CONSUMER FINANCIAL PROTECTION POST DODD-FRANK: SOLUTIONS TO PROTECT CONSUMERS AGAINST WRONGFUL FORECLOSURE PRACTICES AND PREDATORY SUBPRIME AUTO LENDING

CHRISTOPHER K. SEIDE*

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I. INTRODUCTION

The financial crisis of 2008 was the most severe economic crisis to affect the United States since the Great Depression in 1929.[1] Once United States ("U.S.") government officials and policymakers saw the financial markets begin to collapse, they attempted to avert the economic crisis.[2] However, despite the injection of large monetary stimulus packages into the U.S economy in early 2008, the financial crisis was not avoided.[3] As concerns about financial losses stemming from toxic assets[4] led to issues surrounding the solvency and funding of major financial institutions, the financial crisis continued to dig its roots into our everyday lives.[5]

Economists, financial experts, policymakers and governmental leaders disagree as to the fundamental causes of the financial crisis. Benjamin S. Bernanke, Chairman of the Federal Reserve, argued that lax regulation and the overall regulatory failures of the Federal Reserve caused the housing bubble and the financial crisis to occur.[6] However, Lloyd Blankfein, Goldman Sachs CEO, blamed Congress, pointing to federal laws and policies that led to housing and credit bubbles, an unbalanced trade deficit, and low interest

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* JD candidate at Chapman University School of Law, Bachelor's Degree in Social Ecology from University of California, Irvine. The author would like to thank Professor Marisa S. Cianciarulo for her proofreading, suggestions, and dedicated support in continuously helping to improve this article. He would also like to thank Professor Timothy A. Canova for his guidance in the substantive organization of this article.

[1] Benjamin S. Bernanke, Remarks at the Economic Club of Minnesota 2011-2012 Speaker Series (Sept. 8, 2011), http://www.bloomberg.com/news/2011-09-08/crisis-recovery-is-much-less-robust-than-hoped-bernanke-says-full-text.html.

[2] *Id.*

[3] *Id.*

[4] Definition of Toxic Assets: "An asset that becomes illiquid when its secondary market disappears. Toxic assets cannot be sold, as they are often guaranteed to lose money. The term 'toxic asset' was coined in the financial crisis of 2008, in regards to mortgage-backed securities, collateralized debt obligations and credit default swaps, all of which could not be sold after they exposed their holders to massive losses". *Toxic Asset Definition*, INVESTOPEDIA, http://www.investopedia.com/terms/t/toxic-assets.asp#axzz1uZs9wLQt (last visited May 05, 2012).

[5] Nikola Spatafora, *World Economic Outlook: Crisis and Recovery*, *in* THE GLOBAL FINANCIAL CRISIS 2009: PREPARING FOR THE FUTURE (2009).

[6] Catherine Rampell, *Lax Oversight Caused Crisis, Bernanke Says*, N.Y. TIMES (Jan. 3, 2010), http://www.nytimes.com/2010/01/04/business/economy/04fed.html.

rates.[7] In support of his contention, Mr. Blankfein noted that the Federal Reserve had the power to stop the issuance of subprime mortgages by creating and implementing responsible mortgage lending standards but failed to do so.[8] His contention is also supported by the following fact: between 2000 and 2006, the Federal Reserve only referred three cases of predatory lending to the Department of Justice.[9] This indicates that enforcement against predatory subprime lending by governmental regulators was practically non-existent.[10] Others believe that large financial institutions significantly contributed to the onset of the crisis by using collateralized debt obligations[11] ("CDO's") to turn pools of subprime mortgages[12] into toxic assets, ultimately creating the need for financial rescue bailouts[13] by the U.S. government.[14] Additional factors cited as helping

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7 Patrice Hill, *CEO's trade blame with Congress over financial crisis*, THE WASHINGTON TIMES (Jan. 14, 2010), http://www.washingtontimes.com/news/2010/jan/14/ceos-trade-blame-with-congress-over-finance-crisis/?page=all.

8 Phil Angelides et al., *Financial Crisis Inquiry Commission*, *in* THE FINANCIAL CRISIS INQUIRY REPORT XVII (2011), http://fcic-static.law.stanford.edu/cdn_media/fcic-reports/fcic_final_report_full.pdf (stating that in response to out of control subprime lending in the late 1990's, the Federal Reserve passed rules that only affected 1% of lenders dealing in subprime loans. In 2006, the Federal Reserve only issued voluntary guidance rules and did not address any wide scale mandatory rules related to predatory lending until 2008).

9 *Phil Angelides: The Financial Crisis Inquiry Report (3/3/11)*, THE COMMONWEALTH CLUB OF CALIFORNIA RADIO PROGRAM (Mar. 14, 2011), http://www.apple.com/itunes/podcast. Also *available* at http://www.youtube.com/watch?v=Vpn87fyKFNk (last visited May 5, 2011).

10 *Id.*

11 Definition of collateralized debt obligation: "an investment-grade security backed by a pool of bonds, loans and other assets. CDO's do not specialize in one type of debt but are often non-mortgage loans or bonds".*Collaterized Debt Obligation Definition*, INVESTOPEDIA, http://www.investopedia.com/terms/c/cdo.asp#axzz1uZs9wLQt (last visited May 05, 2012).

12 Definition of Subprime Mortgage: "a type of mortgage that is normally made out to borrowers with lower credit ratings. As a result of the borrower's lowered credit rating, a conventional mortgage is not offered because the lender views the borrower as having a larger-than-average risk of defaulting on the loan. Lending institutions often charge interest on subprime mortgages at a rate that is higher than a conventional mortgage in order to compensate themselves for carrying more risk." *Subprime Mortgage Definition*, INVESTOPEDIA, http://www.investopedia.com/terms/s/subprime_mortgage.asp#axzz1uZs9wLQT (last visited May 6, 2012).

13 Definition of bailout: "a situation in which a business, individual or government offers money to a failing business in order to prevent the consequences that arise from a business's downfall. Bailouts can take the form of loans, bonds, stocks or cash. They may or may not require reimbursement." *Bailout Definition*, INVESTOPEDIA, http://www.investopedia.com/terms/b/bailout.asp#axzz1uZs9wLQt (last visited May 06, 2012).

14 Adam Davidson, *How Wall Street Made The Mortgage Crisis Worse*, NATIONAL PUBLIC RADIO (Aug. 27, 2010), http://www.npr.org/blogs/money/2010/08/26/129454550/inside-the-sausage-factory-how-wall-street-made-the-financial-crisis-worse.

to create the financial crisis[15] include: (1) low global savings rates; (2) misjudgments and conflicts of interest between credit rating agencies; (3) lack of transparency regarding extreme risks banks were taking in pursuit of short term profits; (4) industry reliance on faulty mathematical formulas that incorrectly priced financial risks; (5) flawed executive compensation models; (6) monetary and fiscal policies like "too big to fail";[16] and (7) flawed Treasury Department responses to worsening economic conditions in 2007.[17] Nevertheless, whatever its main causes, the financial crisis was the culmination of a series of events that deeply plagued the financial markets and global economy more than anyone could have ever imagined.

This article will identify how the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act")[18] responded to the financial crisis, effectively preventing predatory subprime mortgage lending practices but failing to protect consumers against wrongful foreclosure and home loan modification programs as well as subprime auto lending. Part I will address a critical timeline of events and subprime mortgage lending practices that caused the financial crisis of 2008. Part II will discuss key substantive and structural provisions of the Dodd-Frank Act that effectively protect consumers against subprime mortgage lending practices. Part III will identify current predatory practices that continue to threaten economic recovery and consumer financial safety including wrongful mortgage foreclosures, home loan modification practices, and subprime auto lending. Part IV will propose solutions to amend the Dodd-Frank Act to: (1) provide bailouts to consumers negatively affected by wrongful foreclosure and home loan modification practices while continuing to stabilize the overall economic recovery and (2) bring consumer financing arrangements, including auto lending practices, under the regulatory control of the U.S. government. Ultimately, successful implementation of these additional measures will provide better consumer protection for all Americans in the aftermath of the financial crisis of 2008.

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[15] Jacob Weisberg, *What Caused the Economic Crisis?*, SLATE (Jan. 9, 2010, 6:59 AM), http://www.slate.com/id/2240858/.

[16] Definition of Too Big to Fail: "the idea that a business has become so large and ingrained in the economy that a government will provide assistance to prevent its failure. 'Too big to fail' describes the belief that if an enormous company fails, it will have a disastrous ripple effect throughout the economy." *Too Big to Fail Definition*, INVESTOPEDIA, http://www.investopedia.com/terms/t/too-big-to-fail.asp#axzz1uZs9wLQt (last visited May 6, 2012).

[17] Weisberg, *supra* note 15.

[18] *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (to be codified in scattered sections of U.S.C) [hereinafter Dodd-Frank Act].

II. OVERVIEW OF THE LARGEST FINANCIAL CRISIS SINCE THE GREAT DEPRESSION

A. A Timeline of Critical Events Leading to the 2008 Financial Crisis

A series of critical events dating back to the 1970's led to the worst financial crisis since the Great Depression. Some may have viewed the financial crisis of 2008 as a very short, rapidly unfolding series of news headlines that flashed across television screens during nightly news reports. However, the foundation of the financial crisis was established over three decades ago.

1. Early Causes of the Crisis: Deregulation and Soaring Interest Rates

The events that culminated in the financial crisis began to unfold during the late 1970's under the Carter Administration and subsequently during the early to mid-1980's under the Reagan Administration.[19] As competition in unregulated financial markets outside the U.S. increased, lower interest rates for investors caused large depositor institutions to seek higher interest rates outside of the regulated U.S. financial markets.[20] This ultimately led to deregulation by the federal government within the U.S financial and banking industries in an attempt to remain competitive.[21] However, as a result of deregulation, inflation became an issue and the Federal Reserve, during the Carter Administration, adopted a policy of "tight money,"[22] a series of actions by the Federal Reserve to reduce spending or

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[19] Timothy A. Canova, *The Transformation of U.S. Banking and Finance: From Regulated Competition to Free-Market Receivership*, 60 BROOK. L. REV. 1295, 1309-1310 (1995). (discussing how both President Carter and President Regan accepted certain market theories that completely violated market realities which ultimately led to deregulation in the banking and finance industries and the abolishment of interest rate ceilings in the marketplace).

[20] *Id.* at 1310.

[21] *Id.* (showing that ". . . the Democratic Administration and Congress opted not to extend the scope of regulation to nonbank institutions and failed to harmonize policy with peripheral jurisdictions. Interest rates were allowed to rise at the expense of national economic objectives and the federal government bowed to the myriad pressures for financial deregulation").

[22] Greg Ip & Mark Whitehouse, *How Milton Friedman Changed Economics, Policy, and Markets*, WALL ST. J. (Nov. 17, 2006), http://online.wsj.com/public/article/SB116369744597625238-foIWt7vDyt4ralPtdifXt5Ux3Lo_20061216.html?mod=tff_main_tff_top (the concept of "tight money" was adopted under the theory of "monetarism" which is an economic theory that focuses on the macroeconomic effects of the supply of money and central banking. Formulated by Milton Friedman, it argues that excessive expansion of the money supply is inherently inflationary and that monetary authorities should focus solely on maintaining price stability).

curb inflation in an economy that appeared to be growing too quickly.[23] This policy increased short-term interest rates, which in turn reduced the amount of borrowing.[24] While some economists say that "tight money" lowered inflation, others say that it ultimately did not work.[25]

Under the Reagan Administration, the ceiling on interest rates was removed.[26] Consequently, as a result of the deregulation of the financial markets coupled with the seemingly limitless rise of real (inflation-adjusted) interest rates, a deterioration of the American way of life began to take place.[27] Furthermore, predatory practices, similar to those used in the subprime mortgage market leading up to the financial crisis of 2008, existed in the financial markets in the mid-1980s.[28] All of these factors led to unsustainably high interest rates, which ultimately caused subprime and prime borrowers to default on their loans and go into foreclosure.[29] Deregulation and the removal of interest rate ceilings appear to have been major building blocks in the chain of events leading to the financial crisis of 2008.[30]

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[23] Canova, *supra* note 19, at 1311-1312 (stating that "Under Volcker, the Fed announced that it would ignore the rising level of interest rates. Instead, it would try to control the entire supply of money and credit in a $3.5 trillion economy by targeting the growth of volatile money aggregates").

[24] *Id.*

[25] *See Id.* at 1314 (illustrating that "by the end of 1980, tight money had proven largely fatal to the Carter administration. More importantly, the monetary experiment had made financial deregulation inevitable. Double digit interest rates had imperiled the entire structure of regulated interest rates").

[26] *See Id.* at 1320 (the Garn-St. Germain Depository Institutions Act of 1982 allowed depository institutions to open special accounts and set a special timeline for when all depository interest rate limits would no longer exist in 1986).

[27] *See Id.* at 1324 ("Those with wealth and savings took advantage of the opportunity to profit from the high returns. Those dependant on credit found themselves paying the highest sustained real interest rates of the century. As the cost of capital and credit rose, risk-taking and entrepreneurialism suffered. The American dream of home ownership, of business ownership, of directing and managing a productive enterprise, and of creating new wealth was becoming more difficult to fulfill").

[28] *See Id.* at 1328 (banks started to implement more aggressive lending practices in order to realize higher yields. Competition to lend money to certain commodities markets led to degradation in lending standards which resulted in a large number of defaulting loans).

[29] *Id.* at 1332.

[30] *See Id.* at 1339 (stating that "since the late 1970's, real interest rates for most individuals, businesses, and all levels of government have remained at unprecedented levels, more than triple the historical average. The massive redistributions of wealth and income have continued unabated into the Presidency of Bill Clinton. This consequence may be the most troubling and least recognized effect of financial deregulation and high real interest rates").

2. The Unraveling of the U.S. Economy

In early 2007, concerns began to grow that subprime mortgage borrowers would not be able to make good on their obligations and that the negative effects of these risky mortgages would spread to other, more conventional loans not considered to be as risky.[31] As the economy began to show signs of weakening in early 2007, borrowers who had taken out loans during the first six months of 2007 started to default on those loans at a faster pace than those who had borrowed money prior to 2007.[32] Furthermore, during the housing boom of 2005 and 2006, borrowers flocked to adjustable rate mortgages ("ARM's") to take advantage of lower interest rates for the first few years of their loans, planning to refinance when mortgage rates would start to increase.[33] However, as home values declined, this practice became unsustainable.[34] As worries about the rising default rate on non-traditional and subprime mortgages grew, investors in mortgage-backed securities were unable to accurately determine the present value of their investments and began to fear they had overpaid for their securities.[35] This created a panic in the financial markets that rattled investors.

In the summer of 2007, as their short term obligations began to come due, large mortgage lenders began to encounter trouble funding their operations. Countrywide Financial Corporation ("Countrywide") relied on short-term debt to fund new loans and to pay employee salaries.[36] As turmoil rocked the mortgage markets, Countrywide had major problems obtaining funding.[37] Furthermore, as funding sources for other large banks and mortgage lenders were quickly drying up, BNP Paribas, a French bank with major investments in the United States, halted operations in three of its

[31] Vivien Lou Chen, *Subprime Crisis to Spread to Higher-Tier Loans, Economist Says*, BLOOMBERG (Apr. 2, 2007, 8:00 AM), http://www.bloomberg.com/apps/news?pid=newsarc hive&sid=aJokNoiwQHwU&refer=home. (stating that top executives at major financial institutions did not know the terms of the mortgage securities they purchased on the secondary markets nor did they pay attention to the individual agreements that made up these mortgage securities that their firms acquired, causing panic across the entire lending market).

[32] Vikas Bajaj, *As Defaults Rise, Washington Worries*, N.Y. TIMES (Oct 16, 2007), http://www.n ytimes.com/2007/10/16/business/16lend.html.

[33] *Id.*

[34] *Id.*

[35] Bankrate.com*, Countrywide, the mortgage mess and you*, MSN MONEY (Aug. 17, 2007, 12:22 PM), http://articles.moneycentral.msn.com/Banking/HomeFinancing/CountrywideTheMor tgageMessAndYou.aspx.

[36] Jim Zarroli, *Countrywide Financial Struggles Under Credit Woes*, NATIONAL PUBLIC RADIO, (Aug. 16, 2007), http://www.npr.org/templates/story/story.php?storyId=12847195.

[37] *Id.*

investment funds because of an inability to value its own assets.[38] As the ability of large banks to find funding drastically decreased, perceptions of what might be looming on the horizon started a chain of panic-stricken events that rose in magnitude during the ensuing months.

In late 2007, massive losses resulting from the subprime mortgage markets provided strong evidence of the deepening financial crisis.[39] Standard and Poor's Rating Services lowered the credit rating of Merrill Lynch as the company reported a $7.9 billion third quarter loss, nearly double what analysts had expected for that quarter.[40] Due to banks' massive exposure to the subprime mortgage markets and investment grade ratings being given to many CDO's by credit agencies despite being extremely risky and undeserving of said grade,[41] analysts began to be concerned about company risk management and asset valuation practices.[42] Moreover, as financial institutions were forced to write-down[43] the value of their holdings and brace for massive losses from the subprime mortgage market, credit rating agencies put $534 billion worth of bonds and collateralized debt obligations connected to subprime mortgages on review.[44] Money had quickly evaporated from the financial markets and the effects of the housing bubble were starting to show up on the balance sheets of major financial

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[38] *BNP Paribas suspends funds because of subprime mortgage problems*, N.Y. TIMES (Aug. 9, 2007), http://www.nytimes.com/2007/08/09/business/worldbusiness/09iht09bnp.7054054.html.

[39] Standard and Poor's Ratings Direct, *S&P Downgrades Merrill Lynch After "Startling" Loss*, BUSINESSWEEK (Oct. 24, 2007, 11:16 AM) http://www.businessweek.com/investor/content/oct2007/pi20071024_195861.htm.

[40] *Id.*

[41] Matthew Leising & Andrew Frye, *Moody's Chief Says CDO Ratings Were 'Deeply Disappointing'*, BLOOMBERG (June 2, 2010, 8:52 AM), http://www.bloomberg.com/news/2010-06-02/moody-s-chief-mcdaniel-says-ratings-of-cdos-were-deeply-disappointing-.html (indicating that subprime collateralized debt obligations and mortgage-backed securities were given AAA investment grade ratings by the credit rating agency cartel).

[42] *Id.*

[43] Definition of write-down: "reducing the book value of an asset because it is overvalued compared to the market value." *Write-down Definition*, INVESTOPEDIA, http://www.investopedia.com/terms/w/writedown.asp#axzz1uZs9wLQt (last visited May 06, 2012).

[44] Elliot Blair Smith, *'Race to Bottom' at Moody's, S&P Secured Subprime's Boom, Bust*, BLOOMBERG (Sept. 25, 2008), http://www.bloomberg.com/apps/news?pid=newsarchive&sid=ax3vfya_Vtdo. (noting that credit rating agencies were responsible for analyzing and assigning a credit rating for bundles of subprime mortgages that were sold on the secondary markets to investment banks. Prior to the financial crisis, credit rating agencies gave many subprime mortgage pools the highest credit rating, AAA, even though these securities were very risky and did not deserve a AAA credit rating. As borrowers began to default on their mortgages, credit rating agencies were forced to downgrade the ratings of these subprime mortgage pools which in turn negatively affected their values and created even bigger losses in the secondary markets).

institutions deeply tied to the subprime mortgage market. All of these events severely and adversely impacted the U.S. economy.

In March of 2008, investment bank Bear Stearns became the first massive casualty of the financial crisis.[45] Bear Stearns had been in business for eighty-five years; it had survived the Great Depression and eleven subsequent recessions.[46] The firm went from apparent financial health to insolvency in an astonishing seventy-two hours.[47] On March 13, 2008, Bear Stearns' executives discovered that they were nearly out of cash; with only $3 billion in liquidity, they did not have enough money to open for business the next day.[48] Bear Stearns' failure was a result of creditors no longer believing that the investment bank could repay its loans.[49] Worse than not believing the company could make good on its short-term "overnight" debt, investors did not have faith that the investment bank could keep up with the complex agreements it had made with Wall Street.[50] On the brink of bankruptcy, Bear Stearns agreed to sell itself to investment bank JPMorgan Chase for a mere $2 per share on March 16, 2008.[51] One year prior, Bear Stearns' stock had been worth $170 per share.[52] In addition to JPMorgan Chase rescuing Bear Stearns from collapse, the New York Federal Reserve agreed to provide JPMorgan Chase with financing and to fund $30 billion of Bear Stearns' non-liquid assets.[53] Despite the government's help, the negative impact on the financial markets was significant.

Throughout late spring and summer of 2008, systemic risk in the financial sector began to materialize due to the huge risks that financial institutions had taken with regard to investment practices and the lack of regulatory oversight.[54] Prior to the financial crisis, over-the-counter derivatives ("OTC derivatives")[55] were widely used by financial institutions

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[45] Kate Kelly, *Inside the Fall of Bear Stearns*, WALL ST. J. (May 9, 2009), http://online.wsj.com/article/SB124182740622102431.html.

[46] Andrew Ross Sorkin & Landin Thomas Jr., *JPMorgan Acts to Buy Ailing Bear Stearns at Huge Discount*, N.Y. TIMES (Mar. 16, 2008), http://www.nytimes.com/2008/03/16/business/16cnd-bear.html.

[47] *Id.*

[48] *Id.*

[49] David J. Lynch & John Waggoner, *Red Flags in Bear Stearns' Collapse*, USA TODAY (Mar. 19, 2008, 10:07 AM), http://www.usatoday.com/money/industries/banking/2008-03-17-bear-stearns-bailout_N.htm.

[50] *Id.*

[51] Ross Sorkin & Thomas Jr., *supra* note 46.

[52] *Id.*

[53] *Id.*

[54] Tyler Cowen, *Three Trends and a Train Wreck*, N.Y. TIMES (Oct. 17, 2008), http://www.nytimes.com/2008/10/19/business/19view.html?scp=19&sq=derivatives%20assessing%20risk%20in%20financial%20markets%202008&st=cse.

[55] Definition of derivative: "a security whose price is dependent upon or derived from one or more underlying assets. The derivative itself is merely a contract between two or more

such as Bear Stearns, Lehman Brothers, and American Insurance Group ("AIG") in their daily trading of securities.[56] As the financial crisis began to impact Wall Street, the massive losses and systemic problems at these large financial institutions showed how uncertainty and interconnectedness in the OTC derivatives market ultimately led to the tightening of available credit and the "freezing" of economic activity.[57] Lack of transparency[58] in the OTC derivatives market enabled large institutions to over-leverage themselves and sell more credit protection for risky securities than they could cover with liquid assets.[59] This lack of transparency led to the danger of counterparty risk,[60] which created fears in the marketplace.[61] Overall, unlike non-financial firms, the potential failure of large financial institutions presented systemic risks in the financial markets due to their interconnectedness, high degree of leverage, and financing of long-term holdings of relatively illiquid assets[62]

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parties. Its value is determined by fluctuations in the underlying asset. The most common underlying assets include stocks, bonds, commodities, currencies, interest rates and market indexes. Most derivatives are characterized by high leverage." *Derivative Definition*, INVESTOPEDIA, http://www.investopedia.com/terms/d/derivative.asp#axzz1uZs9wLQt (last visited May 6, 2012).

[56] Kent Cherny & Ben R. Craig, *Reforming the Over-the-Counter Derivatives Market: What's to Be Gained?* (July 7, 2010), FEDERAL RESERVE BANK OF CLEVELAND, http://www.clevelandfed.org/research/commentary/2010/2010-6.cfm (for example, AIG insured more than $79 billion of CDO's backed by subprime mortgages, selling insurance to large financial institutions like Merrill Lynch and UBS who then called on AIG to make good on all of their CDO obligations, creating a cash strain on AIG that ultimately required government bailout).

[57] *Id.*

[58] Meaning that the day-to-day transactions in the marketplace were difficult if not impossible for regulators to monitor and track due to the complexity and hidden nature of the transactions.

[59] Austin Kilgore, *Geithner Blames Lack of Transparency for OTC Derivatives Hit on Market*, HOUSING WIRE (July 10, 2009, 5:02 PM), http://www.housingwire.com/2009/07/10/geithner-blames-lack-of-transparency-for-otc-derivatives-hit-on-market.

[60] Definition of counterparty risk: "the risk to each party of a contract that the counterparty will not live up to its contractual obligations. Counterparty risk is a risk to both parties and should be considered when evaluating a contract. Counterparty risk can be diminished when one party mandates a co-signer or a highly rated guarantor." *Counterparty Risk Definition*, INVESTOPEDIA, www.investopedia.com/terms/c/counterpartyrisk.asp#axzz1uZs9wLQt (last visited May 6, 2012).

[61] James Bullard, Christopher J. Neely, & David C. Wheelock, *Systemic Risk and the Financial Crisis: A Primer*, 91 no. 5 (Part 1) FEDERAL RESERVE BANK OF ST. LOUIS REVIEW, 403 (September/October 2009), *available at* http://research.stlouisfed.org/publications/review/09/09/part1/Bullard.pdf.

[62] Definition of illiquid assets: "the state of a security or other asset that cannot easily be sold or exchanged for cash without a substantial loss in value. Illiquid assets also cannot be sold quickly because of a lack of ready and willing investors or speculators to purchase the asset. The lack of ready buyers also leads to larger discrepancies between the asking price (from the seller) and the bidding price (from the buyer) than would be found in an orderly market with daily trading activity." *Illiquid Assets Definition*, INVESTOPEDIA, http://www.investopedia.com/terms/i/illiquid.asp#axzz1uZs9wLQt (last visited May 6, 2012).

with short-term debt.[63] Ultimately, government intervention was required in order to attempt to stabilize the financial markets.[64]

In early September 2008, as losses from declining home values and rising foreclosures started to accumulate in Fannie Mae and Freddie Mac,[65] the U.S. government placed both companies into conservatorship,[66] retaining complete control over both companies.[67] At the time of the government takeover, both companies owed a combined $5.4 trillion in mortgage debt with taxpayers ultimately responsible for guaranteeing those debt obligations.[68] The takeover plan allowed the government to supply up to $100 billion for each company to cover potential shortfalls in capital.[69] The plan also permitted the U.S. Treasury to, if needed, buy each company, banned both companies from lobbying efforts, and eliminated dividend payments to shareholders while securing principal and interest payments on their existing debt.[70] Subsequently, Fannie Mae and Freddie Mac were given access to over $400 billion in taxpayer dollars, leading many economists to fear that it would be very difficult for them to repay the amount borrowed

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[63] *Id.*

[64] Cherny & Craig, *supra* note 56 (stating that Fannie Mae and Freddie Mac are government-sponsored enterprises that provide a secondary investment market in home mortgages. They purchase mortgages from banks and other lenders to generate more cash for those lenders to make additional home loans. Together, Fannie Mae and Freddie Mac hold or guarantee $5.4 trillion worth of home mortgages, about one half of the outstanding home loans in the United States).

[65] Peter J. Wallison, *Government Housing Policy and the Financial Crisis,* 30 no. 2 CATO J. 397 (2010) (there were significant U.S. government housing policies that contributed to predatory lending which ultimately created the need for a massive government bailout of organizations guilty of predatory lending. In 1992, Congress amended the charters of Fannie Mae and Freddie Mac to include an affordable housing mission which enabled them to accept loans with subprime characteristics that they had previously rejected. Also regulations under the Community Reinvestment Act ("CRA") were changed to require banks to lend to all members of their communities, forcing banks to loosen their underwriting standards and approve loans with subprime borrowers).

[66] Definition of conservatorship: "a circumstance in which the court declares an individual unable to take care of legal matters and appoints another individual, known as a conservator, to do so." *Conservatorship Definition*, INVESTOPEDIA, http://www.investopedia.co m/terms/c/conservatorship.asp#axzz1uZs9wLQt.

[67] David Ellis, *U.S. Seizes Fannie and Freddie*, CNN MONEY (Sept. 8, 2008, 8:28 PM), http://money.cnn.com/2008/09/07/news/companies/fannie_freddie/index.htm.

[68] Stephanie Armour & James R. Healy, *Taxpayer take on trillions in risk in Fannie, Freddie takeover*, USA TODAY (Oct. 20, 2008, 9:40 PM), http://www.usatoday.com/money/economy/ housing/2008-09-07-fannie-freddie-plan_N.htm

[69] Edmund L. Andrews & Stephen Labaton, *In Rescue to Stabilize Lending, U.S. Takes Over Mortgage Finance Titans*, N.Y. TIMES (Sept. 7, 2008), http://www.nytimes.com/2008/09/08/ business/08fannie.html?pagewanted=all\.

[70] *Id.*

and the attached interests.[71] Even though the government stepped in to help cover the losses at Fannie Mae and Freddie Mac, the impact of the defaults on mortgages stemming from failed government policies had major effects on housing prices, consumer confidence, consumer purchasing power, and the degradation of neighborhoods throughout the United States.[72]

In September 15, 2008, as the financial crisis continued to spiral out of control, Lehman Brothers Holdings Inc. ("Lehman Brothers"), a 158-year-old investment bank, undermined by bad bets in the real estate and derivatives markets, and by short-selling,[73] was forced to file for Chapter 11 bankruptcy when it was unable to find a buyer to rescue the company from collapse.[74] President Bush stated that the U.S. government would not continue to provide emergency financial bailout packages to Wall Street, and that no form of government aid would be provided to Lehman Brothers.[75] After Barclay's Bank and Bank of America backed out of talks to purchase Lehman Brothers, the Lehman Brothers Board of Directors had no choice but to file for bankruptcy protection.[76]

Immediately following the collapse of Lehman Brothers, the U.S. government took control of AIG, one of the world's largest insurers, with an $85 billion bailout package.[77] The reason that the U.S. government bailed out AIG in the wake of letting Lehman Brothers collapse was that federal officials viewed AIG as "too big to fail"[78] and too widely interconnected with global

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[71] Charles Duhigg, *U.S. Likely to Keep the Reins on Fannie and Freddie,* N.Y. TIMES (Mar. 2, 2009), http://www.nytimes.com/2009/03/03/business/03mortgage.html.

[72] Les Christie, *The Next Wave of Mortgage Defaults*, CNN MONEY (Aug. 16, 2008, 4:34 PM), http://money.cnn.com/2008/08/12/real_estate/prime_defaults_price_drops/index.htm (Greenspan claimed that "the benefits of broadened home ownership" justified the risks of unregulated lending, but even though most of the subprime lending took place between 2004 and 2006, as of early 2008, homeownership levels were back down to the levels prior to 2003).

[73] Definition of short selling: "the selling of a security that the seller does not own, or any sale that is completed by the delivery of a security borrowed by the seller. Short sellers assume that they will be able to buy the stock at a lower amount than the price at which they sold short." *Short Selling Definition*, INVESTOPEDIA, http://www.investopedia.com/terms/s/shortselling.asp#axzz1uZs9wLQt.

[74] Andrew Ross Sorkin, *Lehman Files for Bankruptcy; Merrill Is Sold*, N.Y. TIMES (Sept. 14, 2008), http://www.nytimes.com/2008/09/15/business/15lehman.html?pagewanted=all.

[75] MSNBC News Services, *Wall Street scrambles as Lehman, Merrill falter*, MSNBC.COM (Sept. 15, 2008, 5:54 AM), http://www.msnbc.msn.com/id/26709927/ns/business-us_business/t/wall-street-scrambles-lehman-merrill-falter/.

[76] David Ellis, *Wall Street on Red Alert*, CNN MONEY (Sept. 18, 2008, 4:40 AM), http://money.cnn.com/2008/09/14/news/companies/lehman_brothers/.

[77] Matthew Karnitsching, Jon E. Hilsenrath, Liam Pleven & Deborah Soloman, *U.S. to Take Over AIG in $85 Billion Bailout; Central Banks Inject Cash as Credit Dries Up*, THE WALL ST. J. (Sept. 16, 2008), http://online.wsj.com/article/SB122156561931242905.html.

[78] Alton E. Drew, *Banks 'Too Big to Fail'? Wrong*, BLOOMBERG BUSINESSWEEK (Feb. 18, 2009, 8:48 PM), http://www.businessweek.com/bwdaily/dnflash/content/feb2009/db20090218

financial markets.[79] The majority of AIG's problems stemmed from being forced to come up with huge amounts of collateral due to over-exposure to complex derivatives called credit default swaps or "CDS's,"[80] which some believed threatened to bring down the derivatives division of AIG and, potentially, the entire company and the global economy along with it.[81] Two months after the initial AIG bailout, the U.S. government extended an additional $85 billion in emergency funds, bringing the total bailout to $150 billion.[82] At this point, it was clear that the financial crisis would not only involve the U.S. government, Wall Street, and Main Street, but also the global economy.

Public and institutional panic was now in full swing and a series of rapid-fire events continued to deepen the financial crisis. For example, money market funds, characterized as a low-risk safe haven to put money, "broke the buck"[83] and began to raise questions from ordinary people as to where money should be stored and invested.[84] Morgan Stanley, a large investment bank, feared that it would fail next and reached out to its 8,000 financial advisers in an attempt to reduce investors' worries about its falling stock price, severe market volatility, and possible merger with several other financial institutions.[85] Additionally, Washington Mutual, the largest U.S. savings and loan association, went into receivership under the Federal

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_166676.htm (describing too-big-to-fail as financial institutions that are so large and so interconnected that their failure will be disastrous to an economy. Proponents of this theory believe that these institutions should become recipients of beneficial financial and economic policies from governments or central banks to keep them alive and prevent them from going out of business. Others contend that these large financial institutions should go out of business and not be rescued if they do not have effective risk management in place).

[79] Justin Fox, *Why the Government Wouldn't Let AIG Fail*, TIME BUSINESS (Sept. 16, 2008), http://www.time.com/time/business/article/0,8599,1841699,00.html.

[80] Definition of credit default swap: "a swap designed to transfer the credit exposure of fixed income products between parties." *Credit Default Swap Definition*, INVESTOPEDIA, http://www.investopedia.com/terms/c/creditdefaultswap.asp#axzz1uZs9wLQt .

[81] Mark Felsenthal & Lilla Zuill, *AIG gets $150 billion government bailout; posts huge losses*, REUTERS (Nov. 10, 2008, 2:28 PM), http://www.reuters.com/article/2008/11/10/us-aig-idUSTRE4A92FM20081110.

[82] *Id.*

[83] Definition of "breaking the buck": "when the net asset value (NAV) of a money market fund falls below $1. Breaking the buck can happen when the money market fund's investment income does not cover operating expenses or investment losses. This normally occurs when interest rates drop to very low levels, or the fund has used leverage to create capital risk in otherwise risk-free instruments." *Breaking the Buck Definition*, INVESTOPEDIA, http://www.investopedia.com/terms/b/breaking-the-buck.asp#axzz1uZs9wLQt.

[84] Tara Siegel Bernhard, *Money Market Funds Enter a World of Risk*, N.Y. TIMES (Sept. 17, 2008), http://www.nytimes.com/2008/09/18/business/yourmoney/18money.html.

[85] *Morgan Stanley Execs Tell Advisers: Calm Clients' Fears*, WALL STREET JOURNAL CRISIS ON WALL STREET BLOG (Sept. 18, 2008, 4:15PM), http://blogs.wsj.com/wallstreetcrisis/2008/09/18/morgan-stanley-execs-tell-advisers-calm-clients-fears/.

Deposit Insurance Corporation ("FDIC") and was subsequently purchased by JPMorgan Chase after suffering subprime mortgage related losses, a 95% decline in stock price over a fifty-two week period, and a credit ratings downgrade.[86] Wachovia, a large U.S. bank, amidst an inability to remain viable, was sold to Citigroup for $1 per share, which concentrated the U.S. banking power in the hands of only six large institutions: JPMorgan Chase, Bank of America, Citigroup, Wells Fargo, Goldman Sachs, and Morgan Stanley.[87]

In response to the perceived threat of a domino-like collapse of failing financial institutions, Treasury Secretary Henry Paulson proposed and implemented the Troubled Asset Relief Program ("TARP").[88] TARP was a proposal by the government to get bad mortgages off of the balance sheets of large financial institutions in order to allow lenders to continue producing new loans and generating activity in the financial markets.[89] As housing prices continued to fall and overleveraged banks attempted to shore up balance sheets, falling share prices of companies and stringent lending conditions sent a wave of panic and fear through the financial markets that caused the worst recession in the United States since the Great Depression.[90] Each traumatic event seemed to bring more government intervention than the previous one, but not without a greater risk of unintended consequences.[91] Arguably one of the largest causes of the financial crisis was

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[86] Marcy Gordon, Sara Lepro, & Madlen Read, *JPMorgan Chase Buys WaMu Assets after FDIC Seizure*, HUFFINGTON POST (Sept. 25, 2008, 11:59 PM), http://www.huffingtonpost.com/2008/09/25/jp-morgan-to-buy-wamu-ass_n_129451.html.

[87] Andrew Ross Sorkin, *Citigroup to Buy Wachovia's Bank Assets for $1 a Share*, N.Y. TIMES (Sept. 29, 2008, 7:33 AM), http://dealbook.nytimes.com/2008/09/29/citigroup-nears-a-deal-for-wachovia/.

[88] Politico Staff, *Paulson's Rescue Plan is Called TARP*, POLITICO (Sept. 19, 2008, 10:17 AM), http://www.politico.com/news/stories/0908/13609.html (Henry Paulson stated the reasons behind why the TARP program was needed and how it would relieve stress on the financial markets and U.S. economy: "The federal government must implement a program to remove these illiquid assets that are weighing down our financial institutions and threatening our economy. TARP must be properly designed and sufficiently large to have maximum impact, while including features that protect the taxpayer to the maximum extent possible. The ultimate taxpayer protection will be the stability that TARP provides to our financial system, even though it will involve a significant investment of taxpayer dollars.").

[89] *Id.*

[90] Jon Hilsenrath, Serena Ng & Damian Paletta, *Worst Crisis Since '30s, With No End Yet in Sight*, WALL ST. J. (Sept. 18, 2008), http://online.wsj.com/article/SB122169431617549947.html (colorfully describing the financial crisis and its impact on the U.S. economy: "The U.S. financial system resembles a patient in intensive care. The body is trying to fight off a disease that is spreading, and as it does so, the body convulses, settles for a time and then convulses again. The illness seems to be overwhelming the self-healing tendencies of the markets. The doctors in charge are resorting to ever-more invasive treatment, and are now experimenting with remedies that have never before been applied.").

[91] *Id.*

the huge volume of mortgage payment defaults and foreclosures, precipitated by many years of abusive and predatory mortgage lending practices by both lenders and borrowers.

B. Key Predatory Mortgage Lending Practices as a Major Cause of the Financial Crisis

A majority of analysts believe that one of the largest causes of the 2008 financial crisis in the United States involved the predatory mortgage lending practices of many financial institutions which ultimately drove many homeowners into foreclosure as the crisis began to accelerate. The National Community Reinvestment Coalition points to failed regulatory and oversight policies as having produced unfair, deceptive, and abusive mortgage lending practices.[92] Major deceptive and abusive lending practices included inflated property appraisals, large mortgage broker fees, abusive prepayment penalties, risky and irresponsible loan products, fraud in servicing the loan products, and ineffective underwriting standards.[93] Additional predatory lending practices included: borrowers being encouraged to lie on loan applications and to inflate their income in order to qualify for loans, introductory ARM's with interest rates that reset to significantly higher rates, prepayment penalties that made it costly to refinance a loan, and encouragement to refinance and/or borrow against the equity in one's residence in order to get cash.[94]

The dangers of unfair, abusive and deceptive mortgage lending practices were predicted by many public and private organizations, economists, and even a few legal scholars, but were essentially ignored by federal regulatory agencies.[95] For example, in 2000, Lyle Gramlich, Federal

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[92] Press Release, National Community Reinvestment Coalition, Statement from National Civil Rights, Consumer, Community Development and Housing Groups Regarding Attacks on the Community Reinvestment Act (CRA) (Oct. 13, 2008), http://www.nclc.org/images/pdf/foreclosure_mortgage/predatory_mortgage_lending/pr_cra-statement-oct08.pdf (pointing out that for more than a decade there have been major concerns among community and civil rights leaders that unfair, deceptive, and abusive lending practices have undermined homeownership aspirations for many Americans. They also contend that proper regulatory policies and oversight were ignored by the government. They argue that in some cases, regulations and policy made it easier to embrace predatory lending practices in low-income neighborhoods and communities of color).

[93] James H. Carr, Nat'l Cmty. Reinvestment Coal., Speech at the NAACP Annual National Convention in Cincinnati, Ohio: Understanding the Foreclosure Crisis: Don't Believe the Hype! 4 (July 14, 2008), http://assetfunders.org/library/documents/jamescarrnaacpremarks.pdf.

[94] COMMUNITY HEALTH LAW PROJECT, PREDATORY LENDING PRACTICES AND WHAT TO DO IF YOU ARE AT RISK OF FORECLOSURE (2008-2009), *available at* http://www.chlp.org/docs/predlending.pdf.

[95] James H. Carr & Kate Davidoff, *Legislative and Regulatory Responses to the Foreclosure Crisis*, 17 J. AFFORDABLE HOUS. & CMTY DEV. L. 283, 288 (2008) (arguing that the Federal

Reserve Governor from 1997-2005, proposed to Alan Greenspan, Chairman of the Federal Reserve, that the Federal Reserve use its power to send examiners to the offices of lenders who were part of the government regulated bank holding companies.[96] In response, Greenspan purportedly rejected this proposal for increased regulatory scrutiny, ultimately contributing to the massive volume of foreclosures.[97]

While the majority of government and industry officials view "government regulatory weakness, Wall Street avarice, and corporate incompetence"[98] as the primary causes of the financial crisis, there are critics who hold different views.[99] Regarding predatory mortgage lending, some critics contend that mortgage fraud by lenders was not a primary cause of the financial crisis, but rather was simply a contributing factor to the crisis and a result of the housing bubble.[100] Additionally, others argue that mortgage lenders were not primarily responsible for creating and building up the arsenal of subprime loans,[101] but rather, that the subprime loan problem was a result of predatory borrowers who sought out loans they could not afford.[102] In support of this notion, critics argue that the extent to which subprime loans were pushed onto borrowers was never known and that the real problem was borrowers who manipulated the home mortgage

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Reserve Board never fully exercised their power to reduce and prohibit unfair and deceptive mortgage lending practices from plaguing consumers).

[96] Greg Ip, *Did Greenspan Add to Subprime Woes?*, WALL ST. J. (June 9, 2007), http://online.wsj.com/article/SB118134111823129555.html (Lyle Gramlich stated that Greenspan blocked a proposal to increase scrutiny of subprime lenders under the Fed's broad authority. That added scrutiny might have helped curtail questionable lending practices now blamed for soaring defaults by mostly low-income borrowers).

[97] *Id.* (Alan Greenspan defended his response by saying that there are a large number of small financial institutions and it would be extremely difficult, if not impossible, for the Federal Reserve to detect when they are doing something wrong. Furthermore, he stated that he did not think that it would have been worthwhile for the Federal Reserve to go in and audit all of these small institutions and their mortgage lending practices because they probably would not have been able to find out any significant information).

[98] Sewell Chan, *Dissenters Fault Report on Crisis in Finance*, N.Y. TIMES (Jan. 26. 2011), http://www.nytimes.com/2011/01/27/business/economy/27inquiry.html.

[99] *Id.*

[100] Angelides, *supra* note 8 at 424 (stating that questionable lending standards were much more likely to be responsible for creating so many bad mortgages, not mortgage fraud. Due to low lending standards, it is likely that the housing bubble would still have occurred even if there had been no mortgage fraud).

[101] *Id*. at 447 (highlighting that the view of predatory lending might be a good explanation for the subprime financial crisis if there was actually evidence that showed predatory lending to be so pervasive and widespread as to have produced the volume of high risk loans that were found to have been originated).

[102] *Id.* (stating that predatory borrowers took advantage of poor mortgage underwriting standards to gain and benefit from mortgages they knew they could not afford, unless they were able to sell for more than they borrowed or refinance and draw additional equity out of their house).

market.[103] These critics contend that the best response by the government would have been even less involvement and regulation in the mortgage markets; not the implementation of new regulations.[104]

Despite these views, a lack of regulation and oversight opened the door to predatory lending practices by greedy and unscrupulous subprime mortgage lenders, which led to a massive foreclosure crisis that spread like wildfire throughout the economy. In the aftermath of the financial crisis, voters demanded answers and changes in an effort to better understand how to avoid a similar financial catastrophe in the future.

III. DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT

A. Overview and Key Provisions Related to Predatory Mortgage Lending

In response to the financial crisis, Rep. Barney Frank, Chairman of the House Financial Services Committee, presented a proposed legislation to the House of Representatives on December 2, 2009. That same day, Sen. Christopher Dodd, Chairman of the Senate Banking Committee, did the same in the Senate.[105] These bills became the Dodd-Frank Act, which was signed into law by President Obama on July 21, 2010, impacting nearly the entire American financial services industry.[106] The Dodd-Frank Act addresses a wide range of topics, including key provisions such as: (1) consumer protections; (2) systemic risk oversight; (3) executive compensation regulation; (4) bank capital requirements; (5) ending "too big to fail" bailouts; (6) transparency and accountability relating to complex financial instruments; (7) enforcement of current regulations; (8) reform of the Federal Reserve; (9) mortgage lending reform; (10) hedge fund oversight; (11) control over credit rating agencies; (12) reform of insurance regulations

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[103] Eli Lehrer, *Subprime Borrowers: Not Innocents*, BLOOMBERG BUSINESS WEEK, http://www.businessweek.com/debateroom/archives/2008/03/subprime_borrowers_not_innocents.html (stating that mortgage lenders are not only innocent of the predatory practices that borrowers complain about, but also feel the same pain that borrowers feel when a subprime loan fails and goes into foreclosure. These lenders do not prosper in these circumstances since a lender typically loses one third of its loan value when a foreclosure happens. Therefore, lenders do not have an incentive to make or purchase loans that it genuinely believes a borrower cannot repay. However, unlike borrowers, predatory lenders were able to sell the loans through securitization to reduce their exposure to risk).

[104] *Id.*

[105] Damian Paletta, *It Has a Name: The Dodd/Frank Act*, WSJ BLOGS (June 25, 2010, 6:06 AM), http://blogs.wsj.com/washwire/2010/06/25/it-has-a-name-the-doddfrank-act/.

[106] William Sweet, *Dodd-Frank Act Becomes Law,* THE HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE AND FINANCIAL REGULATION (July 21, 2010, 11:49 AM), http://blogs.law.harvard.edu/corpgov/2010/07/21/dodd-frank-act-becomes-law/.

and investor protections; and (13) addressing securitization and municipal securities.[107]

In an effort to provide better consumer financial protection, the Dodd-Frank Act contains two sections that largely overhaul the consumer lending landscape in the United States and greatly increase the level of scrutiny over government providers of consumer financial services. These are: (1) Title X, known as the Consumer Financial Protection Act of 2010,[108] which creates the Consumer Financial Protection Bureau ("CFPB"), to provide major structural changes to the regulation and enforcement of financial consumer protections;[109] and (2) Title XIV, known as the Mortgage Reform and Anti-Predatory Lending Act,[110] which creates new substantive changes for a variety of consumer financial products, most notably of which are mortgage loans.[111] The discussion below specifically addresses how the Dodd-Frank Act attempts to combat and curtail past consumer predatory and abusive lending practices in the wake of the financial crisis.

B. New Substantive Consumer Protection Requirements Related to Mortgage Lending

Title XIV of the Dodd-Frank Act encompasses the Mortgage Reform and Anti-Predatory Lending Act[112] ("MRAPLA"), which in turn substantially amends the Truth in Lending Act ("TILA"), the Real Estate Settlement Procedures Act ("RESPA"),[113] and the Home Ownership and Equity Protection Act[114] ("HOEPA"). Many of these amendments took effect when

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107 *See* Dodd-Frank Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).
108 *Id.* at § 1001.
109 *Id.* at § 1011.
110 *Id.* at § 1400.
111 Zachary Best, Nina Simon, & Linda Singer, *Breaking Down Financial Reform*, 14 no. 2 J. Consumer & Com, L., 2, 6 (Sept. 2010), http://www.jtexconsumerlaw.com/V14N1/V14N1_Financial.pdf.
112 Michael Simkovic, *Competition and Crisis in Mortgage Securitization*, SOCIAL, SCIENCE RESEARCH NETWORK (Oct. 8, 2011), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1924831 (this section of The Dodd-Frank Act is classified as Enumerated Consumer Law and will primarily focus on standardizing data collection for underwriting loans as well as put new obligations on originators to only lend to borrowers who are likely to repay their loan based on various criteria).
113 Lynnley Browning, *Curbing Closing Costs*, N.Y. TIMES (Jan. 30, 2011), http://nylsblog.com/tag/truth-in-lending-act (prior to its Dodd-Frank amendments, the Truth In Lending Act from 1968 gave borrowers the ability to undo a home refinancing or home equity loan within three years if the lender did not make proper disclosures. Disclosure is usually one of the only protections for borrowers in the home mortgage market).
114 Craig Torres, *Fed Opposes Stripping Power Over Consumer Lending (Update 1)*, BLOOMBERG (June 18, 2009, 11:24 AM), http://www.bloomberg.com/apps/news?pid=newsarchive&sid=atu6O_F8GJRg (in 1994, Congress enacted the Home Ownership and Equity Protection Act, or HOEPA, to amend the Truth in Lending Act, or TILA, and respond to anecdotal

the Dodd-Frank Act was enacted, but some of these provisions will require further definition through rulemaking.[115]

1. *Dodd-Frank Act Substantive Amendments to the Truth in Lending Act and the Real Estate Settlement Procedures Act*

The MRAPLA amended TILA to prevent home mortgage lenders from receiving compensation for originating a loan based on the specific variable terms of each loan, other than the principal amount of the loan.[116] This included banning yield-spread premiums, which are payments received by mortgage brokers from loan originators in exchange for guiding consumers towards loans with riskier terms or higher interest rates.[117] The only exception to this ban is when the originator does not receive any compensation directly from the consumer and the consumer does not make any upfront payments other than standard third-party charges.[118]

Additionally, amendments to TILA create a class of "qualified mortgages" which encourage lenders to move to "plain vanilla" mortgages by guaranteeing that this special class of loans meets the strict new regulatory guidelines.[119] In order for a loan to be considered a "qualified mortgage," the following basic criteria must be met: (1) regular payments do not result in negative amortization[120] or allow payments to be deferred; (2) no balloon payments; (3) qualifying income and financial resources are verified and documented; (4) reliable underwriting standards are used to determine affordability of the loan; (5) compliance with debt-to-income ratio guidelines and other metrics that confirm a borrower's ability to repay the loan; and (6) total points and fees of the loan do not exceed 3% of the principal amount.[121]

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evidence of abusive lending practices in the home-equity lending market and govern the part of TILA that specifically deals with high-cost mortgages).

[115] *See* § 1400(c) of Dodd-Frank Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (highlighting that all of the regulations and amendments under the Mortgage Reform and Anti-Predatory Lending Act must be finally determined and implemented no later than 18 months after their designated transfer date and no later than 12 months after their date of issuance).

[116] *See* § 1403 of Dodd-Frank Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

[117] Meena Thiruvengadam, *Fed Unveils Slew of Mortgage Rules*, WSJ BLOGS (Aug. 16, 2010, 3:31 PM), http://blogs.wsj.com/economics/2010/08/16/fed-unveils-slew-of-mortgage-rules/.

[118] *See* § 1403 of Dodd-Frank Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

[119] *Id.* at § 1414.

[120] Definition of negative amortization: "an increase in the principal balance of a loan caused by making payments that fail to cover the interest due. The remaining amount of interest owed is added to the loan's principal amount, ultimately causing the borrower to owe more money." *Negative Amortization Definition*, INVESTOPEDIA, http://www.investopedia .com/terms/n/negativeamortization.asp#axzz1uZs9wLQt (last visited May 6, 2012).

[121] Best, Simon & Singer, *supra* note 111, at page 6.

Prior to the financial crisis, over 80% of the subprime loans had prepayment penalty[122] provisions that allowed lenders to recoup the commissions they had paid to brokers if the borrower paid back the loan before it was due.[123] The Dodd-Frank Act prohibits prepayment penalties for loans that are not "qualified mortgages" or loans with adjustable interest rates.[124] Also, the Dodd-Frank Act limits prepayment penalties for fixed rate mortgages and prevents fixed rate mortgages with prepayment penalties from being offered to a prospective borrower unless a fixed rate loan without a prepayment penalty is also offered.[125] This represents a major change from past practices in the home mortgage-lending arena.[126]

Other provisions seek to protect consumers from predatory mortgage practices. The Dodd-Frank Act requires mortgage lenders to determine, based on verified and documented evidence, that the consumer has a reasonable ability to repay the loan,[127] and to require any mortgages that have a negative amortization, like option ARM's[128] to include certain

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[122] Definition of prepayment penalty: "a clause in a mortgage contract that says if the mortgage is prepaid within a certain time period, a penalty will be assessed. The penalty is usually based on a percentage of the remaining mortgage balance or a certain number of months worth of interest." *Prepayment Penalty Definition*, INVESTOPEDIA, http://www.investopedia.com/terms/p/prepaymentpenalty.asp#axzz1uZs9wLQt (last visited May 6, 2012).

[123] *See* Eric Stein, *Quantifying the Economic Cost of Predatory Lending*, COALITION FOR RESPONSIBLE LENDING (July 25, 2001), http://www.selegal.org/Cost%20of%20Predatory%20Lending.pdf

[124] *See* § 1414 of Dodd-Frank Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

[125] *Id.* at § 1423.

[126] Bill Thomas, *What is Predatory Lending?*, MORTGAGE NEWS DAILY (Nov. 16, 2011), http://www.mortgagenewsdaily.com/mortgage_fraud/Predatory_Lending.asp (stating that while roughly 2% of conventional, non-subprime mortgages have an abusive prepayment penalty, nearly 80% of subprime mortgages contain a predatory prepayment penalty. When subprime borrowers would take out a subprime loan, if they ever wanted to refinance after rebuilding their credit, these prepayment penalties would prevent them from doing so by essentially draining any available equity in the house. This was a common practice that was aimed at keeping subprime borrowers locked in to the mortgage they had taken, preventing them from refinancing or getting out).

[127] *See* § 1411 of Dodd-Frank Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (in determining whether a borrower can repay, the lender must consider and include the borrower's credit history, income, obligations, debt-to-income ratio, employment status, and other relevant factors while using a fully amortizing payment schedule. Prior to the financial crisis, lenders qualified home mortgage borrowers at the initial, introductory teaser rate which allowed the loan to be made and then sold on the secondary market. Today, legitimate lenders can shield themselves by triggering a rebuttable presumption that borrowers have an ability to pay their qualified mortgages).

[128] Definition of Payment Option ARM: "a type of mortgage where the mortgagor (borrower) has several options as to which type of payment is made to the mortgagee (lender). In addition to having the choice of making payments of interest and principal that amounts to those made in conventional mortgages, option ARM's also have alternative payment options where the mortgagor can make significantly smaller payments by making

disclosures.[129] The Dodd-Frank Act also amends RESPA by requiring that lenders make various types of disclosures to borrowers[130] and create an escrow account for taxes and insurance for residential mortgages.[131] Additionally, mortgage servicers are now banned from imposing force-placed insurance on borrowers who they think have not maintained hazard insurance as required by the mortgage contract.[132] The Dodd-Frank Act also amends TILA and RESPA to protect borrowers from foreclosure actions

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interest-only payments or minimum payments." *Payment Option ARM Definition*, INVESTOPEDIA, http://www.investopedia.com/terms/p/paymentoptionarm.asp#axzz1uZs9wLQt.

[129] *See* §§ 1414-1420 of Dodd-Frank Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (requiring the disclosure to state: (1) the loan, once issued, could result in negative amortization; (2) negative amortization increases the principle balance on the loan; and (3) negative amortization decreases the amount of equity in the borrower's property. Also, lenders cannot require borrowers to make up the difference between the foreclosure amount and the remaining balance on the loan, unless allowed under state law. Other disclosure requirements mandated under the TILA amendments include disclosures required on monthly mortgage statements, notice that an ARM loan with a temporary fixed rate will reset, and notice of any loss of protection under state laws from provisions requiring borrowers to pay the difference between the foreclosure amount and remaining balance on the loan).

[130] *Id.* at §§ 1418-1420 (stating that under RESPA, lenders and servicers are required to give six months advance written notice to a borrower before their mortgage interest rate switches from a fixed interest rate to a variable interest rate. The new Dodd-Frank Act disclosures now require lenders to show the borrower how the new interest rate will be calculated, make a good faith estimate of what the new monthly payment will be, and disclose all of the borrower's available alternatives before the interest rate adjusts upward. Lenders are also required to make certain disclosures on the monthly mortgage statements (or on a separate disclosure document) including, but not limited to the: (1) principal balance owed; (2) date of the interest rate adjustment; (3) prepayment penalty fees (if any); (4) late payment fees (if any); (5) lender direct contact information; and (6) borrower counseling contact information).

[131] *Id.* at § 1461 (preventing borrowers from unknowingly refinancing a mortgage to reduce their monthly payment, only to learn that, with taxes and insurance included, the monthly payment is larger than before).

[132] *Id.* at § 1463 (describing force-placed insurance as insurance taken out by a creditor for an uninsured debtor on a property placed as collateral. This refers to (1) the hazard insurance purchased by a servicer on a borrower's home or property when the policy purchased directly by the borrower on a non-escrow mortgage account has lapsed; (2) when a mortgage servicer contends that the borrower has failed to provide proof of insurance coverage; or (3) when the account is in default. This is general liability insurance for residential and commercial properties and foreclosed properties. Force-placed insurance is very expensive and when forced onto borrowers by mortgage servicers, this can lead to the borrower having to default or go into foreclosure on the loan due to the inability to cover the increased monthly insurance cost. The Dodd-Frank Act requires that mortgage servicers only impose the force-placed insurance if they have a "reasonable belief" that the borrower has failed to maintain the insurance and if the servicer has met the procedural requirements to impose such insurance).

brought by lenders if the lender has used certain abusive lending practices in making the loan.[133]

2. Dodd-Frank Act Substantive Amendments to the Home Ownership and Equity Protection Act

In addition to amending other sections of TILA, the Dodd-Frank Act makes substantive changes to the high-cost mortgage provisions of TILA that are regulated under HOEPA and expands HOEPA's reach to protect consumers in new ways.[134] The Dodd-Frank Act lowers the loan-pricing threshold at which HOEPA regulations will apply, requiring more loans to conform to the amended regulations and new requirements.

Instead of HOEPA only applying to certain types of loans, it has been expanded to cover all types of loans that are secured by the borrower's primary residence, except for reverse mortgages.[135] This brings HOEPA regulations more in line with some of the state mandatory mortgage regulations and helps to standardize protection for all borrowers.[136] Additionally, HOEPA now requires all borrowers to undergo pre-loan counseling before they take out a loan that qualifies under HOEPA.[137] Prior to the financial crisis, if borrowers had been required to receive pre-loan counseling, many of them would have been notified about lower-cost loan programs and would have been able to determine how much money they needed to borrow rather than simply accepting the lender's first offer.[138] This might very well have averted many abusive and predatory lending practices.

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[133] *Id.* at § 1416 (stating that unlike a standard claim and defense which is regulated by a statute of limitations, borrowers who are subject to predatory, abusive practices by their lender are not time barred by any statute of limitations in asserting their defense to a foreclosure action by the lender. The availability of a borrower to assert a defense at any time for subprime loans should reduce the secondary financial markets' interest in purchasing non-qualified, subprime loans. Also, the damage caps placed on certain TILA violations was increased from $500,000 to $1,000,000 for class action law suits brought against lenders. The damage caps placed on RESPA mortgage servicing violations were increased to $1,000,000 for class action law suits and $2,000 for individual law suits).

[134] Best, Simon & Singer, *supra* note 111, at 9.

[135] *See* § 1431 of Dodd-Frank Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

[136] Dennis P. Ryan, *New Origination Requirements Under the Dodd-Frank Act*, AMCFIRST, http://www.amcfirst.com/page/Dodd-Frank-Act-.aspx.

[137] *See* § 1433 of Dodd-Frank Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

[138] Norma P. García, *Comments by Norma P. García at the Hearing Before the Federal Reserve Board of Governors Predatory Lending Practices,* CONSUMER UNION (Sept. 7, 2000), http://www.consumersunion.org/finance/predatorywc900.htm.

3. New Structural Changes to the Regulation and Enforcement of Consumer Financial Protections via Implementation of the Dodd-Frank Act Consumer Watchdog

The Dodd-Frank Act created the Consumer Financial Protection Bureau ("CFPB") which serves as the primary regulatory authority over consumer financial products and almost every consumer financial protection statute in the United States.[139] The CFPB's primary mission is to police activities relating to financial products and services for possible predatory, abusive, and unfair practices and to examine depository and non-depository financial institutions for regular compliance with federal consumer financial laws.[140] The CFPB is charged with acting as a consumer watchdog and ensuring that markets in consumer financial products are fair, transparent, and competitive.[141] The CFPB is housed within and receives its funding from the Federal Reserve, but the Federal Reserve has no power over CFPB officers or the ability to control its rules or orders.[142]

Even though the CFPB is an independent agency, it is created by the merger of several consumer financial regulatory departments from: (1) the Federal Reserve; (2) the Office of Thrift Supervision; (3) the FDIC; (4) the Office of the Comptroller of the Currency; (5) the National Credit Union Administration; and (6) the U.S. Department of Housing and Urban Development ("HUD").[143] All of these departments transferred their consumer financial protection powers and employees to the CFPB.[144]

Much of the CFPB's power comes from the application of the "abusive" standard.[145] Prior to the Dodd-Frank Act, federal regulators had the authority to ban activities or practices that were deemed "unfair or deceptive," but adding the word "abusive" greatly expands the type of misconduct that can be regulated.[146] This broad grant of authority to the CFPB gives it the

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[139] Beth DeSimone, Jeremy Hochberg, Brian Larkin, & Michael Mierzewski, *The Dodd-Frank Act Establishes the Bureau of Consumer Financial Protection as the Primary Regulator of Consumer Financial Products and Services*, 127 BANKING L.J. 722, 1 (2010).
[140] *Id.*
[141] *See* § 1021 of Dodd-Frank Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).
[142] Amanda L. Wait, *The New Bureau of Consumer Financial Protection—An Overview*, 4.5 THE ANTITRUST COUNS. (Sept. 2010), http://www.hunton.com/files/Publication/ca26910d-6ecd-4108-86a8-431f3e390fc5/Presentation/PublicationAttachment/a06c15de-97ef-4997-b898-c5190e5f6cf0/Antitrust_Counselor_Sept_2010.pdf.
[143] *See* § 1061 of Dodd-Frank Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).
[144] *Id.*
[145] *See* § 1031 of Dodd-Frank Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (stating that the CFPB is authorized to take any action to prevent a credit or service provider from committing or engaging in unfair, deceptive or abusive acts or practices in connection with a consumer financial product).
[146] Tiffany S. Leeal, *No More Abuse: The Dodd-Frank and Consumer Financial Protection Act's "Abusive" Standard*, 14 J. CONSUMER & COM. L 118 (2011).

potential power to increase protection of consumers in the financial marketplace.[147]

When President Obama signed the Dodd-Frank Act into law, the CFPB was scheduled to assume consumer financial protection powers on July 21, 2011.[148] Charged with the mission of being the primary consumer watchdog among financial and related products in the marketplace, there are several notable areas in which the CFPB has concentrated its efforts in order to begin fulfilling its mandate to increase consumer protection. For example, Elizabeth Warren, charged with setting up the CFPB, traveled throughout the United States to meet with consumers, bankers, and public interest groups to gather input on potential consumer protection regulations.[149] Furthermore, on its one-year anniversary, both the Federal Reserve and the Department of the Treasury Inspector Generals reported no criticisms of the CFPB's preliminary efforts over the past year.[150] As the CFPB continues to develop, consumer groups have encouraged the CFBP to create substantive protections in a number of key areas including: bank overdraft loans,[151] fees

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[147] Desimone, Hochberg, Larkin, & Mierzewski, *supra* note 139 (stating that the chief areas that give the CFPB its power include: (1) an independent director as opposed to a commission of directors; (2) the definition of "covered persons," giving it power to regulate and police a broad group of people and institutions in the financial industry; (3) a broad and expansive rulemaking authority related to financial regulation; (4) the ability to assess existing financial regulations currently in place; (5) the ability to proactively educate consumers as to the various risks related to financial products; (6) broad examination authority over depository and non-depository financial institutions; and (7) the ability to increase damage penalties for financial institutions that violate consumer financial laws).

[148] Drake Bennett & Carter Dougherty, *Elizabeth Warren's Dream Becomes a Real Agency She May Never Get to Lead*, BLOOMBERG (July 7, 2011, 2:01 PM), http://www.bloomberg.com/news/2011-07-07/elizabeth-warren-s-dream-becomes-a-consumer-bureau-she-may-never-lead.html.

[149] Dana Milbank, *Elizabeth Warren's Winning Formula*, WASHINGTON POST (Oct. 28, 2011), http://www.washingtonpost.com/opinions/elizabeth-warrens-winning-formula/2011/10/28/gIQAjNSIPM_story.html (stating that the CFPB's website is unusually accessible as compared with other federal agencies, emphasizing its clear language and offering the public opportunity to comment on new rules and regulations. For example, when the CFPB created new mortgage disclosure prototype forms, it posted the form on its website and received thousands of suggestions).

[150] *Review of CFPB Implementation Planning Activities*, OFFICES OF INSPECTOR GENERAL, BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM AND BUREAU OF CONSUMER FINANCIAL PROTECTION, DEPARTMENT OF THE TREASURY, FRB OIG 2011-03, OIG-11-088, (July 15, 2011), *available at* http://www.federalreserve.gov/oig/files/OIG_2011_Review_of_CFPB_Implementation_Planning_Activities.pdf(stating that the CFPB identified the activities it had to undertake to meet its Dodd-Frank Act obligations, that it was developing and implementing appropriate plans to meet its mandates, and that it was communicating its plans effectively to employees and financial regulators with which it must collaborate).

[151] George Gombossy, *Bank Consumer Traps and Tricks Continue Despite Congressional Financial Reform*, CTWATCHDOG.COM (Mar. 16, 2011, 12:41 PM), http://ctwatchdog.com/2011

and protections relating to prepaid credit cards, and wrongful foreclosure and abusive mortgage servicer practices.[152]

However, despite the Dodd-Frank Act's efforts to increase consumer protection in the financial marketplace, a number of existing and emerging predatory practices continue to threaten consumers. The Dodd-Frank Act, through the CFPB, must have the ability to effectively, efficiently, and swiftly respond to these predatory practices in order to better protect consumers, help to stave off a double-dip recession,[153] and to restore safety and security within the financial industry in order to avoid a future financial crisis.

IV. CURRENT PREDATORY PRACTICES THAT CONTINUE TO THREATEN ECONOMIC RECOVERY AND CONSUMER SAFETY IN THE FINANCIAL MARKETPLACE

Even after the many trials and tribulations experienced by financial institutions and consumers as a result of the financial crisis, significant predatory practices directed at consumers continue to threaten their safety in the financial marketplace and the overall health of the economic recovery.[154] These predatory practices do not appear to be regulated or controlled by the Dodd-Frank Act.[155]

/03/16/bank-consumer-traps-tricks-continue-despite-congressional-financial-reform (stating that banks continue to charge steep and multiple fees for overdraft loans, requiring immediate repayments, and they take payment first out of account holders' next pay deposit, before other debits are paid. Some banks also continue to manipulate the order in which they pay debits to consumers in order to increase the number of overdrafts that occur and the amount of fees consumers must pay).

[152] Nick Timiraos & Alan Zibel, *Reviews Begin for Borrowers Disputing Foreclosures*, WALL ST. J. (Nov. 2, 2011), http://online.wsj.com/article/SB10001424052970203707504577012130 274478996.html (some banks have acknowledged that they have foreclosed on active-duty military families and overcharged many others in violation of federal law. Additionally, millions of homeowners have been harmed by the fraudulent and abusive practices of mortgage servicers whose staff are trained for collection activities instead of loss mitigation, whose infrastructure cannot handle the volume and intensity of the demand, and whose business records are a mess).

[153] Definition of double-dip recession: "when gross domestic product ("GDP") growth slides back to negative after a quarter or two of positive growth. A double-dip recession refers to a recession followed by a short-lived recovery, followed by another recession." *Double-dip Recession Definition*, INVESTOPEDIA, http://www.investopedia.com/terms/d/doubledip recession.asp#axzz1uZs9wLQt.

[154] Jennifer Liberto, *Wall Street reform: A year down a bumpy road*, CNN MONEY (July 21, 2011, 5:27 AM), http://money.cnn.com/2011/07/21/news/economy/dodd_frank_reform/index. htm (stating that despite the enactment of the Dodd-Frank Act and the setup of the CFPB, great uncertainty continues to exist and many necessary reforms in mortgage regulation, the derivatives markets, and other critical areas have not taken place, leaving consumers at risk).

[155] *Id.*

Reverse mortgages,[156] which are predominantly aimed at the elderly, continue to be heavily marketed through mid-day and late night television commercials, deceptive direct mailing campaigns, and endorsements by older celebrities as a safe and secure solution to obtain cash directly from the equity of a person's home.[157] Predatory credit card offers made to subprime consumers are rising after a lull in the availability of consumer credit following the financial crisis of 2008.[158] Additionally, due to the lack of available credit,[159] more Americans are finding the need to go to payday lenders, pawn shops and local loan sharks, in part because banks and financial institutions appear to be hoarding large amounts of cash in an effort to reduce risk in the face of regulatory uncertainty. [160]

While a variety of predatory practices continue to be used by financial institutions looking to boost profits and generate new business in the short term, non-traditional predatory practices have emerged. The Dodd-Frank Act inadequately addresses these non-traditional predatory practices. Two of the most prevalent predatory practices that continue to negatively impact consumers include: (1) mortgage foreclosure and home loan modification

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[156] Definition of reverse mortgage: "a type of mortgage in which a homeowner can borrow money against the value of his or her home. No repayment of the mortgage, principal or interest, is required until the borrower dies or the home is sold. After accounting for the initial mortgage amount, the rate at which interest accrues, the length of the loan and rate of home price appreciation, the transaction is structured so that the loan amount will not exceed the value of the home over the life of the loan. Reverse mortgages have large origination costs and interest rates relative to other types of loans." *Reverse Mortgage Definition*, INVESTOPEDIA, http://www.investopedia.com/terms/r/reversemortgage.asp#axzz1uZs9wLQt.

[157] Anne Tergesen, *Mortgage Fraud: A Classic Crime's Latest Twists*, WALL ST. J. (Aug. 27, 2009, 10:41 AM), http://online.wsj.com/article/SB10001424052970204044204574362641338197748.html (stating that in the wake of the subprime mortgage crisis, regulators and law enforcement officials view reverse mortgage lending as another mortgage scam aimed at consumers. Additionally, even though many lenders are taking steps to curtail abuses in the reverse mortgage market, elderly consumers are still at risk from non-traditional predators).

[158] Clinton Hultman, *Subprime consumers receiving more card offers*, CREDITCARDS.ORG (Feb. 1, 2011, 11:42 AM), http://www.creditcards.org/article/subprime-consumers-receiving-more-card-offers-800375342.html (reporting that market research firm, Synovate, found that the overall number of credit card offers rose from 1.39 billion in 2009 to 2.73 billion in 2010, showing that the credit card mailing offers targeted subprime consumers with low credit scores as the market for high credit score consumers became saturated with offers during the economic downturn. Furthermore, due to slow economic growth, banks are trying to increase the amount of new credit cards that they issue in order to grow new business and boost overall profits).

[159] Commonly referred to as the "credit crunch" or "credit crisis."

[160] Todd Zywicki, *Dodd-Frank and the Return of the Loan Shark*, WALL ST. J. (Jan. 4, 2011), http://online.wsj.com/article/SB10001424052748704735304576058211789874804.html#articleTabs%3Darticle (stating that while the Dodd-Frank Act regulates pay day lenders, the bigger issues continuing to impact consumers concern the lack of access to available credit through traditional channels such as banks and credit card companies).

programs; and (2) the increased popularity of subprime auto loans, for both consumers and investors.

A. Consumer Fraud and Abuse Relating to the Mortgage Foreclosure and Home Loan Modification Process

As a result of the massive volume of defaults[161] by borrowers on their monthly mortgage payments, banks were confronted with a huge volume of foreclosures that destabilized their balance sheets, erased profits, threatened their financial stability and had an immense impact on the entire U.S. real estate market.[162] With over one million foreclosures in 2010, banks began authorizing employees to put home mortgages into foreclosure without following proper legal procedures.[163] Banks and mortgage servicers became so overwhelmed with the volume of foreclosures that many decided to authorize the practice of "robo-signing"[164] foreclosure documents. Initially thought to have been restricted only to foreclosure documents, it was recently discovered that robo-signing practices have tainted many mortgage documents that date back as far as 1998, creating massive legal and title problems.[165]

Another form of predatory foreclosure action by banks is temporary mortgage modifications that purport to allow homeowners a permanent

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[161] Definition of default risk: "the event in which companies or individuals will be unable to make the required payments on their debt obligations. Lenders and investors are exposed to default risk in virtually all forms of credit extensions. To mitigate the impact of default risk, lenders often charge rates of return that correspond to the debtor's level of default risk. The higher the risk, the higher the required return, vice versa." *Default Risk Definition*, INVESTOPEDIA, http://www.investopedia.com/terms/d/defaultrisk.asp#axzz1uZs9wLQt.

[162] Chris Arnold, *Major U.S. Banks Investigated For Foreclosure Fraud*, NATIONAL PUBLIC RADIO (Oct. 8, 2010), http://www.npr.org/templates/story/story.php?storyId=130421557.

[163] Pallavi Gogoi, *Robo-Signing Practices Older, More Pervasive Than First Thought*, HUFFINGTON POST (Sept. 1, 2011, 8:50 PM), http://www.huffingtonpost.com/2011/09/01/robo-signing-practices-1990s_n_945867.html (stating that many states have laws that require a lender to file an affidavit with the court before they foreclose and take a home back. The affidavit represents an authorized bank employee who signs under oath that s/he has reviewed a case and that everything is accurate. However, bank employees admitted that they were signing and authorizing thousands of foreclosure documents without reviewing the case or the facts of each situation).

[164] Definition of robo-signer: "an employee of a mortgage servicing company that signs foreclosure documents without reviewing them. Rather than actually reviewing the individual details of each case, robo-signers assume the paperwork to be correct and sign it automatically, like robots." *Robo-signer Definition*, INVESTOPEDIA, http://www.investopedia.com/terms/r/robo-signer.asp#axzz1uZs9wLQt.

[165] Gogoi, *supra* note 163 (stating that since many mortgage documents were improperly authorized, mortgages and chains of title are being invalidated by the courts, which prevents borrowers from proving that they own the property that they bought with the mortgage and banks cannot prove that they had the right to sell houses or issue the mortgage).

payment plan modification in order to stay in their homes.[166] However, after presenting all required documents and making all modified payments under the temporary plan, banks are then denying homeowners the ability to permanently modify their mortgage payments under the terms of the plan, leading to a litany of abuse, confusion, and an increase in foreclosures.[167] Additionally, private companies that promise homeowners a mortgage modification in exchange for a one-time upfront fee have emerged.[168] Often, however, after the homeowner pays the fee, he/she learns that the modification service promised to them by the private company is non-existent, often causing the borrower to forfeit the chance to renegotiate their mortgage with the bank.[169] Even if these private companies do obtain some sort of mortgage modification, many times it is not feasible for homeowners to make the new payments under the modified terms.[170] These predatory home mortgage modification programs are hurting consumers in a number of ways.[171]

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[166] Peter N. Freiberg, *Are Temporary Loan And Mortgage Modifications A Scam*, CLASS ACTION BLOG (Sept. 14, 2010), http://classactionblog.mdpcelaw.com/2010/09/articles/mortgage-scams/are-temporary-loan-and-mortgage-modifications-a-scam/.

[167] Stacie Spring, *ASU law students help homeowners facing foreclosure, fraud*, EAST VALLEY TRIBUNE (Oct. 1, 2011, 6:30 AM), http://www.eastvalleytribune.com/arizona/article_567b5f 36-eaf3-11e0-a5c8-001cc4c002e0.html (giving an example of a homeowner who applied for and received a trial mortgage modification from his bank. The homeowner turned in all of his paperwork and met all of the trial mortgage payments. Then, he was advised that his modification was permanent. However, when the homeowner went to make his first payment under the permanent modification, the bank informed him that his house had not only been foreclosed on, but had also been sold).

[168] John Leland, *Swindlers Find Growing Market in Foreclosures*, N.Y. TIMES (Jan. 14, 2009), http://www.nytimes.com/2009/01/15/us/15mortgage.html?pagewanted=all (since many homeowners have little to no equity in their homes after the financial crisis and real estate market downturn, companies present themselves as "mortgage foreclosure rescue companies." After being charged $2,000 to $4,000 upfront, borrowers learn that the modification either failed with the bank or the company never even attempted to modify the borrowers' mortgage payments).

[169] *Id.*

[170] Charles Feldman, *A pocket guide to avoiding mortgage modification scams*, DAILY FINANCE (Dec. 29, 2009), http://www.dailyfinance.com/2009/12/29/a-pocket-guide-to-avoiding-mortgage-modification-scams/ (pointing out that even if private mortgage modification companies are successful in getting a borrower a loan modification, often the terms of the modification require the borrower to make a large "balloon payment" that they cannot afford prior to the permanent mortgage modification going into effect. This results in the borrower being unable to take advantage of the mortgage modification. Many borrowers eventually end up in foreclosure).

[171] Press Release, Loan Modification Scam Prevention Network, LMSPN Spotlights Loan Scams for National Consumer Protection Week (March 3, 2011), http://www.preventloan scams.org/newsroom/press_releases?id=0003 (listing a number of ways that private home mortgage modification programs are negatively impacting consumers including: (1) asking for an upfront fee prior to working with a lender and then not performing any type of modification service after collecting the fee; (2) falsely guaranteeing that a foreclosure can

Consumers are also being negatively impacted by mortgage foreclosure and home modification scams. First, a bank that does not even own the actual mortgage and promissory note can foreclose because of the MERS[172] system of recording.[173] Not only is the home essentially stolen in the fraudulent foreclosure action, but the actual owner of the mortgage and promissory note can come back and sue the former homeowner for payment of the full amount of the mortgage. Second, when a bank wrongfully takes back a foreclosed home and then sells the property to a new owner, the bank may not be the actual owner of the property.[174] This creates a potential future problem for the purported new owners who may find that they legally do not own the home that they thought they had purchased from the bank.

The Dodd-Frank Act has a number of provisions directed at the prevention of predatory mortgage foreclosure practices and home modification scams. These provisions include: (1) providing borrowers with a defense against foreclosures;[175] (2) conducting studies of defaults and foreclosures;[176] (3) setting up a default and foreclosure database;[177] (4) warning consumers of foreclosure rescue scams;[178] (5) initiating a

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be stopped or that a home mortgage can be modified; (3) requesting that the borrower stop paying monthly mortgage payments to the original lender and make the payments to the private company instead; (4) pressuring the borrower to sign over the deed to the modification company or sign documents that they have not had a chance to read; and (5) a request to release personal financial information online or over the phone).

[172] Gretchen Morgenson & Michael Powell, *MERS? It May Have Swallowed Your Loan*, N.Y. TIMES (Mar. 5, 2011), http://www.nytimes.com/2011/03/06/business/06mers.html?pagewanted=all (stating that MERS, Mortgage Electronic Registration Systems, a private mortgage registry that was developed for Wall Street, has replaced the majority of public land ownership records in the United States. In the aftermath of the subprime mortgage crisis, bankruptcy and state courts have found that MERS and its member banks often confused and misrepresented who owned mortgage notes, losing and destroying loan documents in many cases).

[173] LeNoir Law Firm, *What is Foreclosure Fraud and How Does It Affect Home Owners and Buyers?*, DEBTINVERSION.COM, (Jan. 29.2011), http://www.debtinversion.com/blog/2011/01/29/what-is-foreclosure-fraud-and-how-does-it-affect-home-owners-and-buyers/.

[174] *Id.*

[175] *See* § 1413 of Dodd-Frank Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (permits a borrower to assert a defense to foreclosure against a creditor or assignee or other holder of a mortgage loan in a judicial or non-judicial foreclosure or any other action to collect debt in connection with a mortgage loan when there is a violation of anti-steering and ability to repay provisions. A claim can lead to actual damages, statutory damages and enhanced damages including return of finance charges).

[176] *Id.* at § 1446 (requires HUD to conduct an extensive study of the root causes of foreclosures using empirical data).

[177] *Id.* at § 1447 (requires HUD in consultation with federal financial regulatory agencies to establish and maintain a database on foreclosures and defaults that will be collected, aggregated and made available on a census tract basis).

[178] *Id.* at § 1452 (provides assistance to the Neighborhood Reinvestment Corporation to provide notice to delinquent borrowers concerning foreclosure rescue scams).

Government Accountability Office ("GAO") study on government efforts to combat mortgage foreclosure rescue scams;[179] (6) creating a multifamily mortgage resolution program;[180] and (7) making amendments to TILA that prevent modification and deferral fees.[181]

However, in spite of efforts by Congress to protect consumers in this area, the Dodd-Frank Act fails to hold banks, financial institutions, and private companies liable for committing foreclosure and modification fraud. On February 9, 2012, the "AG Settlement" was announced whereupon the U.S. Department of Justice and attorney generals from 49 states (except Oklahoma) entered into an agreement with Bank of America, Wells Fargo, JPMorgan Chase, Citigroup, and Ally Financial Inc., to settle claims related to foreclosure and modification fraud.[182] However, the $26 billion settlement consists mostly of reductions. That is, only $5 billion will be paid out in cash by the banks. The remainder of the settlement accounts for several reductions that will be conceded to homeowners. For instance, $17 billion of the settlement is made up of principal reductions for up to 1 million homeowners and $3 million accounts for refinancing to be offered to 750,000 "underwater" homeowners.[183] The banks also agreed to totally ban robo-signing. Although homeowners would still have the ability to pursue claims against banks, the state Attorney Generals would not be able to bring additional origination or servicing claims against the participating banks. Moreover, the settlement would not shield banks from prosecution related to criminal activities, claims based on mortgage securities violations, fair lending suits, or claims against MERS.[184] Thus, although not totally negative, the AG Settlement lets the banks off relatively easily. Criminal prosecutions

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[179] *Id.* at § 1492 (requiring the Comptroller General to report to Congress on effectiveness of an inter-agency task force to combat mortgage foreclosure rescue and modification scams, recommendations for legislative protections, and sufficiency of resources to crackdown on scams).

[180] *Id.* at § 1481 (authorizes the development of a HUD administered program to provide foreclosure assistance to promote transfer of properties with five or more units that are at risk of foreclosure. As result of foreclosure, tenants would be protected from losing their homes. It also calls for development of a program to provide financing to consumers and might include subsidies, rehabilitation and reserves for property. The goal of the program would be to transfer property to new, responsible and lawful owners committed to continued affordability of property and to maintain services to existing tenants).

[181] *Id.* at § 1433 (prohibits a creditor or third-party from charging an upfront fee to modify, renew, extend or amend high-cost mortgages or to defer payments).

[182] Chris Isidore & Jennifer Liberto, *Mortgage Deal Could Bring Billions in Relief*, CNN MONEY (Feb. 15, 2012, 3:17 PM), http://money.cnn.com/2012/02/09/news/economy/mortgage_settlement/index.htm?iid=EAL.

[183] *Id.*

[184] Press Release, Center for Responsible Lending, AG Settlement: Not Perfect, but Significant Reform of Mortgage Servicing (January 24, 2012), http://www.responsiblelending.org/media-center/press-releases/archives/AG-Settlement-Not-Perfect-but-Significant-Reform-of-Mortgage-Servicing.html.

have a higher standard of proof than a civil lawsuit and individual homeowners are at a serious disadvantage in litigating against banks. Overall, while the Dodd-Frank Act is proactive in its attempt to prevent foreclosure and modification abuses from occurring in the future, it fails to hold large financial institutions and banks responsible for the immense amount of damage, harm, and fraud that they have already caused.

B. Auto Lending—The New Subprime Money Maker for Wall Street

The prevalence and increase in subprime auto loans made to consumers who cannot afford monthly car payments mirror the same types of predatory lending practices associated with the subprime mortgage lending crisis in 2007-2008.[185] While auto lending is not mortgage lending, financial institutions are using this other "market" to make quick and easy money in the face of Dodd-Frank Act regulations, which have brought subprime mortgage lending practically to a halt. "Buy Here, Pay Here"[186] dealerships are issuing car loans to consumers who have bad credit and then packaging the loans and selling them to investors in secondary financial markets.[187] The origination of new subprime auto loans has been steadily rising since the 2008 financial crisis.[188] Investors view pools of auto loans as a relatively safe investment because the loans are collateralized[189] and

[185] David Heath, *Buyer Beware: Predatory Tactics That Led To Mortgage Meltdown Still Plague Auto Loans*, I WATCH NEWS (April 11, 2011, 4:00 PM), http://www.iwatchnews.org/2011/04/11/4070/buyer-beware (demonstrating how Wall Street is buying up bundled packages of subprime auto loans, growing a secondary investment market that is aimed at the most vulnerable consumers, and relieving the dealerships, who sell the cars and make the loans, of any risk associated with making subprime auto loans).

[186] Jon Acuff, *Buy Here Pay Here Financing Basics*, AUTOTRADER.COM, (last updated Sept, 2, 2011), http://www.autotrader.com/creditcenter/credit/article-25356/buy-here-pay-here-financing-basics.jsp (stating that "Buy Here Pay Here" financing means that a consumer can arrange a loan and make payments on it at the dealership. Consumers purchase the car through in-house financing at the dealership versus through a third party, such as a bank).

[187] Joseph Marco, *Dealership Package Billions Of Dollars Worth Of Subprime Auto Loans Into Securities*, HUFFINGTON POST (Nov. 11, 2011, 8:08 PM), http://www.huffingtonpost.com/2011/11/01/auto-subprime-securities_n_1070328.html (stating that $15 billion worth of pooled car loans have been packaged and sold on secondary markets to large financial institutions over the past two years. As potential car buyers with poor credit find it easier to get car loans, the practice of subprime auto lending may become as popular as subprime mortgage lending).

[188] *Id*. (new car loans for buyers with subprime credit scores rose 20% in the second quarter of 2011 as compared with the second quarter in 2010).

[189] Definition of collateralization: "the act where a borrower pledges an asset as recourse to the lender in the event that the borrower defaults on the initial loan. Collateralization of assets gives lenders a sufficient level of reassurance against default risk, which allows loans to be issued to individuals and companies with less than optimal credit history rating." *Collateralization Definition*, INVESTOPEDIA, http://www.investopedia.com/terms/c/collateralization.asp#axzz1uZs9wLQt (last visited May 6, 2012).

repossessing cars is much easier than foreclosing on homes in the event of borrower defaults.[190]

The subprime auto lending market appears to be very similar to the subprime mortgage lending market that existed prior to the financial crisis of 2008. Some of the current tactics used by subprime auto lenders include: charging consumers hidden fees, lying about interest rates, and inaccurate reporting of facts on borrowers' loan applications.[191] The packages of pooled car loans sold to financial institutions are backed by contracts signed by borrowers who cannot even qualify for a credit card.[192] Popular auto trading and review companies are advertising subprime auto loans as a great way for consumers with bad credit to acquire a new car that they might not otherwise be able to afford.[193]

While the Dodd-Frank Act contains new provisions and rules, as well as an entire agency (the CFPB) largely dedicated to preventing another subprime mortgage lending crisis, Congress specifically kept auto lending regulation out of the reach and protection of the CFPB.[194] Auto industry lobbyists were successful in keeping car loans, made by auto dealers, away from the reach of the CFPB.[195] This has left the CFPB powerless to safeguard consumers from threats posed by subprime auto lending.[196] Unlike the

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190 Monica Davis, *Lenders Making More Subprime Car Loans*, FOX BUSINESS (Aug. 30, 2011), http://www.foxbusiness.com/markets/2011/08/30/us-lenders-making-more-subprime-car-loans-report/.

191 Heath, *supra* note 180.

192 Davis MacMillan, *Subprime Auto Loans Look An Awful Lot Like Bubble-Era Subprime Mortgages*, MINYANVILLE.COM (Nov. 7, 2011, 12:11 PM), http://www.minyanville.com/dailyfeed/2011/11/07/subprime-auto-loans/ (reporting that a borrower who takes out a subprime auto loan typically pays double the Kelley Blue Book value of the car and is charged an interest rate close to 30%. Additionally, subprime auto securities sold in secondary financial markets increased from $3 billion last year to $7 billion this year. Ironically, many of the dealers are so sure that the consumers will default on these subprime auto loans that they install GPS trackers and ignition blockers in the cars).

193 Warren Clarke, *Tips for Subprime Borrowers: Getting a Car Loan with Bad Credit*, EDMUNDS.COM (April, 30, 2009), http://www.edmunds.com/car-loan/tips-for-subprime-borrowers.phtml (advising consumers that there are plenty of credit grantors specializing in subprime auto lending who are eager and willing to loan money to people with bad credit).

194 Heath, *supra* note 185.

195 Daniel Indiviglio, *5 Ways Lobbyists Influenced the Dodd-Frank Bill*, THE ATLANTIC (July 5, 2010, 10:15 AM), http://www.theatlantic.com/business/archive/2010/07/5-ways-lobbyists-influenced-the-dodd-frank-bill/59137/.

196 Jeff Crenshaw, *Car dealers mostly escape CFPB, but may face scrutiny elsewhere*, CONSUMER REPORTS (July 22, 2010, 4:30 PM), http://news.consumerreports.org/money/2010/07/consumer-financial-protection-bureau-new-law-exempts-loans-car-auto-dealers-still-regulated-ftc-powe.html (stating that final Dodd-Frank Act legislation gives the CFPB authority only over dealers who make direct loans to consumers and who do not transfer their loans to third parties, as is the common practice in the auto industry. This effectively prevents most dealer-assisted financing arrangements from being regulated under the Dodd-Frank Act since most dealers act as brokers in the lending process).

MRAPLA, which amended TILA, to ban yield spread premiums used by mortgage originators, the Dodd-Frank Act does not ban the similar practice in the auto industry of "dealer reserve."[197] Ultimately, the end result is an auto industry which continues to be incentivized to take advantage of subprime consumers shopping for a car that they cannot afford, and taking on an obligation that will ultimately end in default. While the effect of these subprime auto loans on the economy, in general, is not as great as those in the subprime home loan industry, it still poses a significant danger to economic recovery and long term economic health.

V. SOLUTIONS TO AMENDING THE DODD-FRANK ACT TO BETTER PROTECT CONSUMERS

While a number of provisions in the Dodd-Frank Act aim to better protect consumers in the financial marketplace from the predatory practices of unscrupulous lenders and financial institutions, it fails to ensure that consumers will have complete access to fair and just compensation for past wrongs inflicted upon them by predatory foreclosure practices; nor will they gain complete protection against financial industry lobbyists who continue to pressure Congress for carve-out exceptions to consumer regulatory safeguards.

A. Possible Solutions

There are a number of possible solutions that might protect consumers against wrongful foreclosure actions and predatory auto loans. However, while the two possible solutions discussed below attempt to provide consumers with a workable remedy, they are not ideal solutions for a variety of reasons.

1. A Possible Solution to Wrongful Foreclosures/Loan Modifications

One possible solution to providing consumers with adequate relief was to amend the Dodd-Frank Act to prevent any "AG Settlement" from being approved. By allowing banks to settle for pennies on the dollar in comparison to the amount of harm they have caused, the government is essentially providing banks with another massive bailout program.[198] A $20-$25 billion

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[197] "Dealer reserve" is a practice by auto dealers in directing subprime borrowers towards more expensive loans in exchange for a monetary kickback from the subprime auto lender. *See* Delvin Davis & Joshua M. Frank, *Under the Hood: Auto Loan Interest Rate Hikes Inflate Consumer Costs and Loan Losses*, SOCIAL SCIENCE RESEARCH NETWORK (April 19, 2011), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1860188.

[198] Matt Taibbi, *The Next Big Bank Bailout*, ROLLING STONE: POLITICS: TAIBBLOG (Oct. 5, 2011, 9:34 AM), http://www.rollingstone.com/politics/blogs/taibblog/attorneys-general-

settlement amount is far less than the total monetary amount of damage for which financial institutions are actually responsible. Giving consumers their day in court would give them the ability to prove their case against the financial institution and to obtain a fair judgment for the losses and harm they sustained from wrongful foreclosure actions. However, this possible solution would take years to achieve, flood the court system, and would create a significant risk that the affected financial institutions would have to file for bankruptcy protection as the number of judgments against them would likely be much greater than the amount they could ever pay out to consumers.[199]

2. *A Possible Solution to Prevent Future Problems Similar to Subprime Auto Lending*

One possible solution for getting rid of carve-outs and exceptions included in legislation is to ban all lobbying efforts by private companies, industry associations, and related special interest groups. However, this would be difficult and impractical to do for many reasons. Identifying lobbyists and preventing them from influencing politicians without violating their constitutional rights guaranteed by the First Amendment would be difficult for the government to do. [200] Additionally, banning special interest groups, who strive to lobby on behalf of consumers by positively influencing politicians in drafting and passing legislation, would detrimentally affect consumer safety. Moreover, devising a system that effectively insulates politicians who draft legislation from the external, negative influences of the outside world would be nearly impossible to do.

B. Alternative Solutions

In order to overcome the weaknesses in the potential solutions discussed above, this article proposes two alternative solutions that would

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settlement-the-next-big-bank-bailout-20111005(stating that Bank of America settled a lawsuit for bad mortgage-backed securities that it inherited from Countrywide Bank for $8.5 billion, but that this amount only represented 2% of the face value of the loans when they were originally sold on the secondary markets to investors (value of $424 billion) and represents only 4% of the principal amount still outstanding on these loans (current value of $221 billion)).

[199] *Id.*

[200] United Mine Workers of America, District 12 v. Illinois Association et al., 389 U.S. 217 (1967) (holding that the rights to assemble peaceably and to petition the government for a redress of grievances are among the most precious of the liberties safeguarded by the Bill of Rights. These rights, moreover, are intimately connected, both in origin and in purpose, with the other First Amendment rights of free speech and free press).

increase the protection of consumers from wrongful foreclosure actions and predatory auto loans.

1. Solution #1—Provide Bailouts to Consumers while Stabilizing the Economy

The first solution is to amend the Dodd-Frank Act to: (1) give the CFPB the authority to approve or deny a settlement with banks after having conducted a study that identifies the total dollar amount that banks are realistically able to pay out for their wrongs while remaining solvent; (2) direct the Federal Reserve to provide funds to bailout consumers who have suffered from wrongful foreclosure actions and mortgage modification programs to make up for the difference between what banks are able to pay and the total amount of harm caused; and (3) give the CFPB the authority to create a federally controlled program to administer government bailout funds to consumers in a fair and efficient manner.[201] While this proposed solution initially holds taxpayers responsible for bailing out consumers for wrongs committed by the financial institutions, by giving the CFPB the power to set a settlement floor based on what financial institutions can actually pay (compared with what they propose to pay), it may prevent financial institutions from filing bankruptcy. Bankruptcy filings by financial institutions potentially have a much greater negative impact on the economy than the repercussions of increased bailout dollars.

Furthermore, even though this proposed solution would increase the federal deficit, it effectively prevents financial institutions from obtaining another windfall in the form of paying next to nothing for their wrongs, while providing consumers with a program that allows them to remain in their homes and covers some or all of their losses. One benefit of this solution is that it would provide consumers with stability and additional cash which would enable them to pay their fair share of taxes and purchase goods and services, all of which would have a beneficial effect on the economy.

2. Solution #2—Bring All Consumer Financing Arrangements under the Umbrella of the CFPB

The second solution is to bring the regulation of auto dealer financing under the regulatory protection of the CFPB by amending the Dodd-Frank

[201] Components of a consumer bailout program could include: (1) requiring consumers to complete and submit standardized claim forms and personal financial documents to prove their wrongful losses; (2) devising a priority system to rank which consumers are most in need; (3) sending federal personnel to maintain special departments within the major banks to help streamline the flow of funds from the government to banks on behalf of consumers; (4) coming up with new streams of revenue that would cover the payment of bailout funds to consumers while contributing to economic growth.

Act to: (1) allow the CFPB to have regulatory authority over all existing and future consumer financing arrangements offered in the marketplace; (2) require all special interest groups to register with the CFPB prior to being able to lobby politicians and legislators and obtain special carve-outs in their favor; (3) draft new rules and regulations that prevent exceptions from being written into new laws that have a substantial negative impact on consumer protection and economic stability of the financial markets; and (4) create a department in the CFPB that monitors all registered special interest lobbying efforts, making recommendations to Congress about potential risks to consumers from proposed legislation prior to enactment of that legislation into law. Giving the CFPB complete authority to regulate all types of consumer financing will help to ensure that consumers do not fall victims to predatory lending practices in both the home loan and auto loan industries (and possibly other industries yet to be "imagined").

VI. CONCLUSION

In response to the financial crisis of 2008, the Dodd-Frank Act effectively limits the harm to consumers from predatory subprime mortgage lending practices. However, the Dodd-Frank Act fails to adequately prevent wrongful foreclosure and home loan modification practices and predatory auto lending. The continued existence of these predatory practices threatens the economic recovery and overall safety of consumers in the financial marketplace. Additional amendments to the Dodd-Frank Act must be made in order to avert another financial crisis and its negative impact on the U.S. and global economies.

Overall, holding large banks responsible for a reasonable amount of damage as a result of foreclosure and home loan modification fraud, while providing consumers with a financial bailout, will help further the economic recovery. Additionally, empowering the CFPB to have complete regulatory authority over all types of consumer financial arrangements will help ensure transparency and fairness in the marketplace, while continuing to encourage free trade and economic growth.