a license in every state in this country. State regulators counter that they can best "serve the interests of consumers, industry and local economies." Local regulation, they argue, "gives consumers more control over their financial well-being, including the terms of credit offered in their communities."[232]

However fintech companies fare in their efforts to compete, it is too soon to count out the pioneers that saw consumer credit as the means to finance a new industry a century ago. According to a recent report, General Motors is considering the formation of an industrial bank that would accept deposits and make loans on electric automobiles.[233] The company that embraced consumer credit despite its social stigma and used it to overtake Ford as

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[230] Yang, *Jack Ma's Ant Group Ramped Up Loans, Exposing Achilles' Heel of China's Banking System*, WALL STREET JOURNAL, Dec. 6, 2020.
[231] Id. (internal quotations and references omitted).
[232] John Ryan, *Congress, not the OCC, decides what is and isn't a bank*, AMERICAN BANKER, August 19, 2020, [HYPERLINK "https://www.americanbanker.com/opinion/congress-not-the-occ-decides-what-is-and-isnt-a-bank"].
[233] Orla McCaffrey and Mike Colias, *GM Plans to Seek Banking Charter to Grow Auto-Lending Business,* WALL STREET JOURNAL, Nov. 27, 2020, available at [HYPERLINK "https://www.wsj.com/articles/gm-plans-to-seek-banking-charter-to-grow-auto-lending-business-11606501125"].

the largest automaker in the United States may once again engage consumers in the financing of an industrial revolution. This time the effort would underwrite the expensive technology that is displacing the internal combustion engine.

Whether fear of big tech proves to be a more formidable barrier than the social stigma of consumer credit in 1920 or the opposition to Walmart in recent times remains to be seen. So far the twenty-first century has accrued a cautionary history of efforts by innovators to cross the borders of the banking sector.[234] Nonetheless, potential competitors keep trying. Consumers have much at stake in how the next chapter will unfold.

In short, there are signs of progress, but a history of failed attempts to offer banking services counsels caution along with optimism. The proportion of the population without a bank account remains significant. Payments are still dominated by bank cards. Whether these characteristics stem from indifference on the part of consumers or barriers to competition for banking and payment services is worth continued examination.

Competition and Equal Access to Credit

With the ability to r~~R~~ank~~ing~~ consumers, to decide whether and how much to lend, and to ~~and~~ customiz~~eing~~ credit products, lenders can and do treat ~~are forms of discrimination~~different consumers differently. When the exercise of that ability is ~~based on~~limited to sound business reasons – such as the risk that a loan will be repaid – the differences that result ~~such discrimination~~ can enhance ~~lending~~ efficiency, consumer welfare, and system stability. Ignoring legitimate ~~such~~ distinctions, on the other hand, can increase the incidence of debtor default and raise the cost of credit. In extreme cases – like the Crash of 1929, the Savings and Loan Crisis of the 1980s, and the Global Financial Crisis of 2007-2008 – inadequate attention to ~~creditworthiness~~ risk of repayment can compromise financial markets and threaten entire sectors of the economy.

History has documented centuries of harm ~~When D~~~~discrimination~~ that persecuted, excluded, and ~~is unrelated to legitimate business considerations~~, ~~it can~~ ~~s~~~~cause consumer harm~~marginalized populations have suffered from credit discrimination that had little or nothing to do with legitimate distinctions. ~~Equal credit opportunity laws and regulations have identified~~The ECOA was enacted in 1974 to address serious discriminatory harms and ~~have~~ prohibit~~eds~~ the discrimination that inflicts them. Federal and state policies with discriminatory impacts have been and continue to be repealed and reformed. The ongoing efforts to protect~~ion of~~ consumers from prohibited discrimination is the subject of other

Commented [VF(77]: This is incomplete/confusing as written; for example, discrimination can occur even if there is a "legitimate business need"—only if there is no less discriminatory alternative to the discrimination policy or practice.

Commented [ML(78]: Does this mean that **discrimination** would sometimes be related to legitimate business considerations? You might consider rewording this.

[234]Id. The article on General Motors recalled, "More than a decade ago, a wave of opposition led by the banking industry pushed retailers Walmart Inc. and Home Depot Inc. to abandon their attempts to secure industrial-loan charters."

chapters. This chapter explores some evidence whether competition can ameliorate the harm or contribute to that protection. ~~Here it is worth considering whether competition plays a role in access and if so whether the influence of competition is beneficial or detrimental.~~

As a matter of theory, when buyers in a marketplace have numerous choices with whom to deal, they can penalize providers that ~~discriminate~~ engage in ~~overt~~ discriminatory actions by patronizing competitors that do not. As described in Chapter 10, s~~Numerous~~ ~~s~~tudies of various industries have confirmed the theory with evidence that the discipline of competition does reduce ~~overt ory activityion~~discrimination~~. A fuller discussion of the general literature can be found in Chapter 10, but it is worthwhile to consider here some studies and reports that have explored credit markets~~. The empirical research tends to confirm the hypothesis that competition ~~inhibits illegitimate discrimination~~reduces discrimination in credit markets as well. In an extensive study of bank branches, ~~for example,~~ Lux, et al found that increasing competition benefits populations that have been disproportionately denied loans:

> [T]he effect of intensified bank competition is stronger for populations that are ex ante more likely to be rationed by banks, which reinforces the identification of supply effects. First, we find that black households benefit more from branching deregulations than do non-black households only in states with a history of discrimination. For the same level of income, black households are indeed 20% less likely than white households to hold a bank account in states with a history of discrimination, but this gap narrows to only 15% after deregulation, to the level observed in states with no history of discrimination. Second, the effect of branching deregulations increases when the level of income decreases.[235]

~~the~~In mortgage market~~s~~s, competition from the new wave of digital lending has taken business away from traditional sources and given more of that business to nontraditional customers. ~~One of those lenders, Better.com, saw Hispanic clients increase by over 500 percent, African Americans by over 400 percent, and L.G.B.T.Q clients ten-fold, according to a~~A recent New York Times article report~~ed~~ing that "Discrimination is falling, and this trend corresponds to the rise in competition among various lenders.[236]

Commented [FP(79]: Citations?

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[235] Marshall Lux and Robert Greene, *The State and Fate of Community Banking,* M-RCBG ASSOCIATE WORKING PAPER SERIES (February 9, 2015), available at [HYPERLINK "https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/files/Final_State_and_Fate_Lux_Greene.pdf"]. (including a survey of the literature).

[236] Jennifer Miller, *A Bid to End Loan Bias*, New York Times, September 20, 2020, at Business 4.

Similar trends appear in CFPB data, which show Black or African American and Hispanic shares of mortgages up 10 percent overall since 2010.[237]

Borrowers interviewed for the New York Times article said they faced fewer obstacles ~~dealing~~ applying for credit online than in person, and their experiences were consistent with the findings of a study conducted by a team of researchers at UC Berkeley who found that fintech companies discriminated less than face-to-face lenders.[238] In the study, discrimination declined between 2008-2009 and 2014-2015, a result that "could be due to competition from the platforms and/or the ease of shopping around made possible by online applications." Although the analysis could not conclude prove causation, "the pattern seems to reflect growing competition edging out the possibility" that loan officers were extracting discriminatory rates. The results also showed rejections rates were lower for fintech than face-to-face loans and lower still for the lenders who relied more on fintech. Discrimination among fintech lenders was less than half that found among small lenders.

Another study considered settings where competition may be attenuated and found that opportunities for discrimination increased. One situation that has been the subject of research and regulation is the market for automobile loans, many of which are made in a private negotiation in the dealership. A study of that sector found that competitive markets did not drive the lowest prices for consumers, because poor transparency in the market allowed dealers to create better deals for themselves than for consumers.[239] In these loans, according to the authors, credit worthiness of the individual borrower and the details of the auto loan (term length, payment-to-income ratio, etc.) significantly influenced price. The study also found, however, that prices paid by consumers varied widely even after controlling for credit worthiness, and minority borrowers paid more than their relative risk and other legitimate factors justified:

> A majority of consumers paid no 'markup' over the credit-based buy-rate, while a small percentage of consumers paid thousands of dollars in additional markup. Moreover, minority borrowers were found to be highly over-represented in the category of those paying significant markups.[240]

Commented [VF(82]: We should refrain from citing specific financial institutions and should, instead, use governmental or academic literature, by and far.

Commented [FP(83R82]: Agree. The better.com statistics may be misleading if their loan volumes are small. If so, then the percentage increases are dwarfed by the actual number of borrowers who accessed credit. This is also confusing because the benchmark is unclear. Is the increase over its own book of business?

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[237] CFPB (2019), *supra* note 207.

[238] Bartlett, et al., *Consumer-Lending Discrimination in the FinTech Era*,

[239] Cohen, *Imperfect Competition in Auto Lending: Subjective Markup, Racial Disparity, and Class Action Litigation,* REVIEW OF LAW AND ECONOMICS (2012).

[240] Id. A study of mortgages analyzed FHFA data for evidence of discrimination against minority borrowers relative to white borrowers in more concentrated markets. The results "fail to reject the null hypothesis of no noneconomic discrimination." James A. Berkovec, Glenn B. Canner, Stuart A. Gabriel and Timothy H. Hannan, *Discrimination, Competition, and Loan Performance in FHA Mortgage Lending*, REVIEW OF ECONOMICS AND STATISTICS, Volume 80, Issue 2, p.241-250 (May 1998), available at [HYPERLINK "https://doi.org/10.1162/003465398557483"]).

Chapter 9 explores how the market has responded to situations such as these, and how competition through innovation could protect future consumers. Chapter 10 evaluates regulatory efforts to improve inclusion.

Conclusion

The ~~preliminary conclusions from the~~ foregoing review of competitive conditions today finds evidence ~~are~~ consistent with the circumstances~~ose~~ described in the NCCF Report and with observations from historians who have studied the credit sector throughout its development. The most important ingredient of competition – ease of entry – remains essentially free of intrinsic impediments in credit markets. The number of suppliers available to serve consumers' demand for credit, across a wide variety of credit products and services, far exceeds levels considered adequate for robust competition. There appears to be no intrinsic barrier to competition in lending.

Commented [VF(84]: How accurate is this statement considering much of what is contained in this chapter is from sources that are about 50 years old?

Nonetheless, some sectors display worrisome symptoms of competitive impairments. Two sectors stand out. The first is the supply of small loans to borrowers with below-average credit qualifications – populations that are disproportionately poor, unbanked, and in great need. Consumers in this sector often resort to inferior options, because better options are unavailable – sometimes because of the high costs of operating profitably in certain markets and sometimes ~~have been restricted or eliminated by~~ due to barriers to entry into those markets~~regulation~~. The second sector is the supply of information, particularly credit ratings and credit reports. That competition among information providers to the sector might be less than robust is ironic, given the rapid advances in information technology over the last fifty years. Information is plentiful and cheap. Monopoly power in this sector would be especially disquieting given that information is indispensable to credit transactions. If information is more expensive, more restricted, or less accurate, it is likely to raise the cost and reduce the availability of loans and other financial services to consumers.

Commented [VF(85]: Provide a citation. Some of these areas are credit deserts not due to regulation but because banks may not find them profitable enough as compared to more populated areas of the country. I is unclear *why* the deserts exist, and existing regs might be a factor but or not.

The impediments to competition in credit markets are not unique to the sector. Nor is the source of the problems. To the contrary, it is commonplace in antitrust experience. Providers of credit have attempted to insulate themselves from competition. Sometimes exclusionary behavior by dominant providers can suffice to deter rivals. Sometimes insulation comes in the form of standards that competitors collectively develop. The most effective barriers are those that become ossified in the amber of laws and regulations. In the case of credit, those barriers can take the form of enforceable interest rate caps, licensing restrictions, territorial and product limitations, suppression of information, and outright prohibitions of competition.

The enforcement of the antitrust law is entrusted to other agencies, but the preservation of competition depends on more than the prevention of anticompetitive conduct. Within the Bureaus' powers are numerous tools to ensure "that markets for consumer financial products and services are fair, transparent, and competitive,"[241] and that "markets for consumer financial products and services operate transparently and efficiently to facilitate access and innovation."[242] These tools range from facilitating the free flow of accurate information to leveling the playing field for competitors regardless of their status as depository institutions. ~~With respect to entry and barriers to it, t~~The NCCF ~~made a~~ expressed ~~recommendation~~aspirations fifty years ago that the Federal Government would lead in the harmonization of consumer credit laws to achieve similar purposes ~~that could apply to many services today~~:

> The effect of the present fractionalized legislation and regulation upon consumers should be reviewed as well as the progress of efforts to enact state consumer credit legislation. Enactment of consumer credit legislation of the type recommended in this report…should be also reviewed to determine whether any added amendments inhibit the basic aim of ensuring free entry of firms and fair treatment of all consumers. Should this research demonstrate that the states are not fostering an environment in which consumers have access to a wide variety of competitive financial services, that progress of consumer credit legislation at the state level is too slow, and that overall Federal legislation is deemed infeasible, then the Commission recommends that Congress undertake Federal chartering of finance companies in a manner, designed to remedy these deficiencies in the market for consumer credit.[243]

~~Fifty years later, Clarke and Zywicki saw in the CFPB a potential fulfillment of the Commission's vision: "The creation of the CFPB as a consolidated national regulator of consumer credit products provides a historic opportunity to establish a more coherent regulatory framework that can integrate enforcement, supervision, regulation, and research tools into one regulatory agency."~~[244]

Commented [VF(86]: It seems inappropriate and optically troublesome to quote the Task Force's own Chairman's writing.

Two and a half centuries of economic scholarship have refined the definitions and explanations of competition, but the appreciation ~~fundamental~~of its role in the economy ~~descriptions~~ remains much the same as ~~they did~~ when Smith ~~first~~ articulated it in 1776. ~~them and when Samuelson's text taught them to a generation of students.~~ Effective competition drives prices down to the costs of providing goods and services and

[241] DFA Section 1021(a) (12 U.S.C. § 5511(a))
[242] DFA Section 1021(b)(5) (12 U.S.C. § 5511(b)(5))
[243] NCCF, *supra* note 6 at 166.
~~[244] Clarke and Zywicki, PAYDAY LENDING, BANK OVERDRAFT PROTECTION, AND FAIR COMPETITION AT THE CFPB, Review of Banking & Financial Law, Vol. 33, No. 1, pp. 235-281, at 243 (2013).~~

Formatted: Font: Italic, Complex Script Font: Italic incentivizes producers to reduce those costs more. ~~The same principle applies to markets where consumers shop, markets where retailers go to buy supplies, and markets where companies go to procure resources. In other words, competition~~It ~~puts pressure on~~pushes sellers ~~up and down the stream of commerce~~ to find the best deal they can get and to offer the best deal they can give. It is, as the Commission noted, painful for the participants on the selling side. But it is beneficial to everyone on the buying side~~. Fortunately for consumers~~, including consumers of financial services~~, they are the buyers who benefit from competition~~.

Commented [VF(87]: This section seems to suggest breaking apart the monopoly of the CRAs. But where is the Bureau's authority for that ? If this report is to inform the Bureau, its recommendations should align with the agency's authorities.

Appendix A

I. Summary of Statutory References to Competition and Efficiency

- The DFA mentions "competition" in four places:
  - Section 1021(a) (12 U.S.C. § 5511(a))—identifying the Bureau's statutory purposes, including to ensure "that markets for consumer financial products and services are fair, transparent, and competitive."
  - Section 1021(b)(4) (12 U.S.C. § 5511(b)(4))—identifying five objectives for which the Bureau may exercise its authorities, including to ensure that "Federal consumer financial law is enforced consistently, without regard to the status of a person as a depository institution, in order to promote fair competition."
  - Section 1031(c) (12 U.S.C. § 5531(c))—stating that the Bureau may not declare an act or practice to be unfair unless it has a reasonable basis to conclude that the act or practice causes or is likely to cause substantial injury and that "such substantial injury is not outweighed by countervailing benefits to consumers or to competition."
  - Section 1100(f)(2) (12 U.S.C. § 5107(f)(2))—identifying factors that the Bureau must consider when promulgating rules to implement the SAFE Act, including "the need to ensure a competitive origination market that maximizes consumer access to affordable and sustainable mortgage loans."
- The DFA mentions "efficient" markets, regulations, or enforcement in three places:
  - Section 1021(b)(5) (12 U.S.C. § 5511(b)(5))—identifying five objectives for which the Bureau may exercise its authorities, including to ensure that "markets for consumer financial products and services operate transparently and efficiently to facilitate access and innovation."
  - Section 1013(c) (12 U.S.C. § 5493(c))—identifying the functions of the Bureau's Office of Fair Lending and Equal Opportunity, which include "coordinating fair lending efforts of the Bureau with other Federal agencies and State regulators, as appropriate, to promote consistent, efficient, and effective enforcement of Federal fair lending laws."
  - Section 1013(g)(3)(E) (12 U.S.C. § 5493(g)(3)(E))—identifying the duties of the Bureau's Office of Financial Protection for Older Americans, including to "coordinate consumer protection efforts of seniors with other Federal agencies

and State regulators, as appropriate, to promote consistent, effective, and efficient enforcement."

- At least three of the eighteen enumerated consumer laws identify ensuring competition or efficiency as among their purposes:
  - FCRA section 602(a)(1)) (15 U.S.C. § 1681(a)(1))—listing Congressional findings, including that, "Inaccurate credit reports directly impair the efficiency of the banking system."
  - FDCPA section 802(e) (15 U.S.C. § 1692(e))—identifying the FDCPA's purposes, including "to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged."
  - TILA section 102(a) (15 U.S.C. § 1601(a))—listing Congressional findings, including that, "The Congress finds that economic stabilization would be enhanced and the competition among the various financial institutions and other firms engaged in the extension of consumer credit would be strengthened by the informed use of credit."
- By comparison, the FTC Act explicitly prohibits unfair methods of competition:
  - Section 5 (15 U.S.C. § 45)—prohibiting unfair methods of competition and empowering and directing the FTC to prevent persons from using unfair methods of competition.

II. Statutory Text

Commented [VF(88]: ECOA is missing from this list; also, the definition of "fair lending" contained in DFA§ 1001

- Below are the relevant statutory provisions from the Dodd-Frank Act, FCRA, FDCPA, TILA, and FTC Act.
- References to competition are highlighted in yellow.
- References to efficiency are highlighted in blue.

Dodd-Frank Act

DFA section 1021 (12 U.S.C. § 5511). Purpose, objectives, and functions.

(a) Purpose. The Bureau shall seek to implement and, where applicable, enforce Federal consumer financial law consistently for the purpose of ensuring that all consumers have access to markets for consumer financial products and services and that markets for consumer financial products and services are fair, transparent, and competitive.

(b) Objectives. The Bureau is authorized to exercise its authorities under Federal consumer financial law for the purposes of ensuring that, with respect to consumer financial products and services—

(1) consumers are provided with timely and understandable information to make responsible decisions about financial transactions;

(2) consumers are protected from unfair, deceptive, or abusive acts and practices and from discrimination;

(3) outdated, unnecessary, or unduly burdensome regulations are regularly identified and addressed in order to reduce unwarranted regulatory burdens;

(4) Federal consumer financial law is enforced consistently, without regard to the status of a person as a depository institution, in order to promote fair competition; and

(5) markets for consumer financial products and services operate transparently and efficiently to facilitate access and innovation.

DFA section 1031(c) (12 USC 5531(c)). Prohibiting unfair, deceptive, or abusive acts or practices.

. . .

(c) Unfairness.—

(1) In General. The Bureau shall have no authority under this section to declare an act or practice in connection with a transaction with a consumer for a consumer financial product or service, or the offering of a consumer financial product or service, to be unlawful on the grounds that such act or practice is unfair, unless the Bureau has a reasonable basis to conclude that—

(A) the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers; and

(B) such substantial injury is not outweighed by countervailing benefits to consumers or to competition.

(2) Consideration of Public Policies. In determining whether an act or practice is unfair, the Bureau may consider established public policies as evidence to be considered with all other evidence. Such public policy considerations may not serve as a primary basis for such determination.

DFA section 1100 (12 U.S.C. § 5107). Bureau of Consumer Financial Protection backup authority to establish loan originator licensing system.

. . .

(f) Regulation Authority.—

(1) In General. The Bureau is authorized to promulgate regulations setting minimum net worth or surety bond requirements for residential mortgage loan originators and minimum requirements for recovery funds paid into by loan originators.

(2) Considerations. In issuing regulations under paragraph (1), the Bureau shall take into account the need to provide originators adequate incentives to originate affordable and sustainable mortgage loans, as well as the need to ensure a competitive origination market that maximizes consumer access to affordable and sustainable mortgage loans.

DFA section 1013 (12 U.S.C. § 5493). Administration.

. . .

(c) Office of Fair Lending and Equal Opportunity.—

(1) Establishment. The Director shall establish within the Bureau the Office of Fair Lending and Equal Opportunity.

(2) Functions. The Office of Fair Lending and Equal Opportunity shall have such powers and duties as the Director may delegate to the Office, including—

(A) providing oversight and enforcement of Federal laws intended to ensure the fair, equitable, and nondiscriminatory access to credit for both individuals and communities that are enforced by the Bureau, including the Equal Credit Opportunity Act and the Home Mortgage Disclosure Act;

(B) coordinating fair lending efforts of the Bureau with other Federal agencies and State regulators, as appropriate, to promote consistent, efficient, and effective enforcement of Federal fair lending laws;

(C) working with private industry, fair lending, civil rights, consumer and community advocates on the promotion of fair lending compliance and education; and

(D) providing annual reports to Congress on the efforts of the Bureau to fulfill its fair lending mandate.

. . .

(g) Office of Financial Protection for Older Americans.—

. . .

(3) Duties. The Office shall—

(A) develop goals for programs that provide seniors financial literacy and counseling, including programs that—

(i) help seniors recognize warning signs of unfair, deceptive, or abusive practices, protect themselves from such practices;

(ii) provide one-on-one financial counseling on issues including long-term savings and later-life economic security; and

(iii) provide personal consumer credit advocacy to respond to consumer problems caused by unfair, deceptive, or abusive practices;

(B) monitor certifications or designations of financial advisors who advise seniors and alert the Commission and State regulators of certifications or designations that are identified as unfair, deceptive, or abusive;

(C) not later than 18 months after the date of the establishment of the Office, submit to Congress and the Commission any legislative and regulatory recommendations on the best practices for—

(i) disseminating information regarding the legitimacy of certifications of financial advisers who advise seniors;

(ii) methods in which a senior can identify the financial advisor most appropriate for the senior's needs; and

(iii) methods in which a senior can verify a financial advisor's credentials;

(D) conduct research to identify best practices and effective methods, tools, technology and strategies to educate and counsel seniors about personal finance management with a focus on—

(i) protecting themselves from unfair, deceptive, and abusive practices;

(ii) long-term savings; and

(iii) planning for retirement and long-term care;

(E) coordinate consumer protection efforts of seniors with other Federal agencies and State regulators, as appropriate, to promote consistent, effective, and efficient enforcement; and

(F) work with community organizations, non-profit organizations, and other entities that are involved with educating or assisting seniors (including the National Education and Resource Center on Women and Retirement Planning).

<u>Fair Credit Reporting Act</u>

FCRA section 602 (15 U.S.C. § 1681). Congressional findings and statement of purpose.

(a) Accuracy and fairness of credit reporting. The Congress makes the following findings:

(1) The banking system is dependent upon fair and accurate credit reporting. Inaccurate credit reports directly impair the efficiency of the banking system, and unfair credit reporting methods undermine the public confidence which is essential to the continued functioning of the banking system.

(2) An elaborate mechanism has been developed for investigating and evaluating the credit worthiness, credit standing, credit capacity, character, and general reputation of consumers.

(3) Consumer reporting agencies have assumed a vital role in assembling and evaluating consumer credit and other information on consumers.

(4) There is a need to insure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy.

<u>Fair Debt Collection Practices Act</u>

FDCPA section 802 (15 U.S.C. § 1692). Congressional findings and declaration of purpose.

(a) Abusive practices. There is abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors. Abusive debt collection practices contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy.

(b) Inadequacy of laws. Existing laws and procedures for redressing these injuries are inadequate to protect consumers.

(c) Available non-abusive collection methods. Means other than misrepresentation or other abusive debt collection practices are available for the effective collection of debts.

(d) Interstate commerce. Abusive debt collection practices are carried on to a substantial extent in interstate commerce and through means and instrumentalities of such commerce. Even where abusive debt collection practices are purely intrastate in character, they nevertheless directly affect interstate commerce.

(e) Purposes. It is the purpose of this subchapter to eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses.

<u>Truth In Lending Act</u>

TILA section 102 (15 U.S.C. § 1601). Congressional findings and declaration of purpose.

(a) Informed use of credit. The Congress finds that economic stabilization would be enhanced and the competition among the various financial institutions and other firms engaged in the extension of consumer credit would be strengthened by the informed use of credit. The informed use of credit results from an awareness of the cost thereof by consumers. It is the purpose of this subchapter to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit, and to protect the consumer against inaccurate and unfair credit billing and credit card practices.

(b) Terms of personal property leases. The Congress also finds that there has been a recent trend toward leasing automobiles and other durable goods for consumer use as an alternative to installment credit sales and that these leases have been offered without adequate cost disclosures. It is the purpose of this subchapter to assure a meaningful disclosure of the terms of leases of personal property for personal, family, or household purposes so as to enable the lessee to compare more readily the various lease terms available to him, limit balloon payments in consumer leasing, enable comparison of lease terms with credit terms where appropriate, and to assure meaningful and accurate disclosures of lease terms in advertisements.

Federal Trade Commission Act

FTC Act section 5 (15 U.S.C. § 45). Unfair methods of competition unlawful; prevention by Commission.

(a) Declaration of unlawfulness; power to prohibit unfair practices; inapplicability to foreign trade.

(1) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.

(2) The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, savings and loan institutions described in section 57a(f)(3) of this title, Federal credit unions described in section 57a(f)(4) of this title, common carriers subject to the Acts to regulate commerce, air carriers and foreign air carriers subject to part A of subtitle VII of Title 49, and persons, partnerships, or corporations insofar as they are subject to the Packers and Stockyards Act, 1921, as amended [7 U.S.C. § 181 et seq.], except as provided in section 406(b) of said Act [7 U.S.C. § 227(b)], from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.

(3) This subsection shall not apply to unfair methods of competition involving commerce with foreign nations (other than import commerce) unless—

(A) such methods of competition have a direct, substantial, and reasonably foreseeable effect—

(i) on commerce which is not commerce with foreign nations, or on import commerce with foreign nations; or

(ii) on export commerce with foreign nations, of a person engaged in such commerce in the United States; and

(B) such effect gives rise to a claim under the provisions of this subsection, other than this paragraph.

If this subsection applies to such methods of competition only because of the operation of subparagraph (A)(ii), this subsection shall apply to such conduct only for injury to export business in the United States.

(4)—

(A) For purposes of subsection (a) of this section, the term “unfair or deceptive acts or practices” includes such acts or practices involving foreign commerce that--

(i) cause or are likely to cause reasonably foreseeable injury within the United States; or

(ii) involve material conduct occurring within the United States.

(B) All remedies available to the Commission with respect to unfair and deceptive acts or practices shall be available for acts and practices described in this paragraph, including restitution to domestic or foreign victims.

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Appendix B

[History of Credit and Competition]