The Dodd-Frank Consumer Protection Act: Consumer Protection, Predatory Lending Reforms and Fair Lending Enforcement

Melvin W. LaPrade
laprade@nurg.org

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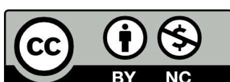
Abstract

On July 21, 2010, President Obama signed the *Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010* (Dodd-Frank). Title X of Dodd-Frank, the *Consumer Financial Protection Act of 2010*, establishment of the Consumer Financial Protection Bureau (CFPB) is among the most controversial provisions, merging consumer protection powers from existing regulatory agencies into a new Executive agency. Nearly two years after President Obama signed Dodd-Frank into law, the CFPB has fully embraced its vision to implement and enforce federal consumer financial laws to make certain that consumers have access to fair, transparent, and competitive financial products and services. Regrettably, these efforts will supply limited support for consumers already trapped in the web of foreclosure and downward spiral of economic collapse. Yet, the introduction of new consumer protections is a step in the right direction, as it sends a clear message to financial services providers that, for the first time, a single federal regulatory is committed to the task of forestalling further harm with a willingness to take innovative steps within its authority to achieve this goal.



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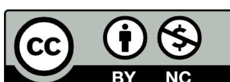
Introduction

Following what is often describe as the *Great Recession of 2008*, newly elected President Obama economic team developed and released a comprehensive regulatory reform plan in response to the financial crisis. The proposal executive summary read in part, "we must build a new foundation for financial regulation and supervision that is simpler and more effectively enforced, that protect consumers and investors, that rewards innovation and that is able to adapt and evolve with changes in the financial markets."[1] Soon after, the House of Representatives introduced and passed H.R. 4173, the Wall Street Reform and Consumer Protection Act.[2] The Senate passed its own version of financial reform, the Restoring American Financial Stability Act.[3] C-SPAN provided unprecedented gavel-to-gavel live coverage of the House-Senate Conference convening to reconcile the two bills. After heated debates and extensive lobbying, on June 25, 2010, the House-Senate Conference Committee reported out a Conference Report on H.R. 4173 enacted by both Houses of Congress. On July 21, 2010, President Obama signed the

[1] U.S. Department of the Treasury, Financial Regulatory Reform: A New Foundation: Rebuilding Financial Supervision and Regulation, Washington, DC, June 2009, available at http://www.treasury.gov/initiatives/Documents/FinalReport_web.pdf

[2] The bill passed the House of Representatives by a vote of 223 yeas to 202 nays, with all Republicans voting against passage.

[3] The bill passed the Senate by a vote of 59 yeas to 39 nays, with three Republicans voting for passage, senators Brown (MA), Collins (ME) and Snowe (ME). Democratic Senator Feingold (D-WS) voted against the bill.



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Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank).[4]

Due to political acrimony over the very existence and composition of the agency, Senate Republicans refused to allow the nomination to move forward delaying implementation of the nonbank rulemaking statutory mandate.[5] Republican Minority Leader Mitch McConnell wrote a letter to President Obama expressing "concerns about the lack of accountability in the structure of the CFPB, the powers vested in the CFPB director "without any effective checks and balances, and the "unfettered authority" of the Director over the CFPB budget. [6] In support of Senator McConnell, 44 Republican Senators signed the letter stating: "we will not support the consideration of any nominee, regardless of party affiliation, to be the CFPB director until the structure of the Consumer Financial Protection Bureau is reformed."[7]

On January 4, 2012, circumventing the Senate confirmation process and despite Republican Senate admonition, President Obama announced the "recess appointment" of

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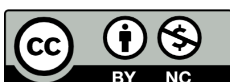
[4] The Dodd-Frank Wall Street Reform and Consumer Protection Act United States H.R. 4173, now Public Law 11-203, is title for Senator Christopher Dodd, chair of the Senate Committee on Banking, Housing and Urban Affairs, and Representative Barney Frank, chair of the House Committee on Financial Services, who both served as principle Conference Committee negotiators.

[5] By July 21, 2012, the CFPB was required to delineate the specific market segments of the nonbank consumer financial industry subjected to the CFPB nonbank supervisory program.

[6] United States Senate Office of the Republican Leader Mitch McConnell, May 2, 2011 letter to The Honorable Barack Obama, The President, available at http://moran.senate.gov/public/index.cfm?a=Files.Serve&File_id=525ebae5-7383-4456-a239-4a89c55ab5c2

[7] Ibid



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Richard Cordray as the CFPB first Director.[8] A few days later, during his 2012 State of the Union address, President Obama unambiguously articulated the purpose of the CFPB, "if you're a mortgage lender or a payday lender or a credit card company, the days of signing people up for products they can't afford with confusing forms and deceptive practices are over. Today, American consumers finally have a watchdog in Richard Corday with one job: To look out for them."[9] In existence for one year, with the appointment of a Director, and nearly two years after President Obama signed Dodd-Frank into law, the CFPB has fully embraced its vision as the first twenty-first-century regulatory consumer watchdog agency to ensure that financial market places have transparency, aligned incentives, and fair competition for the benefits of consumers and financial services providers. [10]

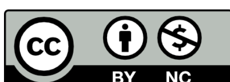
Overview of the Consumer Financial Protection Bureau

Title X of Dodd-Frank, the *Consumer Financial Protection Act of 2010*, establishment of the Consumer Financial Protection Bureau (CFPB) is among the most controversial provisions, merging consumer protection powers from existing regulatory

[8] President Obama said, "the only reason Republicans in the Senate have blocked Richard is because they don't agree with the law setting up the consumer watchdog. They want to weaken it." See, Obama names Richard Cordray consumer watchdog chief over GOP objections, Washington Post, January 4, 2012, available at, http://www.washingtonpost.com/blogs/44/post/obama-to-use-executive-power-to-name-consumer-watchdog-chief-over-gop-objections/2012/01/04/gIQAVtFXaP_blog.html

[9] Remarks by the President in Sate of the Union Address, January 25, 2012, available at, http://www.whitehouse.gov/photos-and-video/video/2012/01/25/2012-state-union-address-enhanced-version#transcript

[10] See, Lenard J. Kennedy, Patricia A. McCoy, and Ethan Bernstein, The Consumer Financial Protection Bureau: Financial Regulation for the Twenty-First Century, Cornell Law Review, available at, http://www.lawschool.cornell.edu/research/cornell-law-review/upload/Kennedy-et-al-final.pdf



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agencies into a new Executive agency.[11] Elizabeth Warren, Special Advisor to the Secretary of the Treasury on the CFPB, described the agency as the "cop on the beat to enforce the laws on credit cards, mortgages, student loans, prepaid cards, and other kinds of financial products and services."[12] Notably, a single agency will have the authority and accountability to regulate mortgage products and enforce consumer protection laws. In existence for one year, with the appointment of a Director, and nearly two years after President Obama signed Dodd-Frank into law, the CFPB has fully embraced its vision to implement and enforce federal consumer financial laws to make certain that consumers have access to fair, transparent, and competitive financial products and services.[13]

The CFPB fundamental role as principled regulator, researcher, enforcer and interpreter of consumer protection laws transformed the entire consumer protection and fair lending enforcement architecture. Dodd-Frank granted the Secretary of the Treasury "interim authority" to implement the CFPB regulatory supervision. The Secretary selected July 21, 2011 as the "designated transfer date" for the CFPB to assume rulemaking, examination authority, and regulatory oversight for a majority of consumer

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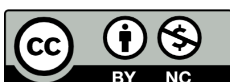
[11] The CFPB is defined an Executive agency, as described in section 105 of title 5, Unites States Code (See Section 1011 of the Act).

[12]Building the CFPB, *Letter From Elizabeth Warren, Special Advisor to the Secretary of the Treasury on the CFPB*, available at, http://files.consumerfinance.gov/f/2011/07/Report_BuildingTheCfpb1.pdf
For complete discussion of history, mission and goals of the CFPB see Elizabeth Warren congressional testimony on the agency http://www.consumerfinance.gov/speech/testimony-of-elizabeth-warren-before-the-house-financial-services-committee/, PBS interview http://www.pbs.org/newshour/bb/business/july-dec10/elizabethwarre_10-05.html;
and lecture at the Clinton School for Public Policy, http://www.clintonschoolspeakers.com/lecture/view/elizabeth-warren/

[13] Dodd-Frank, Title X Section 1021.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protection laws.[14] On that date, the agency became the exclusive federal regulator for consumer protection functions previously executed by several agencies.[15]

The creation of the CFPB was inspired to create a "Level Playing Field" where "no one can build a business model around unfair, deceptive, or abusive practices and market places that work for American consumers, responsible providers, and the economy as a whole."[16] To fulfill this assignment, the organizational structure of the CFPB includes the Offices of Financial Education[17], Fair Lending and Equal Opportunity[18], Financial Protection for Older Americans[19], Service Member Affairs,[20]

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[14] Title X, Section 1002(12).

[15] Dodd-Frank transferred all of the consumer protection functions of the Federal Reserve Board, the Office of the Comptroller of Currency, the Office of Thrift Supervision, the Federal Deposit Insurance Corporation, and National Credit Union Administration, and many of the consumer functions of the Department of Housing and Urban Development, see Designated Transfer Date, 75 Fed. Reg. 57,252, 57,252 (Sept. 20, 2010).

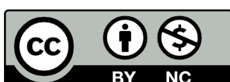
[16] CFPB, Building the CFPB: A Progress Report, July 18, 2011.

[17] Office of Financial Literacy (OFE) will be responsible for developing and implementing initiatives intended to educate and empower consumers on issues of financial literacy, Title X, Section 1013 (d).

[18] Fair Lending and Equal Opportunity (OFLEO) will provide oversight and enforcement of federal laws to ensure the "fair, equitable, and nondiscriminatory access to credit and the promotion of fair lending compliance and education," Title X, Section 1013 (e).

[19] Office of Financial Protection for Older Americans (OFPOA) will provide functions similar to the OFE but with a specific focus on senior citizens over the age of 62 and will produce recommendations on legislation to improve financial services to seniors, Title X, Section 1013 (g).

[20] Office of Service Members Affairs will have a special focus on financial literacy education for military families, Title X, Section 1013(e).



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and a Private Education Loan Ombudsman.[21] The *Research Functional Unit* will study consumer economic behavior, the markets, financial products and services, and the access of "traditionally underserved" communities to such products and services.[22] The *Community Affairs Functional Unit* will offer "information, guidance, and technical assistance regarding the offering and providing of consumer financial products or services to traditionally underserved consumers and communities."[23] A final provision calls for the creation of a Consumer Advisory Board (CAB).[24]

Through research, supervision, rulemaking, enforcement, and consumer education, the CFPB affixed new mandates, regulatory specificity, and enforcement supervision for "covered persons" under several enumerated consumer protection laws.[25] A "covered person" is any person engaged in offering or providing a "consumer financial

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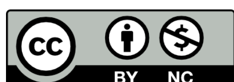
[21] The Ombudsman office serves to "receive, review, and attempt to resolve informally complaints from borrowers" of such loans, including attempts to resolve such complaints in collaboration with the Department of Education and with institutions of higher education, lenders, guaranty agencies, loan servicers, and other participants in private education loan programs. Title X, Section 1035(c).

[22]Title X, Section 1013(b).

[23] A final functional unit will document consumer grievances and direction those complaints to the appropriate federal or state agency. *Ibid.*

[24] The CAB will enlist the advise on mortgage products and policies from "experts in consumer protection, financial services community development, fair lending, and consumer financial produces or services and representatives of depository institutions that primarily serve underserved communities, and representatives of communities that have been significantly impacted by higher-priced mortgage loans, Title X, Section 1014(b).

[25] The BCFP has exclusive rulemaking authority, for large depository institutions with assets of more than $10 billion, to promulgate regulation related to enforcing "enumerated consumer protection laws" which include: the Alternative Mortgage Transaction Parity Act of 1982; the Equal Credit Opportunity Act; Fair Credit Billing Act; Fair Credit Reporting Act; Home Ownership Equity Protection Act of 1998; Home Mortgage Disclosure Act of 1995; Gramm-Leach Bliley Act; Real Estate Settlement Procedures Act of 1974; Truth in Lending Act; Truth in Savings Act; Omnibus Appropriations Act of 2009; and the Interstate Land Sale Full Disclosure Act, Title X, Section 1002(12)



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product or service" that is "offered or provided for use by consumers primarily for personal, family, or household purposes" or "delivered, offered, or provided in connection with such a financial product or service."[26] Reacting to intense pressure from the automobile trade association and concern of disruptions to the small business sector, Dodd-Frank prohibits the CFPB from exercising rulemaking, supervisory or other authority over several exempted entities.[27] The consumer protection agency receives a substantial budget and funding from the Federal Reserve budget rather than from assessments on insured depository institutions or Congressional appropriations process. [28] Even though the CFPB is a bureau within the Federal Reserve, Dodd-Frank expressly prohibits the agency from intervening in any CFPB examination, enforcement action, or rulemaking decisions.[29]

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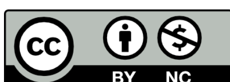
[26] The CFPB has authority over an array of consumer financial products and services, including deposit taking, mortgages, credit cards, and several others product and services. For a complete list see, "Definition of Financial Product or Service" and "Definition of Consumer Financial Product or Service", Title X Sections 1002(6), 1002(15), 1002(15)(A).

[27] Beside the exemption for automobile dealerships other jurisdiction exceptions include merchants, retailers or sellers of nonfinancial goods or services including accountants, attorneys, real estate brokers, and insurance companies, hedge fund managers and persons regulated by the 1934 Securities and Exchange Act, CFTC, or any state securities or insurance regulator, Title X, Section 1027.

[28] The BFCP budget is not to exceed 10 percent of the FRB's total operating expenses in fiscal year 2011, 11 percent for fiscal year 2012, and 12 percent for fiscal year 2013 and beyond. Annual budget adjustments are based on the employment cost index for state and federal government workers. The agency budgets are not reviewable by either the House or Senate Committees on Appropriations. In situation were funds are insufficient for the operation of the BFCP, the Director must submit a written report to the President and the Appropriations Committees of the House and the Senate, and these Committees are authorized to appropriate $200 million for each of fiscal years 2010 thru 2014, see Title X, Sections 1011-1019.

[29] The Director of the CFPB, must seek advice from the Financial Stability Oversight Council (FSOC) and individual bank regulators to ensure that proposal rules do not cause "safety-and –soundness" or other "systemic-risks concerns." On the petition of a member agency, and by a two-thirds vote, the FSOC can set aside a regulation of the CFPB, Title X, Section 1023.



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Mortgage Reform and Anti-Predatory Lending Act of 2010

Common tactics collectively known as "predatory lending," according to congressional testimony and consumer research, included a combination of aggressive marketing practices, high-pressure sales tactics and loan terms.[30] Subprime mortgage products such as hybrid and payment-option adjustable rate mortgages arcane mortgage disclosures presented confusing information, failed to classify mortgage cost, confused consumers about details of the mortgage, and omitted key factors such as prepayment penalties.[31] As described by the former head of the Federal Reserve Committee on Consumer and Community Affairs, in the prime sector "where we need supervision less, we have lots of it. In the subprime market, where we badly need supervision, a majority of loans are made with little supervision. It is like a city with a murder law, but no cops on the beat."[32]

Discretionary pricing policies and compensation structures gave mortgage brokers the discretion to originate mortgages with interest rates higher than the rate related to the

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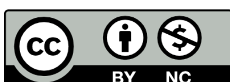
[30] Examples of predatory lending included the practice of "flipping" referring to the repeated refinancing of a mortgage. Cash strapped borrowers were typically urged to undertake such loans when faced with large consumer debt that the lenders urged be consolidated into a home secured debt. Balloon payments were lump sum payments that occurred at the end of a fixed repayment period where monthly payments had not fully amortized the loan principal. One of the most harmful tactics, identified is "equity-stripping" or "asset-based lending", when unscrupulous lenders placed homeowners with a significant amount of equity in their homes into refinanced mortgages, knowing that the loan amount was more than the borrower could financially afford, and thus was likely to result in default. See*,* S. 2415, the Predatory Lending Consumer Protection Act of 2000, 106th Cong. (2000).

[31] For review of predatory lending practices and harmful impacts factors see, S. 2405, the Predatory Lending Deterrence Act, 106th Cong. (2000); H.R. 4250, the Predatory Lending Consumer Protection Act of 2000, 106th Cong. (2000); H.R. 4213, the Consumer Mortgage Protection Act of 2000, 106th Cong. (2000); and H.R. 3901, the Anti-Predatory Lending Act of 2000, 106th Cong. (2000).

[32]Edward M. Gramlich, a Federal Reserve governor and head of the Committee on Consumer and Community Affairs, Edward M Gramlich, 2007. *Subprime Mortgages, American's Latest Boom and Bust*. Washington, D.C (The Urban Institute Press), pp. 13-18.



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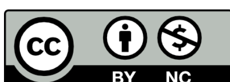
borrower's actual credit risks. This mortgage "sleight of hand" commonly compensated brokers in commission fees for "steering" borrowers into higher cost loans or adjustable-rates mortgages, a procedure so widespread practiced that "the bribe" has a technical name: a "yield spread premium" (YSP). [33] Research conducted by the Federal Trade Commission (FTC) concluded that "disclosures can confuse and even mislead consumers, distort their decisions, and disclosures that provide too much, irrelevant, or unnecessary information, can make it difficult, time-consuming, and frustrating for consumers to understand what is being conveyed and sort the important points from the minor detail." [34]

Dodd-Frank authorized the CFPB primary responsible, with broad latitude, to reconcile and integrate mortgage disclosure information under the Truth in Lending Act (TILA) with disclosure requirements of the Real Estate Settlement Procedures Act (RESPA) into a single uncomplicated disclosure system that make it possible for consumers to comprehend the unnecessarily convoluted mortgage process.[35] The CFPB introduced the *Know Before You Owe* (KBYO) campaign to remove mortgage disclosure

[33] See, Elizabeth Warren, "Mortgage brokers 'slight of hand,' *Boston Globe* (op-ed), October 2, 2007, available at, http://www.boston.com/news/globe/editorial_opinion/oped/articles/2007/10/02/mortgage_brokers_sleight_of_hand/

[34] Federal Trade Commission Bureau of Economics Staff Report, *Improving Consumer Mortgage Disclosures: An Empirical Assessment of Current and Prototype Disclosure Forms*, June 2007, available at, http://www.ftc.gov/os/2007/06/P025505MortgageDisclosureReport.pdf

[35] Title X, Sections 1032(f), 1098, 100A.



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obstructions and enable comparison shopping.[36] On July 9, 2012, after seven rounds of testing, scores of in-depth consumer interviews, and tens of thousands of individual comments to its website, the CFPB squared the differences between TILA and RESPA disclosure requirements by issuing a proposed rule for review and comment for two new mortgage disclosure forms.[37] A new Loan Estimate disclosure form replaces the RESPA Good Faith Estimate (GFE). [38] A revised Closing Disclosure form replaces the HUD-1 closing document.[39] The CFPB expects to finalized revised mortgage disclosure rules by the end of 2012. Building on the methodology used for mortgage disclosures, the CFPB recently expanded the KBYO campaign to include student loans and credit cards.

Ability-to-Repay Qualifying Mortgage Provision

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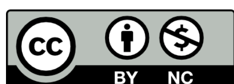
[36] The KBYO research design included quantitative test of alternate prototype disclosure forms, in-depth one-on-one interviews with consumers, and solicitation of online reviews and feedback. See, CFPB Know Before You Owe, available at, http://www.consumerfinance.gov/knowbeforeyouowe/ For review of KBYO project see, Leonard J. Kennedy et al, *The Consumer Financial Protection Bureau: Financial Regulation for the Twenty-First Century*, at 1160-1165.

[37]Bureau of Consumer Financial Protection, 12 CFR Part 1024 [Docket No. CFPB 2012-0034] RIN 3170-AA14, 2012 Real Estate Settlement Procedures Act (Regulation X) Mortgage Servicing Proposal, available at, http://files.consumerfinance.gov/f/201208_cfpb_respa_proposed_rules.pdf

[38] The Estimate form differentiates preliminary written estimates of mortgage cost from the actual final cost of the mortgage. For examples, the Loan Estimate explains whether mortgage factors can increase after closing, the frequency of changes, and maximum amounts. The lenders is also required to disclose additional information about taxes, insurance, and other property cost, and clear warnings when the mortgage includes prepayment penalty, when a prepayment penalty may be imposed, and the amounts of an balloon payments and the dates of such payments. Sample of CFBF Loan Estimate form available at, http://files.consumerfinance.gov/f/201207_cfpb_loan-estimate.pdf

[39] The disclosure form includes information on the terms of the mortgage, finance charges imposed after closing, and how they can change over the length of the loan, mortgage insurance costs and interest, and the total amount needed at closing. Sample of CFPB proposed Closing Disclosure form available at, http://files.consumerfinance.gov/f/201207_cfpb_closing-disclosure.pdf



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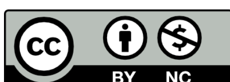
Congress initially addressed some aspects of abusive and predatory lending practice with the passage of the Home Ownership Equity Protection Act of 1994 (HOEPA). As originally enacted, HOPEA amended the TILA by prohibiting mortgage lenders from extending high-interest and high-fee home equity loans without verifying the borrower's ability to repay.[40] *Mortgage Reform Act* revisions to TILA, Regulation Z, expanded the scope of this requirement to cover all consumer credit transactions secured by a residential mortgage, not just home equity loans above the HOEPA threshold.[41] Dodd-Frank charged the CFPB to "assure that consumers receive residential mortgage loans on terms that reasonably reflect their ability to repay the loan and that the terms are understandable and not unfair, deceptive or abusive."[42]

According to a Dodd-Frank mandated the GAO report, a vast majority of mortgages would qualify as qualified mortgages (QM) loans with respect to repayment of principle, loan term of 30 years or less, restrictions on balloon payments, and for full

[40] HOPEA benchmarked the high-cost trigger for first lien on a principal dwelling at 8 percent points above the comparable-term Treasury note, and 10 percentage points for subordinate lien loans. See, 73 Fed. Reg. at 44,546, 44,603; 12 C.F.R. Section 226.34(a)(4)(ii)(A), effective October 1, 2009.

[41] Dodd-Frank Section 1022(b)(2)(A)(i)

[42] The *Mortgage Reform Act* prohibits the establishment of usury limits, but indirectly regulated mortgage products by imposing strict constraints with the goals of curbing predatory lending and increasing mortgage disclosure requirements. Title XIV, Section 1402 and Title X, Section 1027(o).



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documentation of borrower income and other financial resources. [43] The GAO study estimated that, "using an illustrative standard of 41 percent or less for the QM criterion for debt-to-income ratio (DTI)," more than half of the mortgages originated satisfied CFPB proposed QM criterion; "however, a sizable proportion –from 25 to 42 percent- would not have." [44] GAO analysis based on the racial composition of the neighborhood found the percentage of mortgage originations meeting the proposed QM criterion similar to the percentage for all borrowers.[45]

Qualified Residential Mortgage Provision

FDIC Chairman Sheila Bair described the Dodd-Frank risk retention rule as a means to "address a key driver of the housing crisis: misaligned economic incentives arising from the widespread use of private securitization to fund mortgage lending." [46] Fundamentally, she add, "this rule is about reforming the 'originate-to-distribute' model for securitization, and realigning the interest in structured finance towards long-term,

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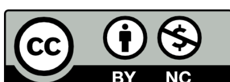
[43] The analysis is based on mortgages from CoreLogic, Inc. proprietary database which captures 60 to 65 percent of the mortgages purchased by Fannie Mae and Freddie Mac, 90 percent of mortgages with government-insurance or guarantees, and roughly 50 percent of mortgage originated in the subprime sector. See, United States Government Accountability Office, Report to Congressional Committees, *Mortgage Reform Potential Impact of Provisions in the Dodd-Frank Act on Homebuyers and the Mortgage Market*, July 2011(GAO-11-656), available at, http://www.gao.gov/new.items/d11656.pdf

[44] GAO-11-656, pp. 21-26.

[45] GAO Report Appendix II, Ibid.

[46] FDIC Press Release, "Chairman's Bair's Statement on Credit Retention Notice of Proposal Rulemaking", March 29, 2011, available at, http://www.fdic.gov/news/news/press/2011/statement03292011.html



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sustainable lending." [47] Under the rule, the *Investor Protection and Securities Reform Act of 2010,* financial firms must retain not less than a five percent economic interest in the assets collateralizing the asset--back securities to ensure that securitizes and originators keep "skin in the game."[48] A key exception from the "five percent rule" exempts securities collateralized exclusively of so-called "qualified residential mortgages" (QRM).

The Financial Stability Oversight Council (FSOC), of which the CFPB Director is a member, coordinated joint federal rulemaking for credit retention exemption meeting the QRM standard. [49] Proposed standards reflected an understanding that Congress intended that risk retention be the norm, with only the best loans exempt." [50] For risk retention to be successful, "there needs to be a sufficient quantity of non-QRM loans of acceptable quality, so that non-QRM securities can achieve a reasonable degree of liquidity. If non-QRM loans are relatively scarce, their costs will be higher and their availability will suffer." [51] On April 29, 2011, after conducting an investigation to determine the performance of conventional single-family mortgages acquired by Fannie

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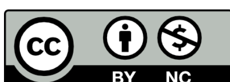
[47] Ibid

[48] Title IX, Investor Protection and Securities Reform Act of 2010, Subtitle D, Section 941.

[49] Dodd-Frank, section 941, requires the federal regulatory agencies, OCC, Federal Reserve, FDIC, SEC, FHFA, and HUD joint rulemaking authority to define and create an exemption for qualified residential mortgages. See, Credit Risk Retention, 76 Fed. Reg. 24,090 (April 29, 2011).

[50] Statement of Patrick J. Lawler, Chief Economist, Federal Housing Finance Agency, Before the U.S. House of Representatives Subcommittee on Capital Markets. Insurance, and Government-Sponsored Enterprises, "Understanding the Implications and Consequences of the Proposed Rule on Risk Retention", April 14, 2011, available at http://www.fhfa.gov/webfiles/21113/RiskRetentionLawler41211.pdf

[51] Ibid



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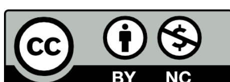
Mae or Freddie Mac that would have met a product-type QRM loan standard compared to the volume and performance of loans that would not have met the requirements. [52] The joint agencies published a notice for public comment on the proposed underwriting criteria for QRM designation:

1. Loan must be a closed-end, first-lien, owner-occupied mortgage.
2. Home purchaser must make a minimum down payment of 20 percent of the purchase price plus closing costs. Subordinate financing is not allowed on purchase loans. Rate and term refinances and cash-out refinances must have combined loan-to-value ratios (LTVs) no greater than 75 percent and 70 percent, respectively.
3. Borrower's mortgage debt payment cannot exceed 28 percent of income and total debt payments cannot exceed 36 percent of income.
4. Loan terms cannot exceed 30 years, and interest-only, negative-amortization, balloon loans, and prepayment penalties are not eligible. Points and fees cannot exceed three percent of the loan amount, and there are payment caps on adjustable rate mortgages to mitigate payment shocks.
5. Borrowers must be current and cannot have missed two consecutive payments on any consumer debt in the past two years; and cannot have had a bankruptcy, foreclosure or short sale within the past three years.
6. Servicing standards must incorporate loss mitigation practices and address subordinate liens.[53]

The proposed QRM rule received harsh criticism and an outpouring of resistance

[52] The investigation defined a product-type QRM mortgage as a first-lien mortgage that is for an owner-occupied with fully documented income, full amortizing with a maturity that does not exceed 30 years and, in the case of adjustable-rate-mortgage (ARMs), have an interest rate reset limit of 2 percent annually and a limit of 6 percent over the life of the loan. A PTI/DTI qualified resident mortgage has a borrower's ratio of monthly housing debt to monthly gross income that does not exceed 28 percent and a borrower's total monthly debt to monthly gross income that does not exceed 36 percent. An LTV ratio qualified residential mortgage must meet a minimum LTV ratio that varies according to the purpose for which the mortgage was originated. For home purchase mortgages, rate and term refinances, and cash-out refinances, the LTV ratio are 80, 75, and 70 percent, respectively; A FICO qualified resident mortgage has a borrower's FICO score greater than or equal to 690 at the origination of the loan. Federal Housing Finance Agency, Qualified Residential Mortgages (Mortgage Market Note 11-02) April 11, 2011, available at, http://www.fhfa.gov/webfiles/20686/QRM_FINAL_ALL.pdf

[53] Joint Agencies Proposed QRM rule available at, http://www.sec.gov/rules/proposed/2011/34-64603.pdf



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from the Coalition for Sensible Housing Policy (the Coalition), a broad-based lobbying collation, who questioned the approach taken and warned of probable unintentional consequences.[54] The Coalition called the proposed QRM rule "unduly narrow" and that the rule would particularly harm first-time homeowners and traditionally underserved communities. Coalition members were "particularly concern about the consequences of establishing a high down payment requirement" as well as "unnecessarily restrictive debt-to-income and rigid credit history requirements." [55] In a joint letter from the Coalition, and a bipartisan group of 44 Senators and 282 members of the House of Representatives members urged federal regulators to redesign a QRM that will support, not hinder, the housing recovery, attract private capital and minimize future defaults without shutting responsible borrowers out of the housing market.[56] Moody's Analytics release a report concluding that the proposed QRM risk-retention rules are "unlikely to meaningfully improve securitization's incentive problem. At the same time, they will raise borrowing costs significantly for many homebuyers and make loans difficult to get for others." [57] James M. Guttentag, an emeritus profession of finance at the Wharton

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[54] The Coalition for Sensible Housing diverse membership included the American Bankers Association, Black Leadership Forum, Center for Responsible Lending, Consumer Federation of America, Mortgage Bankers Association, NAACP, National Association of REALTORS, National Fair Housing Alliance, National Urban League, and the U.S. Conference of Mayors.

[55] Coalition for Sensible Housing Policy, Proposed Qualified Residential Mortgage Definition Harms Creditworthy Borrowers While Frustrating Housing Recovery, available at, http://www.sensiblehousingpolicy.org/uploads/Coalition_for_Sensible_Housing_Policy_-_QRM_White_Paper.pdf

[56] For copy of letter, see http://isakson.senate.gov/documents/House%20QRM%20Letter.pdf

[57] Mark Zandi and Cristian Deritis, "Reworking Risk Rentention", Moody's Analytic Special Report, June 20, 2011, available at, http://www.economy.com/mark-zandi/documents/Reworking-Risk-Retention-062011.pdf

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School of the University of Pennsylvania, argues “the 20% down payment and strict credit requirements would unfairly make future borrowers pay for the mortgage industry’s excess in 2005, 2006, and 2007.” [58]

During her final public appearance as head of the FDIC, Shelia Bair expressed regret over QRM provision. “Everyone, it seems, believes that their mortgage should receive QRM status”, she said. However, “this small extra cost is the price we must pay in the short term to put a little equity behind these mortgages, to ensure that incentives are properly aligned, and to avoid a costly repeat of the mortgage crisis in the future.”[59] Congress Barney Frank, whom the landmark legislation bears his name, said, the notion that you cannot have mortgages with securitization, and you can’t have securitization if you have risk retention is clearly wrong.” Addressing comments that risk-retention will disrupt the market, Frank cynically agreed, saying, “Yes, it’s disruptive because we has to disrupt a rotten system, he continued, “we had to disrupt a system which collapsed and it collapsed because risk was made to appear to disappear.” Frank did support lowering the QRM down payment provision, to the mid-single-digits, but overall he said making it harder to obtain a mortgage loan could be a necessary consequence of improving financial stability.[60]

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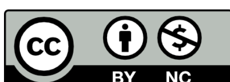
[58] Revitalizing the Private Mortgage Market: ‘Skin in the Game’ and the Consequences for Future Homebuyers: Knowledge@Wharton, available at, http://knowledge.wharton.upenn.edu/article.cfm?articleid=2775

[59] FDIC Chairman Bair remarks at the National Press Club, available at, http://www.c-span.org/Events/National-Press-Club-Luncheon-with-FDIC-Chair-Sheila-Bair/10737422481-1/

[60] Barney Frank, “Report from the Front Line, April 11, 2011, National Press Club, available at, http://www.press.org/news-multimedia/news/rep-barney-frank-says-financial-reform-holding-very-well



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Federal regulators recently confirmed that the publication of final QRM rules for credit retention exemptions would not occur until after CFPB finalized its rulemaking on QM loans. It is apparent that the extension of the CFPB comment period on a final QM ability-to-pay qualify rule will further postponed the effectual data of the QRM rule well beyond the April 2011 date originally visualized by Congress. Even if completed by 2012, Dodd-Frank imposes a mandatory one-year delay before the final QRM requirement can take effect, delaying enactment well into 2014. Within five years after the QM and QRM loans become effective, the CFPB is required to publish a report assessing the effectiveness of the final rules.[61]

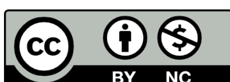
Impact of Dodd-Frank on Fair Lending Enforcement

Dodd-Frank empowers the CFPB Office of Fair Lending and Equal Opportunity (OFLEO) to prohibit mortgage originators from employing "abusive or unfair lending practices that promote disparities among consumers of equal credit worthiness but of different race, ethnicity, gender, or age."[62] CFPB has the authority to implement and enforce fair lending policy under the Equal Credit Opportunity Act (ECOA). [63] Broadly speaking, three legal theories of mortgage lending discrimination provide the foundation for ECOA enforcement. Cases of alleged "intentional discrimination" account for most of the legal actions. In cases of alleged "disparate treatment" borrowers are treated

[61] Title X, Section 1023(d)

[62] Title XIV, Section 1403

[63] Title X, Section 1013(e))



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differently because of their race, for example, an African American applicant receives a higher-cost loan than a similar situation white borrower. Finally, in cases of "disparate impact", a facially neutral policy may violate fair lending laws if it has a disproportionate effect.

While it always has been clear that the ECOA prohibited intentional discrimination and disparate treatment, it has been less clear whether those statutes also apply to claims based on disparate impact analysis. In 1994, Attorney General Janet Reno introduced the "disparate impact theory" approach towards legal interpretations of fair lending enforcement. [64] The use of the disparate impact theory or "the effect test" is contentious because it borrowed heavily from the legal framework of a two decades old *Joint Policy Statement on Discrimination*.[65] The *Joint Statement* ascertained that lending policies and practices "that are neutral on their face and that are applied equally may still, on a prohibited basis, disproportionately and adversely affect a person's access to credit." During the Bush Administration, however, there was a common skepticism about the efficacy of such fair lending enforcement.[66] Despite extensive evidence demonstrating

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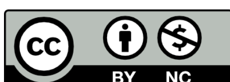
[64] On July 14, 1994, Attorney General Janet Reno sent a memorandum to all agencies to "ensure that the disparate impact provision are fully utilized." See, Memorandum for Heads of All Departments and Agencies That Provide Federal Assistance, from Attorney General Janet Reno, regarding "Use of Disparate Impact Standard in Administrative Regulation under Title VI of the Civil Rights Act of 1964" (July 14, 1994), pp. 1-2.

[65] *Joint Policy Statement on Discrimination and Lending*, available at http://www.fdic.gov/regulations/laws/rules/5000-3860.html#fdic5000policyso3

[66] For reviews of the DOJ Civil Rights Division enforcement efforts see, GAO (2009), Fair Lending: Data Limitation and the Fragmented U.S. Financial Regulatory Structure Challenge Federal Oversight and Enforcement Efforts, available at, http://www.gao.gov/new.items/d09704.pdf; and GAO (October 2009), U.S. Department of Justice, Information on Employment Litigation, Housing, and Civil Enforcement, Voting, Sections' Enforcement Efforts from Fiscal Years 2001 through 2007, available at, http://www.gao.gov/new.items/d1075.pdf



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possible violations of ECOA lending practices, the Bush Era DOJ did not pursue a single case under the disparate-impact theory.[67]

Early in his administration, President Obama established an interagency Financial Fraud Enforcement Task Force to deal with both existing and emerging issues in the face of the extraordinary events of the financial crisis. As part of an expansion of the Civil Rights Division, the DOJ created a new Fair Lending Unit, spotlighting it efforts on mortgage steering, reverse redlining, and discretionary pricing policies. [68] Assistant Attorney General Thomas E. Perez, head of the Fair Lending Unit, explained we "will use every tool" in their arsenal to combat lending discrimination. This includes the use of disparate impact theory "which is a critical tool in our law enforcement arsenal, a tool that has been accepted unanimously by the courts, and a tool that the career staff was discouraged from using" in cases for many years.[69] On April 18, 2012, the CFPB published a *Bulletin on Fair Lending*, warning that the "legal doctrine of disparate impact remains applicable" and the CFPB "will consider evidence of the disparate impact

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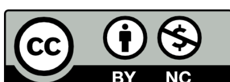
[67] See, The Future of Fair Housing, Report of the National Commission on Fair Housing and Equal Opportunity, available at www.nationalfairhousing.org/NationalCommission/FutureofFaifHousingEnforcement.html

[68] The Division hired a Special Counsel for Fair Lending, a senior position in the Office of the Assistant Attorney General, to ensure that fair lending issues receive immediate attention and high priority. The Unit is comprised of three economists, a math statistician and 20 additional staff members who devoted a significant portion of their time to fair lending cases. See, Assistant Attorney General Thomas E. Peres Testifies Before the House Subcommittee on the Constitution, Civil Rights and Civil Liberties, April 29, 2010, available at www.justice.gov/crt/speeches/2010/crt-speech-100429.html

[69] Thomas E. Perez, Remarks delivered at Howard University School of Law, Clarence Clyde Ferguson, Jr. Civil Rights in 2011 and Beyond, available at http://www.law.howard.edu/1437



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doctrine as one method of providing lending discrimination under the ECOA and its implementing rule Regulation B."[70]

On January 20, 2012, in accordance with Dodd-Frank, the CFPB and DOJ signed a "Memorandum of Understanding" agreeing to consult and coordinate with one another on parallel fair lending investigations.[71] In administrative and adjudication proceedings or court actions, the OFLEO may grant appropriate legal or equitable relief, including civil money penalties, damages, restitution, refunds and other relief.[72] OFLEO also has litigation authority if a person violates federal consumer financial law, and may bring a civil action, in its own name, to impose a civil penalty or seek other appropriate legal and equitable relief, including the imposition of cease-and-desist order and other penalties.[73] The CFPB splits enforcement of the ECOA while DOJ retains primary enforcement authority over the Fair Housing Act.[74]

The Use of Disparate Impact in Fair Lending Acts

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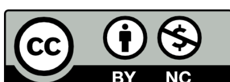
[70] The bulleting placed emphasis on that portion of the ECOA that reads the "availability of credit often determines an individual's effective range of social choice and influences such basic life matters as selection of occupation and housing. Accordingly, "without nondiscriminatory access to credit, consumers face obstacles in obtaining to housing." CFPB Bulletin 2012-04 (Fair Lending), April 18, 2012, available at, http://files.consumerfinance.gov/f/201404_cfpb_bulletin_lending_discrimination.pdf

[71] Title X, Section 1054(d)(2)(B). Also see, Memorandum of Understanding between the Consumer Financial Protection Bureau and The United States Department of Justice, January 20, 2012, available at, http://files.consumerfinance.gov/f/2012/01/CFPB-DOJ-MOU.pdf

[72] Dodd-Frank grants OFLEO authority to investigate potential violations, obtain documents and information, inspect and copy records, and compel statement and testimony Title X, Section 1052.

[73] Title X, Sections 1052, 1053, 1054, and 1055

[74] Title X, Section 1056



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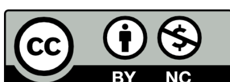
The first example of "dusting-off" of the disparate impact framework came with the announcement of a $6.1 million settlement with two subsidiaries of American International Group Inc. (AIG), the recipient of over $180 billion in assistance from the Federal Reserve and the Treasury. [75] A year later, in the largest residential fair lending settlement in history, the DOJ reached a $335 million agreement with Countywide Home Loans. Evidence of Countrywide "pattern and practice" of discrimination was first disclosed in a 2007 Federal Reserve investigation disregarded by the Bush Admistration DOJ.[76] Upon reassessment, the Obama Justice Department discovered African American and Hispanic borrowers, according to the complaint, "were charged higher fees and interest rates because of their race or national origin, and not because of the borrowers' creditworthiness or other objective criteria related to borrower risk." To resolve the complaint, Bank of America, the parent company of Countrywide, agreed to pay restitution and penalties to 200,000 identified African American and Hispanic borrowers who were victims of discriminatory conduct, including more than 10,000 African-

[75] Specifically, the complaint accused two AIG mortgage lenders, Federal Savings Bank (FSB) and Wilmington Finance Inc. (WFI), of having lending policies with a "pattern and practice of discrimination" where mortgage lenders charged African Americans higher fees on wholesale mortgages by steering them into higher cost mortgage products. The DOJ consent order requires AIG to establish monitoring program to detect difference in broker fess by race, to establish a $6.1 million settlement fund to pay claims of borrowers identified by the DOJ, and must donate at one million dollars to qualified organizations to provide financial educational programs targeted at African American borrowers. Department of Justice Office of Public Affairs, Press Release, March 4, 2010, Financial Fraud Enforcement Task Force Announces Settlement with AIG Subsidiaries to Resolve Allegations of Lending Discrimination, available at, http://www.justice.gov/opa/pr/2010/March/10-crt-226.html

[76] At the time, the Federal Reserve of San Francisco analysis identified "statistically significant pricing disparities by race and ethnicity in over ten Metropolitan Statistical Areas. "After a thorough consideration" of their findings and Countrywide's response, the "Federal Reserve concluded that there was reason to believe that Countrywide Home Loans had engaged in a pattern or practice of discrimination in loan pricing on the basis of race and ethnicity. Accordingly, the matter was referred to the Department of Justice on March 5, 2007." See, Summary of the Federal Reserve's Pricing Review of Countrywide, available at https://www.documentcloud.org/documents/279013-fed-on-cfc-charging-minorities-more.html



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American or Hispanic borrowers who – despite the fact that they qualified for prime loans – were steered into subprime loans. [77]

During the announcement of the settlement, Attorney General Eric Holders said, “today's settlement makes clear that today's Justice Department – and our law enforcement and government partners – will not hesitate to move aggressively in holding lenders – including the nation's largest – accountable for discrimination and financial misconduct. We are committed to protecting the sacred rights, and best interests, of the American people – and to ensuring equal opportunity through the vigorous enforcement of our civil rights laws.” [78] Holder warned the “Justice Department will continue to vigorously pursue those who would take advantage of certain Americans because of their race, national origin, gender, or disability.”[79]

The American Bankers Association (ABA) expressed concerns “about the foundation for, and ramifications of, certain contested credit discrimination claims.” In particularly, the ABA articulated distress regarding “statements and actions that assert enforcement of statutory fair lending obligations using the disparate impact, or effects discrimination doctrine. This doctrine, according to the ABA, “seeks to impose liability on lenders for statistical disparities in outcomes that are not based on any demonstration

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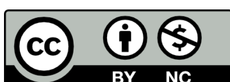
[77] Department of Justice News Release, December 21, 2011, Justice Department Reaches $335 Million Settlement to Resolve Allegations of Lending Discrimination by Countrywide Financial Corporation, available at, http://www.justice.gov/opa/pr/2011/December/11-ag-1694.html

[78] Attorney General Eric Holder Speaks at the Countrywide Financial Corporation Settlement Announcement, available at, http://www.justice.gov/iso/opa/ag/speeches/2011/ag-speech-1112211.html

[79] Ibid



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of illegal intent or differential treatment."[80] The banking trade group released a white paper urging federal regulators to "stand down from applying a disparate impact doctrine approach to fair lending supervision or enforcement" asserting that the use of disparate impact was based on "unsupported legal theory, yet carries real consequences for banks and consumers that detract from legitimate fair lending efforts."[81]

Most recently, on July 12, 2012, the DOJ announced a $175 million resolution with Wells Fargo, the largest mortgage lender in the country. The DOJ cited the fact that Wells Fargo previously was subject to the exclusive regulatory authority of the OCC. However, "as of July 21, 2011, Wells Fargo is subject to the regulatory authority of the OCC and the CFPB." Accordingly, under the CFPB disparate impact theory, "facially neutral practices" could violate the ECOA if it has a disproportionate effect on members of a protected class. In this case, according to the DOJ, even if Wells Fargo discretionary pricing policies and practices were devoid of a knowingly discriminatory intention, they had a disparate impact:

"Wells Fargo had information about each borrower's race and national origin. Wells Fargo also knew or had reason to know based on its own internal monitoring and reporting that its policies of giving unguided discretion to its loan originators was resulting in discrimination… Even when Wells Fargo had reason to know there were disparities based on race and national origin, however, Wells Fargo did not act to determine the full scope of these product placement disparities, nor did it take prompt and

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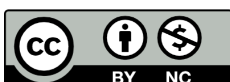
[80] Frank Keating, President and CEO, American Bankers Association, July 18, 2012, Letter to Honorable Ben S. Bernanke, Chairman Board of Governors of the Federal Reserve System, available at, http://www.aba.com/Issues/LetterstoCongress/Documents/CoverLettertoFairLendingWhitePaper.pdf

[81] ABA White Paper, Disparate Impact Under FHA and ECOA: A Theory without a Statutory Basis, available at, http://www.buckleysandler.com/uploads/36/doc/disparateimpactwhitepaper.pdf



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effective action to eliminate those disparities."[82]

Richard Cordray, Director of the CFPB, reiterated the agency's position on the use of the disparate impact theory during a major keynote address to a housing advocate group. He resolutely made known that disparate impact has been the "law of the land for more than twenty years" and the CFPB will "use all available legal avenues", including disparate impact, to pursue lenders who practices discriminate against consumer. In 1994, he said, "the Department of Justice and several other federal agencies—including every one of the federal prudential regulatory agencies—collaborated on a joint policy statement" and although "the Consumer Bureau did not exist at the time it was issued, we concur in its recognition of the disparate-impact doctrine."[83] "We want consumers to avoid the marketplace's silent pickpocket -- discrimination," he said. "We cannot afford to tolerate practices, intentional or not, that unlawfully price out or cut off segments of the population from the credit markets."[84] Testifying before a House Committee on Oversight & Government Reform hearing entitled *Credit Crunch: Is the CFPB Restricting Consumer Access to Credit?* He adamantly defended his agency's implementation and oversight of the ECOA, including the use of the disparate-impact

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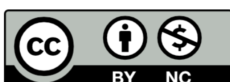
[82] Ibid

[83] See, prepared Remarks by Richard Cordray at the National Community Reinvestment Coalition, April 18, 2012, available at, http://www.consumerfinance.gov/speeches/prepared-remarks-by-richard-cordray/

[84] Ibid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doctrine. [85]

State Preemption and the Role of State Attorneys General

As the chief law enforcement officers of the state, the Attorneys General (AG) assumes primary authority for carrying out consumer protection and fair lending enforcement at the state level. Prior to enactment of Dodd-Frank, federal regulators nullified and "hamstrung" the Attorneys General customary and vital role in ensuring fair lending by preemption of state authority.[86] The Supreme Court reiterated OCC regulatory authority over state mortgage lending enforcement in *Watters v. Wachovia*. [87] Similarly, in case after case, the courts invalidated local predatory lending laws.[88] The CFPB and National Association of Attorneys General (NAAG) reached agreement on a *Joint Statement of Principles on Consumer Financial Protection* (Dodd-Frank Joint

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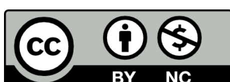
[85] House Committee on Oversight & Government Reform, Credit Crunch: Is the CFPB Restricting Consumer Access to Credit? http://oversight.house.gov/hearing/credit-crunch-is-the-cfpb-restricting-consumer-access-to-credit/

[86] For example, the OCC preemption rule provides that state laws do not apply to national banks if they "obstruct, impair, or condition a national bank's exercise of its federally authorized lending, deposit-taking, and other powers." The "vistorial powers rule" provides that the OCC's regulatory authority over national banks are "exclusive with respect to the content and conduct of activities that are authorized under federal law as part of, or incidental to, the business of banking." For review see , the Office of the Comptroller of the Currency, *Preemption and Visitorial Powers*, OCC 2004-6, January 13, 2004, available at, http://www.occ.treas.gov/news-issuances/bulletins/2004/bulletin-2004-6.html

[87] *Watters v. Wachovia Bank, N.A.,* 550 U.S. 1, 127 S. Ct. 1559 (2007); For review and impact, see Elizabeth R. Schiltz, "Damming the Watters: Channeling the Power of Federal Preemption of State Consumer Bank Laws," Florida State University Law Review (vol. 35:893), available at, http://www.law.fsu.edu/journals/lawreview/downloads/354/schiltz.pdf

[88] See, *American Financial Services Ass'n v. City of Oakland* 104 P.3d 813 (Cal. 2005) and City of Dayton v. State 813 N.E.2d 707 (Ohio Ct. App. 2004).



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Statement).[89] Amongst other things, the CFPB and NAAG agreed to develop joint training programs and share information about developments in federal and state consumer financial laws, share information, data, and analysis, engage in regular consultation to identify mutual enforcement priorities, including by joint or coordinated investigation of wrongdoing and coordinated enforcement actions.

In keeping with the decision in *Barnett Bank v. Nelson*, the OCC Comptroller maintains the power of preemption, but only on a "case-by-case basis."[90] However, preemption determinations are not valid unless the state law has a "discriminatory effect" or the state law "prevent or significantly interfere" with the lending institution ability to conduct business, in accordance with the *Barnett Bank* "Supremacy Clause" standard. The National Association of Attorneys General publication *Wall Street Reform and Consumer Protection Act (Summary for Attorneys General)* notes:

"There are two important facets to [Dodd-Frank] adoption of the *Barnett* standard that will assist states in being more successful in preemption disputes. First, the adoption of the Barrett standard makes every preemption decision a "conflict" decision, rather than a "field preemption" decision, and thus narrows the possible theories that proponents of preemption may pursue. Second, by providing that state laws are preempted "only if" they fall into one of the [prohibited] categories, Congress has established a presumption against preemption. This amount to a substantial change because, prior to [Dodd-Frank], courts hearing national banks' challenges to state banking regulation frequently presume state laws to be invalid. This presumption in favor of preemption yielded preemption of state laws regulating the business of banking even when there was no apparent conflict

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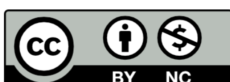
[89] See, U.S. Department of the Treasury Press Center, "Consumer Financial Protection Bureau and National Association of Attorneys General Presidential Initiative Working Group Release Joint Statement of Principles, April 11, 2011, available at http://www.treasury.gov/press-center/press-releases/Pages/tg1134.aspx

[90] Dodd-Frank requires the OCC Comptroller to conduct a review of each preemption determination through public notice and common within five years after the determination to make a determination whether to continue or rescind the determination. The Comptroller of the OCC must make a preemption determination and cannot delegate this authority to any other officer or employee of the OCC. Title X 1044.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with federal law or national bank powers. Now, under the Act, the burden is placed on the proponents of preemption to establish that the state law discriminates against national banks, conflicts with national bank powers, or is preempted by some other federal statute. The adoption of the Barnett standard will not prevent the preemption of state actions against national banks, but it does establish a standard by which banks will bear the burden of explaining why they should not have to abide by individual state laws."[91]

Dodd-Frank bluntly invalidates the authority of federal preemption of subsidiaries of federal financial institutions granted in the *Watters v. Wachovia* court ruling. State laws, will now apply to a bank subsidiary "to the same extent that State consumer financial law applies to any person, corporation, or other entity subject to such State law."[92] This provision gives state AG offices the right not only to enforce their own state consumer protection laws against national banks and thrifts, but also to enforce the rules and regulation of the CFPB. However, the AG can only enforce CFPB regulations, not Title X, against national banks and federal thrifts.[93] According to NAAG, Dodd-Frank amendments to the National Bank Act and Home Owners' Loan Act empowers "states to retain the autonomy and authority to enact consumer protection laws to the standards they feel necessary without any automatic imposition of an enforcement ceiling."[94]

Conclusion

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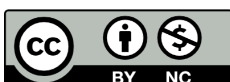
[91] National Association of Attorneys General, Wall Street Reform and Consumer Protection Act: Summary for Attorneys General, Prepared by the Presidential Imitative Working Group, p.11, available at http://www.naag.org/assets/files/pdf/pubs/wall-street-reform-UB.pdf

[92] Title X, Section 1044(a)

[93] Title X, Section 1042

[94] NAAG Summary, p. 9



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On July 30, 2012, the CFPB released its Semi-Annual Report highlighting the agency's efforts during the first half of 2012. According to the report, the CFPB "has used the tools at our disposal for the benefit of consumers in the past year, and we pledge to continue to do so as we work to promote a transparent, fair, competitive consumer financial marketplace."[95] Regrettably, these efforts will supply limited support for consumers trapped in the web of foreclosure and downward spiral of economic collapse. Yet, the introduction of new consumer protections is a step in the right direction, as it sends a clear message to financial services providers that, for the first time, a single federal regulatory is committed to the task of forestalling further harm with a willingness to take innovative steps within its authority to achieve this goal.

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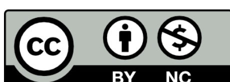
[95] Semi-Annual Report of the Consumer Financial Protection Bureau (January 1-June 30, 2012), available at http://files.consumerfinance.gov/f/201207_cfpb_Semi-Annual_Report.pdf



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