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TRIBAL LENDING UNDER CFPB ENFORCEMENT: TRIBAL SOVEREIGN IMMUNITY AND THE "TRUE LENDER" DISTINCTION

I. INTRODUCTION

Tribal sovereign immunity is an important protection that enables Indian tribes and their entities to regulate their own affairs in a way that benefits the tribe and its members.[1] In recent years, however, this sovereign immunity structure has become prone to abuse within the payday lending industry as some non-tribal lenders have established links with tribes to benefit from tribal immunity and skirt state usury laws.[2] Such schemes have large implications across the banking industry, the Consumer Financial Protection Bureau ("CFPB" or "the Bureau") being no exception. Reverberations have been felt within the Bureau as former director Cordray's "true lender" enforcement approach has ceded to then-Acting Director Mulvaney's promise not to "push the envelope."[3] With Kathy Kraninger's confirmation as new Director comes some uncertainty as to whether Kraninger will continue to follow in Mulvaney's deregulatory footsteps, though that uncertainty is quickly diminishing in light of a new proposal to rescind certain provisions of the 2017 final rule governing payday lending.[4]

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1. *See* Breakthrough Mgmt. Grp., Inc. v. Chukchansi Gold Casino & Resort, 629 F.3d 1173, 1187 (10th Cir. 2010) (discussing the public policy justifications for tribal sovereign immunity, including encouraging tribal economic development).

2. *See* Kate Berry, *CFPB's Mulvaney Shows Lighter Touch with Tribal Lenders*, AM. BANKER, Mar. 19, 2018 (detailing "rent-a-tribe" schemes as non-tribal lender strategies in which lenders establish links with tribes to benefit from their immunity from state usury laws).

3. *See* CONSUMER FIN. PROT. BUREAU, BUREAU OF CONSUMER FINANCIAL PROTECTION STRATEGIC PLAN: FY 2018–2022 (2018), https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/cfpb_strategic-plan_fy2018-fy2022.pdf (promising not to "push the envelope" and risk "interfering with the sovereignty or autonomy of the states or Indian tribes").

4. *See* Neil Haggerty, *Senate Barely Confirms Kathy Kraninger as New CFPB Director*, AM. BANKER, Dec. 6, 2018 (describing Kathy Kraninger's confirmation as Director of the CFPB); *see also Consumer Financial Protection Bureau Releases Notices of Proposed Rulemaking on Payday Lending*, CFPB NEWSROOM (Feb. 6, 2019), https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-releases-notices-proposed-rulemaking-payday-lending/ (providing notice that "the Bureau is proposing to

This Note analyzes the extent of the CFPB's enforcement authority over tribes and tribal lending enterprises ("TLEs"), concluding that Congress intended tribes and TLEs that are "arms-of-the-tribe" to be "states" under Title X of the Dodd-Frank Wall Street Reform & Consumer Protection Act ("Dodd-Frank" or "Dodd-Frank Act").[5] As "states" under Title X, tribes and arm-of-the-tribe lenders are generally exempt from other states' consumer protection laws unless lenders formed under tribal law provide and service loans over the Internet to borrowers outside of the tribe's jurisdiction.[6] Even then, however, arm-of-the-tribe lenders, though required to comply with the usury laws of any state in which they operate, are immune from suit under those laws.[7] Thus, non-tribal payday lenders seeking to evade state usury laws and lend to borrowers in states with interest rate caps are often incentivized to form relationships with tribes to benefit from their tribal sovereign immunity from state usury laws and any suits to enforce them.[8] This immunity is possible if such

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rescind the rule's requirements," which had a compliance date of August 2019, "that lenders make certain underwriting determinations before issuing payday . . . loans," stating that the reason for this rescission is "insufficient evidence and legal support for the mandatory underwriting provisions in the 2017 final rule"); Ted Knutson, *Payday Rule Purge Axes New CFPB Chief's Benefit of the Doubt from Consumer Advocates*, FORBES (Feb. 8, 2019), https://www.forbes.com/sites/tedknutson/2019/02/08/payday-rule-purge-axes-new-cfpb-chiefs-benefit-of-the-doubt-from-consumer-advocates/?source=bloomberg#2bafd87629e6 ("The benefit of the doubt new Consumer Financial Protection Bureau Director Kathy Kraninger received from some consumer advocates evaporated this week when she indicated she would ax payday lending standards developed under Obama CFPB Chief Richard Cordray.").

5. *See* Dodd-Frank Wall Street Reform & Consumer Protection Act (Dodd-Frank) § 1002(27), 12 U.S.C. § 5481(27) (2012) (indicating congressional intent that tribes are considered "states" under Title X of the Dodd-Frank Act by defining "state" as "any State, territory, or possession of the United States, . . . or any federally recognized Indian tribe").

6. *See* Jennifer Ballard et al., *Exploring the Legal Issues Relevant to Online Small-Business Lending*, A.B.A.: BUS. LAW TODAY 2 (2017), https://www.americanbar.org/publications/blt/2017/08/02_ballard.html ("An online lender, like any other nonbank lender, must observe all applicable state laws in each jurisdiction in which it lends.").

7. Michigan v. Bay Mills Indian Cmty., 134 S. Ct. 2024, 2031 (2014) (stating that tribal immunity protects tribes and "arms-of-the-tribe" from suits brought by states *and* individuals).

8. *See, e.g.*, *CFPB Sues CashCall for Illegal Online Loan Servicing*, CFPB NEWSROOM (Dec. 16, 2013), https://www.consumerfinance.gov/about-us/newsroom/cfpb-sues-cashcall-for-illegal-online-loan-servicing/ (discussing the CFPB's enforcement approach under former director Cordray in bringing suit to take "a significant step in the Bureau's efforts to address regulatory-evasion schemes," including partnership with tribal lenders, "that are increasingly becoming a feature of the online small-dollar and payday lending industry").

lenders establish legitimate ties with a tribe because arm-of-the-tribe entities are protected under tribal sovereign immunity.[9]

The CFPB, as the independent federal bureau established by the Dodd-Frank Act to "regulate the offering and provision of consumer financial products or services under Federal consumer financial laws,"[10] should be responsible for ensuring that the payday lenders claiming tribal immunity are "true lenders" with legitimate links to the tribes under which they claim to be formed. Under the Obama administration, former CFPB Director Richard Cordray was active in investigating tribal lenders to ascertain if they truly were arms-of-the-tribe formed and operated under tribal law.[11] Cordray's challenges to tribal lenders were designed to remove immunity protections from lenders that were not legitimate arms of the tribe in so-called "rent-a-tribe" schemes.[12] However, the CFPB began backing away from such scrutiny after the Trump administration's appointment of then-Acting Director Mick Mulvaney, as exemplified by Mulvaney's dismissal of the CFPB's lawsuit against four online payday lenders that claimed to be arm-of-the-tribe lenders with tribal immunity and were investigated under Cordray's direction.[13] Based on this and other recent actions by the CFPB, it is also highly unlikely that the lending practices of online payday lenders with links to tribes will be

9. *See Bay Mills Indian Cmty.*, 134 S. Ct. at 2056 n.4 (stating that "[l]ower courts have held that tribal immunity shields not only Indian tribes themselves, but also entities deemed 'arms of the tribe' "); Hilary B. Miller, *The Future of Tribal Lending Under the Consumer Financial Protection Bureau*, A.B.A.: BUS. LAW TODAY 2 (2013), http://apps.americanbar.org/buslaw/blt/content/2013/03/article-04-miller.pdf (explaining that "[s]overeign immunity applies not only to tribes themselves but also to entities that are deemed 'arms' of the tribe, such as tribally chartered" tribal lending enterprises).

10. Dodd-Frank § 1011(a), 12 U.S.C. § 5491(a).

11. *See* Berry, *supra* note 2 (stating that the CFPB's lawsuit against four payday lenders "argued the linkage between those lenders and the tribe was not sufficient to provide the same exemption from state laws afforded to other tribal lenders" that were correctly classified as "arms of the tribe").

12. *See* Berry, *supra* note 2 (explaining "rent-a-tribe" schemes as non-tribal lender strategies in which "an Indian tribe essentially serves as a front for a lender" to escape state usury laws); *see also* Jeremy Robinson, *"Rent-a-Tribe" Arrangements Under Fire*, DAILY J. (Jan. 14, 2015), https://1df2zx2kci8g3dgnc1321977-wpengine.netdna-ssl.com/wp-content/uploads/2018/05/rent-a-tribe_arrangements_under_fire-1421693261.pdf (discussing the prevalence of "rent-a-tribe" schemes in which "the lenders can cloak themselves in tribal immunity and avoid those meddlesome state consumer protections and remedies").

13. Berry, *supra* note 2 ("[T]he CFPB specifically stated in its strategic plan that the [B]ureau will not interfere with tribal sovereignty, in yet another indication that Mulvaney has ended his predecessor's practice of 'regulation by enforcement.' ").

challenged under the leadership of current Director Kathy Kraninger.[14] This shift in the CFPB's enforcement strategy mirrors the deregulatory agenda of the Trump administration[15] and may result in increased payday lending, with more lenders claiming links to tribes in an attempt to qualify for exemption from state usury laws.[16] Without the CFPB to enforce the distinction between a true "tribal lender" and a payday lender with tenuous links to a tribe, predatory payday lending will continue to flourish. The CFPB would do well to adopt an approach slightly different from that of former Director Cordray, one in which the Bureau investigates lenders with tenuous links to tribes while still promoting the protection of tribal sovereign immunity by acknowledging that tribes and legitimate arm-of-the-tribe lenders are considered "states" under Dodd-Frank.[17]

This Note proceeds in five parts. Part II provides a brief statutory analysis that illustrates why tribes and arm-of-the-tribe lenders should be considered "states" rather than "covered persons" under the Dodd-Frank Act.[18] Part II also highlights the scope of tribal immunity and outlines

14. *See Consumer Financial Protection Bureau Releases Notices of Proposed Rulemaking on Payday Lending*, CFPB NEWSROOM (Feb. 6, 2019), https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-releases-notices-proposed-rulemaking-payday-lending/ (providing notice that the CFPB is planning on rescinding the 2017 final rule, enacted under Cordray, that would create additional protections for borrowers of payday loans); *see also* Knutson, *supra* note 4 (describing Kraninger's proposal to rescind the 2017 rule and providing former Director Cordray's statement that " 'CFPB is proposing to unwind the core part of its payday loan rule—that the lender must reasonably assess a borrower's ability to repay before making a loan . . . [and] [i]t's a bad move that will hurt the hardest-hit consumers' ").

15. *See* Kate Berry, *Bank Regulatory Actions Under Trump Fall to Historic Lows*, AM. BANKER, Apr. 6, 2018 (explaining the Trump administration's deregulatory agenda and its "trickle-down" effect on federal agencies, including the CFPB).

16. *See, e.g.*, Consumer Fin. Prot. Bureau v. CashCall, Inc., CV 15-7522-JFW (RAOx), 2016 U.S. Dist. LEXIS 130584, at *21-22 (C.D. Cal. Aug. 31, 2016) (concluding that the tribe "does not have a substantial relationship to the parties or the transaction" because the non-tribal lender, CashCall, is the "true lender" and stating that "it is clear that the parties' choice was solely based on CashCall's desire to shield itself against state usury and licensing laws"); Consumer Fin. Prot. Bureau v. CashCall, Inc., CV 15-07522-JFW (RAOx), 2018 U.S. Dist. LEXIS 9057, at *38 (C.D. Cal. Jan. 19, 2018) (explaining that the "CFPB relied heavily on evidence that Defendants created the . . . [l]oan [p]rogram to avoid state licensing and usury laws," though ultimately finding that there was insufficient evidence of such a scheme in this case).

17. *See* Berry, *supra* note 2 (describing the CFPB tribal lender enforcement approach under Cordray, in which the article states that " '[w]here the debate is, is that tribal governments and years of case law view tribal authority as on par with the states . . . [b]ut the CFPB said, no, we don't agree and we are now going to pursue you on this theory of collecting voidable loans' ").

18. *See infra* Part II.

the test for determining when a lending entity is an arm-of-the-tribe with tribal immunity protections.[19] Part III discusses the scope of state and federal power to enforce state and federal consumer protection laws against tribes and arm-of-the-tribe lenders.[20] Part IV delves into the "true lender" enforcement approach of former Director Richard Cordray against tribal payday lenders claiming to be arms-of-the-tribe.[21] Part IV also outlines then-Acting Director Mick Mulvaney's retreat from Cordray's enforcement strategy, the Trump administration's deregulatory agenda, and the implications such an approach will have on the tribal payday lending industry.[22] Finally, Part V summarizes the Note, discusses the likely implications of the CFPB's departure from the "true lender" enforcement strategy under Mulvaney and new Director Kraninger, and provides recommendations for future enforcement approaches.[23]

II. TRIBES AND ARM-OF-THE-TRIBE LENDERS AS "STATES" UNDER DODD-FRANK AND THE SCOPE OF TRIBAL IMMUNITY

A. Title X of the Dodd-Frank Act: Tribes are "States"

Payday lenders fall squarely under the supervisory and regulatory authority of the CFPB, which has the authority to regulate and supervise very large banks, savings associations, and credit unions as well as "nondepository covered persons," including covered persons who offer payday loans to consumers.[24] The Dodd-Frank Act defines "covered person" as "any person that engages in offering or providing a consumer financial product or service"[25] and "any affiliate of a person" who offers or provides a consumer financial product or service if acting as a service provider.[26]

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19. *See infra* Part II.
20. *See infra* Part III.
21. *See infra* Part IV.
22. *See infra* Part IV.
23. *See infra* Part V.
24. Dodd-Frank Wall Street Reform & Consumer Protection Act (Dodd-Frank) § 1024(a)(1)(E), 12 U.S.C. § 5514(a)(1)(E) (2012); Dodd-Frank § 1025(a)(1)–(2), 12 U.S.C. § 5515(a)(1)–(2).
25. Dodd-Frank § 1002(6)(A), 12 U.S.C. § 5481(6)(A).
26. Dodd-Frank § 1002(6)(B), 12 U.S.C. § 5481(6)(B).

The CFPB's investigative authority is even broader than its supervisory authority, stretching beyond the supervised entities previously mentioned.[27] The agency may lead investigations "to determine whether *any* person is or was engaged in conduct that violates federal consumer financial law."[28] Outlining the CFPB's enforcement authority over non-depository covered persons such as payday lenders, the Consumer Financial Protection Act of 2010 ("CFPA"), also known as Title X of Dodd-Frank, provides that "to the extent that Federal law authorizes the Bureau . . . to enforce Federal consumer financial law, the Bureau shall have exclusive authority to enforce that Federal consumer financial law."[29] Furthermore, it is "unlawful for . . . any covered person or service provider . . . to engage in any unfair, deceptive, or abusive act or practice."[30] Thus, the CFPB can take any authorized action under the Dodd-Frank Act to prevent the commission of "unfair, deceptive, or abusive act[s] or practice[s] under Federal law in connection with any transaction with a consumer for a consumer financial product or service, or the offering of a consumer financial product or service."[31]

In a manner different from its regulation and enforcement of covered persons under federal consumer financial law, Dodd-Frank requires the CFPB to co-regulate with states in several ways. Title X explicitly outlines preemption standards and expands state power to regulate within the consumer financial protection sphere, establishing that "a statute, regulation, order, or interpretation in effect in any State is not inconsistent with the provisions of this title if the protection that such statute, regulation, order, or interpretation affords to consumers is greater than the protection provided under this title."[32] Stated another way, federal law provides a minimum level of consumer protection that can be expanded under state law, which will not be preempted unless it conflicts directly with federal law and the CFPB's rules.[33] Additionally, Title X gives state

27. *See CFPB Supervision and Enforcement Procedures,* Practical Law (Westlaw) (Sept. 16, 2018) ("[T]he CFPB's enforcement authority is not limited to supervised entities.").

28. *Id.* (emphasis added).

29. Dodd-Frank § 1024(c)(1), 12 U.S.C. § 5514(c)(1).

30. Dodd-Frank § 1036(a)(1)(B), 12 U.S.C. § 5536(a)(1)(B).

31. Dodd-Frank § 1031(a), 12 U.S.C. § 5531(a).

32. Dodd-Frank § 1041(a)(2), 12 U.S.C. § 5551(a)(2).

33. *See* LAUREN SAUNDERS, NAT'L CONSUMER LAW CTR., THE ROLE OF THE STATES UNDER THE DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT OF 2010 4–9 (2010), https://www.nclc.org/images/pdf/legislation/dodd-frank-role-of-the-states.pdf

regulators and attorneys general the authority to enforce provisions of and seek remedies under Title X.[34] Despite this, the CFPB reserves the authority to "enhance consumer protection standards . . . in response to its own motion or in response to a request by any other interested person."[35]

Under Title X, "state" is defined as "any State, territory, or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico, . . . *or any federally recognized Indian tribe*, as defined by the Secretary of the Interior."[36] As indicated by the text of the Dodd-Frank Act, Congress intended tribes to be considered "states" under Title X.[37] Section 5481 defines terms under the scope of the CFPB, and the definition of "state" explicitly includes "any federally recognized Indian tribe."[38] This definition under Title X is different from the general definition of "state" under other provisions of the Dodd-Frank Act, which do not reference Indian tribes.[39] The general definition section of the Dodd-Frank Act provides that the definitions therein "shall apply, except as the context otherwise requires *or as otherwise specifically provided in this Act*."[40] Thus, Congress's inclusion of "Indian tribes" as "states" under Title X and not under other titles of the Dodd-Frank Act indicates

(discussing the broad power of states to enact consumer protection laws so long as those laws do not directly conflict with federal law); *see also* Dodd-Frank § 1041(a)(1), 12 U.S.C. § 5551(a)(1) ("This title . . . may not be construed as annulling, altering, or affecting, or exempting any person subject to the provisions of this title from complying with, the statutes, regulations, orders, or interpretations in effect in any State, except to the extent that any such provision of law is inconsistent with the provisions of this title, and then only to the extent of the inconsistency.").

34. Dodd-Frank § 1042(a)(1), 12 U.S.C. § 5552(a)(1); *see* SAUNDERS, *supra* note 33, at 1 (referencing the section 5552(a)(1) provision that empowers state regulators and attorneys general to enforce Dodd-Frank provisions).

35. Dodd-Frank § 1041(c)(4), 12 U.S.C. § 5551(c)(4).

36. Dodd-Frank § 1002(27), 12 U.S.C. § 5481(27) (emphasis added).

37. *See* Dodd-Frank § 1002(27), 12 U.S.C. § 5481(27) (defining "State" as "any State, territory, or possession of the United States, . . . or any federally recognized Indian tribe"); *see also* Miller, *supra* note 9, at 3 (explaining that tribal lenders "may argue . . . that tribes are 'states' within the meaning of Section 1002(27) of the Act").

38. Dodd-Frank § 1002(27), 12 U.S.C. § 5481(27).

39. *See* Dodd-Frank § 2(16), 12 U.S.C. § 5301(16) (defining "State" as "any State, commonwealth, territory, or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, American Samoa, Guam, or the United States Virgin Islands").

40. Dodd-Frank § 2, 12 U.S.C. § 5301 (emphasis added).

congressional intent that the CFPB specifically treat tribes as "states" under Title X.[41]

Some may argue, however, that because Dodd-Frank does not explicitly differentiate between tribal and non-tribal lenders in its definition of "covered person," tribes are not exempt from Dodd-Frank provisions when lending to consumers.[42] Those who adopt this argument believe that the Dodd-Frank Act must be interpreted as a federal law that is silent as to the coverage of Indian tribes.[43] If Dodd-Frank is considered a federal law of general applicability, then the dispute of whether tribes and arm-of-the-tribe lenders are "covered persons" must be resolved by consulting legal principles that establish how federal laws of general applicability apply to tribes.[44] A federal law of general applicability will apply to Indian tribes unless:

> (1) the law touches 'exclusive rights of self-governance in purely intramural matters'; (2) the application of the law to the tribe would 'abrogate rights guaranteed by Indian treaties;' or (3) there is proof 'by legislative history or some other means that Congress intended [the law] not to apply to Indians on their reservations.'[45]

In *Donovan v. Coeur d'Alene Tribal Farm*, the Ninth Circuit addressed whether Congress's failure to mention tribes or tribal enterprises within the Occupational Safety and Health Act (OSHA) "should be taken as an

41. *See* Dodd-Frank § 1002(27), 12 U.S.C. § 5481(27) (defining "State" as "any State, territory, or possession of the United States, . . . or any federally recognized Indian tribe"); *see also* Heather L. Petrovich, Comment, *Circumventing State Consumer Protection Laws: Tribal Immunity and Internet Payday Lending*, 91 N.C. L. REV. 326, 354 (2012) (concluding that Congress intended tribes to be considered "states" under Title X of the Dodd-Frank Act because the definition of "state" includes "any federally recognized Indian tribe" and because "courts have found similar reasoning—namely, linking definitions advanced in the statutes—to clearly encompass tribes in terms of enforcement").

42. *See* Miller, *supra* note 9, at 2–3 (explaining the argument that the Dodd-Frank Act "does not distinguish between tribal and non-tribal lenders" in defining "covered persons" and thus that "[t]ribes are not expressly exempted from the provisions of the Act when they perform consumer-lending functions").

43. *See* Miller, *supra* note 9, at 3 (referencing federal laws that are silent as to "the issue of applicability to Indian tribes").

44. *See* Miller, *supra* note 9, at 3 (discussing federal laws of general applicability and the principles that govern whether they apply to Indian tribes and under what circumstances).

45. Donovan v. Coeur d'Alene Tribal Farm, 751 F.2d 1113, 1116 (9th Cir. 1985) (quoting United States v. Farris, 624 F.2d 890, 893–94 (9th Cir. 1980)).

expression of intent to exclude tribal enterprises," including the tribal farm in question, from the scope of the Act.[46] The court ultimately concluded, after analyzing OSHA under the three factors discussed above, that neither the "legislative history . . . [n]or the surrounding circumstances of its passage . . . indicate any congressional desire to exclude tribal enterprises from the scope of its coverage."[47] The court reached this conclusion by interpreting the first factor, or exclusive rights of self-governance, as encompassing only "purely intramural matters such as conditions of tribal membership, inheritance rules, and domestic relations" that OSHA did not affect.[48]

If Title X of the Dodd-Frank Act was considered a federal law of general applicability, one could argue that arm-of-the-tribe lenders are governed by the Act because federal governance of consumer financial services likely does not affect either "purely intramural matters" of tribal governance or tribal treaty rights.[49] However, the argument that the Dodd-Frank Act is a federal law of general applicability, silent as to whether tribes and tribal entities are covered, is unconvincing due to the fact that Title X explicitly included tribes within the definition of "states."[50] Furthermore, the definition of "state" under Title X seems to satisfy the third factor of the *Donovan* test by indicating that Congress intended Title X of the Dodd-Frank Act to apply to tribes as "states," not as "covered persons."[51] The Supreme Court has stated that " '[ambiguities] in federal law have been construed generously in order to comport

46. *Id.* at 1115.

47. *Id.*

48. *Id.* at 1116.

49. *See id.* (quoting *Farris*, 624 F.2d at 893–94) (explaining that federal laws that do not explicitly mention whether they apply to tribes will *not* apply if they touch on " 'exclusive rights of self-governance in purely intramural matters' " or if they " 'abrogate rights guaranteed by Indian treaties' "); *see also* Miller, *supra* note 9, at 3 (expressing the opinion that "general federal laws governing consumer financial services do not affect the internal governance of tribes" nor "adversely affect treaty rights").

50. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) § 1002(27), 12 U.S.C. § 5481(27) (2012) (defining "State" as "any State, territory, or possession of the United States, . . . or any federally recognized Indian tribe").

51. *Donovan*, 751 F.2d at 1116 (providing the following three-factor test for determining when federal laws of general applicability will not apply to Indian tribes: "(1) the law touches 'exclusive rights of self-governance in purely intramural matters;' (2) the application of the law to the tribe would 'abrogate rights guaranteed by Indian treaties;' or (3) there is proof 'by legislative history or some other means that Congress intended [the law] not to apply to Indians on their reservations' ").

with . . . traditional notions of sovereignty and with the federal policy of encouraging tribal independence.' "[52] Thus, tribes and arm-of-the-tribe lenders, including many TLEs, should be considered "states" under Title X of the Dodd-Frank Act.

B. The Scope of Tribal Immunity: Tribes and "Arms-of-the-Tribe"

Tribes are protected from suit under state law by tribal sovereign immunity,[53] which includes immunity from individual and state suits.[54] Such sovereignty is subordinate only to the federal government.[55] As a general matter of federal law, a tribe can be sued only in cases where a federal law authorizes such a suit or where a tribe has waived its tribal immunity.[56] Additionally, tribal immunity protects both Indian tribes and arm-of-the-tribe entities from suit.[57] This protection extends to business activities closely linked to the tribe, which can include the activity of tribally chartered TLEs.[58] In cases where a tribe creates an entity to carry out specific activities, "the entity is immune if it functions as an arm of the tribe."[59]

To determine whether an entity is legally an arm of the tribe, courts consider whether "the entity acts as an arm of the tribe so that its activities are properly deemed to be those of the tribe."[60] The Tenth Circuit provides helpful factors to determine whether an economic entity

52. Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 152 (1982) (quoting White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143-44 (1980)); *see also* Mont. v. Blackfeet Tribe of Indians, 471 U.S. 759, 766 (1985) ("[S]tatutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.").

53. *See* Michigan v. Bay Mills Indian Cmty., 134 S. Ct. 2024, 2030 (2014) (quoting Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978)) ("Among the core aspects of sovereignty that tribes possess—subject, again, to congressional action—is the 'common-law immunity from suit traditionally enjoyed by sovereign powers.' ").

54. *Id.* at 2031.

55. Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134, 154 (1980).

56. Kiowa Tribe of Oklahoma v. Mfg. Tech., Inc., 523 U.S. 751, 754 (1998).

57. *Bay Mills Indian Cmty.*, 134 S. Ct. at 2056 n.4.

58. *See* Allen v. Gold Country Casino, 464 F.3d 1044, 1046 (9th Cir. 2006) (explaining that tribal immunity "extends to business activities of the tribe, not merely to governmental activities"); Miller, *supra* note 9, at 2.

59. *Allen*, 464 F.3d at 1046.

60. *Id.*

formed by a tribe is sufficiently subordinate to the tribe so as to enjoy its immunity.[61] To determine this, a court must consider:

> (1) the method of creation of the economic entities; (2) their purpose; (3) their structure, ownership, and management, including the amount of control the tribe has over the entities; (4) the tribe's intent with respect to sharing of its sovereign immunity; and (5) the financial relationship between the tribe and the entities.[62]

Additionally, a court must consider the public policy justifications for protecting tribal sovereign immunity as well as the entities' importance in encouraging tribal economic development.[63] Under a sixth factor, the question becomes whether "those policies are served by granting immunity to the economic entities" that claim to be arms-of-the-tribe.[64]

Tribal casinos are an example of a type of tribal entity that courts have frequently determined to be an arm-of-the-tribe with tribal sovereign immunity.[65] In *Allen v. Gold Country Casino*, the Ninth Circuit found that Gold Country Casino, the defendant, was indeed an arm-of-the-tribe and thus enjoyed tribal immunity from suit for various reasons, including the fact that the tribe fully owned and operated the casino and that "there . . . [was] no question that the[ ] economic and other advantages inure to the benefit of the Tribe."[66] Additionally, the court found that the casino relied heavily on the tribal government for its creation, approval, and assurance that it could operate the gambling activities allowed under tribal law.[67] The federal Indian Gaming Regulatory Act ("IGRA"), under which the casino was formed, also illustrated

61. Breakthrough Mgmt. Grp., Inc. v. Chukchansi Gold Casino & Resort, 629 F.3d 1173, 1187 (10th Cir. 2010).

62. *Id.*

63. *Id.*

64. *Id.*

65. *See, e.g.*, *Breakthrough Mgmt. Grp., Inc.*, 629 F.3d at 1195 (explaining that, after considering the six factors discussed above, the casino and the business that manages it "are so closely related to the Tribe that they should share in the Tribe's sovereign immunity"); *Allen*, 464 F.3d at 1047 (holding that "[i]n light of the purposes for which the Tribe founded this Casino and the Tribe's ownership and control of its operations, there can be little doubt that the Casino functions as an arm of the Tribe").

66. *Allen*, 464 F.3d at 1047.

67. *Id.* at 1046.

congressional intent "for the creation and operation of Indian casinos to promote 'tribal economic development, self-sufficiency, and strong tribal governments.' "[68] Though the Ninth Circuit court did not apply the six-factor analysis considered by the Tenth Circuit, its discussion of the ownership and operation of the casino, the level of control of the tribe, and the financial relationship between the tribe and the casino contemplated similar facets of the relationship between the entity and the tribe.[69] Ultimately, the Ninth Circuit found that "[i]n light of the purposes for which the Tribe founded this Casino and the Tribe's ownership and control of its operations, there can be little doubt that the Casino functions as an arm of the Tribe."[70]

C. The Structure of TLEs

Tribal lenders, often referred to as TLEs, are generally tribally chartered, but many are funded by a third party and often engage in payday lending over the Internet to consumers all over the United States.[71] In their most legitimate formation, TLEs often maintain offices on tribal land, where they operate their servers and hire tribal members as employees in all stages of the lending enterprise.[72] However, in many cases, the majority of TLE funding comes from third-party non-tribal entities, and this often results in lending businesses in which the non-tribal entity receives the bulk of the financial benefit.[73] Such arrangements are favorable to non-tribal lenders because they may be able to claim tribal immunity from borrower-state consumer protection laws, including any usury laws limiting interest rates, and in doing so charge one nationwide interest

68. *Id.* (quoting Indian Gaming Regulatory Act (IGRA) § 3(1), 25 U.S.C. § 2702(1) (2016)).

69. *Id.* at 1046–47 (discussing the fact that the casino is owned and operated by the tribe and that it provides revenue and promotes tribal economic development); *see Breakthrough Mgmt. Grp., Inc.*, 629 F.3d at 1195 (establishing six factors to determine whether an entity is an "arm-of-the-tribe" with tribal sovereign immunity).

70. *Id.* at 1047.

71. Miller, *supra* note 9, at 1 (explaining the "typical model" for tribal lending entities).

72. Miller, *supra* note 9, at 1.

73. Miller, *supra* note 9; *see* Robinson, *supra* note 12 (explaining that "tribes generally receive little if any of the revenue" from the lending operations of the "rent-a-tribe" arrangement).

rate without reference to the usury laws of the borrower's state.[74] Many online lenders attempt to take advantage of the tribal sovereign immunity model to enable them to charge a uniform national interest rate and avoid any state laws that limit interest rates or prohibit payday lending altogether.[75]

This tribal lending structure mirrors the "rent-a-bank" arrangement, since shut down by various federal regulators in the early 2000s, in which payday lenders partnered with out-of-state banks and attempted to benefit from the banks' ability to export interest rates that were permissible in their state but usurious under the laws of the borrower's state.[76] The Office of the Comptroller of the Currency (OCC) ultimately eradicated the "rent-a-bank" arrangement among national banks by prohibiting national banks from participating in third-party payday lending arrangements.[77] Subsequent court decisions, such as *Madden v. Midland Funding*, have also affirmed that payday lenders cannot benefit from national banks' preemption of state usury limits in favor of the law of the state within which they reside,[78] sending payday lenders to seek new ways to avoid state usury laws, including partnerships with TLEs.

Despite the potential for the TLE structure to be abused by nontribal payday lenders attempting to benefit from tribal sovereign immunity, many TLEs are properly classified as "arms-of-the-tribe" warranting tribal immunity protection.[79] A TLE is likely to be classified as

74. *See* Miller, *supra* note 9, at 1 ("Because TLEs deem themselves exempt from compliance with all borrower-state laws, a TLE engaged in payday lending usually charges a single rate nationwide.").

75. Miller, *supra* note 9, at 1.

76. *See* JAMES M. KOLTVEIT, ACCOUNTING FOR BANKS § 8.01(7)(a) (2018) (explaining the "rent-a-bank" structure in which payday lenders took advantage of banks' ability to skirt state usury limits in other states).

77. *Id.*

78. *See* Madden v. Midland Funding, LLC, 786 F.3d 246, 250 (2d Cir. 2015) (holding that, though the National Bank Act "expressly permits national banks to 'charge on any loan . . . interest at the rate allowed by the laws of the State, Territory, or District where the bank is located,' " a non-national bank entity such as a payday lender cannot benefit from NBA preemption unless the entity is an entity or subsidiary of a national bank); *see also* Chris Bruce, *Appeals Court May Tackle "True Lender" Debate Affecting Fintechs, Online Lenders*, Banking Rep. (BNA) No. 501 (Mar. 29, 2017) (explaining that the *Madden* decision means that the viability of bank partnership arrangements is declining and voicing the opinion that "online lenders will have to be more vigilant about usury questions").

79. *See NAFSA Comments on True Lender Issue in Bloomberg BNA*, NATIVE AMERICAN FINANCIAL SERVICES ASSOCIATION: NEWS (Mar. 30, 2017), https://nativefinance.org/nafsa-explains-our-best-practices-to-bloomberg-bna/ (explaining that Native American Financial

an arm-of-the-tribe when it is sufficiently controlled by the tribe under which it is chartered and when the economic benefits of the lending enterprise are primarily kept within the tribe.[80] As illustrated by the Tenth Circuit's six-factor test, courts will often consider, among other factors, the "structure, ownership, and management" of the TLE, including the level of tribal governmental control over the lending entity, the "financial relationship between the tribe" and the TLE, and whether the policies underlying tribal sovereign immunity are furthered by granting the TLE tribal immunity.[81] As a result, the TLE may not be classified as an arm-of-the-tribe and protected from suit if non-tribal financiers control a large part of the TLE's business or realize most of the benefit.[82]

III. STATE AND FEDERAL POWER TO ENFORCE AGAINST TRIBES AND TLES

A. CFPB Enforcement Against TLEs

Accepting that tribes and arm-of-the-tribe lenders are "states" under Title X of the Dodd-Frank Act, the CFPB must coordinate with them as it does with other states.[83] Under the Dodd-Frank Act, "states" are given authority to enforce provisions of Title X and its regulations,[84] though the CFPB reserves the right to receive notice of a complaint filed under Title X of the Dodd-Frank Act by a state attorney general or

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Services Association members "are structured in a way in which the lending enterprise that originated the loan is also an entity that services the loan, which means they do not encounter true lender concerns").

80. *See, e.g.*, Allen v. Gold Country Casino, 464 F.3d 1044, 1047 (9th Cir. 2006) (stating that the tribe's ownership and operation of the casino means that the tribe receives the economic and other advantages of the business).

81. Breakthrough Mgmt. Grp., Inc. v. Chukchansi Gold Casino & Resort, 629 F.3d 1173, 1191 (10th Cir. 2010).

82. *See* Consumer Fin. Prot. Bureau v. CashCall, Inc., CV 15-7522-JFW (RAOx), 2016 U.S. Dist. LEXIS 130584, at *17 (C.D. Cal. Aug. 31, 2016) ("In identifying the true or de facto lender, courts generally consider the totality of the circumstances and apply a 'predominant economic interest,' which examines which party or entity has the predominant economic interest in the transaction.").

83. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) § 1041(a)(2), 12 U.S.C. § 5551(a)(2) (2012) (outlining preemption standards and expanded state power to regulate within the consumer financial protection sphere and establishing that "a statute, regulation, order, or interpretation in effect in any State is not inconsistent with the provisions of this title if the protection that such statute, regulation, order, or interpretation affords to consumers is greater than the protection provided under this title").

84. Dodd-Frank § 1042(a)(1), 12 U.S.C. § 5552(a)(1).

regulator[85] and can intervene as a party in various ways.[86] State consumer protection laws are protected from federal preemption if they go further than provisions of the Dodd-Frank Act in protecting consumers from unfair, deceptive, and abusive practices.[87] Thus, many states provide greater consumer protection through usury laws capping interest rates or laws banning payday lending altogether.[88] The Dodd-Frank Act limits the ability of financial services entities to claim immunity from state consumer protection law by limiting the circumstances in which state consumer protection law can be preempted.[89]

Despite the CFPB's broad power to enforce federal consumer protection laws, the Bureau does not have authority, either express or implied, under state consumer protection laws.[90] The CFPB also lacks the authority to establish usury limits for lenders, so the power to impose usury laws is reserved for the states.[91] Therefore, if tribes and arm-of-the-tribe lenders are considered "states" under Title X and are immune from suit for violating another states' usury laws, the CFPB should not have the authority to enforce those usury laws against them.[92] Additionally, the CFPB is limited in its ability to enforce TLEs' lending practices if their only questionable practice is charging interest rates above those permitted by state usury laws because TLEs' engagement in payday lending with high interest rates does not violate the CFPA.[93] In fact, many

85. Dodd-Frank § 1042(b)(1)(A), 12 U.S.C. § 5552(b)(1)(A).

86. Dodd-Frank § 1042(b)(2)(A)–(C), 12 U.S.C. § 5552(b)(2)(A)–(C) (permitting the CFPB to "intervene in the action as a party, . . . remove the action to a U.S. district court, . . . be heard in all matters arising in the action, . . . and appeal an order or judgment").

87. *See* Dodd-Frank § 1041(a)(2), 12 U.S.C. § 5551(a)(2) (requiring that consumer protection laws enacted by States *only* avoid preemption by the CFPA if they "afford[ ] to consumers . . . greater . . . protection" than that provided under the CFPA).

88. SAUNDERS, *supra* note 33, at 2 (explaining that "the Dodd-Frank Act appropriately recognizes that states have a crucial role to play in protecting consumers" and that states can "prevent gaps in federal protections from being exploited" by passing additional state consumer protection legislation).

89. SAUNDERS, *supra* note 33, at 2.

90. Miller, *supra* note 9.

91. Dodd-Frank § 1027(o), 12 U.S.C. § 5517(o).

92. *See* Miller, *supra* note 9, at 3 ("Although the CFPB has virtually unlimited authority to enforce federal consumer lending laws, it does not have express or even implied powers to enforce state usury laws.").

93. *See* Miller, *supra* note 9, at 3.

states that have not explicitly prohibited payday lending or enacted usury laws still permit these lenders to operate within their borders.[94]

However, the CFPB *is* permitted to investigate TLEs and bring enforcement action against them if the Bureau has reason to suspect that the TLE is not a true arm-of-the-tribe with tribal immunity or that the tribal lender is not the "true lender" in the enterprise, permitting the CFPB to treat the lender as a "covered person."[95] In *CashCall*, the CFPB asserted that the non-tribal "true lender" of the lending enterprise "engaged in unfair, deceptive, and abusive acts and practices ("UDAAP") in violation of the CFPA by servicing and collecting full payment on loans that state-licensing and usury laws had rendered wholly or partially void or uncollectible."[96] The UDAAP in *CashCall* arose, in part, from non-tribal lender CashCall's allegedly deceptive claim of tribal immunity from state suit to enforce usury laws.[97] As *CashCall* illustrates, if a TLE is not sufficiently controlled by or benefiting the tribe under which it is formed, it is likely not an arm-of-the-tribe[98] and will no longer be classified as a "state" with tribal sovereign immunity under Dodd-Frank.[99] Instead, the TLE will be a "covered person" without tribal immunity, subject to greater control and regulation by the CFPB and the states.[100]

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94. *See* Miller, *supra* note 9, at 3 ("[P]ayday lending itself, without more, cannot be a UDAAP, since such lending is expressly authorized by the laws of thirty-two states: there is simply no 'deception' or 'unfairness' in a somewhat more pricey financial service offered to consumers on a fully disclosed basis in accordance with a structure dictated by state law.").

95. *See, e.g.*, Consumer Fin. Prot. Bureau v. CashCall, Inc., CV 15-7522-JFW (RAOx), 2016 U.S. Dist. LEXIS 130584, at *16 (C.D. Cal. Aug. 31, 2016) (agreeing with the CFPB's request that the court look "to the substance, not the form, of the transaction to identify the true lender").

96. *CashCall, Inc.*, 2016 U.S. Dist. LEXIS 130584, at *11.

97. *Id.* at *33 (holding that the non-tribal lenders "engaged in a deceptive practice prohibited by the CFPA" by "serving and collecting on Western Sky loans, . . . creating the 'net impression' that the loans were enforceable and that borrowers were obligated to repay the loans in accordance with the terms of their loan agreements" when in reality the loans were not subject to tribal law as the lenders claimed).

98. *See, e.g.*, Allen v. Gold Country Casino, 464 F.3d 1044, 1047 (9th Cir. 2006) (stating that the tribe's ownership and operation of the casino means that the tribe receives the economic and other advantages of the business).

99. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) § 1002(27), 12 U.S.C. § 5481(27) (2012) (defining "state" to include Indian tribes but not every business or individual with ties to a tribe).

100. *See* Dodd-Frank § 1024(a)(1)(E), 12 U.S.C. § 5514(a)(1)(E); Dodd-Frank § 1025(a)(1)-(2), 12 U.S.C. § 5515(a)(1)-(2) (providing that covered persons who offer payday loans are subject to supervision and regulation by the CFPB).

B. Other Forms of Federal Enforcement Against TLEs

Beyond the CFPB, other federal agencies have played a part in the investigation of and enforcement against online payday lenders claiming tribal sovereign immunity through partnerships with tribes.[101] In recent years, the Federal Trade Commission ("FTC") has filed multiple suits against nontribal partners of tribal payday lenders for allegedly violating the Federal Trade Commission Act ("FTC Act").[102] In *FTC v. AMG Services*, the district court held that the FTC Act is a law of general applicability which applies to tribes and "arms-of-the-tribe," a finding ultimately affirmed in 2014.[103] Another recent suit brought by the FTC charged payday lender Payday Financial LLC with illegally filing suit against borrowers in default in Cheyenne River Sioux Tribal Court despite a finding that the tribal court lacked jurisdiction over borrowers that did not live on the reservation or in South Dakota.[104] Defendant Payday

101. Richard P. Eckman et al., *Update on the Short-Term Lending Industry: Government Investigations and Enforcement Actions*, 70 BUS. LAW. 657 (2015); *see* Nicholas St. John, *The Future Brightens for Tribal Lending*, Banking Rep. (BNA) No. 362 (Mar. 12, 2018) (explaining that "[i]f the CFPB does become more permissive of tribal lending, there is still the possibility that another federal regulator, the Federal Trade Commission, could potentially pick up the mantle" and discussing the FTC's 2011 suit against nontribal partners of tribal payday lenders in *FTC v. Payday Financial LLC*).

102. *See, e.g.*, FTC v. AMG Servs., No. 2:12-cv-00536-GMN-VCF, 2013 U.S. Dist. LEXIS 185783, at *79–80 (D. Nev. Jul. 16, 2013) (holding that the FTC Act "(1) is one of general applicability, (2) is silent as to Indian Tribes, (3) provides for specific exemptions, none of which exempt Indian Tribes, arms of Indian Tribes, or employees of arms of Indian Tribes, and (4) gives the FTC the *authority* to bring suit against Indian Tribes, arms of Indian Tribes, and employees and contractors of arms of Indian Tribes" and ultimately finding that there are still "genuine issues of material fact . . . as to whether the Tribal Chartered Defendants are 'for profit corporations,' " a finding necessary to determining whether they were in violation of the FTC as alleged); *Payday Lenders That Used Tribal Affiliation to Illegally Garnish Wages Settle with FTC: Settlement Requires Defendants to Pay Nearly $1 Million*, FTC PRESS RELEASES (Apr. 11, 2014), https://www.ftc.gov/news-events/press-releases/2014/04/payday-lenders-used-tribal-affiliation-illegally-garnish-wages [hereinafter *Settlement*] (detailing the FTC's suit against Payday Financial LLC in which the FTC alleged that Payday Financial "illegally tried to garnish consumers' wages without a court order, and sought to manipulate the legal system and force borrowers to appear before the Cheyenne River Sioux Tribal Court in South Dakota, which did not have jurisdiction over their cases").

103. Eckman et al., *supra* note 101; *see* FTC v. AMG Servs., No. 2:12-cv-00536-GMN-VCF, 2014 U.S. Dist. LEXIS 29570, at *15 (D. Nev. Mar. 7, 2014) (holding that "[t]he Defendants offer no compelling explanation as to why the FTC Act should be treated differently from these other broad federal statutes of general applicability" and stating that the district court judge "correctly followed Ninth Circuit precedent in determining that the FTC Act is a statute of general applicability").

104. FED. TRADE COMM'N, FTC FILE NO. X110050, FTC CHARGES THAT PAYDAY LENDER ILLEGALLY SUED DEBT-BURDENED CONSUMERS IN SOUTH DAKOTA TRIBAL COURT WITHOUT

Financial LLC eventually settled, admitting to violations of the Credit Practices Rule, illegally garnishing borrowers' wages without a court order, and impermissibly suing borrowers in tribal court.[105] The *AMG Services* and *Payday Financial LLC* holdings open the door to future suits against tribal payday lenders under the FTC Act.[106] Both proponents and opponents of online payday lending claim that the FTC will perhaps step in and fill the enforcement gap if the CFPB continues to back away from bringing enforcement actions against online payday lenders that claim tribal immunity from state usury laws.[107]

C. State Enforcement Against TLEs

Online, nonbank lenders are required to comply with applicable state laws in the jurisdictions in which they lend, including state usury laws.[108] The scope of a state's regulatory power, in relation to tribal sovereign immunity, is determined by two considerations: "the location of the targeted conduct and the citizenship of the participants in that activity."[109] Thus, a state's power is reduced once it attempts to act or regulate within a reservation's borders, and "courts must weigh the interests of each sovereign—the tribes, the federal government, and the state—in the conduct targeted by the state's regulation."[110]

JURISDICTION: AGENCY EXPANDS ITS CASE AGAINST PAYDAY FINANCIAL, LLC (2012) [hereinafter FTC CHARGES].

105. *See* St. John, *supra* note 101 (summarizing the FTC's suit against Payday Financial LLC and the resulting settlement of almost one million dollars in 2014); *see also Settlement*, *supra* note 102 (explaining that the case ultimately resulted in a settlement in which Payday Financial paid the U.S. Treasury $967,740 for "violating the Credit Practices Rule – which prohibits payday lenders from requiring borrowers to consent to have wages taken directly out of their paychecks in the event of a default").

106. *See* St. John, *supra* note 101 ("If the CFPB does become more permissive of tribal lending, there is still the possibility that another federal regulator, the Federal Trade Commission, could potentially pick up the mantle.").

107. *See* St. John, *supra* note 101 (forecasting that the FTC may step further into the tribal lending enforcement arena if the CFPB continues with its recent shift away from enforcement despite the fact that "[t]he FTC has generally been less aggressive in this area than Cordray's CFPB").

108. Ballard, *supra* note 6; *see* Otoe-Missouria Tribe of Indians v. New York State Dep't of Fin. Servs., 769 F.3d 105, 113 (2d Cir. 2014) (stating that "Native Americans 'going beyond the reservation boundaries' must comply with state laws as long as those laws are 'nondiscriminatory [and] . . . otherwise applicable to all citizens of [that] State' " (quoting Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148–49 (1973))).

109. *Otoe-Missouria Tribe of Indians*, 769 F.3d at 113.

110. *Id.*

TLEs generally claim to be exempt from borrower-state laws, and tribal payday lenders usually charge interest rates above the interest rate cap set in states with usury laws.[111] However, in determining whether a TLE is subject to state usury laws, courts balance sovereign and public interests; ultimately, tribal online lenders that engage with borrowers in other states may be required to comply with those state's consumer protection laws, including state laws that cap interest rates, in certain circumstances.[112] The Second Circuit addressed this issue in *Otoe-Missouria Tribe of Indians v. N.Y. State Department of Financial Services*, a case in which the two defendant tribes and tribal lenders offered payday loans over the Internet to borrowers in New York and other states.[113] These online loans had very high interest rates, far above New York's usury laws, and the terms of the loan "permitted the [tribal] lenders to make automatic deductions from the [New York] borrowers' bank accounts to recover interest and principle [sic]."[114] Plaintiff New York Department of Financial Services claimed that New York usury laws applied to the tribal lenders, who were reaching out to borrowers in New York and impacting borrowers in their state, not on the reservation.[115] In contrast, the tribal lenders claimed that the "challenged transactions occurred on the reservations" because, among other factors, the tribe owned and controlled the website where the loan applications were processed as well as the bank accounts that funded the loans.[116] The Second Circuit ultimately held that, in this particular case, most of the relevant commercial activity occurred in New York because New York was the location of the borrower and where "the borrower . . . [sought] the loan without ever leaving the state . . . [and] without traveling to the reservation."[117] Thus, New York's interest in preventing usurious loans was likely greater in this case

111. *See* Miller, *supra* note 9, at 1 ("Because TLEs deem themselves exempt from compliance with all borrower-state laws, a TLE engaged in payday lending usually charges a single rate nationwide.").

112. *See Otoe-Missouria Tribe of Indians*, 769 F.3d at 113 (explaining that "courts must weigh the interests of each sovereign" when "a state reaches across a reservation's borders").

113. *See id.* at 107–08 (explaining that the tribal lenders "established internet-based lending companies in the hopes of reaching consumers who had difficulty obtaining credit at favorable rates but who would never venture to a remote reservation").

114. *Id.* at 108.

115. *Id.*

116. *Id.*

117. *Id.* at 115.

than the interests of the tribal lenders due to the large impact of these online loans on New York borrowers.[118]

The Supreme Court has also held that "a State may have authority to tax *or regulate* tribal activities occurring within the State but outside Indian country," though it has emphasized that the application of "substantive state laws . . . to off-reservation conduct . . . is not to say that a tribe no longer enjoys immunity from suit."[119] The Court has elaborated, holding that "the immunity possessed by Indian tribes is not coextensive with that of the States, . . . [and] so tribal immunity is a matter of federal law and is not subject to diminution by the States."[120] The Supreme Court provided an illustration in *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma* in which it explained that the state of Oklahoma is permitted to tax the sale of cigarettes to non-tribal members in a tribally-owned store but that the tribe is ultimately immune from a state suit for unpaid state taxes.[121] Thus, there is a "difference between the right to demand compliance with state laws and the means available to enforce them," and the Court has refused to limit tribal immunity from suit to tribal governmental activity and to business activities on reservations themselves.[122] This distinction indicates that TLEs, when held to be an arm-of-the-tribe and protected by tribal immunity, may still have to comply with another state's usury laws if the TLEs lend to that state's residents.[123] However, that state may not be able to sue the TLEs if they fail to comply with those usury laws.[124]

States themselves are generally reluctant to bring suit against TLEs for violations of state consumer protection laws because such suits have historically been defeated upon the TLE's claim of tribal sovereign immunity from state suit.[125] As such, there is limited state case law that has reached the point of discussion on the merits.[126] *Cash Advance & Preferred Cash Loans v. Colorado* exemplifies the rare state suit that

118. *See id.* (explaining New York's interest in preventing usurious loans as weighed against the interests of tribal lenders).

119. Kiowa Tribe of Okla. v. Mfg. Tech., Inc., 523 U.S. 751, 755 (1998) (emphasis added).

120. *Id.* at 756.

121. *Id.* at 754–55.

122. *Id.*

123. *Id.*

124. *Id.*

125. Petrovich, *supra* note 41.

126. Petrovich, *supra* note 41.

considers under what circumstances a lender will qualify for tribal sovereign immunity.[127] The Colorado court held that courts must analyze three factors in determining whether a lender is an "arm-of-the-tribe": "(1) whether the tribes created the entities pursuant to tribal law; (2) whether the tribes own and operate the entities; and (3) whether the entities' immunity protects the tribes' sovereignty."[128] The court then remanded the suit to determine whether the two entities were arms-of-the tribe, and the trial court dismissed the case after a finding of tribal sovereign immunity.[129]

Ultimately, state usury laws may not be as effective against TLEs as they are against other payday lenders due to states' limited enforcement and regulatory power over tribes and tribal lenders.

IV. "TRUE LENDER" ENFORCEMENT APPROACH

A. CFPB "True Lender" Enforcement: CashCall and Beyond

Under former Director Cordray, the CFPB took significant steps to challenge entities utilizing UDAAP, as evidenced from lawsuits such as *CashCall* in which the CFPB questioned the legitimacy of non-tribal financiers that were funding TLEs and claiming exemption, under tribal immunity, from the enforcement of state consumer protection laws.[130] Cordray's CFPB based its authority on its enforcement powers over a variety of lending entities, including online and payday lenders.[131]

Bringing suit against these lenders, the CFPB asserted a "true lender" theory, asking the court to "consider the substance, not the form, of the transaction" to determine the "true" or "de facto" lender on a

127. *See* Cash Advance v. Colorado. ex. Rel. Suthers, 242 P.3d 1099, 1102 (Colo. 2010) (stating that "[t]his tribal sovereign immunity case requires us to address the relationship between the State of Colorado and sovereign American Indian tribes, as that relationship is governed by federal law," in analyzing the state's enforcement power over two entities claiming to be "arms" of two different federally recognized Indian tribes).

128. *Id.* at 1110.

129. Petrovich, *supra* note 41.

130. *CFPB Sues CashCall for Illegal Online Loan Servicing*, *supra* note 8; *see also CFPB Sues Four Online Lenders for Collecting on Debts Consumers Did Not Legally Owe*, CFPB NEWSROOM (Apr. 27, 2017), https://www.consumerfinance.gov/about-us/newsroom/cfpb-sues-four-online-lenders-collecting-debts-consumers-did-not-legally-owe/ (alleging that "the four lenders could not legally collect on these debts because the loans were void under state laws governing interest rate caps or the licensing of lenders").

131. *CFPB Sues CashCall for Illegal Online Loan Servicing*, *supra* note 8.

particular lending enterprise.[132] This approach is not new, and it has been employed by state and federal courts, including the Supreme Court, to resolve questions of immunity from suit.[133] The Supreme Court has held that "[t]he identity of the real party in interest dictates what immunities may be available."[134] For example, the Court decided in *Lewis v. Clarke* that an individual tribal member, not acting within his official tribal capacity, could not be protected from suit under tribal sovereign immunity after committing tortious actions because he, not the tribe, was the "real party in interest."[135] The Court equated the situation to cases involving lawsuits against state or federal employees and explained that "in the context of lawsuits against state and federal employees or entities, courts should look to whether the sovereign is the real party in interest to determine whether sovereign immunity bars the suit."[136] Defendants may only claim sovereign immunity if acting in their official capacity.[137] As courts have recently applied this logic to ascertain the "true lender" of a payday lending enterprise to determine whether they are protected under tribal immunity,[138] so too have courts questioned the "real party of interest" in determining whether a party is protected under state or federal sovereign immunity.[139]

In its recent action against CashCall, a non-tribal lender, and Western Sky Funding, a tribal lender partnering with CashCall, the CFPB alleged that CashCall was the "true lender" because of its greater

132. Consumer Fin. Prot. Bureau v. CashCall, Inc., CV 15-7522-JFW (RAOx), 2016 U.S. Dist. LEXIS 130584, at *15 (C.D. Cal. Aug. 31, 2016).

133. *See, e.g.*, Lewis v. Clarke, 137 S. Ct. 1285, 1292 (2017) (explaining that the court must determine the identity of the "real party in interest" to determine if immunity is available).

134. *Id.*

135. *See id.* (holding that "[t]his is not a suit against Clarke in his official capacity" but is "simply a suit against Clarke to recover for his personal actions, which 'will not require action by the sovereign or disturb the sovereign's property' " (quoting Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 687 (1949))).

136. *Id.* at 1291.

137. *Id.*

138. *See* Consumer Fin. Prot. Bureau v. CashCall, Inc., CV 15-7522-JFW (RAOx), 2016 U.S. Dist. LEXIS 130584, at *17 (C.D. Cal. Aug. 31, 2016) (stating that the "true lender" should be ascertained by considering the "totality of the circumstances" and the entity with "the predominant economic interest").

139. *See Lewis*, 137 S. Ct. at 1292 (explaining that the court must identify the "real party of interest" to determine which immunities might be available).

economic control and interest within the lending partnership.[140] The federal district court agreed that the "true lender" should be ascertained by considering the "substance . . . of the transaction,"[141] the "totality of the circumstances," and the entity with "the predominant economic interest."[142] In *CashCall*, the court found that the most essential factor was whether the tribal lender or the non-tribal lender carried the majority of the financial risk and monetary investment.[143] In concluding that CashCall, not Western Sky, was the "true lender," the court noted that "the entire monetary burden and risk of the loan program was placed on CashCall, such that CashCall . . . had the predominant economic interest . . . and was the 'true lender.' "[144]

The court, in finding the non-tribal lender, CashCall, to be the "true lender," also held that the Cheyenne River Sioux Tribe ("CRST"), the tribe that chartered Western Sky and established the relationship with CashCall, had "no substantial relationship" with CashCall.[145] Even more striking, the court held that the parties' choice of tribal law, as stated in the lending agreement, should not apply because the parties' choice was clearly based on CashCall's attempt to avoid state usury and licensing laws.[146] In providing a public policy justification for rejecting the loan agreement's tribal choice-of-law provision, the court in *CashCall* concluded that the state, not the tribe, had the greater interest here in protecting its citizens from usurious loans through statutes that render violating contracts void or uncollectible.[147] Notably, the court drew attention to the fact that borrowers of CashCall and Western Sky's funds applied for loans on the defendants' website rather than on the reservation and further explained that borrowers pay the loans and any fees from their own state, where the borrower grants Western Sky permission to electronically remove funds from their bank accounts for payment.[148] Ultimately,

140. *See CashCall, Inc.*, 2016 U.S. Dist. LEXIS 130584, at *11 (alleging that CashCall, the non-tribal lender, was the "true lender" of the relationship).

141. *Id.* at *16.

142. *Id.* at *17.

143. *Id.* at *18.

144. *Id.* at *20.

145. *Id.* at *21–22.

146. *Id.* at *22.

147. *Id.* at *23.

148. *Id.* at *24.

borrowers felt the impact of the charges in states outside of the tribe's jurisdiction.[149]

Under Cordray, the CFPB framed the *CashCall* suit as an important stride in the agency's goal of investigating "regulatory-evasion schemes," including partnerships with tribal lenders that are becoming more common in the payday lending industry.[150] In discussing its action against CashCall in 2013, the Bureau explained CashCall's business arrangement with Western Sky Financial by claiming that, despite Western Sky's assertion that it was tribally immune from state consumer protection laws because of its tribal ownership, the tribal relationship "does not exempt Western Sky from having to comply with state laws when it makes loans over the Internet to consumers in various states."[151] In the subsequent *CashCall* case in which the court considered the issue of the proper remedy for the lenders' Title X violation, "the Court held that CashCall was the true lender and, therefore, CashCall . . . [and] W[estern] S[ky] Funding engaged in a deceptive practice within the meaning of the CFPA when servicing and collecting on Western Sky loans by creating the false impression that the loans were enforceable and that borrowers were obligated to repay the loans in accordance with the terms of their loan agreements" when in fact the "interest and fees on Western Sky loans . . . may have been void or unenforceable under state usury and licensing laws."[152] Despite the district court's finding for the CFPB, however, the court denied a restitution award and a permanent injunction because, among other reasons, it held that the "true lender" distinction was not settled law that CashCall could have anticipated.[153] Since then, the

149. *Id.* (quoting Colorado v. W. Sky Fin., LLC, 845 F. Supp. 2d 1178, 1181 (D. Colo. 2011)).

150. *CFPB Sues CashCall for Illegal Online Loan Servicing*, *supra* note 8.

151. *CFPB Sues CashCall for Illegal Online Loan Servicing*, *supra* note 8.

152. Consumer Fin. Prot. Bureau v. CashCall, Inc., CV 15-07522-JFW (RAOx), 2018 U.S. Dist. LEXIS 9057, at *34–36 (C.D. Cal. Jan. 19, 2018).

153. *See id.* at *39, *51 (holding that the CFPB "failed to meet its burden of proving that either restitution or a permanent injunction is an appropriate remedy" and explaining that there was no evidence that the defendants were intending "an unlawful scheme to structure the Western Sky Loan Program to defraud borrowers"); *see also* St. John, *supra* note 101 (explaining that the *CashCall* court's decision to deny a restitution award was partly because the "true lender" issue was not yet settled law).

CFPB has appealed the damages award, asking the Ninth Circuit to review the district court's denial of a restitution award.[154]

In addition to *CashCall*, the CFPB brought an action against Think Finance LLC under former Director Cordray, alleging UDAAP violations by tribal lenders who collected on loans with interest rates that exceeded usury limits within borrowers' states.[155] The CFPB claimed that Think Finance controlled the tribal lenders and thus should be liable for the UDAAP violations.[156] After acknowledging the "gravity of the tribal interests potentially put at stake by tribes and other actors engaging in the conduct alleged by the CFPB's complaint," the district court ultimately concluded that it "w[ould] not create a means for businesses to avoid regulation by hiding behind the sovereign immunity of tribes" and denied the Defendant payday lenders' motion to dismiss.[157] This argument utilized the same "true lender" theory in *CashCall* in which the CFPB sought to hold the nontribal lender accountable for a partnership with tribal lenders that claimed tribal immunity in order to attempt to charge interest rates above usury limits in borrowers' states.[158]

The Native American Financial Services Association ("NAFSA") has spoken on the "true lender" distinction, explaining that " 'NAFSA member tribal lending enterprises are structured in a way in which the lending enterprise that originated the loan is also the entity that services the loan, which means they do not encounter true lender concerns.' "[159] The organization seeks to ensure that its tribal members continue to maintain control of any lending enterprise so as to promote their

154. Evan Weinberger, *CFPB Presses Forward on Two Payday Loan Enforcement Cases*, Banking Rep. (BNA) No. 473 (Apr. 09, 2018).

155. *See* Consumer Fin. Prot. Bureau v. Think Fin., LLC, No. CV-17-127-GF-BMM, 2018 U.S. Dist. LEXIS 130898, at *5 (D. Mont. Aug. 03, 2018) (discussing the CFPB's complaint, which alleges that Defendant Think Finance engaged in UDAAP when collecting on loans).

156. St. John, *supra* note 101 (explaining that the CFPB accused Think Finance of controlling the tribal lenders and violating state interest rate caps).

157. *Think Fin., LLC*, 2018 U.S. Dist. LEXIS 130898, at *11–12, *25.

158. St. John, *supra* note 101.

159. NAFSA, *supra* note 79; *see* Bruce, *supra* note 78 (quoting NAFSA Executive Director Gary Davis and explaining that NAFSA, an organization which represents the interests of Native American-owned financial services providers, "says companies like Western Sky, though sometimes described as 'tribal lenders' or marketing themselves with that label, aren't really economic arms of tribal governments").

reputations as true tribal lending enterprises entitled to tribal sovereign immunity.[160]

B. A Deregulatory Agenda: Mulvaney's Abandonment of the "True Lender" Approach

In regulating the payday lending industry, the CFPB under former Director Cordray did not appear to acknowledge that tribal authority is on par with state authority.[161] Rather, Cordray took the approach that tribes and tribal lenders are "covered persons" to be investigated as such by the CFPB.[162] Since Mick Mulvaney was appointed as then-Acting Director of the CFPB, however, the Bureau's enforcement approach has mirrored that of the Trump administration and its deregulatory agenda.[163] In alignment with this deregulation, the Bureau has backed away from regulation and enforcement efforts against payday lenders claiming tribal links and tribal immunity exemptions from state usury laws.[164] As one of the CFPB's initial actions under then-Acting Director Mulvaney's leadership, the Bureau voluntarily dropped the *CFPB v. Golden Valley Lending* lawsuit originally brought by the agency under Cordray's direction, claiming that the CFPB was "pushing the envelope" in its aggressive enforcement of tribal lenders.[165] If new Director Kraninger follows in Mulvaney's footsteps, she is unlikely to challenge tribal payday lenders and seek enforcement of the important difference between tribal lenders with their own lending enterprises that are operated by and for the benefit

160. *See* NAFSA, *supra* note 79 (explaining through the NAFSA Executive Director's statement that "tribes interested in consumer lending must perform due diligence and avoid injurious business deals that can potentially damage the reputation and sovereign status of legitimate tribal lending entities").

161. *See* Berry, *supra* note 2 (explaining that the debate is whether "tribal authority . . . [is] on par with states" and stating that the CFPB under Cordray did not believe that tribes were on par with states under Dodd-Frank and pursued lenders on the "theory of collecting voidable loans").

162. *See generally* Berry, *supra* note 2 (discussing Cordray's more aggressive enforcement approach).

163. *See* Berry, *supra* note 15 (explaining that financial regulation enactment has "dropped to a 40-year low, . . . a sign that the Trump administration is fulfilling its deregulatory agenda").

164. *See generally* Berry, *supra* note 2 (explaining that Mulvaney dismissed the lawsuit against four online lenders that was brought by the CFPB while Cordray was still the director).

165. St. John, *supra* note 101.

of the tribe and the schemes in which non-tribal lenders claim links to tribes solely to benefit from tribal sovereign immunity.[166]

In furtherance of this hands-off approach to payday lender enforcement, the CFPB issued a new strategic plan in February of 2018 that explicitly pledged to stop "pushing the envelope."[167] In his message as then-Acting Director, Mulvaney stated that "pushing the envelope in pursuit of other objectives ignores the will of the American people . . . [and] also risks trampling upon the liberties of our citizens, *or interfering with the sovereignty or autonomy of the states or Indian tribes*."[168] Mulvaney promised to end the more expansive view of the CFPB's regulatory and enforcement power.[169] Mulvaney's stance appeared to be a direct reflection of the Trump administration's deregulatory rhetoric.[170] He even revised the CFPB's mission statement, demonstrating a commitment to "regularly identifying and addressing outdated, unnecessary, or unduly burdensome regulations" and removing the word "fair" from "by consistently [and fairly] enforcing federal consumer financial law."[171]

In addressing the CFPB's past suits against payday lenders claiming tribal immunity, Mulvaney stated, " 'I was shocked when I read through some of the factual allegations of some of the lawsuits that we had brought at the CFPB.' "[172] Further elaborating, he pledged to rely more heavily on state regulators and attorneys general in enforcing Title

166. *See* Berry, *supra* note 2 (explaining that deregulation is likely to continue under new CFPB leadership).

167. *See* BUREAU OF CONSUMER FINANCIAL PROTECTION STRATEGIC PLAN: FY 2018-2022, *supra* note 3, at 2 (stating in the message from the Acting Director that "this should be an ironclad promise for any federal agency; pushing the envelope in pursuit of other objectives ignores the will of the American people"); *see also* Berry, *supra* note 2 (discussing the CFPB Strategic Plan for 2018-2022 in which Mulvaney pledged to end Cordray's practice of "regulation by enforcement").

168. BUREAU OF CONSUMER FINANCIAL PROTECTION STRATEGIC PLAN: FY 2018-2022, *supra* note 3, at 2 (emphasis added).

169. BUREAU OF CONSUMER FINANCIAL PROTECTION STRATEGIC PLAN: FY 2018-2022, *supra* note 3, at 2.

170. *See* Berry, *supra* note 15 (discussing the Trump administration's deregulatory agenda and explaining how "the tone set by the administration is likely having a trickle-down effect on the approach by independent regulatory agencies," especially the CFPB).

171. *CFPB Releases Strategic Plan*, CFPB NEWSROOM (Feb. 12, 2018), https://www.consumerfinance.gov/about-us/newsroom/cfpb-releases-strategic-plan/.

172. Rachel Witkowski, *AGs, Not CFPB, Should Take Greater Role on Enforcement: Mulvaney*, AM. BANKER, Feb. 28, 2018, https://www.americanbanker.com/news/ags-not-cfpb-should-take-greater-role-on-enforcement-mulvaney.

X.[173] The risk of this approach, however, is that state regulators and state attorneys general have limited authority over tribes and arms-of-the-tribe TLEs, entities that will likely continue to lend to other states' borrowers over the Internet and claim tribal immunity from suit to enforce those states' usury laws.[174]

Then-Acting Director Mulvaney's approach was a marked difference from Cordray's CFPB, in which the Bureau brought lawsuits challenging tribal lenders' immunity from state usury laws.[175] Mulvaney's shift abandoned the inquiry as to whether lenders are "truly affiliated with tribes or are merely claiming such affiliation to avoid state licensing and interest-rate rules,"[176] and payday lenders will likely continue to establish links with tribes in order to benefit from tribal immunity from suit under state consumer protection laws so long as the CFPB continues to push a deregulatory agenda. Without Cordray more aggressively questioning the legitimacy of these lenders' links with tribes, the CFPB will abandon investigations into whether tribal lenders are the "true lenders" and rightful arms-of-the-tribe in payday lending enterprises. Kraninger is likely to continue the implementation of Mulvaney's policies and goals for the CFPB, and thus it is unlikely that the Bureau will question whether online payday lenders who claim links to tribes must comply with state usury laws.[177]

V. CONCLUSION AND RECOMMENDATIONS

The CFPB should consider adopting a payday lending enforcement policy that strikes a balance between former Director Cordray's[178]

173. *Id.*

174. *See* Kiowa Tribe of Okla. v. Mfg. Tech., Inc., 523 U.S. 751, 756 (1998) (stating that tribal immunity protects tribes and "arms-of-the-tribe" from lawsuits by states because "the immunity possessed by Indian tribes is not coextensive with that of the States, . . . [and] so tribal immunity is a matter of federal law and is not subject to diminution by the States").

175. *See CFPB Sues Four Online Lenders for Collecting on Debts Consumers Did Not Legally Owe*, *supra* note 130 (summarizing the CFPB's legal action against four online payday lenders).

176. Berry, *supra* note 2.

177. *See* Knutson, *supra* note 4 (describing Kraninger's recent act in which she proposed the rescission of the 2017 final rule protecting payday loan borrowers).

178. *See CFPB Sues CashCall for Illegal Online Loan Servicing*, *supra* note 8 (exemplifying Cordray's enforcement approach in which "[o]nline lending . . . deserves ample regulatory attention" and discussing the CFPB's "significant step in . . . address[ing] regulatory-evasion schemes").

and former Director Mulvaney's approaches.[179] Under Cordray, the CFPB was proactive in cracking down on predatory payday lending practices, going so far as to finalize a rule in October of 2017 that aimed to prevent debt traps common in the payday lending industry by requiring lenders to make an initial assessment as to whether potential borrowers would be able to repay the requested loan.[180] However, after becoming Acting Director, Mulvaney took a strong deregulatory approach to the payday lending industry, considering a revision to the aforementioned CFPB rule requiring "ability to repay" standards[181] and indicating a clear intent to step back from the regulation and enforcement of payday lenders, particularly those with links to tribes that claim tribal immunity.[182] This approach risks exposing many borrowers to predatory payday lending. Some believe that Mulvaney's hands-off approach is a step in the right direction, potentially acknowledging the difference between true tribal lenders that operate to economically benefit the tribe and lenders that establish a tenuous tribal link to attempt to benefit from tribal immunity.[183] Though there is certainly an important difference between "true" tribal lenders and non-tribal lenders establishing links with tribes to benefit from their tribal immunity, the distinction only matters if the CFPB serves as the regulatory body that enforces it.

The CFPB should play an active role in investigating TLEs that partner with non-tribal lenders when the agency suspects that the non-tribal lender's goal is to evade state consumer protection regulation.[184]

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179. *See* BUREAU OF CONSUMER FINANCIAL PROTECTION STRATEGIC PLAN: FY 2018-2022, *supra* note 3, at 2 (promising not to "push the envelope" and risk "interfering with the sovereignty or autonomy of the states or Indian tribes").

180. *CFPB Finalizes Rule to Stop Payday Debt Traps: Lenders Must Determine if Consumers Have the Ability to Repay Loans That Require All or Most of the Debt to be Paid Back at Once*, CFPB NEWSROOM (Oct. 5, 2017), https://www.consumerfinance.gov/about-us/newsroom/cfpb-finalizes-rule-stop-payday-debt-traps/; *see also* CONSUMER FIN. PROT. BUREAU, CFPB FINALIZES RULE TO STOP PAYDAY DEBT TRAPS (2017), https://files.consumerfinance.gov/f/documents/201710_cfpb_fact-sheet_payday-loans.pdf (providing a background on payday loans and discussing how the new rule stops debt traps).

181. Weinberger, *supra* note 154.

182. *See* BUREAU OF CONSUMER FINANCIAL PROTECTION STRATEGIC PLAN: FY 2018-2022, *supra* note 3, at 2 ("Pushing the envelope . . . risks trampling upon the liberties of our citizens, or *interfering with the sovereignty or autonomy of the states or Indian tribes.*" (emphasis added)).

183. Berry, *supra* note 2.

184. *See CFPB Sues CashCall for Illegal Online Loan Servicing*, *supra* note 8 (explaining Cordray's active approach to uncovering "regulatory-evasion schemes").

With this more aggressive enforcement approach, however, the CFPB should work to preserve tribal sovereign immunity by first acknowledging that tribes and arm-of-the-tribe lenders should be considered "states" under Title X of the Dodd-Frank Act.[185] This classification enables the CFPB to collaborate with tribes and arms-of-the-tribe as co-sovereigns[186] while regulating and investigating as "covered persons" lenders that are not tribes or "arms-of-the-tribe," including non-tribal lenders that attempt to take advantage of tribal immunity by forging links with tribes.[187]

Finally, if the CFPB continues to back away from enforcement measures against online payday lenders, particularly those partnering with tribes, the FTC may be in a position to step in and play a greater role in the enforcement of tribal lending.[188] Courts have found the FTC Act to be a law of general applicability that encompasses tribes and "arms-of-

185. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) § 1002(27), 12 U.S.C. § 5481(27) (2012) (including tribes in the definition of "state"); Miller, *supra* note 9, at 3 (explaining that tribes "may argue . . . that [they] . . . are 'states' within the meaning of Section 1002(27) of the Act").

186. *See* Michigan v. Bay Mills Indian Cmty., 134 S. Ct. 2024, 2031 (2014) (explaining tribal immunity from state lawsuits enforcing state law against tribes and "arms-of-the-tribe").

187. *See* Berry, *supra* note 2 (explaining "rent-a-tribe" schemes as non-tribal lender strategies in which "an Indian tribe essentially serves as a front for a lender" to escape state usury laws); *see also* Robinson, *supra* note 12 (discussing "rent-a-tribe" arrangements where lenders form links with tribes to attempt to benefit from their tribal immunity from state consumer protection laws).

188. *See* St. John, *supra* note 101 (predicting that the FTC may have a greater role to play in the enforcement of tribal lending if the CFPB continues to be lenient on payday lenders claiming tribal immunity).

the-tribe," leaving the FTC free to pursue suits against tribal entities that fall within the Act for violations of the FTC Act.[189]

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189. *See* FTC v. AMG Servs., No. 2:12-cv-00536-GMN-VCF, 2013 U.S. Dist. LEXIS 185783, at *79-80 (D. Nev. Jul. 16, 2013) (holding that the FTC Act is a law of general applicability that applies to tribes and "arms-of-the-tribe").

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