Colorado Attorney General Phil Weiser
LendIt FinTech USA 2020 – Keynote Remarks, 9/29/20
The Role of States in FinTech and Consumer Protection

I'm pleased to join you this year at LendIt. This is an important time to be speaking with a group of professionals focused on innovation in consumer lending. In my remarks, I will first discuss the state of consumer finance, I will then talk about our approach to consumer protection (including a recent key settlement in the field), and, finally, I will share thoughts on where we can go from here.

I. The Case for Access to Credit

The inequality in our society should concern us all. Over the last two generations, we see ever-greater increases in income inequality, with a strong correlation to education levels as well as racial and ethnic backgrounds. Indeed, people of color find themselves less well-off than similarly situated white individuals.[1] This phenomenon, sometimes referred to as "the racial wealth gap" is not new; indeed, our generation's inequity that flows from prior generations' injustices like redlining. During this pandemic, we are seeing this dynamic accelerate, with low income individuals (service workers, for example) struggling greatly; at the same time, their children may be losing ground to their wealthier counterparts during this time of online learning (for example, because they lack access to broadband internet connections).[2]

As a society, it is not just an economic imperative, but a moral imperative, that we confront the rising economic inequality taking hold. As a friend of mine put it, during this pandemic, we are all in the same storm, but we are not in the same boats.

One of the critical foundations for building economic opportunity for all is access to credit. That's why increasing access to safe, affordable credit is a top priority for our department. For far too long, people in disadvantaged groups have worked to improve their lives without equitable access to affordable credit options. This is particularly true when you consider that the consequences of a vicious cycle of costly financial decisions (think: using check cashing services or pay day lending) are not

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[1] David Brooks, *How Moderates Failed Black America*, New York Times (June 18, 2020), *available at* https://www.nytimes.com/2020/06/18/opinion/black-america-education.html
[2] Erica Breunlin and Tamara Chuang, *Colorado pours $2M into internet access for families while partnering with providers like T-Mobile to expand broadband*, Colorado Sun (September 2, 2020), *available at* https://coloradosun.com/2020/09/02/colorado-is-pouring-2m-into-internet-access-for-families-while-partnering-with-providers-to-expand-broadband/

just financial in nature, but also impact mental and physical health. We must do better.

Many of us know at a high level that access to credit is uneven, but the statistics are jarring. The baseline for access to credit is a credit bureau score. My daughter, for example, who benefits from growing up where financial literacy discussions are dinner table conversations and at her school, just asked for a credit card so she could start building her credit score. She just started driving, so there's also the importance of having one to buy fuel. And she would be the first to realize that her position of thinking ahead and building a more secure financial position is a privileged position to be in. Just consider the 40% of Americans don't have sufficient access to credit to pay an emergency expense.[3]

For many adults, the concept of building a credit score is a luxury or a foreign concept. In fact, 30% of adults in low income neighborhoods are credit invisible, meaning they do not have a credit history with the nationwide credit reporting companies.[4] That's eight times greater than the rate in upper income neighborhoods. That's what having the deck stacked against you looks like.

The credit invisibility challenge is not limited to urban areas. In our rural communities, we also find much higher rates of credit invisibility—averaging approximately 15% of adults. And this condition persists in rural areas, even for those who have relatively higher income levels.[5]

As noted above, the racial differences in economic opportunity are mirrored in access to credit. The current statistics tell us that 15% of Black and Hispanic

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[3] The Federal Reserve, *Report on the Economic Well-Being of U.S. Households in 2018 – May 2019* (May 28, 2020), *available at* https://www.federalreserve.gov/publications/2019-economic-well-being-of-us-households-in-2018-dealing-with-unexpected-expenses.htm. This painful fact is why the persistence of cash bail—keeping individuals incarcerated because they cannot afford a bail bond—is wrong and unjust. But that's another story. See my February 24, 2020 testimony before the Colorado State Senate Committee on the Judiciary, *available at* https://coag.gov/press-releases/attorney-general-weiser-testifies-in-support-of-bail-reform-legislation-2-24-20/#:~:text=Attorney%20General%20Weiser%20testifies%20in%20support%20of%20bail,Below%20is%20his%20testimony.%20Attorney%20General%20Phil%20Weiser

[4] The Bureau of Consumer Financial Protection's Office of Research, *Data Point: The Geography of Credit Invisibility* (September 2018), *available at* https://files.consumerfinance.gov/f/documents/bcfp_data-point_the-geography-of-credit-invisibility.pdf.

[5] *Id.*

consumers are credit invisible in America compared with 9% of Whites.[6] As the *New York Times* recently reported, "[g]etting a mortgage can be a harrowing experience for anyone, but for those who don't fit the middle-of-last-century stereotype of homeownership—white, married, heterosexual—the stress is amplified by the heightened probability of getting an unfair deal."[7] Again, the insult of added stress and anxiety comes on top of an unfair injury of degraded access to credit.

As we consider solutions for addressing the challenges of credit access, we must develop a range of creative solutions. I recognize that some have argued that limits on payday lending are likely to result in the unintended consequence of leaving people without access to any form of credit and will make this challenge even worse.[8] I refuse to concede, however, that the only or primary solution to a deep hole for a person's personal finances are to allow others to dig them deeper in debt, further fueling a vicious cycle.[9]

In terms of solutions, one long term strategy, which I will discuss in a bit, is investing in personal financial literacy education in our high schools. For a more near-term solution, I recognize that a promise of fintech is the idea that technology can change these persistent and harmful realities. Consider, for example, that for those rural consumers who might otherwise lack access to credit because they are not close to a traditional brick-and-mortar bank, online lending is a promising option. Similarly, otherwise un-banked individuals might be given access to credit by entities who can use non-discriminatory alternative data sources, allowing for responsible lending to people with thin credit files or those who are credit invisible.

Finally, there is the promise that new technologies will reduce costs and increase competition, with cost savings passed on to borrowers in the form of lower interest rates or closing fees. This benefit is one we have seen in other sectors in the economy—consider how the costs of buying and selling stocks have fallen precipitously on account of online trading platforms. In short, technological changes hold out the promise of cheaper, fairer, and more accessible credit and banking opportunities online.

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[6] The Bureau of Consumer Financial Protection's Office of Research, *Who are the credit invisibles?* (December 2016), *available at* https://files.consumerfinance.gov/f/documents/201612_cfpb_credit_invisible_policy_report.pdf.

[7] Jennifer Miller, *Is An Algorithm Less Racist Than a Loan Officer* (September 18, 2020), *available at* https://nyti.ms/3kFXuNl.

[8] J.D. Vance, *Hillbilly Elegy* (2016).

[9] The CFPB Office of Research, *Data Point: Payday Lending* (March 2014), *available at* https://files.consumerfinance.gov/f/201403_cfpb_report_payday-lending.pdf

II. The Role of State Consumer Protection

In Colorado, we are creative problem solvers—innovation is part of our DNA. We were, for example, one of the first states to legalize recreational cannabis, taking a crucial step forward in criminal justice reform and embracing the opportunity to regulate and tax cannabis as a legal product. We continue to address challenges in this area, including use of cannabis by underage individuals (not a new challenge, to be sure) and sales of marijuana in the illegal market (say, to send to other states). On balance, however, Coloradans are proud of this experiment and the continued trend of following our lead underscores that we blaze trails for others. And on the topic of cannabis, we are working hard to pass the Safe Banking Act in Congress so that Colorado cannabis businesses can access the federal banking system, and not be targets for crime and less well positioned to comply with important legal requirements.[10]

In Colorado, we have an innovative model of overseeing consumer finance in that our department brings together three important and complementary roles. First, we have the traditional consumer protection function, enforcing the Colorado Consumer Protection Act (CCPA). Second, we are Colorado's regulator of non-bank lenders. Our Consumer Credit Administrator is Martha Fulford, who came to us from the Consumer Financial Protection Bureau, is a brilliant lawyer, and is committed to improving access to responsible credit. And, third, working with Martha and our Office of Community Engagement, we are committed to using our platform to convene stakeholders and support public-private partnerships that advance the goals of equitable access to credit and financial services.

With respect to our commitment to innovation, it was a natural for our office to sign up for the CFPB's American Consumer Financial Innovation Network, which works to facilitate financial innovation through a federal-state partnership. I recognize that, at present, I am the only attorney general of my political party who took advantage of this opportunity. That is unfortunate, but I hope to serve as an example to my colleagues of the benefits that come from bipartisan collaboration.

I am a firm believer that no party has a monopoly on good ideas and the opportunity for state AGs to work together and with the federal government across party lines is crucial. There are times when I may sue the federal government because a matter of principle is at stake. That's occurring right now at the Supreme Court on whether the Affordable Care Act should be invalidated.[11] But where I can

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[10] May 8, 2019 Letter to Congressional Leaders from State and Territorial Attorneys General, *available at* https://coag.gov/app/uploads/2019/05/NAAG-Letter-SAFE-Banking-Act-of-2019.pdf

[11] *California, et al., v. Texas, et al.,* No. 19-840 (U.S. Supreme Court).

agree with and work with the federal government or other states led by AGs of a different party, I will embrace that opportunity. Indeed, that is an important lesson I learned from working for Justice Ruth Bader Ginsburg, whose collegial relationship with Justice Antonin Scalia, her intellectual adversary, was justly celebrated.[12] We need more of that in today's world.

I must be clear that my commitment to encouraging innovation, and fintech innovation in particular, is not a carte blanche for firms to do whatever they want and avoid oversight. With regard to consumer lending, for example, the need for protection remains, including the need for transparent disclosures, for sound underwriting practices, and the need to respect and comply with state usury limits. The question that we must ask, however, is whether there are more entrepreneurial and creative approaches to accomplishing those goals.[13] A recent settlement we negotiated after years of litigation is a great case in point of such an approach. In that resolution, two important principles—an embrace of innovation and our commitment to consumer protection—were integrated into a thoughtful settlement that could become a national model.

The twin cases we resolved were known as, respectively, Avant loans and Best Egg loans.[14] In the cases, we challenged both lending programs for attempting to rely on federal banking preemption to lend above state usury limits, including Colorado's limits. To be clear, we did not challenge the concept of federal bank preemption and indeed acknowledged that certain banks have the right to lend above our usury limits. What we did challenge was the use of banking preemption by "non-banks," as banks chartered by the federal government operate with substantial additional obligations and regulatory requirements required by a bank charter.

In our lawsuit, we challenged efforts to lend above state rate caps by non-bank lenders. It was not a new phenomenon, to be sure, that such entities might seek the benefits of preemption without taking on the concomitant obligations of a bank charter. But we challenged such a practice and argued that it needed to come to an

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[12] Jennifer Senior, *The Ginsburg-Scalia Act Was Not a Farce,* New York Times (September 22, 2020), *available at* https://www.nytimes.com/2020/09/22/opinion/ruth-bader-ginsburg-antonin-scalia.html.

[13] For my thoughts on that topic, see Philip J. Weiser, *Entrepreneurial Administration*, 97 B.U. L. Rev. 2011 (2017), *available at* https://scholar.law.colorado.edu/cgi/viewcontent.cgi?article=2198&context=articles.

[14] *Fulford v. Avant of Colorado, LLC, et al.*, Case No. 17CV30377 (Colo. Dist. Ct. Denver County); *Fulford v. Marlette Funding, LLC, et al.*, Case No. 17CV30376 (Colo. Dist. Ct. Denver County).

end, advancing a doctrine referred to as "true lender" doctrine and arguing that the subject loans were bank loans in form only.

To make our case, we relied on a test that calls for a substantive evaluation of the actual loan. In particular, we examined whether the predominant economic interest in the loans belonged to non-banks. The non-banks, we argued, conceived of the lending programs and credit policies, took on the risk of default, and stood to earn the great majority of the benefit when loans performed.

In reaching a settlement in this case, I want to commend the parties for their spirit of engagement. I recognize that, as parties approach state AG offices or other regulatory offices, they have a choice: they can pursue a purely litigation path or they can pursue a creative problem-solving path. On the second path, the question gets asked before a trial—is there a solution that addresses the concerns of the governmental authority (in this case, protecting Colorado consumers) that also enables the company the freedom to operate, compete, and innovate as appropriate.[15] In this case, the companies chose the second path and we were able to come to a precedent-setting agreement as a result.

Before discussing the settlement, I would also like to take a minute to thank our team. In addition to Martha Fulford, Steve Kaufmann, our outstanding Consumer Protection Deputy, and Nikolai Frant, a tremendous First Assistant Attorney General, as well as their respective teams including Phil Sparr, Kevin Burns, Neal Monaghan, Paul Pfenning, and Micah Marsh, all worked hard on this case. It merits emphasis that their ability to craft this settlement reflected their mastery of this complex subject matter. In my experience, and this is a tragedy when it happens, parties sometimes fail to communicate, engage, and reach creative solutions because one side or the other is less comfortable with the intricacies of the substance and the inertial path of litigation takes over. The fact that our team was willing and able to litigate this case aggressively if needed and willing and able to reach a creative resolution is a testament to how well Colorado is served by their leadership.

As for the settlement, it focuses on the balance outlined above. On one hand, it recognizes the role of bank lending, including lending above Colorado's rate cap, where it is done by a legitimate entity who is seeking to serve consumers who might otherwise be unserved or underserved. At the same time, the agreement limits any

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[15] This same course was taken by United Health Care, which settled a merger challenge by our office in 2019, entering into a consent judgment that addressed our concerns. Consent Decree, *State of Colorado v United Health Group Incorperated and Davita Inc. available at* https://coag.gov/app/uploads/2019/06/2019-06-19-08-04-30-UHC-DaVita-CO-consent-judgment-final.pdf.

preemption defense to true bank loans, thereby preventing the improper extension of bank preemption rights to non-bank lenders.

Under the settlement, the two banks involved in the lawsuits, Cross River Bank and WebBank, are parties to the agreement and committed that any and all of their marketplace lending programs will comply with the agreement's terms. In so doing, the agreement creates a safe harbor from Colorado's usury laws—as long as the agreement is followed.

The settlement has three distinct elements—sunshine terms, consumer protection terms, and structural economic interest terms. In particular, the agreement calls for (1) the non-bank lenders to be overseen by the banks and their prudential regulators; (2) any programs must loan under 36% (Colorado's pay day lending cap) and adopt Colorado law to the extent it is not preempted; and (3) the banks must be the true lender on the loan. Let me walk you through each term.

With respect to the sunshine terms, their purpose is to ensure that the programs operate in a transparent manner and that there is adequate oversight by regulators. The terms contemplate four basic requirements:

1. The lending programs must be overseen by the banks' prudential regulators;
2. The banks must oversee and approve all aspects of the lending programs, including controlling all terms of credit;
3. The banks must be disclosed to the consumer as the lender; and
4. The non-bank marketplace partner must be licensed by the Colorado administrator, thereby subjecting each lending program to examination by my department, and thereby requiring each lending program to take on additional reporting requirements.

With respect to the consumer protection terms, the terms are designed to prevent possible consumer harm. First off, as noted above, any and all loans made in Colorado must be under 36% APR. So while some of these bank loans can be made above Colorado's rate caps, there is a hard line at 36% for any and all loans under the programs. Second, these loans are issued with the recognition that Colorado law applies, including its entire consumer protection regime, except to the extent preempted by federal law.

The final category of terms are the economic interest terms. These terms work to ensure that the banks retain an adequate economic interest in the loans made under the program. In particular, they require both that the banks must: (1) fund each and every loan from their own accounts and using their own funds; and (2) use one of three alternative program structures to ensure that the banks retain a sufficient economic interest in the loans.

The spirit of collaboration and engagement that went into this agreement reflected a lot of thought and analysis by very talented lawyers and professionals. We are not suggesting that it is a "copy and paste" agreement that will apply to any program. But for the bank lenders and fintech partners in this case, we believe this agreement strikes a good balance between a multitude of competing interests: (1) it protects against predatory high rate lending; (2) it recognizes bank preemption rights, and the role that banks play in providing access to credit; and (3) it establishes guardrails to ensure that bank charters are not simply rented out by non-banks seeking to circumvent state usury law. We believe this approach can serve as a framework for addressing other programs in Colorado, in other states, and perhaps nationwide. For other states evaluating this or related issues, we would welcome the opportunity to discuss our precedent-setting approach. Indeed, sharing such solutions are the spirit of the Innovation Network we signed up for.

Before concluding my discussion of the settlement, there is a final element of the resolution that bears emphasis. During our conversations, the banks emphasized their commitment to expanding responsible credit and addressing the public policy goals noted at the outset. Drawing on that commitment, and advancing the long-term agenda of enhancing financial literacy, we worked out an agreement where part of the financial element of the settlement was their support and engagement in a financial literacy program we have established here in Colorado for high school students. The name of the program—not by design, but coincidentally a namesake to me—is "MoneyWi$er." I appreciate that the companies accepted the opportunity to give back in this way and be a part of a unique public-private partnership.

III. The Way Forward

I want to close by saying a word about the Office of the Comptroller of the Currency ("OCC") proposal to finalize a true lender definition. I recognize that there is value in increasing legal certainty in this area and I applaud the OCC for recognizing the importance of the true lender issue.

With respect to the merits of the OCC's proposed rule, which it describes as a bright-line standard, I am gravely concerned about its impact. On this topic, I can speak for myself and 24 fellow state attorneys general, who submitted a comment letter stating our objections.[16] We strongly encourage the OCC to reconsider its approach.

First off, even if the proposed rule were a proper exercise of OCC rulemaking authority, we believe it does not address the core issues at the heart of the true lender

[16] AG Comment letter regarding National Banks and Federal Savings Associations as Lenders (Docket No. OCC-2020-0026), Comment 2020-0026-0233 (Sept. 3, 2020), available at https://beta.regulations.gov/comment/OCC-2020-0026-0233.

doctrine. It is essential that guardrails must be built to ensure that bank preemption is available only for true bank loans. And the fact that we were able to develop such a framework in our settlements underscores that appropriate guardrails can be developed, instituted, and enforced.

Rather than develop necessary guardrails, the OCC proposed rule elevates form over substance. The OCC proposed rule elevates the issue of whether a bank is named as the lender on the loan agreement or funds the loan. In practice, we believe that such a test would be a license for abuse by non-bank lenders seeking to benefit from bank preemption.

The industry should reflect carefully before embracing the OCC proposed rule. I recognize the allure of such a rule, but I caution that, when regulatory regimes allow for unscrupulous actors to operate freely, there is a material risk of eroding the trust of all players in the market. There are, as you know well, those who would argue and lobby for fintech operators to be regulated in very restrictive ways. If the OCC's regulatory regime invites abuse and consumer harm, those arguments may become much more compelling down the road.

As we work to develop the rules of the road in this important area, I suggest that our settlement provides some valuable guideposts. It recognizes that lending operates best when there is certainty and well-defined rules of the road. And it honors the importance of adopting meaningful principles to guide the true lender doctrine. There is a reason that state usury laws are in place. And in Colorado, the public adopted the top such cap—36% for pay day lending—by an overwhelming margin at the ballot box (77% to 23%).[17] We believe that such protections remain a critical safeguard to protect consumers from predatory interest rates. As such, a responsible approach to this issue will make sure that bank preemption does not become a means for non-banks to ignore the protections of state law. If it does, I predict the industry will regret the day such a rule went into effect.

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I recognize that companies are often drawn to solving issues at a federal level. That approach, to the extent it overlooks the important roles played by state AG offices and consumer credit administrators, is misguided. At the state level, we are uniquely situated to be "laboratories of democracy" and creative problem solvers. The effort of our team to address the issues raised at the intersection of fintech lending and consumer protection are a compelling such example. And at a time when our federal government is increasingly dysfunctional, divisive, and destabilized by

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[17] Joe Robino, *Colorado Proposition 111: Payday Loan Interest Limit Wins Big*, Denver Post (November 6, 2018), *available at* https://www.denverpost.com/2018/11/06/colorado-proposition-111-payday-wins/ .

political polarization, states are able to operate, to a much greater degree, based on the true north of serving our communities and solving problems, not playing political games. Thanks for your time, and I look forward to working with you in the years ahead.