Title XIV — The Mortgage Reform and Anti-Predatory Lending Act:
The Past, Present, and Future of Anti-Predatory Lending Protections

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A subprime loan is defined as a high-cost loan for borrowers with weak or non-existent credit, low income, or high debt. Though the idea of lending to low-income, high-risk candidates had been in existence since the 1930s, the subprime mortgage market expanded exponentially during the 90's housing boom: Between 1993 and 2005, the subprime lending market grew at an annual rate of 26 percent (Bostic et al, 2010, p. 1). Reassured by steady home price increases, the mortgage lending industry began to drift from previous loan quality standards, as riskier subprime loans were more likely to be sold and securitized for more money on Wall Street. It was undoubtedly a gamble, but the opportunity for profits was tangible, and the risks seemed far off. The government and the Federal Reserve, then under the chairmanship of Alan Greenspan, had encouraged lenders to provide subprime alternatives to the traditional fixed-rate mortgages. The Department of Housing and Urban Development even enacted an "affordable housing mandate" on Government Sponsored Enterprises, Fannie Mae and Freddie Mac (Mian et al, 2010, p. 6). As subprime loans do make credit available to larger group of consumers, the benefits of lax regulation were quickly incorporated into political platforms built on promises of increased home ownership, sure financial growth, and the American dream.

However, as the subprime mortgage market rose so did allegations of predatory tactics or predatory features in loans. Despite the difficulty in neatly summarizing predatory lending, Engel and McCoy (2007) offered a wide definition in their paper on Wall Street financing of predatory loans: (1) loans structured to cause disproportionate harm to borrowers; (2) rent-seeking; (3) illegal fraud or deception; (4) other information asymmetries favoring brokers or lenders; (5) mandatory arbitration clauses; (6) lending discrimination; and (7) servicing abuses. Basically, mortgage loans with a predatory nature utilize manipulation and misinformation in order to generate the highest amount of revenue for the broker or lender. This is usually to the disadvantage of the consumer, who often enters into the loan without full knowledge, only to be surprised later on by the extent or appearance of terms. In fact, evidence has proven that predatory lending resulted in a higher number of foreclosures in a shorter period (Keyfetz, 2005).

Government efforts to limit certain lending maneuvers date back to 1968, with the enactment of the Truth in Lending Act, which required specific loan term disclosures. Consumer protections have continued since then with federal legislation, such as the Home Ownership Equity Protection Act of 1994, which banned certain loan terms and lending practices and enhanced previous TILA disclosure rules for defined "high cost mortgages;" and the Secure and Fair Enforcement for Mortgage Licensing Act of 2008 (the SAFE Act), which improved underwriting standards with the establishment of a registration system for mortgage originators. In addition, some states have also instituted anti-predatory lending laws, ranging from those barring specific provisions to more general legislation.

In July of 2010 action to reaffirm HOEPA, as well as create wider sanctions and stronger protections, was taken with the passage of the Dodd-Frank Wall Street Reform and Consumer Protection Act. More specifically, it was Title XIV—The Mortgage Reform and Anti-Predatory Lending Act that sought to insure borrowers: from the delineation and prohibition of certain, troubling loan terms to the delegation of enforcement responsibility to the Bureau of Consumer Financial Protection, an agency created in Title X of the Bill.

Yet Title XIV mostly reiterates protections already existing in many states rather than introducing new, stronger restrictions on predatory lending terms and tactics. Recent research has shed new light on the impact of certain state anti-predatory lending laws in reducing loan default rates, usually with more success than federal regulators. Considering the newly opened opportunity for increased state regulatory responsibility with the 2009 *Cuomo vs. Clearing*

House Supreme Court decision, Title XIV may overshadow (or preempt) important state powers to the detriment of consumers. As some states still have yet to enact strict anti-predatory lending laws, a regulatory foundation must be built on the federal level to ensure each state meets minimum standards. Still, the establishment of additional, more stringent protections from predatory loans may be best left in the hands of the states themselves, where specific examples have proven such regulations may be better executed and enforced.

As was mentioned above, the Truth in Lending Act of 1968 was the first instance in which measures were taken by the federal government to ensure “the informed use of consumer credit by requiring disclosures about its terms and costs.” Though not anti-predatory lending in nature, the Act did ensure the protection~~s~~ of consumers about to enter into credit agreements. In “Subpart C—Closed-End Credit,” the Act required creditors to make specific “conspicuous” disclosures as to the annual percentage rate of a loan before “consummation of the transaction.” “Subpart E—Special Rules for Certain Home Mortgage Transactions” provided limitations on loans of specified amounts. One of the most notable stipulations of TILA was a provision giving homeowners facing foreclosure the right to cancel predatory loans up to three years after the transaction, provided that the mortgage lenders did not offer the required disclosures at the time of the signing of the loan. Creditors who agreed to rescind the loan (or were forced to do so in court) had to also cancel their lien on the property under the statute, enabling homeowners to avoid foreclosure by refinancing to pay off the remainder of their loan. Over the years, this provision has seen continued use by lawyers and organizations working in the interest of homeowners to fight predatory loans and guarantee transactions favorable to the interest of consumers (Pugh, *McClatchy*).

Yet many needed measures were absent from TILA, including provisions to prevent market failures that lead to abusive lending tactics (Keyfetz, 2005). Such statutes would not be adopted for two decades, though additional steps were taken to continue with the TILA standards of full loan term disclosure with the Real Estate Settlement Procedures Act of 1974. RESPA required that loan originators provide borrowers with a "Good Faith Estimate" highlighting key loan terms and costs, a standard that was most recently revised in 2009.

The first federal legislation to move toward anti-predatory law was the Home Ownership and Equity Protection Act of 1994 (HOEPA). Designed to amend certain aspects of TILA, HOEPA built on previously established disclosure requirements while also creating new limitations on abusive terms excluded from past laws. The "Act" narrowed down regulation to specific "high cost mortgages" or "HOEPA loans," which are loans that surpass one of two triggers: the APR Test or the Points and Fees Test. For the former, the annual percentage rate at the time of loan transaction must exceed the yield for Treasury securities of comparable maturity by more than eight percent for first-lien loans or 10 percent for subordinate lien loans (Bostic et al, 2008, p. 2). For the latter, the points and fees paid by the borrower must exceed eight percent of the total loan amount or a rate annually adjusted to account for changes in the Consumer Price Index, whichever is greater. (At the moment, the trigger is equivalent to $592.) Due to several other qualifications, including requirements that "HOEPA loans" be credit transactions secured by a consumer's principal dwelling (Keyfetz, 2005), these "high cost mortgages" only accounted for one percent of subprime residential mortgages, targeting the most abusive sector of the subprime mortgage market (Bostic et al, 2008, p. 2). (This narrow definition of "high cost" was influenced by industry lobbyists determined to maintain their business, urging Congress to limit regulations as to not "close off" the availability of credit to borrowers in need.)

However, for that small group of loans, HOEPA limited several terms and policies, such as balloon payments, prepayment penalties, default interest rates greater than the pre-default rate, "loan flipping" (the repeated refinancing of loans in a short period of time to increase fees and reduce the equity remaining in the home), and ignorance of a borrower's ability to repay. Furthermore, the "Act" required creditors to provide borrowers with a warning as to the consequences of delinquent payments and previous TILA disclosures up to three days before loan settlement in order to give the borrower ample time to consider the loan. Perhaps the most important protection provided by HOEPA is the increased liability for creditors who violated the legislated standards. Though a "borrower's right to action" had been determined in TILA (with the aforementioned rescission clause), HOEPA significantly expanded on this right to turn the danger of liability into an enforcement measure against predatory lending in "high cost mortgages" (Keyfetz, 2005). According to the "Act," a creditor is liable for "all claims and defenses" asserted by a borrower, whether established under TILA or all federal or state laws (but with certain limitations, such as a cap on damages.) Though this language has been subject to interpretation by the courts, the acknowledgement of protections already guaranteed by other federal and state government measures ensured that a borrower's power would be upheld on all levels in government. Congress would revise HOEPA in 2002 to improve the Act's effectiveness through the adjustment of its triggers and the expansion of restrictions on additional practices (Ho & Pennington-Cross, 2007).

The impact of HOEPA has extended beyond the federal level. In 1999, North Carolina became the first state to adopt a "mini-HOEPA law," modeled after the aforementioned federal legislation. Though the state had previously adopted consumer protection laws barring loan terms such as prepayment penalties, the new law supplemented regulations by continuing with many of the standards established in HOEPA. In this case, the final law was even more restrictive: The APR trigger was lowered in order to include a greater number of loans into "high cost" classification, and limitations on loan terms and disclosures were increased (Bostic et al*,* 2008).

By 2007, 30 states and the District of Columbia had followed North Carolina's example and established some sort of mortgage regulations, generally in the form of the "mini-HOEPA" precedent (Ding et al, 2010a, p. 3). Wide variation existed among established regulations, with some states adhering to the high-cost standards of HOEPA and others creating laws applying to all mortgage loans without any triggers. Prohibitions of specific loan terms also varied widely, with some states enacting complete bans and other limiting sanctions to certain conditions and time limits. Furthermore, enforcement and liability provisions differed among states, with some allowing claims to be brought against the loan originator with relief ranging from damages to civil penalties. As growing concerns over the subprime lending explosion and potential predatory tactics began to increase, states continued to build on these "mini-HOEPA laws," increasing controls against specific loan terms, such as home equity stripping and abusive interest rates, and lowering triggers even further. In this respect, they filled "regulatory gaps" in the mortgage lending market (Ding et al, 2010a). States not only had fewer incentives to act against their constituency, but they could also react more quickly than federal agencies to reported violations of consumer protections and loan standards.

Why would states be more responsive than Congress to low income borrowers?

With this increased enactment of state anti-predatory laws in a market also regulated by federal legislation, the federal government quickly stepped in to establish where state responsibilities in the banking and mortgage industry ended and where federal power began. In 1996, the Office of Thrift Supervision preempted federally chartered savings and loans institutions and their subsidiaries from state regulations. In February of 2004, the Office of the

Comptroller of the Currency, or OCC, officially preempted all state laws regulating the lending practices of national banks and their subsidiaries, claiming that, as national institutions, they should only be subject to federal law. (The OCC also broadened the protections afforded to national banks against prosecution for state civil rights and predatory lending law violations, a matter that would come into spotlight later on in the 2009 Supreme Court case, *Cuomo v. Clearing House*.) Though states laws remained for other mortgage lenders, this preemption significantly limited the “high-cost” loans that could be regulated by the states: The number of high-cost loans preempted in states with previous anti-predatory lending laws increased from 16 percent in 2004 to 46 percent in 2007 (Ding et al, 2010b, p. 3). While the OCC did establish rules for its regulated institutions regarding the avoidance of predatory terms, these regulations and their enforcement have been generally regarded as much looser than those under state anti-predatory lending laws. (The OCC has defined itself as a supervisory organization that “works quietly with [national banks and their subsidiaries] to address consumer issues,” and supervises national banks, quickly alerting them of “potential noncompliances that pose risks to consumers” [Schwartz, *New York Times*]. The result is more “gentle” oversight, primarily due to the more opaque federal regulatory structure.) As this preemption occurred right in the middle of the rise in subprime lending, it has been interpreted as an acceptance of lax standards and underwriting guidelines. Research has suggested this federal preemption led to the adoption of riskier tactics by preempted institutions and may have contributed to the foreclosure crisis (Ding et al, 2010b). This idea will be considered later on.

Along with the rising battle over state anti-predatory laws, House floor debate over whether to enable or restrict subprime lending moved the national issue front and center. From 2001 to 2008, as subprime mortgage lending took off, over 700 roll call votes took place in the

House regarding legislation related to “affordable housing,” “homeownership,” and “subprime.” (Mian et al, 2010, p. 16). Some examples of bills introduced to expand and limit subprime lending practices include the American Dream Downpayment Act of 2003 (which sought to increase homeownership by providing federally sponsored down payment assistance to low-income and minority homebuyers) and the Prohibit Predatory Lending Act of 2005 (intended to place further controls on subprime lenders) (Mian et al, 2010, p. 4). Despite the failure of several legislative efforts to pass mortgage reform legislation, as the full effects of absent regulation in the subprime market became more apparent (and control of the House swept over to new Democratic leadership following 12 years of a Republican majority), Congress began to move forward with needed restrictions. In the summer of 2008, the Secure and Fair Enforcement for Mortgage Licensing Act (also known as the SAFE Act) was passed as part of the Housing and Economic Reform Act — a measure intended to restore American confidence in Fannie Mae and Freddie Mac by injecting capital into the institutions. Separate from the overall goals of the bill, the SAFE Act required states to establish a loan originator licensing and registration system. With uniform licensing standards, it was believed that states would be better able to eliminate bad lenders from the pool. (Studies had suggested that past occupational standards did not do enough to regulate the “market failures” that led to rampant profits at the expense of quality of service [Kleiner and Todd, 2010, p. 3].) This new system would enable government to track loan originators, with the idea that increased monitoring would also limit risky endeavors.

Another bill of particular interest during this time was the Mortgage Reform and Anti-Predatory Lending Act of 2007, the namesake and precursor to Title XIV of the Dodd-Frank Bill. The Mortgage Reform Act (H.R. 3915) was closely linked to the aforementioned PPLA in its purpose as well as its primary sponsor, Rep. Brad Miller (D-NC). Introduced in the House on

October 22, 2007, H.R. 3915 was proposed as an amendment to the Truth in Lending Act "to reform consumer mortgage practices and provide accountability for such practices…" As implied in this purpose, the bill mostly elaborated on previously existing statutes rather than proposing any new substantive restrictions. For example, the bill mandated the standardization of licensing and registration requirements for mortgage originators as well as the establishment of a unique identifier to best track their loans, in line with the recently passed SAFE Act. Furthermore, H.R. 3915 prescribed that loan originators present appropriate mortgages to consumers that had proven adequate ability to repay, a standard determined through documents regarding the consumer's credit history, current and expected income, debt-to-income ratio, and "other financial resources." In the case of refinancing, the bill required creditors to make a "reasonable, good faith determination" as to whether the consumer would receive a "net tangible benefit" from the refinanced loan — a term for which the definition would be determined at some later date. It also reaffirmed several other consumer protections outlined in HOEPA, such as the prohibition of prepayment penalties, mandatory arbitration, and balloon payments. It banned "anti-steering" tactics such as yield spread premiums, or fees paid by lenders to mortgage originators for arranging loans with higher interest rates and lower upfront costs. It also lowered HOEPA triggers to expand the definition of "high cost" loans. In its greatest similarity to HOEPA, the bill further established the liability of creditors should they fail to meet their "duty to care," administering loans in violation of protections established in the bill or in other federal or state statutes. In addition, H.R. 3915 required disclosures as to specific loan features and costs, such as the end of the fixed introductory rates. Finally, the bill procured its own enforcement, authorizing the Federal Reserve to monitor "troublesome" behavior and lending practices, intervening with necessary regulations when deemed appropriate.

Despite its work to ensure anti-predatory lending protections, the Mortgage Reform and Anti-Predatory Lending Act was not passed by both houses of Congress. Following its introduction onto the House floor, the bill was sent to the House Committee on Financial Services. An amended version was reported to the House floor on November 9th, with several noticeable additions: Title IV—Office of Housing Counseling, Title V—Mortgage Disclosures Under Real Estate Settlement Procedures Act of 1974, Title VI—Mortgage Servicing, and Title VII—Appraisal Activities. In order to better ensure consumer knowledge, Title IV created the Office of Housing Counseling within HUD to provide "homeownership counseling and rental housing counseling in connection with any program of the Department [HUD], including all requirements, standards, and performance measures that relate to homeownership and rental housing counseling." This section also defines "homeownership counseling" as "counseling related to homeownership and residential mortgage loans" provided by previous legislation, such as the American Homeownership and Economic Opportunity Act of 2000. Title V primarily reintroduced the disclosure requirements presented in the Real Estate Settlement Procedures Act of 1974, which stated that each "good faith estimate" must contain clear statements listing the loan amount, the type of loan (fixed rate or adjustable rate), the estimated APR, total monthly payments, and others. In essence, this title connected consumer protection to the complete knowledge of the borrower as to relevant loan terms. Title VI clarified previous TILA regulations regarding escrow or impound accounts and requirements of various insurance clauses. It also ordered a HUD study on other "mortgage servicing practices and their potential for fraud and abuse." Finally, Title VII amended TILA property appraisal requirements and regulations for "unfair and deceptive practices" relating to property appraisals.

On November 15th, the House passed H.R. 3915 and sent it on to the Senate, where it was received on December 3rd. However, after referral to the Committee on Banking, Housing and Urban Affairs, the bill died in committee. Critics of the bill at the time were concerned with its language, claiming that the bill was "too vague" too accomplish any substantial reform, especially in the provision regarding the undefined "net tangible benefit." This flaw was acknowledged by Rep. Barney Frank (D-MA), Chairman of the House Financial Services Committee, during deliberations on the bill: "Is it vague? To some extent, but that's what you do with the law and then they are defined by practice" (Rucker and Drawbaugh, *Reuters*).

In their paper, "The Political Economy of the Subprime Mortgage Credit Expansion," Mian et al (2010) attempt to explain the failure of representatives to sign H.R. 3915 into law in the context of increased campaign contributions and lobbying by mortgage lenders as well as the influence and interests of a growing constituency of subprime borrowers: Lenders would generally contribute to representatives with larger subprime constituencies, suggesting an alliance between representatives and the mortgage industry. In observing the roll call vote with these factors in mind, they were able to discern evidence that representatives from districts with a large subprime constituency were "less likely to co-sponsor legislation that was broadly perceived as anti-industry" (21). Furthermore, "anti-industry legislation" was much more likely to be supported by Democrats, though Democrats also expressed support for alternate legislation that would weaken anti-predatory lending regulations (13). Mian et al were careful to state that this provides no "smoking gun" (23). Nonetheless, their work suggests that lobbying interests at the time — strengthened by the growing power of the subprime market and a high-stake need to preserve deregulation — influenced the failure of this legislation and, therefore, prevented the establishment of anti-predatory lending laws.

Mian et al's point confirms the results of an earlier paper by Igan et al (2009) on the

I thought the result of Igan was contrary to one point you make here-- lobbying lenders were likely not to have skin in the game because they resold a higher proportion of their loans.

effects of lobbying in the subprime lending industry. In the latter work, research showed that lobbying institutions were more likely to use risky (but more profitable) lending tactics. Such practices include arranging loans for borrowers with high loan-to-income ratios, securitizing a "faster growing population of loans," increasing credit expansion, and holding large mortgage portfolios. By taking more loans in a less regulated environment, lobbying lenders experienced high default rates as well as negative stock returns during the burst of the housing bubble and the height of the 2008 financial crisis. Specifically, Igan et al reported that 2008 loan delinquency rates were greater in areas in which mortgage lending by lobbying lenders expanded faster than mortgage lending by other lenders. In turn, Igan et al concluded that heavy lobbying is associated *ex ante* with increased risk-taking and *ex post* with worse performance. They stated that increased lobbying by the mortgage industry, including subprime lenders, established a "moral hazard." Through lobbying and other established benefits to allied legislators, lenders expected preferential treatment and security from the federal government, such as "a higher probability of being bailed out" or the construction of a regulatory structure that would allow them to exploit short-term gains of risk-taking behavior. The influence of the financial industry on Congress was a source of "systemic risk." While the federal government might have increased consumer protection as subprime lending went through the roof, Congress' partnership with mortgage lenders lowered legislators' utility for taking increased regulatory action.

In 2009, another attempt was made to pass the Mortgage Reform and Anti-Predatory Lending Act (H.R. 1728). Introduced on to the House floor on March 26th by its original sponsor, Rep. Brad Miller, H.R. 1728 was in mostly the same form as H.R. 3915, including all titles added during its session in the House Committee on Financial Services with no significant changes in language. On May 7th, the House passed H.R. 1728. The Senate received the bill on

May 12th, and it was referred to the Committee on Banking, Housing and Urban Affairs. Yet, like its predecessor, H.R. 1728 also died in committee. Perhaps in both cases the pressure of both mortgage lenders and subprime borrowers enabled Congress to ignore crucial warning signs and allow the crisis to build, mostly without the knowledge of the public.

Yet just over one year after its failure — and the failure of legislators to take action against lending institutions — the Mortgage Reform and Anti-Predatory Lending Act appeared again as Title XIV of a bill considered by many to have enacted some of the nation's most powerful consumer financial protections. Moved forward by the Democratic majority's concern over economic recovery without wider reform, belief in the need to restructure the fallen financial system, and platform promises, H.R. 4173, The Wall Street Reform and Consumer Protection Act of 2009, was introduced to the House floor on December 2, 2009. Though the early version of bill made no mention of further restrictions or consumer awareness of mortgage lenders and originators that have engaged in predatory lending tactics, the Mortgage Reform and Anti-Predatory Lending Act appeared as Title VII of the version that would be passed by the House on December 11th.

The bill passed the House in basically a straight party-line vote, 223-20. It was not supported by any Republicans, perhaps with the upcoming 2010 midterm elections in mind. A December 2009 Gallup poll revealed President Obama's job approval rating had fallen to 47 percent, a low for a president at such a point in his term (Sammon, *FOX*). With voter dissatisfaction with Democratic leadership rising, Republicans may have used their lack of support for legislation that was controversial among their base in order to propel midterm prospects.

On January 20, 2010, H.R. 4173 was received by the Senate and referred to the

Committee on Banking, Housing, and Urban Affairs, with the Mortgage Reform and Anti-Predatory Lending Act still attached to Title VII. On May 20th, H.R. 4173 was finally discharged from the Senate committee by "unanimous consent." But the Mortgage Reform Act had been removed, with various components placed under Title X — Bureau of Consumer Financial Protection. Along with the establishment of the Consumer Financial Protection Bureau, this version of Title X contained provisions regarding "anti-steering regulation," which prohibited yield spread premiums. Title X also banned prepayment penalties with certain conditions and established minimum standards for residential mortgage loans, such as "ability to repay." The merger of the Mortgage Reform and Anti-Predatory Lending Act with Title X was not unreasonable. Under the previous Title VII, all "enumerated consumer laws" would "come under the purview of the Consumer Financial Protection Agency," including "the transfer of function and personnel." While H.R. 1728 maintained the responsibility of the enforcement of consumer protections with the Federal Reserve, the Dodd-Frank Bill planned to create a new, independent watchdog agency to conduct research into predatory tactics and ensure consumer awareness of dangerous loan terms and predatory lending institutions. Under the new financial reforms, this Bureau would have had jurisdiction over the regulations and restrictions established under Title VII. As a result, the consolidation of these statutes seemed fit under Title X.

With these alterations, H.R. 4173 passed the Senate with 59 Yeas and 39 Nays to move on to conference committee. In the vote, Sen. Russ Feingold (D-WI) and Sen. Maria Cantwell (D-WA) were the only Democrats to oppose, while Sen. Scott Brown (R-MA), Sen. Chuck Grassley (R-IA), Sen. Susan Collins (R-ME) and Sen. Olympia Snowe (R-ME) crossed party lines to support the legislation. Though known as some of the most liberal senators, Feingold and Cantwell had decided to not support the bill from the left, believing that it did not go far enough in reform. While Brown and Grassley remained noncommittal to their previous support even following this vote, as moderate Republicans, they were expected to join Collins and Snowe for the bill (Dennis, *Washington Post*). In addition, Sen. Robert Byrd (D-WV) was ill at this point and did not vote. Sen. Arlen Specter (D-PA) also abstained.

In the filed conference committee report for the House vote, the Mortgage Reform and Anti-Predatory Lending Act had returned to the bill (now titled the "Dodd-Frank Wall Street Reform and Consumer Protection Act") as Title XIV in its full, previous form. On June 30th, the conference report with Title XIV attached was passed in the House with 237 Yeas and 192 Nays. On July 15th, this final version of the bill also passed the Senate, with 60 Yeas and 39 Nays.

Compared to its ancestors, H.R. 3915 and H.R. 1728, Title XIV was basically the same bill, excluding a few adjustments in language and consolidation to reduce redundancy. For example, a previous title concerning a federally subsidized "multifamily mortgage resolution program" under HUD to "ensure the protection of current and future tenants and at-risk multifamily properties" was combined with other "Mortgage Resolution and Modifications" under Subtitle G. Furthermore, earlier sections that had been eliminated from H.R. 1728, such as "a study of the effect of drywall presence on foreclosures" and a written reaffirmation in Congress' belief in the need to fix Fannie Mae and Freddie Mac's difficult state in both the public and private market were placed back into the title. More notably, the final version of Title XIV no longer contained a section regarding the definition of net tangible benefits. As was mentioned previously, H.R. 3915 and H.R. 1728 included requirements for creditors to make "reasonable, good faith estimates" as to the "net tangible benefits" for consumers in the refinancing of home mortgage loans. A general idea of "net tangible benefits" was provided in both bills: A loan does *not* have a net tangible benefit to the consumer if the total points and fees on the loan exceed the amount of the principal "without any corresponding changes in the terms of the refinanced loan that are advantageous to the consumer." However, this is a vague definition, one that the legislation called upon federal banking agencies to clarify. This ambiguity is possibly was what prompted the removal of the term. Furthermore, "net tangible benefit" was often linked to "ability to repay" in the previous bills, implying that proof of the former would be implied with the determination of the latter. Though not explicitly stated, the term would still be protected under other Title XIV provisions.

There was one significant addition to Title XIV: enforcement under the newly created Bureau of Consumer Financial Protection (Title X). As discussed earlier, some subtitles of Title XIV were placed under the heading of Title X prior to the convening of the conference committee, an understandable consolidation considering the connection between the two provisions. The Bureau is responsible for the implementation of "reasonable and good faith" lending practices and the regulation of consumer financial products, with the important power to identify services or products that it considers deceptive or abusive. While the agency exists within the Federal Reserve, it operates independently, reporting to the Senate Banking Committee and the House Financial Services Committee. Considering this, the power of the Bureau is significant, as it removes previous enforcement obligations formerly reserved to the Fed.

Following the subprime lending crisis, the Fed received a great deal of criticism for turning a blind eye to the predatory and irresponsible actions of the lending institutions under its jurisdiction, failing to exercise its HOEPA power to oversee lending practices. In 2007, it was Senator Dodd — who would go on to sponsor the Dodd-Frank bill — who led the criticism of the Fed and former Chairman Alan Greenspan for a "pattern of neglect" and an ignorance of decreasing lending standards, the combination of which "fostered a crisis in the mortgage industry" (Cho and Henderson, *Washington Post*). Dodd's critique was not unfounded: In 2004, Greenspan apparently praised the benefits of "mortgage product alternatives to the traditional fixed-rate mortgages," now seen as risky and dangerously misunderstood by borrowers. While Greenspan has since retreated from those statements, claiming they were not intended to suggest that the Fed was "pushing subprime mortgages," the Fed rarely invoked HOEPA in its regulatory practices, another move widely regarded as a misstep. Considering this, legislators appear to have established the Consumer Financial Protection Bureau to take away an important power from the organization that had disregarded it, while still involving Congress in the monitoring process.

Blame regarding the failure to act cannot be entirely placed on the shoulders of the Federal Reserve. As was evidenced by Mian et al (2010), legislators also frequently passed by the opportunity to regulate or force action during the most critical period, influenced by their own motives and carrots. Despite the establishment of laws and restrictions that had the potential to prevent the subprime lending crisis, due to the work (or lack thereof) of these institutions, the strength of federal legislation did not matter, as the regulations never came into play. Even so, these federal laws were weak overall, perhaps not powerful enough to limit predatory tactics and poor subprime loans even with a cooperative Fed and Congress. Despite the fact that it was not written as an anti-predatory lending law, the Truth in Lending Act did not require lenders to inform borrowers about the exact dollar amounts of their maximum possible monthly payments following rate reset. Regarding the limitations of HOEPA, Ding et al (2010b) mentioned some of these problems in their paper: "…the coverage of HOEPA was quite limited and virtually no mortgages were originated that were covered by HOEPA's high-cost threshold, likely because the HOEPA threshold was quite high and also because subprime lenders learned how to avoid it" (7). Though HOEPA was revised in 2002, the high triggers remained, and the law's narrow scope continued.

Compared to their federal regulatory counterparts, state anti-predatory lending laws had much greater success in guaranteeing consumer protections: Fewer loans with abusive terms were used in states with anti-predatory lending laws, resulting in fewer foreclosures. Proof of this effect is strong. Ding et al (2010a) stated, "Loans originated in states with [anti-predatory lending laws] were significantly less likely to be 90+ days delinquent" (15). They also found, "A typical [anti-predatory lending law] lowered neighborhood default rates by 3.8 percent to 18 percent, depending on the default risk measure considered" (17). (By "typical," Ding et el means that the law at least encompassed HOEPA coverage and prohibited loan characteristics such as prepayment penalties as well as high points and fees.) This confirmed that state anti-predatory lending laws were connected to "lower mortgage risks" (21). Overall, Ding et al concluded, "Strong state [anti-predatory lending laws] are an important tool for consumer protection …" (8) Affirmation of this conclusion also came outside of the study and in the inclusion of enacted state laws into federal regulation. In the case of H.R. 3915, the bill was based on many statutes comprising the 1999 North Carolina "mini-HOEPA" law. Its use in this legislation is understandable, as the Center for Responsible Lending applauded the regulation as "the model for preventing abusive lending while preserving access to credit" (Mian et al, 2010, p. 8). In this case, imitation truly is the sincerest form of flattery.

Despite the recognizable successes of state anti-predatory lending laws, critics of these regulations have asserted that they limit the flow of subprime credit: By requiring strict standards and restrictions, the argument claims that lenders have had to increase loan costs and interest rates, reducing affordability of subprime loans. However, additional research suggests this is not the case. According to a nationwide study conducted by Morgan Stanley in 2002, growth in subprime mortgage applications was not significantly affected by an increase in state restrictions. In fact, consumers felt more comfortable procuring “subprime products” from local branches knowing that there were mandated disclosures and limitations on penalties and fees. This actually caused “a positive impact on loan volume” (Bostic et al, 2008, p. 4). Li and Ernst (2006) also established that, “in all but two states with anti-predatory lending laws,” mortgage interest rates remained the same or decreased in comparison to those in states with no regulatory legislation in place. In addition, they concluded that state anti-predatory lending laws, specifically mini-HOEPA laws, did not lower the number of subprime originations, but did decrease the occurrence of subprime loans with predatory terms. This was the intention of these state restrictions: If the anti-predatory lending laws limited the use of predatory practices and loan terms while permitting non-abusive subprime lending to develop, the laws did what they were intended to do.

Yet, as was mentioned above, state impact was severely reduced following actions by federal regulators to “preempt” state anti-predatory lending laws, reserving the power implied in state legislation for the national government. Ding et al (2010b) detailed the effects of the 2004 OCC preemption. At least 26 percent of high-priced loans in states with anti-predatory lending laws were originated by national banks, federal thrifts and subsidiaries protected by federal preemption. With this in mind, Ding et al observed, “Preemption generally increased the default risk of privately securitized mortgages originated by OCC lenders in [anti-predatory lending] states” (38). This is expected, as loans from preempted lenders were immune from the more stringent state laws. Overall quality of loans was allowed to decrease as lenders adopted unrestricted predatory tactics in order to increase profits. Ding et al also stated that, following OCC preemption, states with formerly binding consumer protection laws had a significant increase in the origination of loans with risky features among OCC lenders. In turn, enabled OCC lenders could outpace independent mortgage companies in most markets (36).

Along with the establishment of unsafe loan terms, fraud was facilitated as disclosure requirements were lessened or unmonitored. In 2008, *The Oregonian* reported on a leaked Chase Bank inter-office memo regarding various “Cheats & Tricks” in manipulating Chase’s automated loan underwriting system, Zippy, for approval of stated-income loans, also known as “liar loans” (Friesen, *The Oregonian*). The note instructed employees and mortgage brokers working with borrowers to not report “gift funds,” or additional money gifted to the borrower in order to pay for the loan. It also suggested “resubmitting with a slightly higher income” should the first-reported value fail to get Zippy approval. These predatory tactics, if encouraged by Chase, revealed the bank’s encouragement of mortgage brokers to commit fraud. Yet as a federally charted institution, Chase need only answer to the OCC rather than state regulators. Though Chase fired the account representative tied to sending around the memo, the OCC took no action to investigate or prosecute any involved personnel: The bank had stopped offering stated-income loans prior to the leak, rendering the issue a “moot point” in the eyes of federal regulators. Despite the evidence, the OCC left all questions unanswered, enabling further fraud with impunity established under preemption. No matter Chase’s involvement in this scandal or others, the bank has made profits off of unsuspecting consumers, as federal departments failed — and continue failing — to end such “flagrant” behavior.

Ding et al (2010b) also suggested that preemption helped push the nation toward “looser underwriting standards,” as state regulators were forced to respond to a disruption in the balance of the regulatory system. Following preemption, lenders with federal charters were protected from stringent state regulations, while banks with state charters were not. As a result, obtaining a federal charter became more attractive and profitable. In turn, several state banks found ways to switch their previous charters for the more beneficial national charters. One such example of this "regulatory system abandonment" can be found in Illinois, where in 2008 the state attorney general began looking into the actions and loan standards of a Wells Fargo branch with a state charter, a legitimate investigation under Illinois anti-predatory lending law. Following the state's subpoena of information related to the investigation, Wells Fargo Bank, a nationally chartered institution, brought the branch under its control, ending Illinois' right to continue with the case under the terms of the OCC preemption (Streitfeld and Rudolf, *New York Times*). As a result, the branches could avoid charges for misconduct. This was not the only instance of abuse of preemption statutes. As states across the country began to watch state-regulated banks move to federal charters, these institutional shifts caused oversight to drop: Restrictions on state banks were reduced and state regulators were forced to ease some protections as an incentive to maintain its regulatory powers (Ding et al, 2010b).

Since the 2004 preemption and the height of the subprime lending crisis, steps have been taken to reinforce the power of the states as regulators and supervisors. In 2005, then-New York State attorney general Eliot Spitzer attempted to enforce state antidiscrimination and fair-lending laws by beginning an investigation into the lending practices of several banks. The investigation was based on public information regarding a disproportionate number of high-interest home mortgage loans made to black and Hispanic borrowers. However, during the course of his work, Spitzer came up against the OCC preemption. He was sued by the Clearing House Association and the OCC on the basis that the states had no authority over national banks, as additional state regulations would create “a national patchwork of conflicting regulations” (Schwartz, *New York Times*).

With this, a four-year battle through the nation’s court system began. (When Andrew Cuomo was elected New York State attorney general, he would take over Spitzer’s case.) Though the lower courts agreed with the banks, by the time the case reached the Supreme Court in 2009, the attitude of the nation toward regulation had greatly changed. By this time, financial scandal and the big failures of major lending institutions had resulted in high unemployment, a larger national deficit, and millions of Americans struggling to get by with a foreclosed home. With this, questions began to circulate as to the regulatory impact of the “gentle” OCC and the efficiency of existing restrictions and legislation, as well as the role that these factors played in the propagation of the current crisis. Unlike the lower courts, the Supreme Court could not ignore these questions. In a 5-4 decision, the Supreme Court ruled in favor of Cuomo and the attorneys general of all states. Perhaps a quote from Justice Antonin Scalia — who also described the relationship between the federal and state government in the regulation arena as “weird” — best established the opinion of the Court as well as the national opinion toward federal regulation and preemption: “What incentive does the federal government have to enforce state law? It has so much spare time after enforcing federal law that it’s going to be worrying about state law?” (Schwartz, *New York Times*)

The decision undoubtedly reduced the expansion of federal authority that began in 2004 with OCC preemption. States are now empowered to explore and file lawsuits against national lenders and subsidiaries that previously misled consumers as to loan quality with poor marketing tactics and incomplete disclosures. As fraud against consumers, these tactics are undoubtedly predatory. Of course, the authority does not come without constraints: The decision did limit the subpoena power of state attorneys general against national banks, which may make it more difficult to build a case. While many states have already begun to consider cases against the more grievous lenders, they will continue to encounter roadblocks as they attempt to increase their regulatory impact through the court system.

With the enactment of the Dodd-Frank Bill, another expansion of federal regulatory powers, it opens up the question as to whether additional roadblocks will put in place by the Act, specifically Title XIV. Like its predecessor, H.R. 3915, protections offered under the title are modeled after state anti-predatory lending laws, notably the North Carolina "mini-HOEPA" law. Furthermore, many of the title's provisions are adopted directly from the HOEPA law, which states have also used as the base of their own regulations, even replicating the exact standards. With these overlapping protections, Title XIV indirectly asks where the power of state regulations end and that of federal regulations begins.

Yet the title itself makes no mention of "preemption." In fact, the word does not even appear within its context. The only mention of some sense of state authority to build off of federal statutes occurred in an earlier version of the title, which gave individual states the power to enact its own mortgage originator licensing standards, provided that the state is making a "good faith effort to establish a qualifying State licensing law and to license mortgage originators under such law." Even this provision was added to Title X—Bureau of Consumer Financial Protection in the final bill. In fact, it is Title X that charges the power to oversee federal preemption under the Mortgage Reform and Anti-Predatory Lending Act to the Bureau. Despite the fact that it is not explicitly stated under Title XIV, this discussion of preemption under agency enforcement does relate back to this original title and mitigates the future effect of Title XIV on federal preemption.

Toward this effect, along with its own enforcement responsibilities, Title X implies a new partnership between the Bureau and state attorneys general, now empowered to act on state regulatory practices by *Cuomo v. Clearing House*. In section 1042 of Title X, the Bureau is instructed to provide guidance as to enforcement regulation and “further coordinate actions with the state attorneys general and other regulators.” This section also states, “No provision of this title shall be construed as modifying, limiting, or superseding the operation of any provision of an enumerated consumer law that relates to the authority of a State attorney general or State regulator to enforce such Federal law.” From this language, it would appear that the entire design of the Bureau is based on the avoidance of “unnecessary” preemption. This perception is confirmed by section 1044 of Title X, which curbs the ability of national regulators, primarily the OCC, to block state consumer protection actions: “No regulation or order of the Comptroller of the Currency prescribed … shall be interpreted or applied so as to invalidate, or otherwise declare inapplicable to a national bank, the provision of the State consumer financial law, unless substantial evidence, made on the record of the proceeding, supports the specific finding regarding the preemption …” (In essence, preemption requires “substantial evidence” regarding “a discriminatory effect on national banks or federal thrifts”, or “significant interference with the exercise by the national bank of its powers.”) The section also mandates transparency by the OCC regarding preemption efforts, including “the requirements and constraints determined to be preempted.” While preemption is not eliminated as an option for federal government, it significantly limited to avoid overuse and abuse to protect the interests of powerful allied lenders.

In recent months, the strength of the Consumer Financial Protection Bureau to unite federal and state government on regulation has grown, not with interpretation of the language of the bill but the actions of the Bureau’s director. This past September, under the guidelines of

Title X, President Obama appointed a director to launch the agency — former chairwoman of the Congressional Oversight Panel, Elizabeth Warren (Bazinet, *New York Daily News*). Since then, Warren has spent time meeting with representatives of community bankers, consumer interest groups, bank executives, and other regulators, including the Securities and Exchange Commission and the Federal Reserve (Randall, *FOX Business*). In the final week of November, Warren also met with the attorneys general of all 50 states in Florida to "plot strategy": She has recruited the attorneys general as agency advisers as well as collaborators in formulating new polices around mortgages and credit cards (Dougherty, *Bloomberg BusinessWeek*). This move has undoubtedly strengthened that partnership between state and federal government as well as broadened the enforcement arm of the Bureau to truly extend across the nation. In a recent FOX Business report, Warren stated that the attorneys general "will likely take the lead in dealing with complaints that banks have mishandled foreclosure paperwork, signing off on foreclosure documents without reading them," a direct continuation of the power granted to them in *Cuomo v. Clearing House*, though officially recognized by federal regulators (Randall, *FOX*). More importantly, in forging a close relationship with the Bureau, state attorneys general may be in the position to reduce the extent of federal preemption. In fact, there has already been some discussion of future Bureau endorsement of federal funding for state enforcement actions (Dougherty, *Bloomberg BusinessWeek*). Considering the previously noted effectiveness of state anti-predatory lending laws and the ability of state attorneys general to appropriately respond to complaints of bank fraud, such collaboration could assist efforts to boost stringent regulations.

In considering the Bureau's impact on preemption, it is important to remember that the agency is still young. Though it is expected to be "up and running" within the next six to 12 months, Warren still has many decisions left to make before the full launch. Though many duties and personnel will be transferred from the Federal Reserve and the Office of Thrift Supervision to the Bureau, the agency must still establish a working agenda and priorities amidst insight from countless different directions. According to Title X, with the reallocation of these new responsibilities to the Bureau, it is now in charge of the enforcement of all legislation ranging from the Truth in Lending Act to HOEPA to the new Title XIV. These laws span years and include a sprawling weave of varying protections. It is a good amount of material to sort through in consideration of the final product. Funding presents another issue to the agency. Title X provides that the Federal Reserve must transfer a percentage of its combined earnings to the Bureau to be appropriately allocated by the Bureau's director. The title also establishes some caps, as the funds cannot "exceed a fixed percentage of the total operating expenses of the Federal Reserve System equal to 10 percent of such expenses in fiscal year 2011," with this value increasing by one percent in 2012 and 2013. Considering this, the Fed is expected to give the Bureau a budget of about $500 million. But with the complete responsibilities of the Bureau still undetermined, this budget may not be enough.

Even the increased interconnectedness of the Bureau and the states could lead to problems: Some attorneys generals believe that, in encouraging their participation, the Bureau may eventually feel empowered to legislate through them, telling them how to proceed with enforcement (Dougherty, *Bloomberg BusinessWeek*). Though this is assured against in the statutes of Title X, attorneys general are still wary, as the federal government has discounted ~~them~~ before. Warren will have to prove that her promises to the attorneys general are honest rather than patronizing.

Though Title XIV and Title X do not appear to be continuing with past precedents of federal preemption, there are doubts as to whether increased federal cooperation with the states is still preferable with loose federal regulations remaining at the helm. As determined through Mian et al (2010), federal legislators previously ignored their power to enact reform and limit lending practices. Their failure to act undoubtedly contributed to the crisis from which our country is still working to recover. While the nation has undergone an incredible trauma since then, rattling the very core of the financial system, there are no guarantees that Congress will now stand up for Title XIV and the entire Dodd-Frank Bill. Despite this newfound commitment to regulatory enforcement, the mortgage industry will continue to contribute to relevant campaigns (though the attempts of many big banks to lobby against the Dodd-Frank Bill failed, perhaps due to the increased attention paid by constituents on federal action following the crisis). Even more importantly, the impending turnover in party control in the House will provide obstacles to the implementation of certain aspects of the bill that Republicans opposed during the bill's passage under the Democratic majority. (Interestingly enough, HOEPA was also enacted under a Democratic Congress bound for a party turnover with the "Republican Revolution of 1994." The Act went untouched in the 104^{th} Congress, but this was probably due to its overly narrow

Overturning HOEPA might have faced a Clinton veto.

regulatory definitions, unlike the Dodd-Frank Bill's sweeping reform. Nonetheless, the new Republican Congress did block efforts to pass additional reforms to support HOEPA.) Though constituent interests appear to be more in line with efforts against the big lenders compared to their previous support of subprime borrowing, a new, partisan agenda — which is especially heated against the Bureau — may render some enforcement provisions ineffective and prevent legislators from moving forward once again.

Despite uncertainty as to federal action on anti-predatory lending enforcement, most states have a proven history of active regulation and defense of consumer protections. As Title XIV is vague and leaves many definitions and measures of enforcement to be determined by the already overwhelmed Bureau, perhaps the federal government is an interesting position to take a new direction apart from the initial interpretations of the title's language. Perhaps the Bureau could establish a true dual regulatory system, one with two connected spheres responsible for various aspects of regulation rather than incomprehensible and unproductive overlap: While federal agencies could continue to promote overall "bank fiscal soundness," the state government could work to fight bank fraud on behalf of consumers, continuing with the powers returned to them under *Cuomo vs. Clearing House*. Title XIV could be established as a regulatory floor, one which states could then build upon with stronger restrictions and standards based on local conditions. While the federal government could set up the guidelines and maintain a "working relationship" with the lending industry, states could act as impartial enforcement, more deeply connected to the actual borrowers and better suited to protect them. This arrangement brings up numerous problems, such as the fact that some states still have not established anti-predatory lending laws. Yet, it also opens up the possibility that the successes observed by individual states prior to preemption could spread across the country, encouraging national lenders to adopt improved underwriting practices to fit into the new system and prevent future crises.

At the moment, no such balance exists, and the nation must cope with Title XIV and the building of the Bureau of Consumer Financial Protection. Yet despite the many things that can go wrong with these provisions and their agency, these reforms may also go incredibly well. As was stated above, the Bureau is still young, and less than a year has passed since the enactment of Dodd-Frank. Though many factors that may affect enforcement will be introduced over the next few months, the leadership of Elizabeth Warren through strife has not yet been tested: She may prove to shine through compromise with Republican leadership. There is an unfortunate precedent of preemption, undermined states laws, and lax, manipulated Congressional leadership.

But there is also the opportunity for true reform and accomplishment in unmarked territory. As the future is unknown, before considering the alternative, perhaps it is still better to wait with watchful eyes and hope for the best.

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