Catholic University Law Review

Volume 67
Issue 2 *Spring 2018*

Article 9

5-15-2018

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Cover Page Footnote

J.D., The Catholic University of America, Columbus School of Law, 2018; B.A., The University of Maryland – College Park, 2014. Thank you to Professor Heidi Schooner for her guidance and expertise, and for patiently keeping me focused on a single topic throughout the writing process. Thank you also to the Catholic University Law Review for their assistance in publishing this Comment. Finally, I would like to extend my sincerest gratitude to my friends and family for their unyielding support of all my endeavors.

THE CFPB'S ENDAROUND

Chris O'Brien[+]

Michael Marcus has been considering buying a used vehicle for several months.[1] He gives the salesman his name, address, and social security number; however, without Michael's knowledge, the salesman changes the information on his credit application.[2] Michael's information is sent to a creditor who, without verifying any of the information on the credit application, immediately "approves" the application at a rate of 14.9%.[3] After a few months, Michael realizes that his interest rate is extremely high and that he is unable to qualify for a credit card.[4] As it turns out, the salesman's falsification of Michael's credit history not only increased his interest rate for the car but also destroyed his credit rating.[5] Now, Michael is stuck with a car that he can't afford and his credit has been destroyed.[6] The abusive practices seen in Michael's case, such as charging disproportionately higher interest rates to certain borrowers and overextending credit, have recently come under scrutiny because they mirror the activities that contributed to the mortgage crisis in 2008.[7]

For many consumers, the design of most cities and the lack of reliable public transportation make a vehicle a necessity.[8] When consumers have poor credit, purchasing a vehicle can be a cumbersome task because lenders use creditworthiness as a measure of the likelihood a loan will be repaid.[9] The task is especially cumbersome for subprime borrowers: "individual[s] with a less-

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1. This example is based loosely on *Marcus v. Plaza Auto Mall, Ltd. See* Brief of Plaintiff-Appellant at *3, Marcus v. Plaza Auto Mall, Ltd., No. 200-307186, 2004 WL 3719320 (N.Y.A.D. Apr. 16, 2004).

2. *Id.*

3. *See id.* at *2–3.

4. *Id.*

5. *See id.*

6. *Id.*

7. *See* David Heath, *Buyer Beware: Car Dealers Adopt Outlawed Mortgage Tactics, New Consumer Agency Powerless Against Them*, CTR. FOR PUB. INTEGRITY (May 19, 2014, 12:19 PM), https://www.publicintegrity.org/2011/04/11/4070/buyer-beware.

8. CAROLYN L. CARTER ET AL., CONSUMER CREDIT REGULATION: CREDIT CARDS, PAYDAY LOANS, AUTO FINANCE AND OTHER NON-MORTGAGE CREDIT 447 (1st ed. 2012).

9. *See* OFFICE OF THE COMPTROLLER OF THE CURRENCY, A-RCR, RATING CREDIT RISK: COMPTROLLER'S HANDBOOK 1 (2001), https://www.occ.gov/publications/publications-by-type/comptrollers-handbook/rating-credit-risk/pub-ch-rating-credit-risk.pdf.

than-perfect credit rating."[10] When a consumer has a subprime credit rating, fewer lenders are willing to extend credit to that consumer.[11] Consequently, it is difficult for subprime borrowers to obtain loans, and when they do, the loans come with significantly higher interest rates to compensate the lender for the increased risk.[12]

Following the housing bubble and subsequent economic crisis of 2008, subprime lending came under close scrutiny.[13] Although many believed that the enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank)[14] would protect against future meltdowns, concern is growing about a potential bubble in auto loan market.[15] The heart of this concern is that automobile lenders are over-extending credit to subprime borrowers—behavior eerily reminiscent of pre-2008 mortgage lending—which could make the automotive industry ripe for a repeat of 2008.[16]

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10. *Glossary: Subprime Borrower*, LENDINGTREE , https://www.lendingtree.com/glossary/what-is-subprime-borrower (last visited Dec. 28, 2017). Subprime borrowers typically have any number of the following characteristics: a FICO score below 660, recent delinquencies, a foreclosure in the last two years, a recent bankruptcy, a poor debt-to-income ratio, and trouble paying living expenses. *Id.*

11. *See id.* ("A subprime borrower is someone whose credit history has blemishes on it. Because of this, a subprime borrower may find getting a mortgage to be a bit difficult, but it is still possible. However, subprime borrowers are often subject to higher interest rates.").

12. *See id.*

13. *See* Chris Matthews, *The Subprime Mortgage Crisis Wasn't About Subprime Mortgages*, FORTUNE (June 17, 2015), http://fortune.com/2015/06/17/subprime-mortgage-recession/ ("In the years following the financial crisis . . . journalists zeroed in on one set of villains: subprime lenders and the supposedly irresponsible borrowers who were their customers. We were regaled with stories of mortgage lenders like Countrywide handing out loans that borrowers couldn't possibly repay, and then selling them on to investment banks, who packaged them into 'toxic' bundles like Goldman Sachs' infamous Abacus collateralized debt obligation.").

14. Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified in scattered sections of 12 U.S.C).

15. *See*, *e.g.*, Matt Egan, *U.S. Government Worried About Risky Car Loans*, CNN (July 11, 2016), http://money.cnn.com/2016/07/11/investing/auto-loans-risk-occ/.

16. *See* Allan Smith, *The U.S. Auto Loan Debt Market is Reminiscent of the Subprime Mortgage Bubble*, HUFFINGTON POST (Sept. 8, 2016), http://www.huffingtonpost.com/allan-smith/the-us-auto-loan-debt-mar_b_11911206.html; Michael Snyder, *The One Trillion Dollar Consumer Auto Loan Bubble is Beginning to Burst*, THE ECON. COLLAPSE (Sept. 6, 2016), http://theeconomiccollapseblog.com/archives/the-one-trillion-dollar-consumer-auto-loan-bubble-is-beginning-to-burst. As early as 2012, the following was observed:

> The subprime auto lending market appears to be very similar to the subprime mortgage lending market that existed [before] the financial crisis of 2008. Some of the current tactics used by subprime auto lenders include: charging consumers hidden fees, lying about interest rates, and inaccurate reporting of facts on borrowers' loan applications.

Christopher K. Seide, *Consumer Financial Protection Post Dodd-Frank: Solutions to Protect Consumers Against Wrongful Foreclosure Practices and Predatory Subprime Auto Lending*, 3 U. P.R. BUS. L. J. 219, 250 (2012) (footnote omitted).

In 2016, the volume of outstanding auto loans reached a new all-time high of $1.072 trillion, an increase of more than forty percent from late 2009.[17] In that time, "subprime auto lending has more than doubled, while lending on terms that reflect a good credit history has increased by only about half." [18] Although some see this trend as a signal of vitality in the automotive market, banks are capitalizing on this market in precisely the same way they capitalized on the housing market.[19] This is leading to a sharp influx of lenders in the subprime auto loan market, as well as a rise in deceptive and predatory lending practices by dealers.[20]

The Bureau of Consumer Financial Protection (CFPB), created by Dodd-Frank, aims to ensure that "markets for consumer financial products are fair, competitive, and transparent," and has broad regulatory authority over consumer financial markets.[21] But due to lobbying efforts, Dodd-Frank excluded auto dealers from the authority of the CFPB, thereby restricting the CFPB's ability to regulate the auto market.[22] Despite a recent promulgation expanding the CFPB's regulatory authority over certain automobile dealers,[23] subprime borrowers remain targets for many dealers because of the sizable profits that dealers can reap from them.[24]

Despite extensive regulations intended to protect consumers, consumers face costly abuses totaling billions of dollars.[25] Abuses like predatory lending, inability to discharge auto loan debt in bankruptcy, and abusive debt collection practices make it difficult for consumers to satisfy their debt obligations.[26]

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17. Melinda Zabritski, *State of the Automotive Finance Market: A Look at Loans and Leases in Q4 2016*, EXPERIAN (2016), http://www.experian.com/automotive/automotive-credit-webinar.html; Egan, *supra* note 15.

18. Editorial, *Putting an End to Abusive Car Loans*, N.Y. TIMES (June 13, 2015) http://nyti.ms/1SdurwW [hereinafter *Abusive Car Loans*].

19. Seide, *supra* note 16, at 249–51.

20. *See id.*

21. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1021, 124 Stat. 1376, 1979–80 (2010).

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

23. Defining Larger Participants of the Automobile Financing Market and Defining Certain Automobile Leasing Activity as a Financial Product or Service, 80 Fed. Reg. 37,496 (June 30, 2015) (to be codified at 12 C.F.R. pts. 1001 and 1090) [hereinafter "Defining Larger Participants"].

24. CARTER ET AL., *supra* note 8, at 447 ("[G]enerally one half or more of dealer's profits come not from the sale of cars, but from the sale of financing and related products."); Heath, *supra* note 7.

25. *Abusive Car Loans*, *supra* note 18.

26. For a discussion of issues relating to bankruptcy, see Chunlin Leonhard, *Negative Externalities and Subprime Auto Financing: Time to Let the Hanging Paragraph Go*, 45 U. TOL. L. REV. 267 (2014) (describing how a bankruptcy provision that prevents debtors from discharging auto loan debt by bankruptcy hinders their ability to productively participate in the economy) and Miyong Mary Kang, Comment, *Is It Time to Hang the Hanging Paragraph, 11 U.S.C. § 1325(A)?*, 26 EMORY BANKR. DEV. J. 49 (2009) (arguing that, under the title bankruptcy provision, debtors

Although some see the CFPB's expansion of regulatory authority over auto dealers as a step toward curtailing these issues, others view this as the CFPB overstepping its authority, thereby harming the very consumers they seek to help.[27]

This Comment argues that the auto dealer exemption in Dodd-Frank should remain in place and further regulation of the subprime auto loan market is unnecessary because the factors that contributed to the collapse of the mortgage market are absent in today's auto loan market. In addition, the current regulations are sufficient to protect consumers from abusive, predatory, and deceptive practices. Part I of this Comment discusses the market conditions that led up to the enactment of Dodd-Frank and how the CFPB regulates the automotive finance market. Part II discusses the various consumer protection issues prevalent in the industry today. Finally, Part III recommends keeping the current regulatory system in place and discusses the potential costs of increased regulation.

I. EVENTS THAT FORMED THE CURRENT REGULATORY SCHEME

A. The Economic Crisis of 2008

In the years leading up to the economic crisis of 2008, deregulation of the market, predatory lending practices, and the securitization of subprime loans set in motion a chain of events that would cripple the U.S. economy. In the aftermath, Congress passed Dodd-Frank in an effort to prevent another crisis.

1. Growth of the Housing Bubble

The beginning of the twenty-first century was marked by the bursting of the tech bubble, a decline in consumer spending, rising energy prices, and rising unemployment.[28] In 2002, Congress passed the Sarbanes-Oxley Act[29] to quell public outrage regarding stock market losses and countless instances of corporate fraud.[30] Although the Sarbanes-Oxley Act brought accountability to corporate officers engaging in securities fraud, it did little to hinder the growth of a housing bubble that would play an important role in the 2008 economic

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should be able to fully repay their debts by surrendering their cars so that debtors are not left having to pay the difference between the remaining debt and the depreciated value of the car when, in all likelihood, they would be unable to do so).

27. *See* Richard J. Zack et al., *The Consumer Financial Protection Bureau Takes the Equal Credit Opportunity Act for a Spin in the Indirect Auto Lending Industry and Crashes into Dealer Markup Policies*, 45 UCC L.J. 4 (2014) (on file with Catholic University Law Review).

28. Stephen M. Bainbridge, *Dodd-Frank: Quack Federal Corporate Governance Round II*, 95 MINN. L. REV. 1779, 1779 (2011).

29. Sarbanes-Oxley Act of 2002, Pub. L. 107-204, 116 Stat. 745 (2002).

30. Bainbridge, *supra* note 28, at 1779–80.

crisis.[31] As a result of low interest rates, "the deregulatory strategy of allowing nonbank financial intermediaries to provide services virtually indistinguishable from those of banks," increasing rates of unemployment, and irresponsible behavior by both subprime borrowers and lenders, a bubble in the housing market developed where housing prices rose and peaked in early 2006.[32]

Subprime borrowers are often targets for predatory loans designed to exploit unsophisticated, vulnerable borrowers.[33] As the result of deregulation in financial markets and low interest rates, lenders were extending credit to subprime borrowers who were unlikely to repay their debts.[34] Although subprime loans by their nature carry with them a higher risk of default, lenders were able to lessen this risk through securitization.[35] Securitization improves market liquidity and incentivizes lenders to extend credit regardless of a consumers' ability to repay.[36]

In November 2007, the Center for Responsible Lending reported that 7.2 million families held a subprime mortgage, 14.44% of subprime mortgages were in default, and $1.3 trillion worth of subprime loans were outstanding.[37] When housing prices began falling in late 2007, panic swept over the financial market, and large banks struggled to find funding.[38] As consumer default rates rose and home values declined, the Federal Reserve cut interest rates in an effort to curb the rapid decline in the stock market.[39]

By 2008, financial institutions were suffering massive losses, and the U.S. government began stepping in to "bail out" commercial and investment banks.[40] As housing prices continued to fall, unemployment rates rose, commercial institutions once considered "too big to fail" were on the brink of collapse, and stock prices fell to all-time lows, the United States fell into one of the worst

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31. *See Congressional Comments About Sarbanes-Oxley*, 15 FED. SENT'G REP. 252, 252 (2003).

32. RICHARD A. POSNER, A FAILURE OF CAPITALISM: THE CRISIS OF '08 AND THE DESCENT INTO DEPRESSION 22–23 (2009); *accord* ROBERT J. SHILLER, IRRATIONAL EXUBERANCE 62 (3d ed. 2015).

33. Sally Pitman, Comment, *Arms, But No Legs To Stand On: "Subprime" Solutions Plague the Subprime Mortgage Crisis*, 40 TEX. TECH L. REV. 1089, 1095 (2008). For common characteristics of subprime borrowers, see *supra* note 10 and accompanying text.

34. *See* Seide, *supra* note 16, at 224.

35. *See* Pitman, *supra* note 33, at 1102; *see also* Leonhard, *supra* note 26, at 286. Securitization is the process where "interests in loans and other receivables are packaged, underwritten, and sold in the form of 'asset-backed' securities." OFFICE OF THE COMPTROLLER OF THE CURRENCY, L-SEC, ASSET SECURITIZATION: COMPTROLLER'S HANDBOOK 2 (1997), https://www.occ.treas.gov/publications/publications-by-type/comptrollers-handbook/asset-securitization/pub-ch-asset-securitization.pdf.

36. Pitman, *supra* note 33, at 1098.

37. CTR. FOR RESPONSIBLE LENDING, SNAPSHOT OF THE SUBPRIME MARKET 1 (2007), http://www.responsiblelending.org/pdfs/snapshot-of-the-subprime-market.pdf.

38. Seide, *supra* note 16, at 225.

39. Pitman, *supra* note 33, at 1103.

40. Seide, *supra* note 16, at 229–30.

recessions since the Great Depression.[41] In the aftermath, many government and industry officials have agreed that subprime lending was one of the major causes of the 2008 financial crisis.[42]

2. Dodd-Frank Wall Street Reform and Consumer Protection Act

In response to the financial crisis, President Obama signed Dodd-Frank into law on July 21, 2010.[43] The purpose of Dodd-Frank is "to promote the financial stability of the United States by improving accountability and transparency in the financial system, to end 'too big to fail', to protect the American taxpayer by ending bailouts, to protect consumers from abusive financial services practices, and for other purposes."[44] Dodd-Frank has many key provisions, including:

> (1) consumer protections; (2) systemic risk oversight; (3) executive compensation regulation; (4) bank capital requirements; (5) ending "too big to fail" bailouts; (6) transparency and accountability relating to complex financial instruments; (7) enforcement of current regulations; (8) reform of the Federal Reserve; (9) mortgage lending reform; (10) hedge fund oversight; (11) control over credit rating agencies; (12) reform of insurance regulations and investor protections; and (13) addressing securitization and municipal securities.[45]

3. The Bureau of Consumer Financial Protection

Pursuant to Dodd-Frank, Congress enacted the Consumer Financial Protection Act of 2010 (CFPA), which established the CFPB.[46] The CFPB was created "to implement and enforce federal consumer financial laws in order to promote fairness, transparency, and competition in markets for consumer financial products and services."[47] The CFPB is an independent agency with rulemaking

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41. *Id.* at 230–32; *accord* Pitman, *supra* note 33, at 1105.

42. *See* KATALINA M. BIANCO, THE SUBPRIME LENDING CRISIS: CAUSES AND EFFECTS OF THE MORTGAGE MELTDOWN 3 (2008) ("Many experts and economists believe [the crisis] came about th[r]ough [sic] the combination of a number of factors in which subprime lending played a major part."); *see also* FINANCIAL CRISIS INQUIRY COMMISSION, FINAL REPORT OF THE NATIONAL COMMISSION ON THE CAUSES OF THE FINANCIAL AND ECONOMIC CRISIS IN THE UNITED STATES 18–23 (2011) (finding that widespread failures in regulation and supervision, a failure of corporate governance and risk management, and a systemic breakdown in accountability and ethics in the markets were the key factors in causing the crisis). *But see* Matthews, *supra* note 13.

43. Seide, *supra* note 16, at 235.

44. Pub. L. 111-203, 124 Stat. 1376, 1376 (2010).

45. Seide, *supra* note 16, at 235–36 (citing Dodd-Frank Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010)).

46. *See* 12 U.S.C. § 5491 (2012); Karoline E. Andris & Kenneth J. Rojc, *Automotive Finance: Impact of the Dodd-Frank Act*, 67 BUS. LAW. 597, 597 (2012).

47. Kim B. Perez, Note, *The CFPB "Indirectly" Regulates Lending Through Auto Dealers*, 18 N.C. BANKING INST. 399, 401 (2014); *see* 12 U.S.C. § 5511(a).

authority and power to enforce consumer laws such as the Truth in Lending Act (TILA), the Equal Credit Opportunity Act (ECOA), the Fair Credit Reporting Act (FCRA), and the Fair Debt Collection Practices Act (FDCPA).[48] Before Congress consolidated consumer financial protection "rulemaking, supervisory, and enforcement authority" under the CFPB, this power was shared by seven different federal agencies.[49]

In addition to the CFPB, several other federal agencies "oversee the activities, products, and services that auto finance companies offer."[50] The Federal Trade Commission (FTC), which has authority over "deceptive trade practices and debt collection activities,"[51] gathers information on possible consumer protection issues and "brings enforcement actions against auto credit providers for deceptive practices."[52] The Department of Justice (DOJ) is responsible for enforcing fair lending laws.[53] Finally, states also retain enforcement powers over the provisions in the CFPA.[54]

Section 1029 of Dodd-Frank excludes auto dealers from the CFPB's authority.[55] The inclusion of this provision has been attributed to lobbyists such as former Senator Sam Brownback who asserted that auto dealers were not responsible for the financial crisis and therefore should not be federally regulated by the CFPB.[56] As a result, the CFPB is prohibited from exercising any rulemaking, supervisory, or enforcement authority over "a motor vehicle dealer that is predominantly engaged in the sale and servicing of motor vehicles, the leasing and servicing of motor vehicles, or both."[57] However, Dodd-Frank

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48. 12 U.S.C. §§ 1001, 1002(12), 1002(14), 1022(a); 12 U.S.C. §§ 5481(12), 5491(a).

49. *US Consumer Regulatory Law: Overview*, PRACTICAL LAW FINANCE, WL Practice Note 0-541-5546 (last visited Jan. 5, 2018) [hereinafter *Regulatory Law: Overview*]. This included the Office of the Comptroller of the Currency (national banks), Federal Reserve Board (state-chartered member banks), Federal Deposit Insurance Corporation (state-chartered non-member banks and other state-chartered banking institutions), National Credit Union Administration (federally-insured credit unions), Office of Thrift Supervision (federal savings and loan associations and thrifts), the FTC (consumer protection generally), and HUD (housing). *Id.*

50. Kevin M. McDonald & Kenneth J. Rojc, *Automotive Finance: Shifting into Regulatory Overdrive*, 69 BUS. LAW. 599, 599 (2014).

51. *Id.*

52. Kwesi D. Atta-Krah, Note, *Preventing a Boom from Turning Bust: Regulators Should Turn Their Attention to Starter Interrupt Devices Before the Subprime Auto Lending Bubble Bursts*, 101 IOWA L. REV. 1187, 1201 (2016).

53. McDonald & Rojc, *supra* note 50, at 599.

54. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376, § 1042; *see Regulatory Law: Overview*, *supra* note 49; *see also* 12 U.S.C. § 5514(b)(3) (2012) (discussing coverage of the Larger Participant Rule and the requirement that the CFPB consult with the FTC before issuing a new rule).

55. 12 U.S.C. § 5519.

56. *See* Indiviglio, *supra* note 22; Janet Hook & Jim Puzzanghera, *Battle over Financial Form Pits Auto Dealers vs. Military*, L.A. TIMES (May 13, 2010) http://articles.latimes.com/2010/may/13/business/la-fi-car-dealers-20100514.

57. Dodd-Frank Wall Street Reform and Consumer Protection Act § 1029; *see* Dodd-Frank Wall Street Reform and Consumer Protection Act, PL 111-203, July 21, 2010, 124 Stat 1376, Title

does not exclude: (a) dealers who "provide consumers with any services related to residential or commercial mortgages or self-financing transactions involving real property"; (b) dealers "who extend credit or leases involving motor vehicles directly to consumers and does not routinely assign the governing contract to an unaffiliated third party"; or (c) dealers who "offer[] a consumer financial product or service unrelated to a motor vehicle."[58]

Although the CFPB is largely precluded from regulating motor vehicle dealers, the Federal Reserve Board and the FTC are still able to do so.[59] According to Congress, the CFPA provides the FTC with authority to "prescribe unfair or deceptive trade practice rules against automobile dealers in accordance with the standard informal rulemaking procedures of the Administrative Procedure Act rather than having to adhere to the much more rigorous procedures of the Magnuson-Moss Act, [which the FTC must normally follow]."[60] Indeed, Congress believed that the CFPA "ma[de] it somewhat easier for the FTC to regulate [auto dealers]."[61] Although the FTC has broad power to prohibit any practice that it determines to be unfair or deceptive by motor vehicle dealers, even if the practice or act is related to vehicle financing, the FTC has not exercised this power as of 2015.[62]

The CFPB has the authority to "prevent a covered person or service provider from committing or engaging in an unfair, deceptive, or abusive act or practice under Federal law in connection with any transaction with a consumer for a consumer financial product or service, or the offering of a consumer financial product or service."[63] A covered person is "any person that engages in offering or providing a consumer financial product or service."[64] The CFPB also has regulatory authority over any covered person who "is a larger participant of a market for other consumer financial products or services," and is authorized by Dodd-Frank to define "larger participants" of certain financial markets.[65] In addition, the CFPB has authority over those who "the Bureau has reasonable cause to determine . . . is engaging, or has engaged, in conduct that poses risks

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X § 1029; CCH, DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT: LAW, EXPLANATION AND ANALYSIS 499–500 (Andrew A. Turner et al. eds., 2010) [hereinafter CCH].

58. SUSAN BERSON & DAVE BERSON, THE DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT: FROM LEGISLATION TO IMPLEMENTATION TO LITIGATION 59–60 (2012); *accord* 12 U.S.C. § 5519(b).

59. *See* ABA, REVIEW OF CONSUMER PROTECTION LAW DEVELOPMENTS, 222–23 (2011); CCH, *supra* note 57, at 500; D. Patrick Yoest et al., *Adjusting to the CFPB's Auto Finance Examination Authority*, 69 CONSUMER FIN. L.Q. REP. 224, 226 (2015).

60. DAVID H. CARPENTER, CONG. RESEARCH SERV., R41338, THE DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT: TITLE X, THE CONSUMER FINANCIAL PROTECTION BUREAU 10 (2010) (footnotes omitted).

61. *Id.*

62. Yoest et. al, *supra* note 59, at 226.

63. 12 U.S.C. § 5531(a) (2012).

64. § 1002(6)(A).

65. § 5514(a)(1)(B).

to consumers with regard to the offering or provision of consumer financial products or services."[66]

Although the CFPB has broad power, it cannot declare something "unfair" unless there exists a reasonable basis to conclude that "the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers; and such substantial injury is not outweighed by countervailing benefits to consumers or to competition."[67] Although this requirement is effective to curtail some of the CFPB's power, a unique feature of Dodd-Frank is the creation of the "abusive" standard, which provides the CFPB with expansive authority to regulate the market.[68] Under this standard, the CFPB can declare an act abusive only if it:

> [m]aterially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service; or takes unreasonable advantage of a lack of understanding on the part of the consumer of the material risks, costs, or conditions of the product of service; the inability of the consumer to protect the interest of the consumer in selecting or using a consumer financial product or service; or the reasonable reliance by the consumer on a covered person to act in the interests of the consumer.[69]

B. Automobile Industry During and After the 2008 Crisis

In the aftermath of the financial collapse, the automobile industry recovered quickly.[70] In 2015, auto loans topped $1 trillion for the first time—an increase of more than forty percent from 2009.[71] Even compared to prime auto lending, subprime auto lending has been booming in recent years, growing at a rate in excess of 130% since the financial crisis.[72] Between 2009 and 2014, the percentages of used car loans that franchise auto makers made to subprime borrowers increased from 17% to 25.4%.[73] This increase in used car loans is interesting in light of Department of Transportation statistics showing that the

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66. § 5514(a)(1)(C).

67. § 5531(c).

68. Seide, *supra* note 16, at 241–42.

69. § 5531(d).

70. Cristian deRitis, *Is U.S. Auto Lending About to Bubble Over?*, MOODY'S ANALYTICS (Aug. 12, 2014), https://www.economy.com/dismal/analysis/free/249410; *see also* MANHEIM, 2016 USED CAR MARKET REPORT 10 (2016), https://www.manheim.com/content_pdfs/products/UCMR-2016.pdf ("Autos have clearly been a gem in an otherwise dull economy.").

71. Claudia Assis & Rachel Koning Beals, *Subprime Car Loans Aren't Subprime Mortgages Yet Still Worry Jamie Dimon and, now, John Oliver*, MARKETWATCH (Aug. 15, 2016) http://www.marketwatch.com/story/could-subprime-auto-loans-lead-to-same-economic-catastrophe-as-risky-mortgages-2016-07-27; Egan, *supra* note 15.

72. Atta-Krah, *supra* note 52, at 1209; Assis & Beals, *supra* note 71.

73. Atta-Krah, *supra* note 52, at 1195.

percentage of people using an automobile as a primary means of transportation to work has remained relatively constant since 1999.[74]

For many, a vehicle is invaluable and may be the only way for consumers "to travel to work and earn a paycheck."[75] Despite a general lack of public discussion regarding the issue, legislators have been concerned about the state of the auto industry since 2009.[76] The House Subcommittee on Commerce, Trade, and Consumer Protection found evidence suggesting that "fraudulent practices with regard to both the condition and financing of used cars are on the rise."[77] In particular, Representative John Sarbanes found that "in the purchase and sale of automobiles . . . [t]here is a legion of opportunities to take advantage of people and exploit people."[78]

Much of this concern revolves around how consumers finance automobile purchases. Consumers can obtain an auto loan through either direct or indirect financing.[79] Through direct financing, the consumer seeks credit directly from a lender, such as a bank or credit union.[80] When a consumer obtains indirect financing, an auto dealer collects credit information about the applicant and facilitates a loan from a third party.[81] The indirect lender will then offer the dealer a minimum interest rate on the loan, called the "buy rate."[82] The dealer then offers a slightly higher rate to the consumer, either splitting the difference between this rate and the buy rate with the lender or retaining any interest over the buy rate as compensation.[83] Although this "one-stop shop[]" can be beneficial to consumers, dealers and creditors often "work together to needlessly

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74. Bureau of Transp. Statistics, *Table 1-41: Principle Means of Transportation to Work (Thousands)*, DEPT. OF TRANSP. (2017), http://www.rita.dot.gov/bts/sites/rita.dot.gov.bts/files/publications/national_transportation_statistics/html/table_01_41.html.

75. *See Consumer Protection in the Used and Subprime Car Market: Hearing Before the Subcommittee on Commerce, Trade, and Consumer Protection of the Committee on Energy and Commerce*, 111th Cong. 6 (2009) (statement of Rep. George Radanovich, H.R. Subcomm. on Comm., Trade, & Consumer Prot.).

76. *Id.* at 1 (statement of Rep. Bobby L. Rush, Chairman, H.R. Subcomm. on Com., Trade, & Consumer Prot.) ("While the mortgage and home foreclosure crisis has garnered much-deserved attention in Congress and in the media, there has been much less focus on similar problems that are associated with the purchase of automobiles although repossession rates are on the rise and only getting worse.").

77. *Id.*

78. *Id.* at 10 (statement of Rep. John P. Sarbanes, H.R. Subcomm. on Com., Trade, & Consumer Prot.).

79. *See id.* at 214 (response by witness John Van Alst to questions from Rep. Doris Matsui).

80. *CFPB Proposes Federal Oversight of Auto Lending Companies*, CONSUMER FIN. PROT. BUREAU (Sept. 17, 2014), http://www.consumerfinance.gov/about-us/newsroom/cfpb-proposes-new-federal-oversight-of-nonbank-auto-finance-companies/ [hereinafter *CFPB Proposes Federal Oversight*].

81. Perez, *supra* note 47, at 402–03.

82. *Id.* at 403.

83. *Id.*; CARTER ET AL., *supra* note 8.

saddle customers with high-interest-rate loans" that charge astronomical fees.[84] Dealers often seek to increase their profits by including unnecessary add-ons, which increase the purchase price of the vehicle and consequently, the amount of principle on which the consumer pays interest.[85]

In early 2016, the number of car borrowers at least sixty days late on their payments had risen to 5.16%, higher than during the financial crisis.[86] Further, Experian, one of the three major credit reporting agencies, reported that in 2016, "[i]ncreases in both [thirty and sixty]-day delinquency rates [rose] as the percentage of loans in the subprime portion of open portfolios [grew]."[87] One would expect that high delinquency rates, particularly in the subprime area, would deter lenders from extending credit to borrowers; however, investors are often attracted to the debt because "the riskier the borrower, the higher the yield."[88] This behavior has contributed to a large influx of new issuers entering the subprime auto asset-backed securities market.[89]

Banks, hedge funds, and private equity groups have been successfully marketing these bonds to traditionally conservative investors because these securitized investments offer high rates of return and repossessing vehicles are relatively easier than foreclosing homes.[90] According to JPMorgan Chase, the recent rise in delinquencies "can be traced back to new issuers crowding into the booming industry."[91] As new lenders scramble to enter the auto lending market,

84. *Consumer Protection in the Used and Subprime Car Market: Hearing Before the Subcommittee on Commerce, Trade, and Consumer Protection of the Committee on Energy and Commerce*, 111th Cong. 2 (2009) (statement of Rep. Bobby L. Rush, Chairman, H.R. Subcomm. on Com., Trade, & Consumer Prot.).

85. *See* CARTER ET AL., *supra* note 8, at 447–48; NATIONAL CONSUMER LAW CENTER, THE PRACTICE OF CONSUMER LAW § 9.2.4 (2d ed. 2006). Dealer financing markups have been well recognized as disproportionately affecting minority car buyers. Jean Braucher & Angela Littwin, *Examination as a Method of Consumer Protection*, 58 ARIZ. L. REV. 33, 83 (2016); Christopher M.A. Chamness et al., *Subprime Auto Finance Developments*, 71 BUS. LAW. 723, 724 (2016); Zack et al., *supra* note 24. However, this is beyond the scope of this comment.

86. Tracy Alloway, *This Is What's Going On Beneath the Subprime Auto-Loan Turmoil*, BLOOMBERG (Mar. 21, 2016), https://www.bloomberg.com/news/articles/2016-03-21/this-is-what-s-going-on-beneath-the-subprime-auto-loan-turmoil. Delinquencies during the financial crisis peaked at 5.04%. Matt Scully, *Subprime Auto Bond Delinquencies Highest in 20 Years, Says Fitch*, BLOOMBERG (Mar. 14, 2016), http://www.bloomberg.com/news/articles/2016-03-14/subprime-auto-bond-delinquencies-highest-in-20-years-says-fitch.

87. Melinda Zabritski, *State of the Automotive Finance Market: A look at loans and leases in Q1 2016*, EXPERIAN AUTOMOTIVE, http://www.experian.com/automotive/automotive-credit-webinar.html (last visited Dec 29, 2017).

88. *See* Scully, *supra* note 86.

89. Alloway, *supra* note 86.

90. Jeff Kirk, *Subprime Auto Loans, The Rising Menace of Wall Street's Latest Darling*, 18 J. CONSUMER & COM. L. 72, 72 (2014).

91. Alloway, *supra* note 86. In 2010, Santander Consumer USA and GM Financial issued 93.5% of the market's notes, while in 2016 they accounted for less than half of the market. *Fitch: Reprieve for U.S. Subprime Auto Delinquencies Likely Short-Lived*, FITCH RATINGS (Apr. 14,

there is concern that these lenders will "lower their underwriting standards as they fight for market share in an effort to produce relatively quick returns." [92] Delinquency rates on subprime loans issued by new lenders are often higher as compared to more established players.[93] Thus, there is concern that the subprime auto loan market is on the verge of collapse.[94]

C. Recent Trends in the Automotive Finance Industry and Consumer Protection

The state of the automotive finance market has caused mounting concerns about another bubble budding in the subprime auto loan market.[95] In spite of regulatory efforts, lenders in the automotive lending industry are engaging in practices disallowed in mortgage lending.[96] In addition, some lenders are engaging in predatory lending, which has been linked to higher default and repossession rates among subprime borrowers.[97] In thirty-seven states and Washington, D.C., more than half of consumers are forced to take subprime loans because their credit scores are too low.[98] This statistic could have major implications as the majority of predatory lending practices target consumers with low credit ratings.[99]

Subprime auto finance has been linked to allegations of "reverse redlining . . . abusive title loans and repossession practices, loan values that exceed the values of the vehicle, and hidden defects in used cars marketed to subprime borrowers." [100] In addition, subprime lenders have been sharply criticized for charging hidden fees, inaccurate reporting on loan applications, lying about interest rates, use of indirect lending methods, and abusive debt collection methods.[101] The Center for Responsible Lending speculates that dealer markups

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2016), https://www.fitchratings.com/site/pr/1002494 [hereinafter *Fitch: Reprieve for U.S. Subprime Auto Delinquencies*].

92. Alloway, *supra* note 86.

93. *Id.*

94. *See* Kirk, *supra* note 90, at 74. For a discussion of how lending and collateral values contribute to the creation of an asset bubble, see GEORGE SOROS, THE ALCHEMY OF FINANCE: READING THE MIND OF THE MARKET (1989).

95. *See* Alice Holbrook, *Is There a Subprime Auto Loan Bubble?*, USA TODAY (Sept. 27, 2014), http://www.usatoday.com/story/money/personalfinance/2014/09/27/subprime-auto-loan/16272641/. *But see* Assis & Beals, *supra* note 71.

96. Holbrook, *supra* note 95.

97. *Abusive Car Loans*, *supra* note 18.

98. Nirah Chokshi, *Map: Majorities of Consumers in 37 States Have Subprime Credit Scores*, WASH. POST (Feb. 27, 2014), https://www.washingtonpost.com/blogs/govbeat/wp/2014/02/27/map-majorities-of-consumers-in-37-states-have-subprime-credit-scores/.

99. *See* Kathleen C. Engel & Patricia A. McCoy, *A Tale of Three Markets: The Law and Economics of Predatory Lending*, 80 TEX. L. REV. 1255, 1261 (2002).

100. Chamness et al., *supra* note 85, at 723–24 (footnote omitted). Reverse redlining is the "targeting of minorities with the most expensive loans." *Id.*

101. *See* Atta-Krah, *supra* note 52, at 1210 (describing how some lenders condition their loans on receiving the borrower's permission to install starter interrupt devices (SIDs) in the borrower's

on loans could cost consumers "an additional $25.8 billion over the lives of their loans."[102]

1. Predatory Lending

Predatory loans are characterized by a set of practices and terms including: "(1) loans structured to result in seriously disproportionate net harm to borrowers, (2) harmful rent seeking, (3) loans involving fraud or deceptive practices, (4) other forms of lack of transparency in loans that are not actionable as fraud, and (5) loans that require borrowers to waive meaningful legal redress."[103] In most cases, predatory loans are also subprime loans; however, prime-interest loans may "display one or more of the problems that are common to predatory loans." [104]

In 2015, the New York Independent Democratic Caucus published a report focused on eight allegedly deceptive lending practices that are unregulated in the subprime market.[105] These included "auto credit with 'abusively high interest rates' . . . ; high loan-to-value ratios due to negative equity and ancillary product financing; dealer financing markups . . . ; dealer fraud in forcing buyers to purchase 'optional' ancillary products . . . ; spot delivery; and the use of . . . starter interrupt devices." [106] Although the subprime auto lending market has only recently come under scrutiny, the FTC has been investigating allegations of illegal lending practices for more than a decade.[107]

The prevalence of deceptive and abusive practices in the automotive industry is unsurprising due to the large profits that can be made through auto loans.[108] These loans often "contain hidden charges and other essentially useless add-ons like credit insurance."[109] Dealers reap the benefits of these markups by "acting as a middleman" between the consumer and the lender when the consumer opts for "dealer financing." [110] The lender gives the dealer discretion to quote a

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car that allow lenders to disable a car when the borrower falls behind on payments); McDonald & Rojc, *supra* note 50, at 604 (describing how some lenders make "false threats of lawsuits," lie about being able to waive debts, and charge late fees for debt payments even when the borrower pays on time); Seide, *supra* note 16, at 250 (describing how some lenders charge borrowers "hidden fees," lie about the interest rate on loans, and inaccurately report borrowers' information).

102. *See Abusive Car Loans*, *supra* note 18.

103. Engel & McCoy, *supra* note 99, at 1260.

104. *Id.* at 1261.

105. Chamness et al., *supra* note 85, at 724.

106. *Id.* at 724–25.

107. *See* Press Release, Fed. Trade Comm'n, FTC Testifies on Its Efforts to Combat Unfair and Deceptive Subprime Lending (Feb. 24, 2004), https://www.ftc.gov/news-events/press-releases/2004/02/ftc-testifies-its-efforts-combat-unfair-and-deceptive-subprime (describing enforcement actions the agency has taken against illegal subprime mortgage lenders and efforts to educate "older consumers" about abusive lending practices).

108. *See Abusive Car Loans*, *supra* note 18.

109. *Id.*

110. *Id.*

higher interest rate and shares the surplus with the dealer.[111] The possibility of sharing in that surplus incentivizes the dealer to "sell" the consumer on unnecessary add-ons that increase the price and consequently increases the amount that can be quoted to the buyer.[112] While exercising their discretion, lenders have quoted minorities disproportionately higher interest rates than white borrowers.[113]

Predatory loans have also been linked to "higher odds of default and repossession for subprime borrowers," and puts low-income consumers at higher risk of auto-loan predation.[114] Before the Federal Reserve outlawed the practice, lenders were engaging in similar behavior in the mortgage market.[115] In fact, "[a]uto lending is the only major lending where dealer markup kickbacks through indirect lending still occurs."[116] The CFPB supervises large banks making auto loans—i.e., direct financing—but until recently, did not supervise nonbank finance companies.[117] Thus, there was potential for abuse, deception, and predatory lending practices by nonbank finance companies.

Lenders have not been solely responsible for the issues fueling the recent upswing in deceptive practices.[118] The CFPB recently held a focus group to research consumer experiences with auto financing.[119] The results of the focus group showed that most consumers: (1) did not conduct advance research on available financing options, "[(2)] focused on the monthly payment and vehicle price, [(3)] did not consider or attempt to negotiate financing or interest rates, and [(4)] purchased add-on products despite having negative perceptions of the sales process for add-ons."[120] Overall, the CFPB found among consumers "a lack of understanding of financing options, difficulty understanding loan features during loan negotiations, and problems with add-ons such as paying for unwanted add-ons and reports of lenders insisting that the purchase of add-ons was necessary for loan approval."[121]

Despite concerns of deceptive lending practices and lack of education on the part of consumers with respect to financing, the CFPB, FTC, and DOJ have

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111. *Id.*

112. *See id.*

113. *Id.*

114. *Id.*

115. *See* Heath, *supra* note 7.

116. *Id.* (quoting Chris Kukla, senior counsel at the Center for Responsible Lending).

117. *CFPB Proposes Federal Oversight*, *supra* note 80.

118. Barbara S. Mishkin, *CFPB Unveils Know Before You Owe Auto Loan Initiative; Issues Report on Consumer Auto Financing Experiences*, BALLARD SPAHR LLP: CONSUMER FIN. MONITOR (June 13, 2016), https://www.cfpbmonitor.com/2016/06/13/cfpb-unveils-know-before-you-owe-auto-loan-initiative-issues-report-on-consumer-auto-financing-experiences/.

119. *Id.*

120. *Id.*

121. *Id.*

brought only a handful of actions against lenders in recent years.[122] These enforcement actions, however, have proven to have far-reaching impacts.[123] When the CFPB investigated Ally Financial Inc. and Ally Bank (Ally) and found that "more than 235,000 African American [sic], Hispanic, Asian and Pacific Islander borrowers paid higher interest rates for their auto loans between April 2011 and December 2013," the CFPB forced Ally to establish a $80 million settlement fund for certain minority borrowers, hire a settlement administrator to distribute the funds to the victims, set up a compliance program to avoid similar future violations, and fined Ally for $18 million.[124] Thus, it is clear that regulators possess the tools to identify and remedy deceptive lending practices.

2. Efforts by the CFPB to Address Consumer Financial Protection Issues

"Auto loans are the third largest category of household debt," eclipsed "only by mortgage and student loan debt."[125] According to CFPB Director Richard Cordray, "[n]onbank auto finance companies extend hundreds of billions of dollars in credit to American consumers, yet they have never been supervised at the federal level."[126] On June 10, 2015, the CFPB exercised its rulemaking authority under Dodd-Frank to define "larger participants."[127] Under the new rule, a "nonbank covered person that engages in automobile financing is a larger participant of the automobile financing market if it has at least 10,000 aggregate annual originations."[128]

When the CFPB proposed this rule, roughly thirty-eight entities met this requirement, accounting for approximately ninety percent of the auto loan market.[129] The regulation was directed toward protecting consumers who seek indirect financing through auto finance companies, specialty finance companies,

122. *See* Zack at al., *supra* note 27 (describing a joint CFPB and DOJ action against Ally Financial, Inc. and Ally Bank); *see also* Michael Corkery & Jessica Silver-Greenberg, *Santander Consumer Gets Subpoena in Subprime Car Loan Inquiry*, N.Y. TIMES (Aug. 7, 2014), http://dealbook.nytimes.com/2014/08/07/santander-consumer-gets-subpoena-in-subprime-inquiry/?_r=0 (describing a DOJ enforcement action against Santander Consumer USA); Peter N. Cubita, *Another Auto Finance Company Agrees to Change Dealer Compensation Policy to Settle ECOA Claims Alleged by CFPB and DOJ*, BALLARD SPAHR LLP: CONSUMER FIN. MONITOR (Feb. 8, 2016), https://www.cfpbmonitor.com/2016/02/08/another-auto-finance-company-agrees-to-change-dealer-compensation-policy-to-settle-ecoa-claims-alleged-by-cfpb-and-doj/.

123. *See* Zack et al., *supra* note 27.

124. *Id.*

125. *CFPB Proposes Federal Oversight*, *supra* note 80.

126. *Id.*

127. *CFPB to Oversee Nonbank Auto Finance Companies*, CONSUMER FIN. PROT. BUREAU (June 10, 2015), https://www.consumerfinance.gov/about-us/newsroom/cfpb-to-oversee-nonbank-auto-financecompanies/. Dodd-Frank authorizes the CFPB to regulate nonbanks if they are "larger participants" of the market. *See* 12 U.S.C. § 5514(a)(1)(b) (2012).

128. Defining Larger Participants, *supra* note 23, at 37,498.

129. *CFPB Proposes Federal Oversight of Auto Lending Companies*, PRACTICAL L. FIN., WL Article 6-582-2226 (Sept. 24, 2014) [hereinafter Article 6-582-2226].

captive nonbanks, and Buy Here Pay Here (BHPH) companies.[130] Of these, large "captive" nonbanks, which are subsidiary finance companies owned by auto manufacturers, dominate the market, with specialty finance companies and BHPH companies accounting for a significant portion of the remaining market share.[131] However, the new definition does not cover motor vehicle dealers, as they are explicitly excluded from Dodd-Frank.[132]

Through the new rule, the CFPB seeks to ensure that auto lenders are "treating consumers fairly by: [f]airly marketing and disclosing auto financing, . . . [p]roviding accurate information to credit bureaus"; and "[t]reating consumers fairly when collecting debts."[133] In particular, the new rule sought to address "discriminatory pricing in the auto-lending market."[134] The CFPB found that indirect auto financing presents a risk of discrimination because of "the incentives these policies create, and the discretion they permit."[135] In addition, the new rules have brought automobile leasing and BHPH companies under the supervision of the CFPB.[136] According to the CFPB, automobile leasing amounts to the "functional equivalent" of purchase finance agreements because, as in such agreements, consumers must provide largely the same information as when seeking a loan and typically have the option to purchase the vehicle after the lease period.[137] The importance of automobiles to financial well-being and auto finance's position as the third largest category of household debt are repeatedly cited as an important reason for increased regulation in this market.[138]

Proponents of the new rule view this as a step in the right direction toward protecting consumers against unfair, deceptive, and predatory practices, thereby

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130. Defining Larger Participants, *supra* note 23, at 37,507.

131. *Id.* at 37,507.

132. *See* 12 U.S.C. § 5519(a) (2012) ("The Bureau may not exercise any rulemaking, supervisory, enforcement or any other authority, including any authority to order assessments, over a motor vehicle dealer that is predominantly engaged in the sale and servicing of motor vehicles, the leasing and servicing of motor vehicles, or both.").

133. *CFPB Proposes Federal Oversight*, *supra* note 80.

134. *Id.*

135. CONSUMER FIN. PROT. BUREAU, CFPB BULL. NO. 2013-2, INDIRECT AUTO LENDING AND COMPLIANCE WITH THE EQUAL CREDIT OPPORTUNITY ACT 2 (2013), http://files.consumerfinance.gov/f/201303_cfpb_march_-Auto-Finance-Bulletin.pdf; *see* Richard Cordray, *Prepared Remarks of Director Richard Cordray at the National Community Reinvestment Coalition Annual Conference*, CONSUMER FIN. PROTECTION BUREAU (Mar. 22, 2013), http://www.consumerfinance.gov/newsroom/prepared-remarks-of-director-richard-cordray-at-the-national-community-reinvestment-coalition-annual-conference/ (discussing the effect that discretionary markup policies have on minority borrowers).

136. *See* Defining Larger Participants, *supra* note 23, at 37,498, 37,507.

137. *Id.* at 37,498–99.

138. *See, e.g.*, *id.* ("From a consumer's standpoint, whether a vehicle is leased or financed through a loan, any act or practice that impedes access to a vehicle or otherwise creates problems related to the loan or leasing arrangement can have a critical impact on the consumer."); *CFPB Proposes Federal Oversight*, *supra* note 80 (finding that "cars are indispensable for most working Americans").

limiting the risk of another loan bubble.[139] In fact, proponents claim that additional regulations are necessary to fully protect consumers.[140] Director Cordray defends the Bureau's actions on grounds that "nonbank finance companies originate 'about' forty percent of auto loans made today and more than eighty-five percent of auto leases."[141] He claims that the CFPB "permits honest competition to flourish," and the CFPB "provides valuable information to Congress as its seeks to monitor the markets and prevent another financial crisis." [142] Moreover, the CFPB claims that the new Larger Participant Rule "does not impose new substantive consumer protection requirements" because "[n]onbank covered persons generally are subject to the Bureau's regulatory and enforcement authority, and any applicable Federal consumer financial law, regardless of whether they are subject to the Bureau's supervisory authority." [143]

Although market participants are concerned about additional compliance costs imposed by the new rule, the CFPB expects the cost of compliance to be minimal.[144] The CFPB estimates that the total cost of an examination would cost "less than one-tenth of [one] percent of total revenue from originations for that year."[145] Further, the CFPB expects compliance costs to be "limited" for both existing and newly covered entities, arguing that although FTC Act does not impose the "abusive" standard, most practices covered by the new rule are already covered by other sections of Dodd-Frank and the FTC Act.[146] Furthermore, the CFPB believes that for those entities already subject to supervision, additional costs will be "minimal."[147]

On the other hand, many critics are concerned that the CFPB "overextends its mandate, limits consumer choice[,] and negatively [affects] the economy."[148] The National Automobile Dealers Association and the National Association of Minority Auto Dealers have expressed concern that this new rule will "increase the cost of auto financing by impairing competition in the auto-lending market."[149] In addition, critics argue that the new rule ignores that dealer markups include "negotiation over purchase price and interest rate, and

139. *See* Atta-Krah, *supra* note 52, at 1217.

140. *See, e.g.*, Erica N. Sweeting, Comment, *Disabling Disabling Devices: Adopting Parameters for Addressing a Predatory Auto-Lending Technique on Subprime Borrowers*, 59 HOW. L.J. 817, 842 (2016).

141. Steven Harras, *CFPB Chief Cordray Defends His Agency's 'Umpire' Role*, CONG. QUARTERLY: CQ ROLL CALL (Dec. 19, 2016), *available at* 2016 WL 7335452.

142. *Id.*

143. Defining Larger Participants, *supra* note 23, at 37,497.

144. *See id.* at 37,519 n.144 (claiming that the CFPB, while formulating the proposed rule, had already factored the costs that regulated entities would incur providing the information the CFPB would request).

145. *Id.* at 37,520.

146. *Id.* at 37,522.

147. *Id.* at 37,523.

148. Zack et al., *supra* note 27.

149. Perez, *supra* note 47, at 407.

compensation from markups can be used to offset lower purchase prices."[150] Moreover, critics argue that the costs of developing a comprehensive system to ensure compliance with the CFPB,[151] the $750,000 to $1 million that larger companies would have to pay in preparation for the CFPB's examinations, and the costs of defending against a CFPB action will be passed on to consumers.[152] Finally, critics argue that the CFPB is attempting to circumvent the auto dealer exemption in Dodd-Frank to regulate dealers outside its jurisdiction.[153]

3. The Federal Trade Commission's Role in Consumer Protection

The FTC also plays a role in the auto lending market by protecting consumers from unfair, deceptive, and fraudulent trade practices.[154] The FTC is permitted under Dodd-Frank to prescribe rules regarding auto dealers.[155] Specifically, the FTC can regulate auto dealers who engage in "unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce."[156] The FTC also has authority to prescribe "rules which define with specificity acts or practices which are unfair or deceptive acts or practices in or affecting consumers."[157]

The FTC has brought several actions against auto dealers through its powers.[158] Specifically, the FTC brought deceptive advertising actions.[159] In addition, the FTC collaborated with law enforcement officials to "target auto finance application fraud, deceptive practices related to add-on products and services, and deceptive advertising."[160]

II. PROBLEMS WITH CFPB OVERSIGHT OF AUTO DEALERS

The exclusion of automobile dealers from Dodd-Frank has introduced a myriad of issues into the subprime auto financing market. Underlying these

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150. *Id.* at 420.

151. McDonald & Rojc, *supra* note 50, at 604–05. *But see* Defining Larger Participants, *supra* note 23, at 37,520 (estimating that the total labor costs of an examination would be approximately $27,611 and that this would account for "less than one-tenth of 1 percent of total revenue from originations for that year.").

152. Defining Larger Participants, *supra* note 23, at 37,520; Perez, *supra* note 47, at 427.

153. Zack et al., *supra* note 27; *see* Perez, *supra* note 45, at 409.

154. *See The Auto Marketplace*, FED. TRADE COMM'N, https://www.ftc.gov/news-events/media-resources/consumer-finance/auto-marketplace (last visited Dec. 22, 2017).

155. *See* ABA SEC. OF ANTITRUST L., 2011 REVIEW OF CONSUMER PROTECTION LAW DEVELOPMENTS 222–23 (Robin L. Moore et al. eds., 2011); CCH, *supra* note 59, at 499–500; *see also* Yoest et al., *supra* note 56, at 226.

156. 15 U.S.C. § 45(a)(1) (2012).

157. § 57a(a)(1)(B).

158. *See* Chamness et al., *supra* note 85, at 726–29.

159. *Id.* at 727–28.

160. *Id.* at 728–29.

issues is the tension between consumer protection and freedom of contract.[161] On one side, subprime auto lending has an established history of harming low-income consumers and minorities.[162] Given their decreased credit scores, such individuals are prime targets for predatory lending practices that exasperate their credit issues.[163] Furthermore, access to personal transportation is often essential to employment, given that ninety-one percent of Americans "commute to work using their personal vehicles."[164] As such, individuals with subprime credit are forced to take out loans that far exceed the value of the vehicle.[165]

On the other hand, consumers voluntarily enter into these financing contracts, and proponents of deregulation argue that lenders should not be penalized for extending credit to individuals whose poor credit scores ordinarily bar them from financing.[166] Having extended credit to risky borrowers, lenders need some way to collect on defaulted loans.[167] Without the monetary incentives, lenders likely would be reluctant to make subprime loans, in turn depriving the subprime borrowers of the financing to purchase vehicles they need to hold employment.[168]

A. The CFPB's Power to Protect Consumers

The CFPB possesses broad powers to regulate financial markets. Before the implementation of the new Larger Participant rule, the CFPB had authority to regulate large banks that directly financed automobile purchases by

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161. *See Abusive Car Loans*, *supra* note 18 ("Of course, dealer-arranged financing is not always a bad deal, and dealers should be fairly compensated for their services. But for many consumers, especially for those without other financing options, dealer-arranged financing can lead to unfair and deceptive lending, which is illegal under federal consumer financial law.").

162. *See id.*

163. Sweeting, *supra* note 140, at 832.

164. *See* Kirk, *supra* note 90, at 73 ("While subprime mortgages and subprime vehicle loans differ substantially, one difference in particular is simple but key: a consumer can forego purchasing a home and rent one, but car ownership is a requisite for an overwhelming majority of American households.").

165. *See* Leonhard, *supra* note 26, at 281–82 ("The BHPH dealers target people who need cars to get to work, but can't qualify for conventional loans because of poor credit scores. Because the buyers can't obtain loans elsewhere, they have to pay interest at three times the going rate or greater for regular used car loans.").

166. *See* Austin Goolsbee, *'Irresponsible' Mortgages Have Opened Doors to Many of the Excluded*, N.Y. TIMES (Mar. 29, 2007), http://www.nytimes.com/2007/03/29/business/29scene.html ("[T]he historical evidence suggests that cracking down on new mortgages may hit exactly the wrong people. As Professor [Harvey S. Rosen of Princeton University] explains, 'The main thing that innovations in the mortgage market have done over the past 30 years is to let in the excluded: the young, the discriminated against, the people without a lot of money in the bank to use for a down payment.' It has allowed them access to mortgages whereas lenders would have once just turned them.").

167. *See* Sweeting, *supra* note 140, at 826.

168. Kirk, *supra* note 90, at 73.

consumers.[169] After the new rule became effective, the CFPB had authority over roughly ninety percent of the auto finance market.[170] Although Dodd-Frank explicitly excluded auto dealers from the authority of the CFPB, the CFPB nonetheless oversees a vast majority of this market.[171]

Director Cordray argues that this regulation is necessary to protect consumers who need automobiles for financial stability.[172] However, this argument is a rather weak justification for such broad regulatory action, particularly in the face of a statute explicitly excluding auto dealers from the CFPB's authority. Rather, the regulation seems like a thinly veiled attempt by the CFPB to regulate one of the only credit markets that remain outside its supervision.

Now that the Larger Participant rule is in place, a majority of previously uncovered persons will be required to comply with the rules and regulations of the CFPB. The $750,000 and $1 million per examination estimated by the rule's critics may very well be passed on to consumers.[173] Although the cost of compliance will likely decrease over time as the entities become more familiar with the applicable regulations, this cost is unnecessary altogether because the FTC already largely oversees this market.

Consequently, additional oversight by the CFPB would only further complicate matters by duplicating powers between two agencies. The FTC is charged with oversight for these types of transactions under largely the same standard and has exercised its authority on numerous occasions.[174] Moreover, the "abusive" standard imposed by Dodd-Frank is a higher bar for entities to comply with.[175] Auto dealers were expressly excluded from the CFPB's jurisdiction and thus this higher standard. By circumventing this express act by Congress, the CFPB has only added unnecessary costs through duplicative oversight.

B. Likelihood of an Auto Loan Bubble

There has been growing concern about a bubble forming in the subprime auto loan market, similar to the one in the mortgage market that contributed to the

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169. *Compare CFPB Proposes Federal Oversight*, *supra* note 80 (noting that the CFPB's proposed role would include "nonbank auto finance entities" within its purview) *with* 12 U.S.C. § 5481(6) (2012) (defining the entities within the CFB's purview as those "engag[ing] in offering or providing a consumer financial product" and affiliates of those entities).

170. *CFPB Proposes Federal Oversight*, *supra* note 80.

171. *See* 12 U.S.C.A. § 5519(a) (2012); *see also* Article 6-582-2226, *supra* note 129.

172. *CFPB Proposes Federal Oversight*, *supra* note 80 ("Many people depend on auto financing to pay for the car they need to get to work . . . . Nonbank auto finance companies extend hundreds of billions of dollars in credit to American consumers, yet they have never been supervised at the federal level . . . . Today's proposal would extend our oversight, allowing us to root out discrimination and ensure consumers are being treated fairly across this market.").

173. *See* Defining Larger Participants, *supra* note 23, at 37,520.

174. *See* Chamness et al., *supra* note 85, at 727–28.

175. *See* Bainbridge, *supra* note 28, at 1783.

financial collapse of 2008.[176] Although auto lending is the third largest area of consumer debt, the fear of another bubble can be attributed to the close temporal proximity between increased levels of auto lending and the mortgage crisis. Analysts and industry officials are aware of the current lending trends and have repeatedly rejected the notion that another bubble is building.[177]

There are many factors that make the likelihood of another bubble unlikely. First, the size of the auto loan market is, at most, less than an eighth of the size of the housing market.[178] Second, banks and other lenders are more heavily regulated through Dodd-Frank and thus less likely to undertake the risks that contributed to the mortgage crisis. Furthermore, recovering collateral is far easier in auto lending than in mortgage lending. When a borrower defaults on payments, lenders can recover a portion of their losses in a matter of days, whereas in mortgage lending, lenders must wait months or years for the debtor's home to be foreclosed before they can recover.[179] The increased certainty of a quick recovery allows lenders to more accurately adjust their lending practices going forward.[180] Finally, after Dodd-Frank and the CFPB's new Larger Participant rule, there are few auto lenders that remain unregulated.

Although the delinquency rate of loans, particularly in the subprime area, still concerns many,[181] the delinquency rate is not necessarily the best indicator of market vitality.[182] A large portion of these delinquency rates have been attributed to new lenders in the market.[183] As these lenders become more established and improve their risk analytics, it is likely that the delinquency rates stabilize. Moreover, delinquencies account for only a tiny fraction of the overall market.[184] This, combined with the relative ease of repossession of collateral and the substantially lower cost of an automobile as compared to a house, shows that delinquency rates are not necessarily indicative of imminent financial collapse.

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176. *See* Smith, *supra* note 16 ("History has shown that aggressive subprime lending is unfavorable to both subprime borrowers, investors and subprime lenders. Most recently, subprime lending led to the rise and collapse of the housing bubble, in turn, this led to the U.S. subprime mortgage crisis. Ultimately, subprime lending led to the U.S. recession between December 2007 and June 2009. Now, there is one industry that is reminiscent of the U.S. subprime mortgage lending industry. The U.S. auto loan debt market has been slowly growing and some believe the bubble will burst."). *But see* Egan, *supra* note 15 ("It's important to remember that auto loans don't appear to pose the systemic risk that mortgages did before they started the Wall Street meltdown of 2008. Auto loans overall make up a much smaller universe of lending compared to mortgages. And banks too are much stronger to deal with any potential losses.").

177. *See* Assis & Beals, *supra* note 71; Holbrook, *supra* note 95.

178. *See* Assis & Beals, *supra* note 71; Holbrook, *supra* note 95.

179. Holbrook, *supra* note 95.

180. *See id.*

181. *Id.*

182. *Fitch: Reprieve for U.S. Subprime Auto Delinquencies*, *supra* note 91.

183. *See id.*

184. *Id.*

III. ADDITIONAL REGULATION IS UNNECESSARY AND WOULD HARM CONSUMERS

For good reason, many industry members, analysts, and academics feel that the CFPB has substantially more power than needed to achieve its goals. Although the CFPB has complied with its mandate to protect consumers in financial markets, it has overstepped its authority in the auto lending market. Dodd-Frank specifically excludes auto dealers from the authority of the CFPB. It is reasonable to read the auto dealer exclusion as encompassing nonbank auto finance companies generally, as evidenced by Senator Brownback's rationale for the section asserting that auto dealers were not responsible for the financial crisis.[185]

The circumstances and the actions taken by regulators, banks, and mortgage lenders before and leading up to the financial crisis are notably absent in the current subprime auto lending market. In particular, while the deregulation of the mortgage lending market was a significant contributor to the growth of the housing bubble,[186] the auto loan market is heavily regulated, with more than ninety percent of lending entities currently regulated.[187] Moreover, while consumers view the purchase of real estate as an investment that has the potential to increase in value,[188] most consumers are aware that there is almost no possibility of a vehicle rising in value and that most vehicles depreciate in value as soon as the vehicle is driven off the lot.[189] Thus, there is no comparable risk in the auto lending market that a period of falling asset values will surprise vast numbers of consumers.

The crux of the complaints regarding the auto lending market relate to unfair, deceptive, and predatory practices. However, there is no need for the CFPB to bring actions on these grounds as the FTC already oversees this area. Authorizing the CFPB to bring actions on these grounds would only further increase compliance costs by lenders, costs that would be passed on to consumers through increased prices and higher interest rates. As Director Cordray stated, automobiles are essential to maintaining employment and financial stability. By introducing additional obstacles and increasing the prices of automobiles, additional regulations may in fact harm the very consumers that regulators seek to protect. Finally, regulations that further decrease the risk of auto loan transactions for lenders by preventing them from making risky loans, will disincentive lenders from extending credit to subprime borrowers. This means that consumers will be less able to acquire the financing they need to purchase vehicles.

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185. Perez, *supra* note 47, at 402; *see* Indiviglio, *supra* note 22.
186. Pitman, *supra* note 33, at 1093.
187. Article 6-582-2226, *supra* note 129.
188. *See* Kang, *supra* note 26, at 53; *see also* Matthews, *supra* note 13.
189. *See* Kang, *supra* note 26, at 53.

IV. CONCLUSION

After the financial crisis of 2008, consumers and regulators were understandably wary about lending practices. In recent years, subprime auto lending has come under scrutiny, with many calling for additional regulation in the auto finance market. The Dodd-Frank auto dealer exemption largely prevents the CFPB from regulating the auto finance market. However, the CFPB's new definition of a "larger participant" leaves few auto lenders outside the supervision of the Bureau. Despite contentions that additional regulations are necessary to protect consumers, additional regulations may do more harm than good by increasing prices and interest rates, and limiting consumer access to credit.