June 1, 2020

*Electronically filed via regulations.gov*

The Honorable Kathy L. Kraninger
Director
Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20552

Re: Request for Information for Taskforce on Federal Consumer Financial Law, Docket No. CFPB-2020-0013

Dear Director Kraninger,

The Center for Responsible Lending (CRL) submits this comment in response to the Request for Information (RFI) issued by the Consumer Financial Protection Bureau to assist the Taskforce on Federal Consumer Financial Law (Taskforce). CRL is a non-profit, non-partisan research and policy organization that works to ensure a fair, inclusive financial marketplace. CRL's work focuses on those who may be marginalized or underserved by the existing financial marketplace, people who often are targeted for unfair and abusive financial products that leave them worse off. This includes people of color, women, rural residents and low-wealth families and communities.

CRL has joined a broad coalition of consumer, community, and civil rights groups in submitting a letter protesting the composition, structure, and processes of the Taskforce. CRL shares the view articulated in that letter that the Taskforce is a one-sided body, several of whose members have patent conflicts of interest; that the Taskforce has been established in such a way as to thwart the transparent processes envisioned by the Federal Advisory Committee Act; and that the RFI is diverting the time and attention of both the CFPB and of stakeholders at a time when all should be laser-focused on protecting consumers – and our own organizations and staff – from the impacts of the COVID-19 economic and health crisis.

Like the other signers of the coalition letter, CRL resources have been severely strained by the need to respond to the crisis while keeping our employees safe. Even in the best of times, it would not have been even remotely possible to provide a full response in a period of just sixty days to the Taskforce's RFI which, by our count, includes over 55 questions which together cover virtually every nook and cranny of consumer finance regulation, implementation, and enforcement as well as fundamental questions of administrative law and of federal-state relations. Responding to an RFI of this magnitude in such a short period of time is even less plausible during the current crisis. The fact that the Bureau has twice extended the comment period for the Supplemental Notice of Proposed Rulemaking and Time Barred Debt – providing a total of almost 180 days to comment on that proposal – yet is allowing only sixty days to respond to this massive RFI magnifies our concern that the Taskforce, for unexplained reasons, is engaged in a rush to judgment to issue a report whose conclusions are pre-determined.

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Given these time and resource limitations at this critical time and the Taskforce's extremely insufficient timeline, CRL submits this comment to respond, albeit in only a partial and incomplete way, to just one of the questions posed by the RFI: "Are there gaps in consumer financial protection that should be filled by strengthening the Bureau's regulations?" Based on its almost twenty years of experience as researcher and advocate, CRL has no doubt that most, if not all, consumer finance markets are "performing poorly" – to quote the RFI – when it comes to serving low- and moderate-income (LMI) households and communities of color whose interests CRL exists to champion and that therefore there is a vital need for stronger consumer protections and more vigorous enforcement to enhance the welfare of these consumers.

We offer below just a handful of examples. We do not attempt to identify all of the problems consumers face in the markets discussed below, let alone to cover the full range of consumer finance markets which are failing LMI consumers and consumers of color; that would not be possible in the time the Taskforce has allowed for responses to the RFI. Rather, these examples are intended to be illustrative of the kinds of issues confronting LMI households and communities of color in attempting to navigate the consumer finance system.

**Deposit Accounts and Overdraft Loans –** Measured by the number of consumer participants, the market for deposit accounts is the largest single consumer finance market in the United States. Almost 95% of all households have a deposit account – although notably, almost 20% of those earning under $30,000 are unbanked and the percentage of unbanked African Americans and Hispanic households is four to five times higher than for white households.[1] Moreover, every bank and credit union in the United States offers deposit accounts, meaning that there are over 10,000 providers ranging from the national mega-banks to small community-based banks and credit unions.

Unfortunately, however, to the extent depository institutions compete with each other in this market it is generally to see how little they can charge consumers who can afford to meet minimum deposit requirements and how many ways they can enable consumers to make deposits and debits. As a result, a large number of consumers pay nothing for their increasingly complex and increasingly valuable checking accounts.

But of course there is no free lunch and the market for checking accounts has evolved into a two-tier market with a segment of consumers – those living paycheck to paycheck with little margin for error – providing enormous subsidies to better-off consumers through exorbitant fees charged for overdraft transactions. Consumers pay an estimated $15 billion in overdraft-related fees each year, with over $11 billion coming from banks with assets over $1 billion.[2] The Bureau's research has established that these fees represent at least 65% of all checking account fees that consumers incur and contribute at least 8% of banks' net income.[3] In other words, banks' economic success in offering deposit accounts is tied to a misalignment of interests: banks succeed when consumers' expenses outstrip their income in a particular pay cycle, thereby triggering penalty fees.

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[1] Federal Deposit Insurance Corporation, *FDIC National Survey of Unbanked and Underbanked Households* (2017), https://www.fdic.gov/householdsurvey/2017/2017report.pdf

[2] See Jackie Wattles, *Americans paid $15 billion in overdraft fees last year, CFPB says*, CNN Money, Aug. 4, 2017, https://money.cnn.com/2017/08/04/pf/overdraft-fees-cfpb/index.html. Call report data suggest that this figure has not decreased since 2016. For example, FDIC call report data show that banks over $1 billion in assets earned $11.7 billion in overdraft-related fees in 2019.

[3] *New Insights on Bank Overdraft Fees and 4 Ways to Avoid Them* (Feb. 25, 2016), https://www.consumerfinance.gov/about-us/blog/new-insights-on-bank-overdraft-fees-and-4-ways-to-avoid-them/. These data are for banks with assets over $1 billion. The percentages are even higher for smaller banks and credit unions.

The Bureau further has found that the per incident overdraft fee levels have spiked in recent years, increasing from approximately $5.00 in the mid-1980's to $35 today.[4] This is not because of any increase in costs; if anything, overdraft services were far more costly to deliver in the past when they were manual in nature and offered as an occasional courtesy. Indeed, the Bureau's research has found that the median transaction that leads to an overdraft is $50; the median overdraft is repaid in three days; and losses on overdrafts are quite low, with under 3% of overdraft episodes leading to chargeoff.[5] The most common transactions that cause overdraft fees are debit card transactions that could easily be declined for no fee when the consumer lacks sufficient funds; the median size of these transactions is only $24 of which approximately 40% is covered by accountholder funds .[6] In short, the amount charged for an overdraft bears no relationship to the cost of providing the service. This is subsidy pure and simple.

The Bureau's research also makes clear on whom the burden of providing these subsidies fall.[7] Nine percent of customers incur nearly 80 percent of all overdraft fees. The overwhelming majority of these frequent overdrafters come from LMI households with low or no credit scores. Undoubtedly, they are disproportionately people of color as well. Thus, the pricing practices in this market are a classic example of Robin Hood in reverse.

To be clear, these are not issues that are amenable to resolution by more disclosures which would put the burden on LMI and minority consumers to somehow avoid becoming the source of these subsidies. As the Bureau has recognized, in order for consumers to understand the cost of penalty fees for particular checking accounts, consumers would need to know not only the per transaction overdraft and NSF but also understand the myriad of bank policies that can affect when a transaction may be deemed to exceed the amount in the account and when and to what extent fees are charged. Consumers also would need to understand the presentment and clearing practices associated with different forms of deposits and debits. And after receiving such voluminous disclosures, the consumers who are saddled with these fees would have to have the wherewithal to avoid them.

In short, the problem in this market is not one of transparency but one of fundamental fairness. In the near term, CRL believes that consumers need immediate relief from overdraft fees during the COVID-19 crisis and has urged the Bureau to require such relief.[8] More fundamentally, to assure that the market for checking accounts serves the needs of all consumers rather than creates wealth transfer from the most vulnerable, CRL believes that regulation is needed to (1) rein in excessive fees by requiring that checking account penalty fees be reasonable and proportional to the institution's cost; (2) limit the number of overdraft fees that can be charged; and (3) eliminate the exception to the definition of finance charges and regulate overdraft as credit. For a fuller statement of CRL's views, the Taskforce should review *Unfair Market: The State of High-Cost Overdraft Practices in 2017*[9] and our 2019 comments to the Bureau on its review of the 2009 Regulation E "opt-in" rule.[10] We also recommend to the Taskforce the ground-breaking work of the United Kingdom's Financial Conduct Authority on this issue.[11]

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[4] *CFPB Study of Overdraft Programs* (2013), https://files.consumerfinance.gov/f/201306_cfpb_whitepaper_overdraft-practices.pdf
[5] CFPB, *Data Point: Checking account overdraft* (2014), https://files.consumerfinance.gov/f/201407_cfpb_report_data-point_overdrafts.pdf
[6] *Id.*
[7] CFPB, *Data Point: Frequent overdrafters* 2017), https://files.consumerfinance.gov/f/documents/201708_cfpb_data-point_frequent-overdrafters.pdf
[8] *See* Rebecca Borné, Relief from Unreasonable Overdraft Fees is Needed During COVID-19 Crisis, Op-ed, Morning Consult, April 16, 2020, https://morningconsult.com/opinions/relief-from-unreasonable-overdraft-fees-is-needed-during-covid-19-crisis/.
[9] Peter Smith, *Unfair Market: The State of High-Cost Overdraft Practices in 2017*, Center for Responsible Lending (Aug. 2018), https://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/crl-unfair-market-overdraft-l-aug2018.pdf.
[10] Comments of CRL and other consumer and civil rights groups on the CFPB's review of the overdraft opt-in rule, July 1, 2019, https://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/crl-comment-overdraft-rfa-jul2019.pdf.
[11] U.K. Financial Conduct Authority, PS19/16: High-Cost Credit Review: Overdraft Policy Statement (July 6, 2019), https://www.fca.org.uk/publications/policy-statements/ps19-16-high-credit-review-overdrafts.

**Auto Lending –** Similar issues infect the market for auto loans. An estimated 80% of all auto loans are "indirect," meaning that they are obtained through auto dealers.[12] There are a large number of banks, credit unions, and finance companies offering indirect auto loans. But to the extent these financial institutions are in competition, they are competing for the *dealers'* business, not the borrowers'; indeed, on average dealers have relationships with more than nine lenders and on any given transaction will receive quotes from multiple lenders.[13] To secure the dealers' business, these lenders permit dealers to mark up the interest rate on a loan above and beyond the interest rate at which the lender is willing to make the loan given the credit risk and other cost factors (the "buy rate"). This was the same dynamic that was at play in the mortgage market in the years leading up to the 2008 financial crisis, as lenders paid brokers discretionary yield-spread premiums to put borrowers into higher-cost loans than they qualified for; the mortgage provisions of the Dodd-Frank Act prohibited this practice.[14]

Dealers argue that the buy rate is a wholesale rate and that their mark-ups reflect their costs in originating indirect auto loans. Even if true, the reality is that the market that has emerged is, like the market for deposit accounts, a two-tier market. Some buyers receive loans at the so-called wholesale rate and thus pay nothing towards whatever origination costs the dealers may incur. Other buyers, in contrast, are offered loans that are marked up to the maximum amount permitted by lenders (typically 250 basis points for a prime loan), so that these consumers end up subsidizing the borrowers who receive more favorable terms.

There is no doubt as to who bears the brunt of this system. In a series of four enforcement actions, the Bureau found that African American and Hispanic borrowers paid higher rates on average than similarly-situated non-Hispanic whites for their auto loans, with total damages in these four cases exceeding $120 million.[15] Numerous academic studies have confirmed the Bureau's findings.[16] And, in a study funded in part by CRL in which testers were sent to dealers to seek to purchase a car and obtain indirect financing, over 60% of the time non-white testers presenting a more favorable credit profile than their white counterparts were nonetheless offered more costly pricing options.[17]

Again, this is not a problem that is amenable to solution with more disclosures. Consumers who are financing a car are already engaged in a complex transaction involving not only a vehicle purchase but frequently the purchase of various add-on products and the trade-in of the consumer's current automobile (which can involve rolling over a loan on that car). These consumers are thus overwhelmed by the mountain of paperwork thrust at them; adding one more disclosure to this stack is unlikely to register with consumers, let alone solve the fundamental unfairness of this system in which minority borrowers provide subsidies for white borrowers.

CRL believes that the solution is simple: ban the practice of discretionary dealer interest-rate mark-ups or other compensation that is tied to the terms of the loan, and vigorously enforce the laws against unfair, abusive, and discriminatory acts and practices.

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[12] Grunewald, Lanning, Low, and Salz, *Auto Dealer Loan Intermediation: Consumer Behavior and Competitive Effects* (2020), file:///C:/Users/dsilb/Downloads/SSRN-id3568571.pdf

[13] *Id.*

[14] Dodd-Frank Act § 1403, 124 Stat. 2139. Before the Act took effect the Board of Governors of the Federal Reserve System finalized a proposal that it had issued in 2009 to prohibit such yield-spread premiums. 75 Fed. Reg, 58509 (Sept. 24, 2010).

[15] *In re Allied Financial,* 2013-CFPB -0010, https://files.consumerfinance.gov/f/201312_cfpb_consent-order_ally.pdf; In re Fifth Third Bank, 2015-CFPB-0024, https://files.consumerfinance.gov/f/201509_cfpb_consent-order-fifth-third-bank.pdf; *In re American Honda Finance Corp.,* 2015-CFPB-0014, https://files.consumerfinance.gov/f/201507_cfpb_consent-order_honda.pdf; *In re Toyota Motor Credit Corp.,* 2016-CFPB-0002, https://files.consumerfinance.gov/f/201602_cfpb_consent-order-toyota-motor-credit-corporation.pdf

[16] *E.g.,* Cohen, *Imperfect Competition in Auto Lending: Subjective Markup, Racial Disparity, and Class Action Litigation* (2006), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=951827

[17] National Fair Housing Alliance, *Discrimination When Buying A Car: How the Color of Your Skin Can Affect Your Car-Shopping Experience* (2018), https://nationalfairhousing.org/wp-content/uploads/2018/01/Discrimination-When-Buying-a-Car-FINAL-1-11-2018.pdf

**Debt Collection and Debt Buying –** Like the indirect auto market, the market for debt collection and debt buying is populated by thousands of participants, both debt collectors and debt buyers.[18] But as with indirect auto lenders, the customers for these debt collectors and debt buyers are *creditors*, not consumers, and the competition is for the *creditors'* business. Contingency debt collectors win business based on how much money they can extract from consumers and pay to creditors; debt buyers win auctions to purchase charged-off accounts based on how much they offer to pay for those accounts and their profit is entirely a function of how much they can extract. Neither debt collectors nor debt buyers have to worry about winning or retaining consumers' business; their relationships with consumers are purely transactional.

The Bureau's research has demonstrated the effect of this system on consumers. In the Bureau's survey of consumers' experiences with debt collection, a large share of consumers reported being hounded about debts that were not theirs. Consumers reported that debt collectors persisted in continuing to call them even after being requested to stop doing so. Only half of the consumers felt they received accurate information from the debt collector or were treated politely; over a quarter reported being threatened.[19]

One especially egregious symptom of the problematic incentives in this market is the explosive growth in debt collection lawsuits. In 2010, the FTC issued a report finding that "[t]he system for resolving disputes about consumer debts is broken," citing among other things the frequency with which suits are filed with insufficient evidence and with improper service and the frequency with which such suits result in default judgments.[20] A series of CFPB enforcement actions attest to the prevalence of these problematic practices.[21] Yet multiple reports since the CFPB enforcement actions have found that the number of debt collection lawsuits has continued to skyrocket, that the majority of these cases result in default judgments against the consumer, and that, as a recent study by The Pew Charitable Trusts found, these default judgments "exact heavy tolls on consumers," with accrued interest and court fees that can exceed the original amount of the debt.[22]

Not surprisingly, the consumers who are victimized by abusive debt collection practices disproportionately come from LMI households and communities of color. For example, in its national survey the CFPB found that 52% of consumers earnings under $20,000 and 42% of consumers earning between $20,000 and $40,000 had been contacted by a debt collector in the prior twelve months; among consumers earning above $70,000, only 16% were contacted. Among African Americans, the percentage contacted by a debt collector was 50% higher than for whites.[23] A study in New York City found that 95% of people with default debt collection judgments against them

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[18] CFPB, *Fair Debt Collection Practices Act: CFPB Annual Report 2020,* https://files.consumerfinance.gov/f/documents/cfpb_fdcpa_annual-report-congress_03-2020.pdf

[19] CFPB, *Consumer Experiences with Debt Collection* (2017) https://files.consumerfinance.gov/f/documents/201701_cfpb_Debt-Collection-Survey-Report.pdf

[20] Federal Trade Commission, *Repairing A Broken System: Protecting Consumers in Debt Collection Litigation and Arbitration* (2010), https://www.ftc.gov/sites/default/files/documents/reports/federal-trade-commission-bureau-consumer-protection-staff-report-repairing-broken-system-protecting/debtcollectionreport.pdf.

[21] *E.g., In re Financial Services Credit Inc., d/b/a Asset Recovery Associates,* 2019-CFPB-0009, https://files.consumerfinance.gov/f/documents/cfpb_asset-recovery-associates_consent-order_2019-08.pdf; *In re Encore Capital Group,* 2015-CFPB-0022, https://files.consumerfinance.gov/f/201509_cfpb_consent-order-encore-capital-group.pdf; *In re Portfolio Recovery Associates,* 2015-CFPB-0023, https://files.consumerfinance.gov/f/201509_cfpb_consent-order-portfolio-recovery-associates-llc.pdf

[22] Pew Charitable Trusts, *How Debt Collectors Are Transforming the Business of State Courts* (2020); Stifler, L., Feltner, T., & Sajadi, S. (2018). *See also* Center for Responsible Lending, *Undue Burden: The Impact of Abusive Debt Collection Practices in Oregon,* https://www.responsiblelending.org/researchpublication/undue-burden-impact-abusive-debt-collection-practices-oregon; Feltner, T., Barnard, J., Stifler, L., *Debt by Default: Debt Collection Practices in Washington 2012-2016* (2019), https://www.responsiblelending.org/research-publication/debtdefault-debt-collection-practices-washington-2012-2016 (finding that debt buyers secured default judgments in 80 percent of cases filed by one large debt collection law firm in Washington between 2012 and 2016).

[23] *Consumer Experiences with Debt Collection, supra.*

lived in LMI census tracts and more than 50% lived in predominantly African-American census tracts.[24] And an analysis of court judgments over a five-year period in St. Louis, Chicago, and Newark found that even after accounting for income, the rate of default judgments in mostly black neighborhoods was nearly double that of mostly white ones, and that once a judgment was obtained, the garnishment rate was 20% higher in mostly black neighborhoods.[25]

The CFPB has put forward a modest proposal to enhance the transparency of the debt collection market by requiring debt collectors to provide more information to consumers about the debts they are seeking to collect. This is a small step forward (although there are aspects of the CFPB's proposed model notice that CRL believes are likely to confuse consumers and create problems). But the CFPB proposal is grossly insufficient. CRL joined with a number of consumer and civil and human rights organizations to submit a comprehensive set of recommendations to the CFPB to bring fairness to the debt collection market. We refer the Taskforce to that comment letter for details.[26]

**Payday and Other Small-Dollar Loans–** Each year, an estimated 12 million Americans take out a payday loan [27] and two million Americans take out high-cost vehicle title loans.[28] The consumers who use such high-cost small dollar loans, and at whom the loans are targeted, are overwhelmingly drawn from the ranks of low- and moderate-income households and disproportionately people of color.

Unlike overdraft loans, borrowers utilizing payday, car title, and other high-cost small dollar loan are not subsidizing better-off consumers because the latter group turns to mainstream credit providers for their borrowing needs. But high-cost small dollar loans and overdraft credit resemble each other in one fundamental respect: the interests of lenders and borrowers are completely misaligned. Payday lenders lose money if a borrower repays the loan as agreed when the loan comes due. Just as checking account fee revenue is powered by consumers whose accounts are repeatedly driven into the red, the payday loan business model depends on consumers' inability to repay, and on consumers becoming trapped in debt, rolling over their loans time and time again. Competition in this market is about who can succeed in building the biggest, most effective debt traps.

The Bureau's own research documents all of this. The Bureau has found, for example, that over two-thirds of all payday loans were in sequences of at least seven loans and that over half of all loans were in sequences of 10 or more loans.[29] The Bureau has documented the range of practices that payday lenders use to keep consumers trapped in debt.[30] And, the Bureau has found, based on its careful analysis of the academic literature, that "intensive use of these loans appears to make consumers worse off."[31] The Bureau has also raised concerns that payday and vehicle title installment loans – often made by the same lenders making single-payment loans – are made based on lenders' ability-to-collect rather than borrowers' ability-to-repay, with business models that permit lenders to profit even when very large portions of borrowers default.[32]

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[24] C. Wilner et al., "Debt Deception: How Debt Buyers Abuse the Legal System to Prey on Lower-Income New Yorkers" (New Economy Project, Legal Aid Society, MFY Legal Services, and Urban Justice Center, 2010), https://www.issuelab.org/resources/15013/15013.pdf.
[25] Waldman & Kiel, *Racial Disparity in Debt Collection Lawsuits: A Study of Three Metro Areas* (2015), https://static.propublica.org/projects/race-and-debt/assets/pdf/ProPublica-garnishments-whitepaper.pdf
[26] https://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/crl-civilrights-debtcollection-regf-sep2019.pdf
[27] Pew Charitable Trusts, *Payday Lending in America: Who Borrows, Where They Borrow, and Why* (2012), https://www.pewtrusts.org/-/media/legacy/uploadedfiles/pcs_assets/2012/pewpaydaylendingreportpdf.pdf
[28] Pew Charitable Trusts, *Auto Title Loans* (2015), https://www.pewtrusts.org/-/media/assets/2015/03/autotitleloansreport.pdf
[29] CFPB*, Supplemental findings on payday, payday installment, and vehicle title loans and deposit advance products* (2016), https://files.consumerfinance.gov/f/documents/Supplemental_Report_060116.pdf
[30] 82 Fed. Reg. 54472, 54560-54565 (Nov. 17, 2017).
[31] *Id. at* 54846.
[32] 81 Fed. Reg. 47864, 47986 (July 22, 2016).

CRL strongly supports the Bureau's 2017 Payday Rule that would prevent the unfair and abusive practice of making single-payment or balloon loans without regard to whether the consumer has the ability to repay, and we vigorously oppose the proposed repeal. We refer the Taskforce to the extensive comment CRL submitted with respect to the repeal proposal.[33]

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As previously stated, the examples we have discussed are intended simply to illustrate the types of challenges facing low-and moderate-income consumers and consumers of color in attempting to navigate the consumer finance system. To repeat, this discussion is far from exhaustive. For example, the structural issues inherent in the debt collection market – in which providers compete for the business of creditors -- also characterize a number of other consumer finance markets, including credit reporting, mortgage servicing and student loan servicing – markets in which consumers have no choice of their provider. "Reverse Robin Hood" subsidies are present in other credit markets, such as the credit card market where subprime consumers and those who can afford to make only minimum payments subsidize the well-to-do. And racial disparities are endemic to consumer finance, as is evidenced, for example, in the thirty percentage point gap in the home ownership rate between whites and blacks,[34] or in what researchers from the Brookings Institution have termed the "crisis level" for student debt and default among black college students including the fact that black BA graduates default on their student loans at five times the rate of white BA graduates and are more likely to default than even white dropouts.[35]

For all these reasons, CRL believes that once the current crisis has subsided the Bureau should undertake a thorough, unbiased, evidence-based study to identify where consumer protection falls short and what is needed to create fair, accessible, and non-discriminatory markets. To do that, the current Taskforce should be disbanded and the CFPB should create a broadly representative body that in fact, and not just in name, resembles the National Commission on Consumer Finance.

Sincerely,

The Center for Responsible Lending

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[33] Comments of CRL, Public Citizen, and a number of consumer and civil rights groups to CFPB, May 17, 2019, https://www.responsiblelending.org/research-publication/comment-cfpbs-proposed-repeal-payday-lending-rule.

[34] Urban Institute, *These Five Facts Reveal the Current Crisis in Black Homeownership* (2019), https://www.urban.org/urban-wire/these-five-facts-reveal-current-crisis-black-homeownership

[35] Scott-Clayton, *The Looming Student Loan Default Crisis Is Worse Than We Thought* (2018), https://www.brookings.edu/wp-content/uploads/2018/01/scott-clayton-report.pdf