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Before the U.S. House of Representatives Committee on Financial Services

"H.R. 1728, the Mortgage Reform and Anti-Predatory Lending Act of 2009"

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Good afternoon Chairman Frank, Ranking Member Bachus, and members of the Committee. Thank you for inviting us to testify about H.R. 1728, the Mortgage Reform and Anti-Predatory Lending Act of 2009.

I serve as President of the Center for Responsible Lending (CRL), a nonprofit, non-partisan research and policy organization dedicated to protecting homeownership and family wealth by working to eliminate abusive financial practices. CRL is an affiliate of Self-Help, a nonprofit community development financial institution that consists of a credit union and a non-profit loan fund. For close to thirty years, Self-Help has focused on creating ownership opportunities for low-wealth families, primarily through financing home loans to low-income and minority families who otherwise might not have been able to get affordable home loans. Self-Help's lending record includes a secondary market program that encourages other lenders to make sustainable loans to borrowers with weak credit. In total, Self-Help has provided over $5.6 billion of financing to 62,000 low-wealth families, small businesses and nonprofit organizations in North Carolina and across America.

A year and a half ago, this chamber passed legislation designed to make the subprime mortgage market safer for consumers. Today, the market that legislation targeted has virtually disappeared, and the entire mortgage finance system has imploded. The long-standing bulwarks of that system, Fannie Mae and Freddie Mac, have failed, and are now under the care of the government and receiving taxpayer aid. The private investment banking system that operated and built up the non-conforming secondary market has vanished, and the values of mortgage-backed assets once thought to be risk-free are now in free fall.

In light of what has happened, it is more essential than ever that Congress pass strong, sensible lending rules that will permit the mortgage market to resume its full functioning yet will prevent abusive, unsustainable lending in the future that could return us to the current crisis. *The key to reform is to realign the incentives of the market with as many bright-line rules as possible, yet also with adequate remedies to ensure that no one will fall through the cracks.*

We know that addressing this issue requires courage and resolve. Many industry interests have already begun to present objections to any limits on lending, threatening that they won't make loans if the rules are too strong from their perspective. Yet it is the *absence* of substantive and effective regulation that has managed to lock down the flow of credit beyond anyone's wildest dreams. For years, mortgage bankers told Congress that their subprime and exotic mortgages were not dangerous and regulators like the Federal

Reserve and the Office of Thrift Supervision believed the ideology that we should not restrain the "free flow of credit" at any cost. Then, after the mortgages started to go bad, lenders swore the damage would be easily contained.[1] As the global economy lies in tatters today with credit choked off, any new request to operate without basic rules of the road is more than indefensible; it's appalling.

The central question before us today is whether H.R. 1728 does what is necessary to prevent future abuses in the mortgage market. While we applaud many of the steps that this bill takes, we fear that on balance, the current language of the bill is insufficient for the task it undertakes. On the positive side, HR 1728 includes important protections that are similar to those in the Federal Reserve's rules on underwriting earlier this year: requiring underwriting with regard to ability to repay, requiring documentation of income, and limiting egregious prepayment penalties on certain categories of loans. The bill also expands the scope of the Federal Reserve guidance, putting in place critical protections with regard to "nontraditional" mortgages. And it includes a prohibition against abusive refinancing loans that do not provide a benefit to the borrower, but instead strip equity from the home to provide more income to the lender.

Some of these standards reflect significant improvements over earlier versions of similar bills, such as H.R. 3915 in the 110th Congress. HR 1728 does not include the earlier bill's "irrebuttable presumption" section, which gave some lenders a free pass to make unsustainable loans with no recourse at all available to the wronged homebuyer. It also makes crucial changes that strengthen the definition of "qualified mortgages," and adds a credit risk retention requirement for nonqualified mortgages. The strong tenant protection rules in this bill will greatly assist those innocent victims of the crisis, and the addition of legal aid funding will help wronged homeowners obtain redress.

There are still several important deficiencies in the bill, however, that will prevent the bill from achieving its stated goals:

- ***The bill does not eliminate the perverse incentives that led originators to push risky loan terms and products.*** While the bill imposes some duties on mortgage originators, prohibits steering, and restricts yield spread premiums, most of these provisions are relatively weak and the remedies are extremely limited. The bill needs stronger broker duties, a more powerful anti-steering prohibition, and a tighter ban on yield spread premiums, as well as stronger remedies for these violations, to end the reckless and discriminatory lending that has devastated many neighborhoods of color. As many states have already realized, one of the most effective steps the bill could take to realign incentives would be to ban prepayment penalties entirely throughout the market, thereby enabling any consumer to refinance immediately if they discover they can get a better mortgage elsewhere.

- ***While the bill establishes an "ability to pay" requirement and a requirement that refinancing loans provide a "net tangible benefit" to the homeowner, the consequences faced by wrongdoers are so minimal that there will be little incentive to comply with the law***. Even with strong standards, there are no serious consequences to lenders for violating these standards. All a lender (or assignee) needs to do when a homeowner discovers wrongdoing is to "cure" the mortgage, giving the homeowner the loan that should have been provided at the outset. The cost of curing is minimal, meaning that lenders can simply factor a small number of cures into the cost of doing business. This remedy is unlikely to change business practices or provide useful remedies to homeowners. While the bill does include an innovative credit risk retention mechanism to discourage risky lending, the risk retention requirement alone – as useful as it may be – cannot substitute for providing consumers with a way to hold lenders accountable. In fact, most lenders already retained some risk on existing loans through recourse arrangements and buy-back requirements, yet the system still failed.

- ***The bill does little to realign incentives and reduce Wall Street's appetite for risky loans***. The bill continues to protect the secondary mortgage market from the consequences of ignoring basic underwriting standards by eliminating any due diligence requirement, completely banning all class actions no matter what kind of conduct was involved, and prohibiting homeowners from obtaining recourse against the owners of their loans unless foreclosure has already been filed. Direct and meaningful accountability for those who fund, facilitate and encourage inappropriate loans is the only way to make victims whole and discourage risky lender or broker behavior. Furthermore, for protections to be meaningful, homeowners must be able to communicate with the people who own the note or those who can act on behalf of holders to provide the wronged borrower with a remedy. During economic hard times, making consumers default on their mortgages in order to vindicate their rights does no one any good – not homeowners, not their neighbors, not the lenders, and not the economy as a whole.

  The bill would threaten the use of the most important tools being used at the state level to fight predatory lending abuses. The preemption provision in the bill removes the strongest existing claims that homeowners are using now to save their homes, particularly those state laws that are currently used to reach secondary market participants. It limits homeowners victimized by unfair, deceptive and unconscionable acts to the weak remedies described above. In this significant respect, it would be a step backward for consumer protection.

In this testimony, we highlight the strengths and weaknesses of HR 1728, and we suggest specific ways in which the bill could be strengthened. Specific legislative language to carry out our suggestions has been provided to the Committee staff, and is available upon request.

I. Background

A. Today's mortgage market

While statistics seem almost unnecessary to illustrate what everyone here knows, every part of the mortgage origination system is in deep trouble. Overall mortgage activity has plummeted. For 2008, residential loan production cratered: $1.61 trillion compared to $2.65 trillion in 2007.[2]

Furthermore, originations of subprime, Alt A, and other non-prime mortgages all but stopped in 2008. Only an estimated $64.0 billion in such mortgages was originated last year, according to an analysis by Inside B&C Lending.[3] At its high point in 2006, nonprime lending constituted 33.6% of all mortgage production. By the fourth quarter of 2008, it had fallen to 2.8%.[4] These loans are not being originated in large part due to the collapse of the secondary market for these mortgages, which was driving the demand and facilitating the production, and analysts predict that 2009 will see "little or no non-agency securitization."[5]

Meanwhile, tens of thousands of mortgage brokers have lost their jobs, and more are positioned to lose their jobs as lenders stop using independent brokers; mortgage insurers are placing additional restrictions on loans originated by brokers; and banks are increasing net worth requirements on third-party lenders.[6]

On the demand side as well, every major indicator is down. Between 2006 and 2008, existing home sales dropped 24 percent,[7] while new home sales and new construction starts plummeted by 54 and 58 percent, respectively.[8] In February, mortgage applications for the purchase of homes hit their lowest levels since April 1998.[9]

While this hearing focuses on mortgage origination rather than on foreclosure prevention, the devastation of the foreclosure crisis is yet another factor that should guide our thinking as we craft lending legislation. Our most recent report on subprime mortgages shows that over 1.5 million homes have already been lost to foreclosure, and another two million families with subprime loans are currently delinquent and in danger of losing their homes in the near future.[10] New projections of foreclosures on all types of mortgages during the next five years estimate 13 million defaults from 2008Q4 until 2014.[11] Right now, more than one in ten homeowners is facing mortgage trouble.[12] Nearly one in five homes is underwater.[13]

The spillover costs of the foreclosure crisis are massive. Tens of millions of homes – households where, for the most part, the owners have paid their mortgages on time every month – are suffering a decrease in their property values that amounts to hundreds of billions of dollars in losses.[14] These losses, in turn, cost states and localities enormous sums of money in lost tax revenue and increased costs for fire, police, and other services. As property values decline further, the cycle of reduced demand and reduced mortgage origination continues to spiral downward.

B. A brief explanation of the recent meltdown.

Buying or refinancing a home is the biggest investment that most families ever make. For the vast majority of Americans, this transaction is often decisive in determining a family's future financial security. For this reason alone, prospective homeowners cannot be treated with a hands-off, caveat-emptor approach. But recent events have shown us the macroeconomic importance of affordable mortgages for homeowners. Rules of the road for mortgage lending are not just for the benefit of individual families, but for the benefit of the entire housing market and national economy.

A misalignment of incentives lies at the heart of today's mortgage meltdown.[15] Back in the days when families went to their local savings and loan to get a mortgage and the thrift held that loan among its own investments, the interests of borrowers and lenders were aligned: if the borrower did not pay the mortgage, the lender did not make money. But the proliferation of independent brokers and the growth of the secondary market upset that core alignment of interests between lender and borrower by creating a system where each actor was compensated early in the loan transaction, often within the first month of the loan term, thereby reducing or even eliminating the incentive to worry about how the borrower would fare later on.[16]

At the height of the housing bubble, independent mortgage brokers originated the vast majority of subprime loans, receiving their compensation from lenders immediately upon brokering the loan. Those lenders then sold the loan into the secondary market within weeks, where it was bundled together with other mortgages and sliced and diced into mortgage-backed securities (MBS). The facilitators of this process – the investment bankers, lawyers, and ratings agencies involved – were all paid their fees regardless of the performance of the MBS. Those securities were then sold to investors. At the same time, even more derivative products were layered on top of them, with credit default swaps at the top of the pyramid – what Warren Buffet identified as early as six years ago as "financial weapons of mass destruction."[17]

Now, the entire economy is paying the price of this untenable structure, as lenders have gone out of business, and those remaining are limiting their lending. The investors that sliced and diced the loans can't put them back together again to help prevent massive foreclosures that are a direct result of their original facilitation of bad acts in the marketplace. To prevent this situation from happening again in the future, a legislative effort to help create a safer, more sustainable mortgage market should have the guiding principle of realigning both the market incentives and the legal incentives all the way up the chain, from brokers through investors.

II. Eliminate the perverse incentives that lead originators to push risky loan terms and products.

A. Ban yield spread premiums.

One of the most significant drivers of the subprime mortgage crisis was the institution of yield spread premiums (YSPs), through which mortgages brokers were able to obtain additional compensation from lenders in return for selling consumers a higher rate loan than they qualified for. YSPs create a perverse incentive for mortgage brokers to steer borrowers into loans that are more costly and dangerous even though they could qualify for a more affordable product. Lenders then provide additional compensation to brokers to lock borrowers into those higher-rate loans with a prepayment penalty to provide an income stream to pay off that upfront YSP payment.

In the prime market, the YSP was originally used as a trade-off for up-front mortgage origination fees. In those cases, the consumer essentially financed their upfront costs by agreeing to a higher rate loan; the lender then paid the broker a sum of money rather than the consumer paying the broker directly. The reality, however, is that – especially in the subprime and nontraditional mortgage markets – this trade-off rarely, if ever, occurs.[18] The fact is, most consumers have a great deal of trouble understanding the concept of paying through the rate.[19] Because YSPs are so confusing, brokers have been able to charge customers up-front for discount points and other fees while also placing them into a higher interest rate loan than that for which they qualified and thereby earning a YSP – essentially being paid for the same loan by both the customer and the lender.

We applaud H.R. 1728 for banning YSPs that vary with the terms of the loan. We believe this ban will significantly reduce incentives for brokers to upsell borrowers into more expensive and riskier loans than those for which they qualify.[20] However, there is still a large loophole in the ban that needs to be closed. Although Section 103 bans yield spread premiums that vary with the term of the loan, it still permits consumers to finance fees, costs and compensations through a higher interest rate on their loan than that for which they qualify. We agree that financing through the rate can be a useful tool for some borrowers, but only if it is done in a very careful way and consumers are adequately protected. Thus, we strongly recommend permitting financing through the rate only for qualified mortgages only if all fees and costs are paid through the rate.

B. All mortgage originators should have a duty of good faith and fair dealing, and independent mortgage brokers should have a fiduciary duty to their customers.

While H.R. 1728 does establish a duty of care for originators, we believe these duties need to be stronger to ensure that originators uphold the highest standards when selling mortgage loans to consumers. For all mortgage originators, any legislation should establish a duty of good faith and fair dealing for all mortgage originators, requiring an originator to make reasonable efforts to secure a home mortgage loan that is appropriately advantageous to the consumer. The originator would have to sell a product that was appropriate with respect to product type, rates, charges, and repayment terms of the loan.

Independent mortgage brokers, however, should be held to an even higher standard than retail lenders. Experts on mortgage financing have long raised concerns about problems inherent in a market dominated by broker originations. For example, the chairman of the Federal Reserve Board, Ben S. Bernanke, noted that placing significant pricing discretion in the hands of financially motivated mortgage brokers in the sales of mortgage products can be a prescription for trouble, as it can lead to behavior not in compliance with fair lending laws.[21] Similarly, a report issued by Harvard University's Joint Center for Housing Studies, stated, "Having no long term interest in the performance of the loan, a broker's incentive is to close the loan while charging the highest combination of fees and mortgage interest rates the market will bear."[22]

For the foregoing reasons, independent brokers should have a fiduciary duty to their customers, just as stockbrokers do. Unlike retail lenders, who are obviously in business to sell loans to consumers, brokers hold themselves out to consumers as trusted advisers for navigating the complex mortgage market. Like stockbrokers, that is the value-added service they sell, and it is the service consumers assume they are buying. Yet most mortgage brokers and their trade associations deny that they have any legal or ethical responsibility to refrain from selling inappropriate, unaffordable loans, or to avoid benefiting personally at the expense of their borrowers. Moreover, because of the way they are compensated, brokers have strong incentives to sell excessively expensive loans to their customers, even when those customers qualify for better loans.

C. Ban discriminatory steering of borrowers into more expensive loans than those for which they qualify.

Mortgage lending legislation should absolutely prohibit racially discriminatory steering. While an efficient financial market theoretically would provide equally qualified borrowers with equally competitive prices on subprime home loans, both quantitative research and anecdotal evidence show that some borrowers, particularly African-American and Latino families, pay more than necessary for their mortgages.

In May 2006, CRL analyzed data submitted by mortgage lenders for loans made in 2004 to assess the effects of race and ethnicity on pricing in the subprime market while controlling for the major risk factors used to determine loan prices. Our findings showed that, for most types of subprime home loans, African-American and Latino families were at greater risk of receiving higher-rate loans than white borrowers, even after controlling for legitimate risk factors.[23] In other words, if two families received subprime loans, one African American and one white, and they had the same credit score and were similarly qualified in every other way, the African-American family has a significant chance of receiving a higher-cost loan.

We are pleased to see that H.R. 1728 contains an anti-steering provision. However, this provision needs to be stronger. It currently prohibits "abusive or unfair lending practices," but does not explicitly preclude steering consumers to loans more costly than those for which they qualify or prohibit certain types of mischaracterizations of information.

D. Combine Title I and Title II of the bill to improve clarity and remedies.

We strongly recommend moving the substantive lending standards in Title I (all of Sec. 123) to Title II for two reasons: (1) to improve clarity by including all lending standards in the same Title; and (2) to ensure that remedies are both consistent and adequate for violations of all lending standards. This change would place anti-steering protections, YSP limitations, and broker underwriting duties on the same level with the other standards in the bill. Consumers should receive the same protections and remedies for all of the bill's standards.

III. Require that all loans are affordable and provide the customer with a benefit and ensure that the consequences for failing to meet these standards are sufficient to change behavior.

A. Mortgage originators should be required to evaluate the ability of the consumer to pay the loan and provide the consumer with a net tangible benefit when refinancing a loan.

Perhaps one of the most astonishing aspects of the recent reckless lending spree was that the market utterly ignored whether a borrower could actually afford the mortgage. This core underwriting principle – a basic, common-sense business principle that would be understood by virtually anyone – was not only ignored, it was affirmatively shunned. The mortgages that sparked the market meltdown were "designed to terminate" specifically to ensure a continuing stream of new originations.[24] Given that business model, sustainability was at best irrelevant and at worst affirmatively undesirable.

Not considering a borrower's ability to repay was especially dangerous in the case of adjustable rate mortgages (ARMs) that incorporated an element of payment shock to the borrower. Payment shocks are created by a variety of dangerous loan structures: loans made without documenting incomes because the families simply did not afford the payment; subprime exploding ARMs where the payment increases by 30% - 40% after the second year, even if rates in the economy stay constant; interest-only loans where the payment can increase by 50% when the loan starts amortizing over a shorter remaining life; and payment option ARMs where the payment can double when it recasts at the fifth year, for lenders who require recasting at that time rather than ten years out. If these loans were not carefully underwritten at the fully indexed, fully amortizing payment when made, as many lenders failed to do, they set the borrowers up for almost certain failure. In fact, at times of very low interest rates, such as the current time, it may be prudent to underwrite to a higher payment, such as the maximum payment under the loan, because when interest rates rise, homeowners face payment shock from any type of adjustable rate loans.

Most loan originators understood that they were putting borrowers into loans that were unsustainable and that would need to be refinanced prior to reset. In 2004, the General Counsel of New Century, then the nation's second-largest subprime lender, referred to its 2/28 interest-only product and stated that "we should not be making loans to borrowers with the expectation that the borrower will be able to refi in a couple years."[25] His warning was ignored.

What's more, during the recent heyday of reckless lending, loan originators – particularly independent mortgage brokers – encouraged borrowers to take out so-called "no doc" or stated-income loans even when those borrowers had easy access to their W-2s. Without adequate income verification, a lender's approval of a loan is meaningless. Borrowers often do not understand that they are paying a higher interest rate not to document their income, even though their W-2s are readily available. They also often do not realize that the broker has inflated their income on the loan application. A review of a sample of stated-income loans disclosed that 90 percent had inflated incomes compared to IRS documents and almost 60 percent of the stated amounts were exaggerated by more than 50 percent.[26] Overstated incomes leads to overestimated repayment ability and then to foreclosures.

In July of last year, the Federal Reserve Board finally exercised its authority under HOEPA to prohibit unfair and deceptive practices.[27] Its rule addresses some of the most destructive practices leading to this crisis, although only for subprime loans. It requires lenders to evaluate a borrower's ability to repay; reduces abusive prepayment penalties on short-term subprime ARMs; and requires escrowing for taxes and insurance.

Unfortunately, the Federal Reserve Board did not extend these common-sense protections far enough. To help prevent further abusive lending, these common sense protections must apply to the entire mortgage market. As we have seen from the crisis we are now in, no segment of the mortgage market is immune from dangerous lending practices. Such legislation would simply codify what responsible lenders are already doing.

Federal legislation also should mirror successful state laws requiring a net tangible benefit for mortgage refinances. Loan flipping has, since the beginning of the subprime market, been a prime tool for stripping the equity from homeowners. These laws prevent the serial refinancing by unscrupulous originators and have been shown not to reduce access to legitimate credit.[28]

For the reasons above, we are very pleased to see that H.R.1728 applies the ability to repay and net tangible benefit requirements to all loans. By establishing a special category of "qualified" mortgages, the legislation provides mortgage industry participants with the protection that if loans fall within these parameters, they will benefit from the presumption of the ability to repay. On the other hand, by making that presumption rebuttable, the law protects those homeowners who may fall through the cracks and receive loans that are clearly unsustainable. Similarly, the net tangible benefit requirement provides lenders with similar protections for refinancing activity.

B. Tweak definition of qualified mortgage to limit excessive fees and consider residual income.

In defining “qualified mortgage,” H.R. 1728 properly identifies many of the best indicators regarding the sustainability of a loan. It requires full documentation of income; underwriting to a fully-indexed, fully-amortizing rate; and consideration of a consumer’s debt-to-income ratio. It also appropriate excludes nontraditional mortgages, such as interest-only or negatively amortizing “option ARM” loans. All of these requirements make good business sense; indeed, much of the American public has been mystified to discover that these basic rules had not regularly been followed by the mortgage industry.

Two additional requirements are needed for this category. The first protection, and one that has long been at the forefront of preventing predatory lending, is limiting excessive fees.[29] Historically, mortgage loans primarily generated income and profits through the performance of the loans and the payment of interest. In recent years, this model was abandoned for quick payments generated at closing that were divorced from the long-term sustainability of the loan. Longstanding and widespread state limitations on upfront mortgage fees were swept aside by federal preemption, and mortgage lending turned its focus from performance-tied returns to fees extracted at closing. The result has been the loss of home equity for families and an unstable and unsustainable mortgage system that has badly wounded our overall economy.

Legislation should provide transparent limits on up-front fees. Originator fees should be limited to 2%, with additional costs and profits recovered through the interest rate. This provides pricing transparency, which is essential for competition to work, and it rewards lenders who provide sustainable loans instead of lenders who extract the greatest amount of equity at closing. To the extent loans are permitted that exceed these limits, there should be additional safeguards and lender responsibilities to ensure that homeowners benefit from any additional charges. This limitation on fees should include all direct and indirect fees and charges other than bona fide filing fees and escrow amounts.[30]

Finally, while we agree that debt-to-income ratios are an important tool in ensuring the customer’s ability to repay a loan, it is also crucial to consider residual income when evaluating ability to repay. This is especially true for lower-income consumers. In §226.34 of the new HOEPA regulations released last summer, the Federal Reserve Board described residual income as “the income the consumer will have after paying debt obligations.” We believe that consideration of residual income as defined this way should be added as a factor to be considered in evaluating ability to repay for all mortgages or, at the least, for qualified mortgages. Further definition should be left to the regulators.

C. Ban prepayment penalties for all loans.

Prepayment penalties were a pervasive and insidiously harmful feature of the now-collapsed subprime market. During the current crisis, many families that might have escaped their mortgage by refinancing before housing values became prohibitively low found themselves trapped by a prepayment penalty. Commonplace in the subprime market, a prepayment penalty on a $250,000 loan could be expected to be in the range of $8,000-$10,000—enough to prevent or discourage refinancing. Independent research has fixed the increased risk of default on subprime mortgages with prepayment penalties from 16-20% over already high baseline rates.[31]

Costly prepayment penalties and high front-end fees rewarded originators by paying them handsomely regardless of the long-term sustainability of the loan. Prepayment penalties were also highly valued by Wall Street because they protected the income stream to investors. We now know that the harm caused by trapping borrowers in bad loans and stripping equity caused far more harm to those investors in the long run. In short, prepayment penalties are an anticompetitive practice and the direct and indirect costs of this market-distorting practice far outweighs the benefits.

Contrary to some industry claims, empirical analysis of the effects of anti-predatory lending laws, including those with limitations on prepayment penalties, shows that banning prepayment penalties and other predatory practices does <u>not</u> cause a restriction in access to credit.[32] Instead, it only causes a decrease in targeted abuses. In fact, in states that have limited prepayment penalties as part of their approach to curbing predatory lending, interest rates have stayed the same or even been lowered, compared with control states where such protections are absent.[33] In other words, rather than reducing access to legitimate credit, regulation has countered a market that had previously been governed by Gresham's Law (bad loans tended to drive out good loans). Careful regulation is a thereby an aid to competition as well as to consumers.

For these reasons, we are pleased that H.R. 1728 bans prepayment penalties for nonqualified mortgages. However, especially given the rarity with which these penalties are used in the prime market, we support a full ban on prepayment penalties for all mortgages. These provisions are extremely rare in the current origination environment, which provides the perfect opportunity to ban them from the marketplace entirely without causing any significant repercussions. (Ironically, yesterday's Wall Street Journal reported the banking industry is aggressively lobbying the Treasury Department to make it less costly for financial institutions to get out of the Troubled Asset Relief Program. The banks told the Journal that they object to being charged prepayment penalties.)[34]

D. Credit risk retention is a creative innovation that could enhance market discipline, but it is not a substitute for bright line origination rules or appropriate legal accountability.

One of H.R. 1728's most interesting innovations is its requirement that lenders retain the credit risk for a certain percentage of its loans. The goal of this requirement is to realign lender incentives for making loans that will perform over time.

While we understand and agree with the goal of this requirement, we have several concerns. First, while structural changes to the market that encourage self-policing are important, they are not a substitute for legal accountability. Even in a market where all the incentives are lined up perfectly, laws and rules will from time to time be violated, and it is crucial that the victims of such wrongdoing have individual recourse to be made whole.

Second, we are not certain that a 5% credit risk retention requirement for nonqualified loans will make a significant difference in the market. At present, most securitized loans features various representations and warranties up and down the chain of ownership that provide essentially full legal risk retention, yet that system did not function to discourage the origination of many abusive and highly risky loans.

Third, this requirement may generate some problems of its own. From our discussions with regulators and industry participants, we hear that it will have a disproportionately negative impact on smaller lenders and non-depository institutions because of enhanced capital requirements, and that the prohibition on hedging may cause significant problems for regulated institutions.

On balance, we suggest considering whether a mortgage reform bill with strong bright line rules, such as a ban on yield spread premiums and prepayment penalties and a cap on fees, plus clear accountability up the chain of ownership, would provide strong enough protections in the market so that this additional provision would be unnecessary.

IV. Realign incentives in order to reduce Wall Street's appetite for risky loans.

Although all parts of the mortgage origination chain bear some responsibility for the foreclosure crisis, perhaps nothing exacerbated the crisis as much as Wall Street's demand for predatory loans. As the subprime market grew, investment bankers sought more and more of these loans offering higher-risk investments with the potential for higher returns.

In response to the Wall Street demand, lenders created new, dangerous loan products that appeared deceptively affordable to borrowers, and brokers pushed these products to earn high fees. After filing for bankruptcy, the CEO of one mortgage lender explained it this way to the *New York Times*, "The market is paying me to do a no-income-verification loan more than it is paying me to do the full documentation loans," he said. "What would you do?" Similarly, Alan Greenspan recently told *Newsweek*, "The big demand was not so much on the part of the borrowers as it was on the part of the suppliers who were giving loans which really most people couldn't afford. We created something which was unsustainable. And it eventually broke. If it weren't for securitization, the subprime-loan market would have been very significantly less than it is in size."[35]

Wall Street rating agencies also turned a blind eye to the increasingly high volume of poorly underwritten, extremely dangerous loans included in mortgage investments. Paid by the securitizers to rate the tranches, the agencies overlooked loans that any experienced underwriter would have known were headed for foreclosure, giving AAA ratings to the majority of the tranches created.[36]

The best way to prevent a reoccurrence of Wall-Street-fueled bad lending is for the secondary market to fear adverse consequences for purchasing – and thereby fueling the demand for – abusive or unsustainable mortgages. If investors want the high returns that come with purchasing risky loans, they should agree to bear some of the risk of the loans that they buy. Accountability must follow the loan all the way through the chain. We do not have to choose between a system that feeds irresponsible debt bubbles with too little accountability and a system that is too restrictive. Carefully crafted legislation can find the appropriate balance to ensure that consumers have adequate redress and that all players in the market have the necessary accountability without unduly restricting responsible and affordable credit.[37]

While both the homeowner and the ultimate note holder may, in most situations, be without specific culpability, the holder is in a far better position than the homeowner to bear the risk of a bad mortgage for three reasons. First, the holder can conduct stringent due diligence to ensure that it is not unwittingly purchasing bad mortgages. Second, the holder can choose from whom to buy their loans and can therefore choose reputable originators who are likely to make quality mortgages and who are strong enough to purchase the loans back if they violate the representations and warranties that the secondary market purchaser imposes. Third, in the rare instances where a holder cannot put losses back on the original lender, the holder can spread its loss across thousands of other loans, while the homeowner has but one home.

Unfortunately, as drafted, H.R. 1728 does not establish an effective level of accountability, and the minimal accountability scheme that it does create is unworkable under current law. Below, we lay out our suggestions for improvement.

A. Require Wall Street firms to scrutinize the loans they buy.

After the events of the past year, it should be axiomatic that Wall Street firms should b required to review the loans they purchase by performing some form of due diligence, yet there is no due diligence requirement in the bill at all. Moreover, permitting secondary market actors to escape all liability through a cure will likely remove or significantly reduce any existing incentive to review loans prior to purchasing and securitizing them. If the only remedy in the small percentage of cases in which rescission is sought is to do what should have been done in the first place, there is very little deterrence to noncompliance. In today's climate, it seems unacceptable to enable Wall Street to continue to purchase loans with no need to be concerned about their terms.

We suggest two possible ways to reintroduce the concept of due diligence into the bill. First, it could be added to the cure provision, so that assignees could escape liability only if they provide a cure to the wronged homeowner *and* if they had conducted due diligence on the loans that they purchased. Alternatively, the ban on class actions could be conditioned on the performance of due diligence.

Finally, because whether appropriate due diligence has been performed can be a grey area that leads to unnecessary litigation costs, we suggest that the bill provide authority to a regulator to provide a clear definition of acceptable practices.

B. Give homeowners a chance to save their homes without having to go into foreclosure first.

H.R. 1728 gives homeowners a right to bring a lawsuit against assignees for violations of the bill's substantive provisions – a right that is consistent with other Truth in Lending provisions – and to receive the main remedy of the bill, which is rescission. Through rescission, an owner of a loan essentially undoes the entire loan transaction, putting wronged homeowners in the position they would have been in before buying the mortgage. Importantly, the only party that can provide rescission is the owner of the loan.

Yet H.R. 1728 artificially insulates trusts (also known as special purpose vehicles, or SPV's) that hold pools of loans from liability. Consequently, if a homeowner's loan is held in the secondary market as a whole loan, the homeowner may bring an action against the owner of the loan; yet if that loan has been securitized, the homeowner may no longer reach the owner. Instead, the homeowner has to sue the "securitizer." But the securitizer is not in the chain of ownership, so as a matter of law, the securitizer cannot provide the rescission remedy.

One justification put forward for this structure is the goal that an SPV not have to go to court. Yet SPVs go to court all the time – most notably, to file foreclosure actions against homeowners in default. In addition, SPVs are sued all the time under TILA, under the holder-in-due-course provisions of the UCC, or under other state laws – and even under H.R. 1728, the homeowner can counterclaim against the SPV if a foreclosure is pending. These lawsuits are handled by a trustee (or, most typically, handled by a servicer hired by the trustee) and the contracts among the SPV and the other market participants (the securitizer, the loan originator, the trustee, etc) generally provide indemnification up and down the chain.

Another justification is the desire to hold harmless the investors in securities backed by pools of mortgages. This concern is unwarranted, because under existing law, investors are not liable for any illegal actions of the trust or previous assignees or originators, just as shareholders in a company are not liable for violations of the company they've invested in. However, to the extent that it is desired, H.R. 1728 can explicitly provide that investors are not liable. It is not necessary to exempt the SPVs themselves from liability to do so.

The fact is, as a practical matter, it is hard enough for homeowners (or as we have seen in many recent cases, even courts) to learn who the real owner of the loan is, much less what firm packaged, sold and underwrote an MBS issuance. Moreover, it is unclear how such a structure would interact with the claims against the SPV that already are part of the law. The homeowner might have to sue different parties for different claims, perhaps even in different courts.

The only way to solve this problem is to permit all homeowners to be able to bring claims against the owner of their loan. If desired, the bill could also explicitly provide for the securitizer to indemnify the SPV, although that is currently the industry practice and would certainly be an even more common practice if H.R. 1728 is passed.

V. Preserve the most important tools being used at the state level to fight predatory lending abuses.

For nearly a decade, we have heard demands for federal preemption in the name of uniformity. Industry argues that the "patchwork quilt" of laws is a drag on the efficiency of the mortgage machine. In response, the federal bank regulatory agencies have pursued a sweeping preemption agenda in the name of uniformity.[38]

The existing crisis vividly demonstrates why federal law must not prevent the states' ability to deal with the problems that they typically see first. It is rare that a problem impacts all states equally and simultaneously. The states are far more nimble than Congress and their role as laboratories is a literal one. States' laws give us a track record for Congress to examine when lobbyists – from all sides – make claims about the likely impact of proposed laws.[39]

Congressional discussions around mortgage reform in 2005 were still focused on the kinds of abuses that the states had begun targeting for legislative reform in 1999, but by then, the market had moved on. And while the federal banking regulators were denying that "their" institutions were engaging in these particular subprime origination practices, they failed to come to grips with the practices their institutions <u>were</u> engaging in – both in buying up the results of those practices, and in their own problem originations in the nontraditional market.[40] As we now know beyond a reasonable doubt, the incredible appetite for originations led to new kinds of abuses: the abandonment of underwriting, and the market pushing inherently risky products for the reasons we have described.

But on the ground, the states recognized that the market was infecting their cities with a new virus. And, to the extent permitted by preemption, they took action. Ohio enacted the first of this "second generation" of anti-predatory mortgage lending laws as early as May 2006.[41] That legislation, among other things, addressed the ability to pay for all home loans and required a duty of good faith and fair dealing by non-preempted originators. It was followed by Minnesota and approximately ten other "second generation" mortgage reform laws.[42] As for Congress, we are here today – nearly three eventful years later – to talk about addressing those problems at the national level, despite the fact that the market self-destructed in the meantime.

We understand that this Committee is attempting to balance the interests of state law enforcement against the interests of industry's desire for a 50-state standard by putting some preemption into the bill, but limiting it to preemption of assignee liability. While we strongly prefer no preemption at all, at a minimum, any preemption clause that must not make consumers worse off than they are now regarding these claims.

However, as written, H.R. 1728's preemption language would override many important existing consumer remedies. As a result, consumers in many states would be put in a worse position than they are now, notwithstanding the strong substantive protections of the bill. Concerns about the current clause include the following:

- The bill as written does not accommodate current state and federal UDAP and UCC law on holders in due course. UDAP claims should not be preempted, especially for abuses grounded in unfairness. Moreover, the protection of the preemption should be limited to holders in due course.

- For claims arising out of state law claims that specifically address ability to repay or net tangible benefit, H.R. 1728 exempts assignees from all liability under these laws. We think it would be more consistent with the intention of the preemption clause compromise to preempt only state law liability that is *greater than* the limited liability set out in the bill.

- The provision needs to be extremely clear that it does not preempt claims regarding the assignee's own illegal actions. An example of such primary liability occurred in the First Alliance case that Rep. Waters raised at the markup in 2007, in which Lehman Brothers was an assignee but also actively participated in the illegal activity. The current preemption clause actually insulates assignees from liability for their *own* conduct if it is not under the rubric of fraud or deception.

VI. Mortgage servicers should attempt to keep homeowners in their homes before filing foreclosure.

Mortgage loan servicing is the least-regulated part of the entire mortgage market. Yet at the same time, servicing is not an industry subject to typical economic incentives. Homeowners "cannot choose the servicer that handles their loan and cannot change servicers if they are dissatisfied."[43] Instead, servicers are driven by the desire to maximize their own profits and to maximize returns to the investors who now stand in the shoes of the original lender.[44]

Over the past year, we have witnessed the spectacular failure of the servicing industry. In the face of millions of defaulting loans, the current servicing model responded with a weak and ineffective loss mitigation effort. The servicers began by focusing on short-term workouts that were not at all effective to solve the current problems, and to the extent loan modifications were made, most were unsustainable. Unbelievably, servicers routinely wrote modifications that *increased* monthly payments on customers who already could not afford their mortgages.[45]

While the servicing provisions of H.R. 1728 are helpful in many ways, loan servicers should be required to engage in loss mitigation prior to foreclosure. Such a requirement – already in existence for FHA and VA mortgage loan servicers – would make clear that alternatives to foreclosure should always be explored. As part of this requirement, homeowners should always be able to reach a live person with decision-making authority, and they should not need to sign away their legal rights just to get the modification. Perhaps most important, any agreement reached through loss mitigation should be affordable by the homeowner. Careful consideration of the borrower's income as well as any expenses, including debt and residual income left over for other living expenses, is critical in determining the affordability of any solution intended to keep homeowners in their home. Legislation should also impose reporting requirements so that policymakers and stakeholders have an accurate understanding of the kinds of loss mitigation being provided. The progress that has been made by the Treasury Department in defining a sustainable loan modification will enable similar legislation to provide more certainty for servicers, homeowners, and investors alike.

Conclusion

Today, as our nation struggles in the ruins of a broken mortgage market, it is important to remember that the benefits of homeownership have not changed. Long-term homeownership remains one of the best and most reliable ways that families can build a better economic future, and all of us have a strong national interest in ensuring that the mortgage market works to build our economy, not tear it down. In an effective home lending market, lenders and borrowers will enter transactions with the same fundamental measure of success – that is, a commitment to a mortgage that represents a solid investment both short-term and long-term. We urge Congress to strengthen H.R. 1728 so that it can help ensure competent risk management, profitable mortgage-backed investments, and sustainable homeownership.

[1] For example, in September 2006, Robert Broeksmit of the Mortgage Bankers Association told Congress, "Our simple message is that the mortgage market works and the data demonstrate that fact," and "I strongly believe that the market's success in making these "nontraditional" products available is a positive development, not cause for alarm." Statement of Robert D. Broeksmit, CMB Chairman, Residential Board of Governors, Mortgage Bankers Association, Before a Joint Hearing of the Subcommittee on Housing and Transportation and the Subcommittee on Economic Policy, U.S. Senate Committee on Banking, Housing and Urban Affairs, Calculated Risk: Assessing Non-Traditional Mortgage Products, *available at* http://banking.senate.gov/public/_files/broeksmit.pdf./. In May 2007, John Robbins of the Mortgage Bankers Association said, "As we can clearly see, this is not a macro-economic event. No seismic financial occurrence is about to overwhelm the U.S. economy. And we're not the only ones who think so." John M. Robbins, CMB, Chairman of the Mortgage Bankers Association at the National Press Club's Newsmakers Lunch – Washington, D.C. , *available at* http://www.mortgagebankers.org/files/News/InternalResource/54451_NewsRelease.doc.

[2] *National Mortgage News* (March 9, 2009).

[3] *Inside B&C Lending* (February 27, 2009).

[4] Id.

[5] *Inside Mortgage Finance MBS Database.*

[6] *National Mortgage News* (March 9, 2009).

[7] National Association of Realtors, http://www.realtor.org/research/research/ehsdata.

[8] US Census Bureau, http://www.census.gov/const/quarterly_sales.pdf and http://www.census.gov/const/www/quarterly_starts_completions.pdf.

[9] Based on the Mortgage Bankers Association's Weekly Mortgage Applications Survey for the week ending February 27, 2009. The four-week moving average for the seasonally adjusted Purchase Index reached its lowest level since April 1998. *See* www.mortgagebankers.org/NewsandMedia/PressCenter/67976.htm.

[10] Center for Responsible Lending, *Continued Decay and Shaky Repairs: The State of Subprime Loans Today*, p.2 (Jan. 8, 2009) [hereinafter "*Continued Decay*"], *available at* http://www.responsiblelending.org/issues/mortgage/research/continued-decay-and-shaky-repairs-the-state-of-subprime-loans-today.html.

[11] Goldman Sachs Global ECS Research, Home Prices and Credit Losses: Projections and Policy Options (Jan. 13, 2009), p. 16; *see also* Credit Suisse Fixed Income Research, Foreclosure Update: Over 8 Million Foreclosures Expected, p.1 (Dec. 4, 2008).

[12] Mortgage Bankers Association National Delinquency Study (March 5, 2009).

[13] First American Core Logic (March 4, 2009).

[14] *Continued Decay*, p. 3.

[15] For a much longer discussion of the roots of today's crisis, see Testimony of Eric Stein, Center for Responsible Lending, before the Senate Committee on Banking (Oct. 16, 2008), *available at* http://www.responsiblelending.org/pdfs/senate-testimony-10-16-08-hearing-stein-final.pdf.

[16] Chairman Bernanke makes this point in a recent presentation: "Housing, Housing Finance, and Monetary Policy," remarks by Ben Bernanke, Chairman, Board of Governors of the Federal Reserve System at the

Federal Reserve Bank of Kansas City's Economic Symposium – Jackson, Hole, Wyoming (August 31, 2007), pp. 16 – 17.

[17] Berkshire Hathaway Annual Report (2002).

[18] HUD, in the regulatory review accompanying the issuance of their recently-enacted proposed rule in March 2008, cited extensive evidence to the fact that even in the prime market, borrowers with YSPs pay in the aggregate more in fees, interest, and other closing costs than borrowers who do not pay YSPs. *See* Susan Woodward, *A Study of Closing Costs for FHA Mortgages*, HUD Office of Policy Development and Research (May 2008); *see also* Howell E. Jackson and Laurie Burlingame, Kickbacks or Compensation: The Case of Yield-Spread Premiums, 12 Stan. J. L, Bus & Fin. 289, 353 (2007).

[19] See 73 Fed. Reg. 44563-65 (consumers do not understand yield spread premium disclosures).

[20] Last year, we released a study that showed broker-originated mortgages cost more for subprime loans but less for some classes of prime loans. Keith Ernst, Debbie Bocian and Wei Lei, Center for Responsible Lending, *Steered Wrong: Brokers, Borrowers and Subprime Loans* (Apr. 8, 2008), *available at* http://www.responsiblelending.org/issues/mortgage/research/steered-wrong-brokers-borrowers-and-subprime-l-oans.html.

[21] Remarks by Federal Reserve Board Chairman Ben S. Bernanke at the Opportunity Finance Network's Annual Conference, Washington, D.C. (November 1, 2006).

[22] Joint Center for Housing Studies, "Credit, Capital and Communities: The Implications of the Changing Mortgage Banking Industry for Community-Based Organizations," Harvard University, pp.4-5. Moreover, broker-originated loans "are also more likely to default than loans originated through a retail channel, even after controlling for credit and ability-to-pay factors." *Id.* at 42 (citing Alexander 2003).

[23] Debbie Gruenstein Bocian, Keith S. Ernst and Wei Li, *Unfair Lending: The Effect of Race and Ethnicity on the Effect of Subprime Mortgages*, Center for Responsible Lending (May 2006), *available at* http://www.responsiblelending.org/pdfs/rr011-Unfair_Lending-0506.pdf.

[24] Souphala Chomsisengphet, Timothy Murphy and Anthony Pennington-Cross, *Product Innovation and Mortgage Selection in the Subprime Era*, presented at The Subprime Housing Crisis: Interdisciplinary Policy Perspectives, Univ. of Iowa, October 10-11, 2008 (referring to loans "designed to terminate.") A former broker confirmed to CRL that applicants were steered to 2/28s to generate repeat business.

[25] Debra Cassens Weiss, *New Century GC Sounded Early Warning About Subprime Exposure*, ABA Journal (March 31, 2008).

[26] Mortgage Asset Research Institute, Inc., *Eighth Periodic Mortgage Fraud Case Report to Mortgage Bankers Association*, p. 12, *available at* http://www.mari-inc.com/pdfs/mba/MBA8thCaseRpt.pdf (April 2006); *see also* 2007 Global Structured Finance Outlook: Economic and Sector-by Sector-analysis, FITCH RATINGS CREDIT POLICY (New York, N.Y), December 11, 2006, at 21 (commenting that the use of subprime hybrid arms "poses a significant challenge to subprime collateral performance in 2007").

[27] The Federal Reserve Board was given the authority to regulate mortgages under the HOEPA law passed in 1994, but they did not exercise that authority until the summer of 2008.

[28] The practices of IndyMac, one of the largest originators of Alt A loans until it went defunct, demonstrate that perverse incentives drove abuse even outside of the subprime market. IndyMac routinely avoided including income information on their loans or pushed through loans with inflated income data, even from retirees. As recently as the first quarter of 2007, only 21% of IndyMac's total loan production involved "full-doc" mortgages.

[29] When widespread abusive lending practices in the subprime market initially emerged during the late 1990s, the primary problems involved equity stripping—that is, charging homeowners exorbitant fees or selling unnecessary products on refinanced mortgages, such as single-premium credit insurance. By financing these charges as part of the new loan, unscrupulous lenders were able to disguise excessive costs. To make matters worse, these loans typically came with costly and abusive prepayment penalties, meaning that when homeowners realized they qualified for a better mortgage, they had to pay thousands of dollars before getting out of the abusive loan. *See, e.g*., Eric Stein, *Quantifying the Economic Costs of Predatory Lending*, Center for Responsible Lending (2001), *available at* http://www.responsiblelending.org/pdfs/Quant10-01.pdf.

[30] Before the current crisis, a strong housing market and largely favorable interest rates allowed borrowers with subprime loans to refinance when their payments rose. In this scenario, with each refinance, the borrowers lost significant equity as they incurred a whole new set of lender fees, broker fees, and third-party closing fees with each loan. In turn, this loss of equity meant that borrowers lost their single largest source of wealth and ended up trapped in a cycle of subprime loan after subprime loan, spiraling towards foreclosure. Breaking this cycle of equity stripping is a critical first step in the new era.

[31] Roberto G. Quercia, Michael A. Stegman & Walter R. Davis, The Impact of Predatory Loan Terms on Subprime Foreclosures: The Special Case of Prepayment Penalties and Balloon Payments (vol. 18, issue 2, 2007), *available at* http://www.mi.vt.edu/data/files/hpd%2018.2/5.hpd_quercia_web.pdf.

[32] Wei Li and Keith S. Ernst, *The Best Value in the Subprime Market: State Predatory Lending Reforms*, pp. 2-3, 13-17, Center for Responsible Lending (February 23, 2006).

[33] *Id.* The study ranked states as to four substantive protections, prepayment penalties among them, as well as the scope of coverage to which the protections applied and the remedies available. The lowered interest rates likely result from the perverse relationship between yield spread premiums and prepayment penalties in the subprime market, as we discuss above. We also note that at least thirty-five states regulate prepayment penalties, including eleven states that have prepayment penalty bans on broad categories of mortgage loans. There is no evidence that consumers feel deprived of "choice" in those states. **Alabama** (unless approved mortgagee under National Housing Act or where creditor is exempt from licensing, per ALA. CODE § 5-19-31) (ALA. CODE § 5-19-4(c)); **Alaska** (except federally insured loans requiring prepayment penalty) (ALASKA STAT. ANN. § 45.45.010(g)); **Indiana** (prepayment penalty banned for a consumer loan (key requirement: secured by an interest in land or by personal property that is the borrower's principal dwelling) that is not "*primarily* secured by an interest in land" (i.e., that is not a first lien mortgage) as well as for a refinancing or consolidation (junior lien)) (IND. CODE ANN. § 24-4.5-3-209 (limitation on penalty); § 24-4.5-3-104 (definition of "consumer loan"); § 24-4.5-3-105 (explanation of "primarily secured by land")); **Iowa** (purchase money or refinance of purchase money loan secured by 1- or 2-family dwelling or by agricultural land)(IOWA CODE ANN. § 535.9.2); (reverse annuity or graduated payment mortgage loans) (IOWA CODE ANN. § 528.4); **Minnesota** (prohibited in residential mortgages under Fannie Mae conforming limit) (Minn. Stat. §58.137(2)(c); **New Jersey** (for loans with interest rates exceeding 6%) (N.J. STAT. ANN. § 46:10B-1, B-2); **New Mexico** (N.M. STAT. ANN. § 56-8-30); **North Carolina** (banned on first mortgage loans below $150,000) (N.C. GEN. STAT. § 24-1.1A(b)(1)); **Ohio** (prohibited in residential mortgage under $75,000) (Ohio Rev. Code §1343.011(2)(a); **South Carolina** (banned on loans below $150,000) (S.C. CODE ANN. § 37-23-80, 37-10-103);**Vermont** (Vermont Stat. Ann. tit. 8 § 2232a, tit. 9 § 45).

[34] "Financial Firms Lobby to Cut Costs of TARP Exit," *Wall Street Journal Online* (April 22, 2009) http://online.wsj.com/article/SB124035639380840961.html.

[35] "The Oracle Reveals All," *Newsweek* (Sept. 24, 2007) pp. 32, 33.

[36] *See, e.g.* Allan Sloan, "An Unsavory Slice of Subprime," *Washington Post* (October 16, 2007) ("Even though individual loans … looked like financial toxic waste," 68% of the issue was rated AAA.)

[37] *See* Raphael Bostic, Kathleen C. Engle, Patricia A. McCoy, Anthony Pennington-Cross & Susan Wachter, *State and Local Anti-Predatory Lending Laws: The Effect of Legal Enforcement Mechanisms*, 60 J. Econ. & Bus. 47-66 (2008), full working paper version *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1005423, p. 18 (finding that stronger private enforcement regimes, including private right of action and assignee liability, did not constrict subprime originations in 2004 and had an elevated probability of originations in 2005).

[38] *See, e.g.* 69 Fed. Reg. 1904, 1908 (January 13, 2004) (supplementary information to OCC Preemption rule).

[39] *See, e.g.*Wei Li and Keith Ernst, *Do State Predatory Lending Laws Work? A Panel Analysis of Market Reforms*, Housing Policy Debate 18:2, p. 347 (2007); Raphael Bostic, Kathleen C. Engle, Patricia A. McCoy, Anthony Pennington-Cross & Susan Wachter, *State and Local Anti-Predatory Lending Laws: The Effect of Legal Enforcement Mechanisms*, 60 J. Econ. & Bus. 47-66 (2008), full working paper version available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1005423 (includes literature review).

[40] *See, e.g.*, Testimony of Patricia A. McCoy Before the U.S. Senate Committee on Banking, Housing and Urban Affairs, *Consumer Protection in Financial Services: Past Problems, Future Solutions* (March 3, 2009).

[41] S.B. 185 (May, 2006), http://www.legislature.state.oh.us/BillText126/126_SB_185_EN_N.pdf.

[42] In addition to Ohio, Minnesota, North Carolina, Maine, Illinois, Kentucky and Colorado have enacted laws taking aim at at least some of these practices since May 2006. This wave of state laws continued in 2008, with New York, Maryland, Connecticut and Washington passing substantive legislation and the Massachusetts Attorney General's rules going into effect as well.

[43] Testimony of Tara Twomey, National Consumer Law Center, Before the U.S. House of Representatives Subcommittee on Housing and Community Opportunity, p. 8 (April 16, 2007).

[44] *Id*. at 7 (cutting costs is one reason for heavy reliance on often frustrating voicemail and touch tone menu options, as well as for the lack of adequate staff to handle requests for negotiation or information).

[45] Alan White, *Deleveraging American Homeowners: December 18, 2008 Update to August 2008 Report*, Valparaiso University School of Law (Dec. 2008), p.2 (finding that of more than 3.5 million subprime and Alt A mortgages (all securitized) reviewed in November 2008, only 35% of modifications reduced monthly payments below the initial payment, while 20% left the payment the same and 45% increased the monthly payment).