CHAPTER 3:

A Better Path for Mortgage Regulation

Diane Katz

The notion of consumers as incapable of determining their credit preferences and managing their financial affairs is now entrenched in federal statute, as is the caricature of lenders as predators of the clueless. It is this paternalist fallacy upon which Democrats[1] in Congress erected much of the Dodd–Frank Wall Street Reform and Consumer Protection Act. The irony is that the housing collapse at the heart of its passage was largely the result of government interference in the mortgage market.

Until passage of Dodd–Frank in 2010, most consumer protection was designed to equip consumers with the information necessary to act on their preferences, given market conditions, and to punish fraud and other wrongdoing. The role of government, at least theoretically, was to facilitate choice and competition—an approach reflecting the belief that free enterprise, albeit imperfect, yields greater benefit than autocratic alternatives.

That deference to consumer autonomy is now largely defunct. Instead, we have the Consumer Financial Protection Bureau (CFPB) and a framework of mortgage regulation that treats consumers as fundamentally irrational and prone to act against their self-interest. In the words of Oren Bar-Gill and Elizabeth Warren, the academic architects of the bureau, consumers suffer "cognitive limitations" and their "learning is imperfect."[2]

Indeed, the bureau takes the position that "too much information" can "detract from consumers' decision-making processes."[3] Under this paradigm, regulatory intervention is necessary to protect consumers from themselves by limiting loan options and standardizing mortgages.

This approach, of course, is inherently contradictory. If consumers suffer cognitive limitations with respect to mortgage matters, would the politicians and bureaucrats who dictate the terms and conditions of loans not also be afflicted by biases, particularly those of a political nature? As noted by economist Edward Glaeser, "Human beings surely make mistakes about their own welfare, but the welfare losses created by these errors are surely second order relative to the welfare losses created by governments which not only make errors, but also pursue objectives far from welfare maximization."[4]

Dodd–Frank's Title X and Title XIV constitute the response of congressional Democrats to a politicized narrative in which the housing

bubble and subsequent crash were the fault of unscrupulous mortgage lenders who took advantage of naive, uninformed consumers.

Reckless lending did play a role in the crisis, but the reality is that millions of lenders and borrowers were responding rationally to incentives created by an array of deeply flawed government policies, including artificially low interest rates contrived by the Federal Reserve, the massive subsidy of risky loans by Fannie Mae and Freddie Mac,[5] and the low-income lending quotas set by the Department of Housing and Urban Development.[6]

None of those major factors was addressed by Dodd–Frank; Congress instead opted to further empower the very regulatory establishment that fueled the crisis and then failed to contain it.

There certainly was a need to modernize mortgage regulation prior to the 2008 financial crisis. But Congress' hastily crafted response—that is, creation of the CFPB and its radical regulatory regime—now constitutes a different threat.

Crisis legislation such as Dodd–Frank is rarely, if ever, elegant. But its blanket restructuring of housing finance confuses government control with financial safety and soundness. That is a mistake that Congress must correct if America's housing market is to flourish. The most effective remedy is to eliminate the government policies that distorted the financial decisions of both lenders and borrowers, with such disastrous results.

DEREGULATION IS NOT TO BLAME

Mortgage origination and servicing did not exist in a regulatory vacuum before the enactment of Dodd–Frank in 2010. Virtually all financial market activity has taken place under the thumb of federal regulators since at least the 1930s.[7] States, too, have long regulated banks and mortgage brokers and interest rates.

Mortgages, in particular, were heavily regulated by the federal government prior to 2010, with a focus on disclosure requirements to ensure that consumers were fully apprised of the terms and conditions of their loans. That approach reflected what George Mason University professor Joshua Wright has described as "the standard economic theory of regulation," which assumed "standard, stable, rational consumer preferences."[8]

In contrast, Dodd–Frank's behaviorist approach substitutes consumer choice with the presumably superior expertise of regulators who are, somehow, free of cognitive bias, and know consumers' true preferences better than individuals themselves.

THE MODERN REGULATORY WAVE

Federal intervention in mortgage lending took hold as a means of increasing credit to farmers. First was the Federal Farm Land Bank Act of 1916, followed by the National Housing Act of 1934.[9] Regulation escalated during the Great Depression, with creation of the Federal Housing Administration (FHA), the Federal National Mortgage Association, and the Home Owner's Loan Corporation.

The next regulatory wave dates to 1960, when Congress began debating disclosure requirements for the cost of credit. In 1968, Congress "intruded" into the long-standing province of the states in regulating consumer transactions[10] with passage of the Consumer Credit Protection Act (CCPA).[11] Title I of the CCPA, the Truth in Lending Act (TILA), mandated disclosure of credit charges "clearly and conspicuously" as specified by the Federal Reserve System.[12]

As declared by Congress, the purpose of TILA was to "assure a meaningful disclosure of credit terms" rather than dictate the conduct of lenders or the content of loan agreements.[13]

> Title I neither regulates the credit industry, nor does it impose ceilings on credit charges. It provides for full disclosure of credit charges, rather than regulation of the terms and conditions under which credit may be extended. It is the view of [the] committee that such full disclosure would aid the consumer in deciding for himself the reasonableness of the credit charges imposed and

further permit the consumer to "comparison shop" for credit.[14]

TILA took effect on July 1, 1969,[15] and it was amended the very next year for the first of more than two dozen times during the next four decades.[16] Every amendment added new disclosure requirements—ultimately reaching at least 110 data points.[17] The attendant implementing rules, known as Regulation Z, increased to 314 pages, with 14 appendices. In the end, the law was unrecognizable from the original statute's tight focus on disclosure.

As noted by former Federal Reserve economist Thomas Durkin, TILA became a vehicle for the ever-growing demands of consumer "advocates," including raising consumer awareness and consumer confidence, improving consumer satisfaction, encouraging comparison shopping, enhancing consumer education, and even meeting macroeconomic goals like enhancing economic stabilization.[18]

Five years after TILA, Congress enacted the Real Estate Settlement Procedures Act (RESPA) to require disclosure of settlement costs and to bar referral fees and kickbacks in lending services.[19] In so doing, Congress breached the regulatory threshold of the *conduct* of mortgage-settlement-service providers. For example, section 8 of the statute prohibited fee-splitting among service providers, and also prohibited any person from giving or accepting referral fees, kickbacks, or "things of value" unless a commensurate amount of work is performed to earn the fee.[20]

THE HOEPA STANDARD

Two decades after RESPA, Congress enacted the Home Ownership and Equity Protection Act (HOEPA).[21] The law subjected certain loans to heightened disclosure requirements if the rates or fees exceed specified limits.[22] HOEPA targeted a small subset of the subprime mortgage market.

Under HOEPA, a creditor is required to disclose to borrowers that they are not required to close on the loan even after signing the mortgage application. HOEPA also required lenders to disclose to borrowers that the loan constitutes a mortgage (as if the borrowers would not know that), and that they could lose the home and any equity if they failed to make payments.[23]

HOEPA further encroached into *conduct* regulation by prohibiting loan proceeds to be used as direct payment to a home improvement contractor, and, more important, barring a pattern or practice of making loans without considering a borrower's ability to repay the loan from sources other than home equity.[24]

Moreover, for the first time, HOEPA imposed federal restriction on the *content* of mortgage terms. For example, a mortgage agreement could not include a higher interest rate after default; require a balloon payment on a loan with a term of less than five years; include a payment schedule that results in negative amortization; include a prepayment penalty (except in limited circumstances); or require advance payments greater than the sum of two periodic payments from the loan proceeds.[25]

In regulating such mortgage terms and conditions, Congress infringed on Americans' freedom of contract, and set a precedent for future government limits on access to mortgage credit.

But such interference was unnecessary to protect consumers from "predatory" lenders.[26] To the extent that predation involves fraud or misrepresentation, such conduct was already illegal under state laws.[27]

A USEFUL CRISIS FOR STATISTS

The U.S. housing market collapsed between 2006 and 2008. The dollar value of mortgage originations for single-family houses fell by half during that period,[28] while the delinquency rate increased by 50 percent and the foreclosure rate increased by 175 percent.[29] The attendant losses to mortgage-backed securities triggered a major recession.

The crisis was a golden opportunity for activists to promote the wholesale regulation of consumer credit that they had long advocated—despite the fact that the crisis was not caused by a failure of the federal mortgage

regulatory regime embodied by TILA, RESPA, and HOEPA. In 2007, for example, then-professor Elizabeth Warren argued for the creation of a financial regulatory agency that would regulate credit products in the same manner that the Consumer Product Safety Commission regulates toasters.[30]

What Warren and her acolytes apparently fail to grasp is that no one benefits from an exploding toaster, but a mortgage deemed "defective" by regulators is suitable for some borrowers in some situations.

The overhaul began in 2008, with passage of the Housing and Economic Recovery Act, which, among other things, created a federal licensing regime for mortgage loan originators and imposed additional TILA disclosures.[31]

The Federal Reserve likewise revised TILA's Regulation Z to carve out a new class of "high-cost" mortgages that effectively expanded HOEPA restrictions to all subprime home mortgages.[32] Among them was a prohibition on prepayment penalties within the first two years of the loan, and the mandatory establishment of an escrow account for taxes and insurance. Lenders were also required to verify a borrower's ability to repay the loan, and were prohibited from undertaking certain appraisal and servicing practices.[33]

These regulatory encroachments were soon followed by the Obama Administration's proposal to transform the entire financial system. Titled "A New Foundation: Rebuilding Financial Supervision and Regulation," the proposal called for a new regulator to "define standards for 'plain vanilla' products" and "require all providers and intermediaries to offer these products prominently, alongside whatever other lawful products they choose to offer."[34] The Administration also proposed that the new regulatory agency "be authorized to place tailored restrictions on product terms and provider practices, if the benefits outweigh the costs."[35] In other words, the Administration was seeking to regulate financial services as a utility.

President Barack Obama unveiled the proposal before a congressional commission released its findings on the causes of the financial crisis.[36] Shortly thereafter, urged on by consumer activists and behavioral economists, the Democratic majorities in Congress enacted the Dodd–Frank Act.[37]

DODD–FRANK LIVES

Divided into 16 titles, Dodd–Frank affects virtually every aspect of the financial system, including checking accounts, credit cards, mortgages, education loans, retirement accounts, insurance, and all manner of securities. The enormity and complexity of this regulatory hijacking is reflected in the thousands of pages of new rules that the various agencies have churned out over the past six years.

The cornerstone of the mortgage regulations by the CFPB is a lender obligation to "make a reasonable and good faith determination based on verified and documented information that the consumer has a reasonable ability to repay the loan according to its terms."[38]

This ability-to-repay provision is more than a procedural requirement. It is the basis of an expansive new consumer right to sue lenders for miscalculating their financial fitness for a loan.

Under the new regime, a borrower may sue a lender within three years of an alleged violation, such as improperly documenting income or assets, or incorrectly calculating the borrower's financial obligations. Those who prevail may recover damages equal to the sum of all finance charges and fees paid—potentially tens of thousands of dollars.

A borrower may also assert a violation of the ability-to-repay requirement as a defense against foreclosure—even if the original lender sold the mortgage or assigned it to a servicing firm. (The lawsuit may ensnare an assignee or holder of the mortgage, as well.) If successful, the borrower may recover all mortgage finance charges and fees paid in addition to actual damages, damages in an individual action or class action, and court costs and attorney fees.[39]

The obvious consequence of this new cause of action is more litigation and less

credit availability. No longer must borrowers who wish to contest foreclosure initiate a lawsuit against the lender. This reduces borrowers' legal costs, and thus increases the incentive to claim a violation of the ability-to-repay requirement in the event that mortgage payments become burdensome.

A new prohibition on pre-dispute arbitration also is expected to "dramatically increase the litigating of disputes which would have otherwise been resolved by arbitration."[40]

The rules reflect the notion that dastardly creditors and lax lending standards led consumers to assume mortgages they could not afford. However, in the context of the rising house prices at the time, higher-leveraged loans made financial sense. As explained by Federal Reserve Bank researchers,

> If [lenders and borrowers] believe that house prices would continue to rise rapidly for the foreseeable future, then it is not surprising to find borrowers stretching to buy the biggest houses they could and investors lining up to give them the money. Rising house prices generate large capital gains for home purchasers. They also raise the value of the collateral backing mortgages, and thus reduce or eliminate credit loses for lenders.[41]

The rules also reflect the low regard in which Americans are held by Congress and the CFPB bureaucrats. Under the ability-to-repay regime, lawmakers shifted accountability for loans from borrowers to lenders. This perversion of credit principles presumes that consumers are incapable of acting in their own interests. Even assuming the most benevolent intentions, such paternalism fosters dependence on government and erodes economic freedom.

Advocates attempt to justify this radical change by citing statistics on the flood of defaults and foreclosures during the housing crash. While many homeowners did incur terrible losses, most were not victims of predatory lending or fraud.[42] The hard truth is that most of them bet on rising home values and lost. They were not imbeciles. And, not one person will be made whole by the government abolishing credit options and curtailing financial freedom.

Even CFPB officials acknowledge that the new rules raise the costs and risks of mortgage lending. Creditors were forced to reconfigure policies and procedures, reprogram loan origination systems, and retrain personnel—thereby increasing the costs of underwriting loans. The threat of litigation breeds greater caution among lenders and thus further restricts the availability of credit. The impact has been particularly hard on community banks, which lack the capacity to increase their compliance staff or to hire consultants. Some have simply exited the mortgage market.[43]

The risks to lenders may be mitigated to some degree by meticulous compliance with the ability-to-repay procedures. But even the most vigilant lender will remain vulnerable because the regulatory parameters are somewhat fluid. (One irrational exception is the outright prohibition of basing a loan decision on the fact that an applicant's income derives from public assistance.)[44]

Although there are specific rules for computing some asset and debt factors, the bureau is allowing some flexibility in underwriting methods. This approach is both a benefit and a bane to lenders. On the one hand, lenders will enjoy some independence in designing ability-to-repay procedures. But it also means that there is no fixed compliance standard to follow, which invites arbitrary enforcement actions. As acknowledged by the bureau, "[The CFPB] does not believe that there is any litmus test that can be prescribed to determine whether a creditor, in considering those factors, arrived at a belief in the consumer's ability to repay which was both objectively reasonable and in subjective good faith."[45]

In other words, the rule of law is what the bureau deems it to be at any particular point in time. This is a direct and undesirable

consequence of Congress avoiding accountability by delegating its legislative authority to regulators. It is also a direct threat to fundamental principles of representative government.

Even if a lender ultimately prevails in a legal challenge, it will not be spared the costs of litigation. According to data submitted to the CFPB, the average litigation cost to secure a motion to dismiss runs an estimated $26,000; a summary judgment, $84,000; and a trial, $155,000.[46]

Perversely, the CFPB is suggesting that lenders look to governmental entities, such as the FHA, for guidance on underwriting criteria. This is the agency that racked up a $16 billion deficit to its insurance fund and requested a $1.7 billion taxpayer bailout in 2013.[47]

vThe Dodd–Frank Act offers a "safe harbor" against potential ability-to-repay litigation in the form of a qualified mortgage (QM).[48] Lenders who meet specific mortgage criteria, including loan limits, fee caps, and prescribed payment calculations, will be presumed to have satisfied the ability-to-repay criteria. The CFPB has also carved out a less-absolute "rebuttable presumption" for higher-priced mortgages.[49] The relative safety of the QM means that lenders will be far less likely to offer loans that do not meet the QM criteria.

Lenders lobbied hard for the safe harbor approach as protection from the litigation risk—which only exists because Congress created the new liability scheme to begin with. But there is also general recognition that establishment of the safe harbor will not eliminate litigation risk altogether. Consumers will still be able to file lawsuits; only the scope of the litigation will be delimited.

To be designated as a qualified mortgage, the interest rate cannot exceed 1.5 percentage points over the Average Prime Offer Rate; points and fees must not exceed 3 percent of the loan; and the term of the mortgage cannot exceed 30 years. Of particular importance is the requirement that mortgage payments will not increase the borrower's debt-to-income (DTI) ratio above 43 percent.

With very limited exception, balloon loans[50] are not eligible for QM status, nor are interest-only mortgages or negative amortization loans.[51] These limitations are based on the misconception that unconventional loans are "predatory" by nature, and played a major role in the housing collapse.

Notwithstanding incessant banker-bashing, a variety of research documents support that unconventional lending did not cause the crisis. According to economist Yuliya Demyanyk, formerly of the Federal Reserve Bank of St. Louis,

> It was a market-wide phenomenon. For example, borrowers with mortgages that carried a fixed-interest rate—the rate that will not reset through the entire term of a loan—had very similar problems to borrowers with hybrid mortgages. Borrowers who obtained a subprime mortgage when they bought a home had the same problems in 2006 and 2007 as those who refinanced their existing mortgages to extract cash. Borrowers who provided full documentation and no documentation followed the same pattern.[52]

In reality, each type of mortgage is beneficial for specific types of borrowers. Balloon mortgages, which feature lower interest rates and monthly payments, are appropriate for homebuyers who plan to sell their house before the balance of the loan (the balloon payment) is due. They also may prove to be profitable if home values are rising consistently; the additional equity will help to secure refinancing to make the balloon payment. On the other hand, interest-only mortgages are ideal for borrowers with irregular incomes or those who anticipate an increase in earnings in the future.

Barring such loans under the QM regime means fewer options for would-be homebuyers, and a new barrier to the wealth creation associated with property investment. This is not consumer protection, but consumer control.

The same approach pervades the QM's DTI requirement. Although a DTI ratio of 43 percent falls within the range of industry standards, there is infinite variety among borrowers' circumstances that bankers would otherwise take into account. The DTI constraint will increase the number of applicants who will be rejected for loans they could afford while others obtain ones they cannot manage.

The Federal Reserve Board, during previous deliberations on the issue, declined to propose a specific DTI ratio for QMs out of concern that doing so could limit credit availability. The board also concluded that setting a quantitative standard would oblige it to micromanage underwriting, such as defining income and debt obligations and compensating factors.

CFPB officials acknowledge that the 43 percent threshold is problematic for some would-be borrowers. For example, a total of 23 percent of the loans acquired by Fannie Mae and Freddie Mac between 1997 and 2009 had DTI ratios of 44 percent or greater, according to data from the Federal Housing Finance Agency. Over the same period, 19 percent of the loans had DTI ratios of 46 percent or greater.[53]

The bureau's DTI threshold is based on the "general boundary" of affordability utilized by the FHA—hardly a paragon of prudent lending, as previously noted. In contrast, Fannie Mae's and Freddie Mac's guidelines link the required DTI ratio to the credit score of the borrower. Those with credit scores below 700 generally require a DTI ratio of 36 percent, while borrowers with a credit score above 700 may be eligible with a DTI ratio of 45 percent.[54]

There is a gradual increase in mortgage delinquency rates as debt increases in relation to income. But there is virtually no difference between a DTI ratio of 42 percent and 45 percent. Numerous other factors have a stronger correlation to loan repayment. For example, the loan-to-value ratio and credit score are much more predictive of loan performance than DTI ratios, according to the Mortgage Bankers Association.

The CFPB acknowledges that there is no "magic number" which separates affordable from unaffordable mortgages. Whether the 43 percent DTI ratio is better than, say, 40 percent or 46 percent, is rather beside the point, however. Any fixed standard will inhibit lenders from making judgments based on an applicant's character, the state of the market, their experience, or a host of other factors. But those are better predictors of creditworthiness than the directives of bureaucrats passing judgment from thousands of miles away.

In congressional testimony, bank director James Gardill warned that a static set of loan criteria will mean a lot fewer mortgages. There are "many American families across the country that are creditworthy but do not fit inside the QM 'box,'" he said. Likewise, the California & Nevada Credit Union Leagues note that even more affluent borrowers may find their access to credit diminished under the QM rules. "A borrower earning $10,000 or $15,000 a month, with no non-housing debts, might have trouble getting a mortgage if his house payment plus taxes and insurance totaled 45 percent of his gross income."

Particularly hard hit are young adults. As first-time homebuyers, they have limited income and college debt, pushing their DTI above "qualified" status. But these are the very buyers who prompt churn in the market, that is, their entry allows current homeowners to parlay their equity into a second better home, fueling upward mobility along the property chain.

New retirees also are vulnerable because they rely on assets rather than income to cover housing payments. As such, the CFPB rule places "significant limitations on the amount of new mortgage credit available to these customer segments and further restrict their home-buying choices."

Advocates argue that the standardization of mortgages would have gone a long way toward preventing the massive defaults of 2006 to 2009. But it was not lack of regulation that prompted the loosening

of standards. The more salient factors were artificially low interest rates and the shift of mortgage risk from private lenders to government, both of which spurred exuberant investment in housing and lowered underwriting standards.

RECOMMENDATIONS FOR REFORM

Repeal Titles X and XIV. Borrowers and lenders should be free to negotiate the terms of mortgage agreements. There is no justification for government regulators substituting their judgment for that of borrowers. Emerging research indicates that Dodd–Frank's interventionist approach is harming the very mortgage borrowers Congress intended to protect.

Short of full repeal, Congress should at least permit borrowers to opt out of each of the content restrictions by attestation.

Devolve Mortgage Disclosure to States. To the extent that disclosures require regulation, states are better positioned than the federal government to determine the information deemed necessary for consumers. In fact, nothing in TILA, RESPA, or HOEPA requires borrowers to actually read the disclosures. Moreover, even a full-disclosure regime cannot satisfy all borrower-information needs at all times or prevent all borrowers from making mistakes.

Encourage Market Competition. The best consumer protection for mortgage borrowers is a vibrant and competitive mortgage lending market. To encourage greater competition among mortgage loan originators, Congress should repeal the SAFE Mortgage Licensing Act's mandatory mortgage loan originator licensure regime. By controlling entry into the mortgage-originator profession, states restrict the quantity of services provided as much as the quality, which limits competition and increases the price of services for borrowers.

Competition can also be promoted by further unbundling of settlement services and specialization among service providers. To that end, Congress should amend RESPA Section 8 to permit greater fee-splitting among service providers.

Because Dodd–Frank failed to deal with Fannie Mae and Freddie Mac, a future Congress will have to address the problem. In order to protect mortgage borrowers, Congress should wind down Fannie Mae and Freddie Mac and encourage private capital investment as a means of creating a sustainable housing finance system and enhancing market discipline.

CONCLUSION

Washington's hastily crafted response to the financial crisis is built on the belief that the housing bubble and subsequent crash were the fault of unscrupulous mortgage lenders who took advantage of naive, uninformed consumers. In reality, lenders and borrowers were responding rationally to incentives created by an array of deeply flawed government policies. None of those major factors is addressed by the new regulatory regime. Congress instead opted to further empower the very establishment that fueled the crisis and then failed to contain it. Consequently, the new rules will unnecessarily limit mortgage options and access to credit—and further erode Americans' freedoms.

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ENDNOTES

1. No House Republicans voted in favor of Dodd–Frank on the first floor vote, although three voted for the conference report: Representatives Joseph Cao (R–LA), Mike Castle (R–DE), and Walter Jones (R–NC). Four Senate Republicans voted for the bill on the first floor vote: Senators Scott Brown (R–MA), Susan Collins (R–ME), Chuck Grassley (R–IA), and Olympia Snowe (R–ME). However, Grassley voted "No" on the conference report, while the other three voted for passage.
2. Oren Bar-Gill and Elizabeth Warren, "Making Credit Safer," *University of Pennsylvania Law Review*, Vol. 157, No. 1 (November 2008), https://www.law.upenn.edu/live/files/112-bargillwarren157upalrev12008pdf (accessed December 21, 2016).
3. Consumer Financial Protection Bureau, "Integrated Mortgage Disclosures Under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z)," *Federal Register*, Vol. 77, No. 164 (August 23, 2012), p. 51126.
4. Edward L. Glaeser, "Psychology and the Market," National Bureau of Economic Research, *Working Paper* No. 10203, January 2004, http://www.nber.org/papers/w10203 (accessed December 21, 2016).
5. Fannie Mae (the Federal National Mortgage Association) and Freddie Mac (the Federal Home Loan Mortgage Corporation) are corporations authorized by Congress to buy mortgages from lenders and pool loans to sell as securities, in order to provide liquidity for lenders.
6. Comprehensive analyses of the financial crisis include Christopher L. Foote, Kristopher S. Gerardi, and Paul S. Willen, "Why Did So Many People Make So Many Ex Post Bad Decisions? The Causes of the Foreclosure Crisis," Federal Reserve Bank of Atlanta, *Working Paper* No. 2012-7, May 2012, http://www.frbatlanta.org/documents/pubs/wp/wp1207.pdf (accessed November 21, 2013); John A. Allison, *The Financial Crisis and the Free Market Cure* (New York: McGraw Hill, 2012); and Peter J. Wallison, *Bad History, Worse Policy: How a False Narrative about the Financial Crisis Led to the Dodd–Frank Act* (Washington, DC: AEI Press, 2013).
7. Norbert J. Michel, "The Myth of Financial Market Deregulation," Heritage Foundation *Backgrounder* No. 3094, April 28, 2016, http://www.heritage.org/research/reports/2016/04/the-myth-of-financial-market-deregulation.
8. Joshua D. Wright, "The Antitrust/Consumer Protection Paradox: Two Policies at War with Each Other," *The Yale Law Journal*, Vol. 121, No. 2216 (2012), http://www.yalelawjournal.org/pdf/1089_i2bo1vco.pdf (accessed December 22, 2016).
9. Kenneth Snowden, "Mortgage Banking in the United States, 1870–1940," Research Institute for Housing America *Research Paper* No. 13-02, October 29, 2013, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2349189 (accessed December 19, 2016).
10. American Bar Association, "The Consumer Credit Protection Act," 2004, http://apps.americanbar.org/buslaw/newsletter/0024/materials/book.pdf (accessed December 22, 2016).
11. Consumer Credit Protection Act (CCPA) of 1968, Public Law 90–321.
12. The Federal Reserve's implementing regulation for TILA is known as Regulation Z. The Dodd–Frank Act transferred authority for enforcing Regulation Z, now found at 12 C.F.R. Part 226, to the bureau.
13. Ibid.
14. Consumer Credit Protection Act, House Committee on Banking and Credit, Report No. 1040, December 13, 1967, http://www.llsdc.org/assets/TILAdocs/tila-lh_h-rep-90-1040.pdf (accessed October 20, 2016).
15. CCPA § 504(b).
16. See generally, "Truth in Lending Act Amendments and Related Links," Law Librarians' Society of Washington, DC, April 2014, http://www.llsdc.org/assets/TILAdocs/tila-amdts.pdf (accessed October 20, 2016). Major amendments to TILA were made by the Fair Credit Billing Act of 1974, the Consumer Leasing Act of 1976, the Truth in Lending Simplification and Reform Act of 1980, the Fair Credit and Charge Card Disclosure Act of 1988, the Home Equity Loan Consumer Protection Act of 1988, and the Home Ownership and Equity Protection Act of 1994 (HOEPA).
17. Thomas A. Durkin and Gregory Elliehausen, *Truth in Lending: Theory, History, and Way Forward* (Oxford, U.K.: Oxford University Press, 2011), pp. 9 and 234–238.
18. Thomas A. Durkin et al., *Consumer Credit and the American Economy* (Oxford, U.K.: Oxford University Press, 2014), p. 416.
19. Real Estate Settlement Procedures Act, 1974, Public Law 93–533, https://www.gpo.gov/fdsys/pkg/STATUTE-88/pdf/STATUTE-88-Pg1724.pdf (accessed December 22, 2016).
20. RESPA § 8(a), (b), and (c). RESPA § 10 also capped the amounts that lenders could require borrowers to deposit in escrow accounts. See 12 U.S. Code § 2609.
21. As Title I, Subtitle B of the Riegle Community Development and Regulatory Improvement Act of 1994, Public Law 103–325.
22. Ibid., § 152.
23. Ibid.

24. Riegle Community Development and Regulatory Improvement Act of 1994 § 129(h)–(i).
25. Ibid., § 129(c)–(g).
26. National Predatory Lending Task Force, "Curbing Predatory Home Mortgage Lending: A Joint Report," U.S. Department of Housing and Urban Development and the U.S. Department of the Treasury, June 2000, p. 17, http://www.huduser.org/Publications/pdf/treasrpt.pdf (accessed October 20, 2016).
27. Durkin, *Consumer Credit*, p. 410.
28. Federal Housing Finance Agency, "Market Data: Single-Family Mortgage Originations, 1990–2011 Q2," revised November 2, 2011, http://www.fhfa.gov/Default.aspx?Page=70 (accessed December 22, 2016).
29. For one-family to four-family residences. U.S. Census Bureau, "Table 1193. Mortgage Originations and Delinquency and Foreclosure Rates: 1990 to 2009," http://www.census.gov/compendia/statab/2011/tables/11s1193.pdf(accessed December 22, 2016).
30. Elizabeth Warren, "Unsafe at Any Rate," *Democracy Journal*, No. 5 (Summer 2007), http://democracyjournal.org/magazine/5/unsafe-at-any-rate/ (accessed October 20, 2016). Warren later expanded upon this concept in an article co-authored with Oren Bar-Gill titled "Making Credit Safer," *University of Pennsylvania Law Review*, Vol. 157, No. 1 (November 2008), https://www.law.upenn.edu/live/files/112-bargillwarren157upalrev12008pdf (accessed October 20, 2016).
31. Housing and Economic Recovery Act, 2008, Public Law 110–289. Title V of the Housing and Economic Recovery Act, known as the Secure and Fair Enforcement for Mortgage Licensing Act of 2008 (SAFE Act), mandated a nationwide licensing and registration system for residential mortgage loan originators. See 12 U.S. Code § 5101–5116.
32. The regulations defined a higher-priced mortgage as one that is secured by the borrowers' principal dwelling and has an annual percentage rate that exceeds the "average prime offer rate" by 1.5 percentage points for loans secured by a first lien, by 3.5 percentage points for loans secured by a subordinate lien, and by 2.5 percentage points in the case of a first-lien jumbo loan. 12 C.F.R. 1026.35(a). The rule's primary objective was to "cover the subprime market and generally exclude the prime market." See "Truth in Lending," *Federal Register*, Vol. 73 (July 30, 2008), p. 44532, http://www.federalreserve.gov/reportforms/formsreview/RegZ_20080730_ffr.pdf (accessed October 24, 2016). The rule became effective October 1, 2009.
33. 12 C.F.R. 1026.42(c) and 1026.36(c).
34. U.S. Department of the Treasury, Financial Regulatory Reform: A New Foundation–Rebuilding Financial Supervision and Regulation, June 17, 2009, p. 16, https://www.treasury.gov/initiatives/wsr/Documents/FinalReport_web.pdf (accessed October 20, 2016).
35. Ibid., p. 15.
36. Congress established the commission by enacting Section 5 of the Fraud Enforcement and Recovery Act of 2009, Public Law 111–21.
37. Dodd–Frank Wall Street Reform and Consumer Protection Act, 2010, Public Law 111–203.
38. "Consumer Financial Protection Bureau, Ability-to-Repay and Qualified Mortgage Standards Under the Truth in Lending Act," *Federal Register*. The requirement is waived for the FHA and other government agencies.
39. In a foreclosure that occurs three or more years after loan consummation, borrowers would be reimbursed for 36 months of interest.
40. John P. Scott, "Mortgage Lending Reform Under the Dodd–Frank Wall Street Reform and Consumer Protection Act," *Federation of Defense and Corporate Counsel Quarterly*, Vol. 63, No. 2 (Winter 2013).
41. Foote, Gerardi, and Willen, "Why Did So Many People Make So Many Ex Post Bad Decisions? The Causes of the Foreclosure Crisis."
42. Norbert J. Michel, "The Myth of Financial Market Deregulation," Heritage Foundation *Backgrounder* No. 3094, April 28, 2016, http://www.heritage.org/research/reports/2016/04/the-myth-of-financial-market-deregulation.
43. Marshall Lux and Robert Greene, "The State and Fate of Community Banking," M-RCBG Associate W*orking Paper* No. 37, Harvard Kennedy School, 2015, https://www.hks.harvard.edu/centers/mrcbg/publications/awp/awp37 (accessed December 22, 2016).
44. Consumer Financial Protection Bureau, "CFPB Consumer Laws and Regulations: Equal Credit Opportunity Act (ECOA)," June 2013, http://files.consumerfinance.gov/f/201306_cfpb_laws-and-regulations_ecoa-combined-june-2013.pdf (accessed December 22, 2016).
45. Consumer Financial Protection Bureau, "Ability-to-Repay and Qualified Mortgage Standards Under the Truth in Lending Act (Regulation Z)," Final Rule, http://files.consumerfinance.gov/f/201301_cfpb_final-rule_ability-to-repay.pdf (accessed December 22, 2016).
46. "Consumer Financial Protection Bureau, Ability-to-Repay and Qualified Mortgage Standards Under the Truth in Lending Act," *Federal Register*.

47. Nick Timiraos, "FHA Will Require $1.7 Billion From Treasury," *The Wall Street Journal*, September 27, 2013, http://www.wsj.com/articles/SB10001424052702304526204579101142224548428 (accessed December 26, 2016).
48. The QM provisions are found in Title XIV of Dodd–Frank while the qualified residential mortgage (QRM) provisions are in Title IX. See Bureau of Consumer Financial Protection, "Ability-to-Repay and Qualified Mortgage Standards under the Truth in Lending Act (Regulation Z)," *Federal Register*, January 30, 2013, Vol. 78, No. 20 (January 30, 2013), https://www.gpo.gov/fdsys/pkg/FR-2013-01-30/pdf/2013-00736.pdf (accessed December 27, 2016), and U.S. Department of the Treasury, Office of the Comptroller of the Currency, "Credit Risk Retention," *Federal Register*, Vol. 79, No. 247 (December 24, 2014), https://www.gpo.gov/fdsys/pkg/FR-2014-12-24/pdf/2014-29256.pdf (accessed December 27, 2016). For a list of mortgage regulations adopted by the CFPB, see Diane Katz, "Dodd–Frank Mortgage Rules Unleash Predatory Regulators," Heritage Foundation *Backgrounder* No. 2866, December 16, 2013, Appendix, http://www.heritage.org/research/reports/2013/12/doddfrank-mortgage-rules-unleash-predatory-regulators#_ftn27.
49. As crafted by the CFPB, two different classes of loans are eligible to be "qualified mortgages." The distinction between the two is based on the annual percentage rate of the loan. The final rule provides a rebuttable presumption for "higher-priced" loans, that is, a residential mortgage loan with an APR of 6.5 percent above the Average Prime Offer Rate for first-lien loans; 8.5 percent for a second or subordinate-lien loan; total points and fees exceeding 5 percent of transaction amounts of $20,000 or more; or the lesser of $1,000 or 8 percent of a transaction smaller than $20,000. For loans that are not "higher-priced," the final rule provides a conclusive presumption that the creditor has satisfied the ability-to-repay requirements once the creditor proves that he has in fact made a qualified mortgage.
50. A balloon loan originated through 2016 that meets the other requirements may be designated as a "qualified mortgage" if it is originated and held in portfolio by a small creditor—defined as holding less than $2 billion in assets and originating 500 or fewer first mortgages per year.
51. A negative amortization loan features initial monthly payments that are less than the actual interest due, thereby increasing the total balance of the mortgage over time. Negative amortization loans allow borrowers to make lower monthly payments in the short term in exchange for higher payments in the long term.
52. Yuliya Demyanyk, "Did Credit Scores Predict the Subprime Crisis?" Federal Reserve Bank of St. Louis, *The Regional Economist*, October 2008, http://www.stlouisfed.org/publications/re/articles/?id=963(accessed December 22, 2016).
53. Statement of Debra Still on behalf of the Mortgage Bankers Association, Subcommittee on Financial Institutions and Consumer Credit, Financial Services Committee, U.S. House of Representatives, "The Impact of Dodd–Frank's Home Mortgage Reforms: Consumer and Market Perspectives," July 11, 2012, http://financialservices.house.gov/uploadedfiles/hhrg-112-ba15-wstate-dstill-20120711.pdf (accessed December 22, 2016).
54. Fannie Mae, "Eligibility Matrix," 2013, https://www.fanniemae.com/content/eligibility_information/eligibility-matrix.pdf (accessed December 22, 2016).