

**A Communication from Academic Faculty  
Who Teach Courses Related to Consumer Law and Banking Law  
at American Law Schools,  
Originally Released Sept. 29, 2009**

**Joined by University Faculty Who Conduct  
Research in Consumer Matters on  
April 18, 2010**

The Honorable Christopher J. Dodd  
Chairman  
Committee on Banking, Housing and  
Urban Affairs  
United States Senate

The Honorable Barney Frank  
Chairman  
Financial Services Committee  
United States House of Representatives

The Honorable Richard C. Shelby  
Ranking Member  
Committee on Banking, Housing, and  
Urban Affairs  
United States Senate

The Honorable Spencer Bachus  
Ranking Member  
Financial Services Committee  
United States House of Representatives

*Via Facsimile*

Dear Senators Dodd and Shelby  
and Representatives Frank and Bachus,

**Statement in Support of Legislation Creating a  
Consumer Financial Protection Agency**

As teachers and scholars in the fields related to consumer law and banking law who currently teach at American law schools in such states as Alabama, Arizona, California, Connecticut, Florida, Georgia, Illinois, Indiana, Iowa, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Ohio, Oregon, Nebraska, North Carolina, Nevada, New Jersey, New York, Pennsylvania, South Carolina, Tennessee, Texas, Utah, Washington, Wisconsin, and Wyoming as well as Washington D.C., we strongly support legislation to create an independent Consumer Financial Protection Agency (“CFPA”). Our review of the regulatory approaches at the existing agencies, whose jurisdiction includes but does

not focus on consumer financial products, leads us to conclude that on balance they place a higher value on protecting the interest of financial product vendors who promote complex debt instruments using aggressive sales practices, than they do on protecting the interests of consumers in transparent, safe, and fair financial products.<sup>1</sup> An independent agency with consolidated authority and a consumer-oriented mission such as the one being considered by your committees is likely to improve public confidence in the safety and efficiency of the vast consumer financial products marketplace—a marketplace that includes complex and nonstandard mortgage instruments, promissory notes, installment sales agreements, credit cards, debit cards, Internet payment devices, and other devices, products, and services in the consumer financial system. It is a system vitally important to public welfare and economic recovery.<sup>2</sup>

The desirable improvements and consolidations proposed to be accomplished by this legislation include (1) a single place to concentrate federal rulemaking authority over consumer financial transactions joined with primary enforcement authority over them; (2)

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<sup>1</sup> Scholarly literature that is critical of regulatory rulemaking and decisional outcomes in the area of consumer financial products includes: Peter A. Alces & Jason M. Hopkins, *Carrying a Good Joke Too Far*, 83 Chi.-Kent L. Rev. 879 (2008); Oren Bar-Gill and Elizabeth Warren, *Making Credit Safer*, 157 Penn. L. Rev. 1 (2008); Mark E. Budnitz, *Commentary, Technology as the Driver of Payment System Rules: Will Consumers Be Provided Seatbelts and Air Bags?*, 83 Chi.-Kent L. Rev. 909 (2008); Michael Barr, *Banking the Poor*, 21 Yale J. On Reg. 121 (2004); Steven F. Davidoff, *Paradigm Shift: Federal Securities Regulation In The New Millennium*, 2 Brook. J. Corp. Fin. & Com. L. 339 (2008); Diane Ellis, *The Effect of Consumer Interest Rate Deregulation on Credit Card Volumes, Charge-Offs, and in the Personal Bankruptcy Rate*, Bank Trends 98-05 (FDIC, Mar 1998); Kathleen C. Engel and Patricia A. McCoy, *Turning A Blind Eye: Wall Street Finance of Predatory Lending*, 75 Fordham L. Rev. 2039 (2007); William N. Eskridge, Jr., *One Hundred Years of Ineptitude: The Need for Mortgage Rules Consonant with the Economic and Psychological Dynamics of the Home Sale and Loan Transaction*, 70 Va. L. Rev. 1083 (1984); David A. Friedman, *Reinventing Consumer Protection*, 57 DePaul L.Rev. 45 (2007); Julia Patterson Forrester, *Mortgaging the American Dream: A Critical Evaluation of the Federal Government's Promotion of Home Equity Financing*, 69 Tul. L. Rev. 373 (1994); John Kiff & Paul Mills, *Money for Nothing and Checks for Free: Recent Developments in U.S. Subprime Mortgage Markets*, IMF Working Paper No 07/188 (2007); Adam Levitin, *Hydraulic Regulation: Regulating Credit Markets Upstream*, 26 Yale J. on Reg. 143 (2009); Cathy Lesser Mansfield, *The Road to Subprime "HEL" Was Paved with Good Congressional Intentions: Usury Deregulation and the Subprime Home Equity Market*, 51 S.C. L. Rev. 473, 555 (2000); Patricia McCoy, *The Middle-Class Crunch: Rethinking Disclosure In A World Of Risk-Based Pricing*, 44 Harv. J. On Legis. 123 (2007); Saule T. Omarova and Adam Feibelman, *Risks, Rules, and Institutions: A Process for Reforming Financial Regulation*, 39 U. Mem. L. Rev. 881 (2009); Christopher Lewis Peterson, *Preemption, Agency Cost Theory, and Predatory Lending by Banking Agents: Are Federal Regulators Biting Off More Than They Can Chew?*, 56 Am. U. L. Rev. 515 (2007); Christopher Lewis Peterson, *Federalism and Predatory Lending: Unmasking the Deregulatory Agenda*, 78 Temple L. Rev. 1 (2005); Elizabeth Renuart and Diane E. Thompson, *The Truth, the Whole Truth, and Nothing But the Truth: Fulfilling the Promise of Truth in Lending*, 25 Yale J. on Reg. 181 (2008); Ralph J. Rohner and Thomas A. Durkin, *TILA "Finance" and "Other" Charges in Open-End Credit: The Cost-of-Credit Principle Applied to Charges for Optional Products or Services*, 17 Loyola Consumer L Rep 137 (2005); Elizabeth R. Schlitz, *The Amazing, Elastic, Ever-Expanding Exportation Doctrine and Its Effect on Predatory Lending Regulation*, 88 Minn. L. Rev. 518 (2004); 31 Fordham Urb. L.J. 413, 471 (2004); Paul M. Schwartz, *Where Do We Go From Here? The Battle Against Predatory Subprime Lending*, 3 Brook. J. Corp. Fin. & Com. L. 213 (2008); Elizabeth Warren, *Unsafe at Any Rate*, 5 Democracy: A Journal of Ideas (Summer 2007).

<sup>2</sup> The proposed legislation excludes securities, see H. 3126, Sec. 122(f)(2).

the power to restore banking federalism so as to better accommodate consumer interests; (3) the authority to improve opportunities for consumers to enforce their rights; and (4) the ability to establish standards for fairness and honesty in agreements for financial products and services. These improvements intrinsically cannot be accomplished through the existing agency structures, or practically are not achievable through them. Several difficulties presented by the existing regime and which are addressed through the proposed changes are documented in the scholarly literature, which is illustrated below.

**1. *Exclusive rulemaking authority and primary enforcement authority.***<sup>3</sup> At critical moments of consumer confusion and vulnerability, regulators of financial institutions, including the Federal Reserve Bank, the Office of Thrift Supervision, and the Office of the Comptroller, have demonstrated unwillingness to expend resources to develop appropriate rules and guidelines and to police mortgage and credit instruments. The two-decades-long delay in effectively regulating credit card practices, despite many warnings from consumer groups, responsible lenders, and scholars, for example, is a well-documented and catastrophic lapse that continues to inflict serious financial injury.<sup>4</sup> Similarly, the Federal Reserve Board waited fourteen years to use the power Congress conferred upon it in 1994 to prohibit unfair or deceptive practices in mortgage lending;<sup>5</sup> had the Fed acted timely, the subprime crisis might have been less severe. As the subprime mortgage market exploded with unfamiliar and dangerous instruments, federal bank regulators failed to act decisively to improve the situation, under pressure from

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<sup>3</sup> Sec. 122 (d) and (e) of H. 3126 if enacted would provide: (d) EXCLUSIVE RULEMAKING AND EXAMINATION AUTHORITY- Notwithstanding any other provision of Federal law other than subsection (f), to the extent that a Federal law authorizes the Agency and another Federal agency to prescribe regulations, issue guidance, conduct examinations, or require reports under that law for purposes of assuring compliance with this title, any enumerated consumer law, the laws for which authorities were transferred under subtitles F and H, and any regulations prescribed under this title or pursuant to any such authority, the Agency shall have the exclusive authority to prescribe regulations, issue guidance, conduct examinations, require reports, or issue exemptions with regard to any person subject to that law. (e) (1) THE AGENCY TO HAVE PRIMARY ENFORCEMENT AUTHORITY- To the extent that a Federal law authorizes the Agency and another Federal agency to enforce that law, the Agency shall have primary authority to enforce that Federal law with respect to any person in accordance with this subsection.

<sup>4</sup> See, e.g., *Rossman v. Fleet Bank Nat'l Ass'n*, 280 F.3d 384 (2002); Norman I. Silber, *Late Charges, Regular Billing, And Reasonable Consumers: A Rationale For A Late Payment Act*, 83 Chi.-Kent L. Rev. 855 (2008); Oren Bar-Gill, *Seduction by Plastic*, 98 Nw. U L Rev 1373, 1420-21 (2004).

<sup>5</sup> See 15 U.S.C. § 1639(l)(2), enacted as part of HOEPA in 1994, which provides:

The Board, by regulation or order, shall prohibit acts or practices in connection with--

(A) mortgage loans that the Board finds to be unfair, deceptive, or designed to evade the provisions of this section; and

(B) refinancing of mortgage loans that the Board finds to be associated with abusive lending practices, or that are otherwise not in the interest of the borrower

vendor constituencies that encouraged non-regulation. When regulators belatedly got together in October 2006 to try to respond to widespread consumer difficulties in understanding nontraditional, hybrid mortgage products, the different agencies provided limited guidance but they could not jointly address hybrid instruments “because of the difficulty agreeing among themselves, and these instruments remained unregulated.”<sup>6</sup> By the time bank regulators did get around to hybrid products, “it was too late to prevent the subprime crisis which had already begun.”<sup>7</sup> Reports that regulators view consumer protection as a backwater are particularly troubling and emphasize that the important goal of consumer protection will not receive adequate attention under the current regulatory structure.<sup>8</sup>

## ***2. The authority to restore banking federalism to accommodate consumer interests.***<sup>9</sup>

The traditional police power of states to regulate commercial practices in the interest of their citizens has been undermined by federal banking regulators, whose assertion of preemption has worked to the advantage of financial institutions at the expense of effective consumer protection by states and localities. Two developments are illustrative. In 1978, the Supreme Court upheld regulations of the Comptroller of the Currency that helped to deregulate the credit card business by interpreting the National Bank Act as preempting states from enforcement of their own usury laws.<sup>10</sup> Almost twenty years later, in the 1996 decision *Smiley v. Citibank, S.D., N.A.*, the Court unanimously upheld the interpretation of the Comptroller of Currency that late payment fees were deemed “interest” for the purposes of preempting state regulation of late fee amounts.<sup>11</sup> Both opinions interpreted the National Bank Act of 1864, 12 U.S.C. § 85, and both deferred to the Comptroller’s analysis of that Civil War statute - ambiguous at best - to block state regulation. Subsequent federal decisions have accepted the principle of deference to the

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<sup>6</sup> WookBai Kim, *Challenging The Roots Of The Subprime Mortgage Crisis: The OCC’s Operating Subsidiaries Regulations and Watters v. Wachovia Bank*, 21 Loy. Consumer L. Rev. 278, 289 (citing Interagency Guidance on Nontraditional Mortgage Product Risks, 71 Fed. Reg. 58,609 (Oct. 4, 2006); Statement on Subprime Mortgage Lending, 72 Fed. Reg. 37,569 (July 10, 2007); see also Laurie S. Goodman, Shumin Li, Douglas J. Lucas, Thomas A. Zimmerman & Frank J. Fabozzi, *Subprime Mortgage Credit Derivatives* (2008) (arguing that the October 2006 Guidance should have regulated the hybrid 2/28).

<sup>7</sup> Kim, *id.* n. 57 (citing Interagency Guidance on Nontraditional Mortgage Product Risks, 71 Fed. Reg. 58,609 (Oct. 4, 2006)).

<sup>8</sup> See Editorial, *Reforming the Financial System*, N. Y. Times, Sept. 14, 2009; Edmund Andrews, *Busted: Life Inside the Mortgage Meltdown* 79 (2009).

<sup>9</sup> Section 143 of H. 3126, STATE LAW PREEMPTION STANDARDS FOR NATIONAL BANKS AND SUBSIDIARIES CLARIFIED, if enacted would provide for an amendment to the Bank Act, 12 U.S.C. 21 et. seq., stating in its key language that “a State consumer law is not inconsistent with Federal law if the protection the State consumer law affords consumers is greater than the protection provided under Federal law as determined by the Agency.” H. 3126, Sec. 143(a).

<sup>10</sup> See *Marquette National Bank v. First of Omaha Service Corp.*, 439 U.S. 299 (1978).

<sup>11</sup> 517 U.S. 735, 745-47 (1996).

Comptroller's interpretation of the scope of nationalized banking regulation.<sup>12</sup> The importance of a more balanced federalism is widely endorsed in the scholarship.<sup>13</sup>

In our view, whatever merit arguments in favor of preemption have are outweighed by the value of having states operate as laboratories, trying different approaches to lending problems, particularly in dealing with the relatively young problems of predatory lending.<sup>14</sup> It is important that Congress not take a simplistic approach favoring only federal development of consumer protection laws in financial products and services; and that Congress not limit the role of the states to enforcement of state and federal law. State legislatures and courts need to be able to continue to develop consumer protection law. Many of the types of non-bank financial products that will be within the jurisdiction of the CFPB have been regulated up until now only by the states, and their good work should not be undermined. In addition, problems are much more likely to grow larger if they can be addressed only at the federal level and not also by states where they first appear.

**3. *The authority to improve the way consumer rights are enforced.***<sup>15</sup> During the past decades, when an increasing proportion of consumer credit agreements have forced consumers into binding arbitration and have severely limited the opportunities to

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<sup>12</sup> See, e.g., *Am. Bankers Ass'n v. Lockyer*, 239 F. Supp. 2d 1000 (E.D. Cal. 2002).

<sup>13</sup> See Nicholas Bagley, Note, *The Unwarranted Regulatory Preemption of Predatory Lending Laws*, 79 N.Y.U. L. Rev. 2274 (2004); Arthur E. Wilmarth, Jr., *The OCC's Preemption Rules Exceed the Agency's Authority and Present a Serious Threat to the Dual Banking System and Consumer Protection*, 23 Ann. Rev. Banking & Fin. L. 225 (2004); Keith R. Fisher, *Toward a Basal Tenth Amendment: A Riposte to National Bank Preemption of State Consumer Protection Laws*, 29 Harv. J.L. & Pub. Pol'y 981 (2006). Christopher L. Peterson, *Federalism and Predatory Lending, Unmasking the Deregulatory Agenda*, 78 Temple L. Rev. 1 (2005); see also *American Bankers Association v. Lockyer*, 239 F. Supp. 2d 1000 (E.D. Cal. 2002) (California Credit Card Payment Warning Act, Cal. Civ. Code § 1748.13, requiring credit card bills to disclose the length of time consumers have to pay off their balances by paying the minimum, declared unconstitutional because preempted by federal law); *Household Credit Services, Inc. v. Pfenning*, 541 U.S. 232 (2004) (holding that Regulation Z's exclusion of overlimit fees from the term "finance charge" is in no way contrary to § 1605 of TILA). Regarding the more general importance of the states, see Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 Colum. L. Rev. 543 (1954); Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 Colum. L. Rev. 215 (2000); Frank S. Alexander, *Federal Intervention in Real Estate Finance: Preemption and Federal Common Law*, 71 N.C. L. Rev. 293 (1993).

<sup>14</sup> See Baher Azmy, *Squaring the Predatory Lending Circle: A Case for States as Laboratories of Experimentation*, 57 Fla. L. Rev. 295, 301-02 (2005).

<sup>15</sup> Section 125 of H. 3126 if enacted would provide: **AUTHORITY TO RESTRICT MANDATORY PRE-DISPUTE ARBITRATION.** The Agency, by regulation, may prohibit or impose conditions or limitations on the use of agreements between a covered person and a consumer that require the consumer to arbitrate any future dispute between the parties arising under this title or any enumerated consumer law if the Agency finds that such prohibition, imposition of conditions, or limitations are in the public interest and for the protection of consumers.

challenge oppressive terms and unfair dealing, existing agencies have not acted effectively to promote the availability, impartiality and quality of arbitration tribunals.<sup>16</sup> The result, in too many cases, has been the demonstrable frustration of consumers seeking to vindicate their contractual rights. In fact, according to a recent Congressional Report, less than 1/10<sup>th</sup> of 1% of arbitrations are brought by consumers.<sup>17</sup> The literature concerning the difficulties with binding consumer arbitration for consumers is extensive.<sup>18</sup> Studies have found the arbitrators find for companies against consumers 94 to 96% of the time,<sup>19</sup> suggesting that arbitration providers are responding to the incentive to find for those who select them: the companies that insert their names in their form contracts. The recent case brought by the Minnesota Attorney General, charging the National Arbitration Forum with deceptive trade practices and false advertising, which terminated in a consent decree under which the NAF agreed to stop accepting new consumer arbitration cases, only emphasizes the importance of regulating predispute consumer arbitration.<sup>20</sup> The CFPA would have the ability to regulate consumer arbitration to insure that it is conducted fairly, or, if that proves impossible, to ban it altogether.

**4. *Standards for fairness, honesty, and information.***<sup>21</sup> It has become increasingly clear that existing disclosures of the costs and terms of many consumer financial products do

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<sup>16</sup> See Arbitration Abuse: an Examination of Claims Files of the National Arbitration Forum, a Staff Report of the Domestic Policy Subcommittee Majority Staff Oversight and Government Reform Committee, House of Representatives (Dennis J. Kucinich, Chairman), , July 21, 2009, at <http://www.clarksvilleonline.com/wp-content/uploads/2009/07/Report-on-National-Arbitration-Forum.pdf>.

<sup>17</sup> “The only available data indicates that more than 99% of "consumer arbitrations" are debt collection claims filed by businesses, usually credit card companies or collection companies, against consumers, seeking to collect past due balances under arbitration "agreements" that were unilaterally imposed by the businesses.” See Arbitration Abuse: An Examination of Claims Files of the National Arbitration Forum, a Staff Report of the Domestic Policy Subcommittee Majority Staff Oversight and Government Reform Committee, House of Representatives (Dennis J. Kucinich, Chairman), July 21, 2009, at <http://www.clarksvilleonline.com/wp-content/uploads/2009/07/Report-on-National-Arbitration-Forum.pdf>.

<sup>18</sup> See, e.g., Mark Budnitz, Mandatory Arbitration: The High Cost of Mandatory Consumer Arbitration, 67 Law & Contemp. Prob. 133 (2004); Jean Sternlight, Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration, 74 Wash U L Q 637 (1996); Jean Sternlight, Creeping Mandatory Arbitration: Is it Just?, 57 Stan L Rev 1631 (2005); Jack Wilson, "No-Class-Action Arbitration Clauses," State-Law Unconscionability, and the Federal Arbitration Act: A Case for Federal Judicial Restraint and Congressional Action, 23 Quinnipiac L Rev 737, 773 (2004).

<sup>19</sup>Public Citizen Report: The Arbitration Trap: How Credit Card Companies Ensnare Consumers (Sept. 2007) available at <http://www.citizen.org/publications/release.cfm?ID=7545> (in the more than 19,000 cases in which an NAF-appointed arbitrator was involved, 94 percent of decisions were for business.); Simone Baribeau, Consumer Advocates Slam Credit-Card Arbitration, Christian Science Monitor, July 16, 2007, available at <http://www.csmonitor.com/2007/0716/p13s01-wmgn.html> (“arbitrators awarded in favor of creditors and debt buyers in more than 96 percent of the cases.”).

<sup>20</sup> The complaint may be found at <http://pubcit.typepad.com/files/2009-07-14-signed-complaint-with-exhibits.pdf> and the consent decree at <http://pubcit.typepad.com/files/nafconsentdecree.pdf>.

not adequately inform consumers about the actual costs. For example, a 2007 Federal Trade Commission study found that many borrowers were not able to determine mortgage loan terms or costs from the disclosures in use at the time of the study.<sup>22</sup> If disclosures alone were adequate to enable consumers to obtain appropriate loans, it would not be possible for mortgage originators to “steer” borrowers who could qualify for prime loans to more expensive subprime loans, and yet such steering has been alleged repeatedly.<sup>23</sup> Disclosure approaches alone cannot solve problems that are caused by overly complex terms that consumers cannot readily comprehend;<sup>24</sup> or counteract terms

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<sup>21</sup> Section 136 of H. 3126 if enacted would provide: STANDARD CONSUMER FINANCIAL PRODUCTS OR SERVICES. (a) Characteristics of Standard Consumer Financial Products or Services-Subject to regulations prescribed by the Agency under this section, a standard consumer financial product or service is a consumer financial product or service that-- (1) is or can be readily offered by covered persons that offer or seek to offer alternative consumer financial products or services; (2) is transparent to consumers in its terms and features; (3) poses lower risks to consumers; (4) facilitates comparisons with and assessment of the benefits and costs of alternative consumer financial products or services; and (5) contains the features or terms defined by the Agency for the product or service.

<sup>22</sup> James M. Lacko & Janis K. Pappalardo, IMPROVING CONSUMER MORTGAGE DISCLOSURES: AN EMPIRICAL ASSESSMENT OF CURRENT AND PROTOTYPE MORTGAGE DISCLOSURE FORMS ES-6, 11-12 (2007)

<sup>23</sup> See Marsha J. Courchane, Brian J. Surette, & Peter M. Zorn, Subprime Borrowers: Mortgage Transitions and Outcomes, 29 J. Real Estate Fin. & Econ. 365, 381 (2004) (“Our results suggest that borrowers may inappropriately receive subprime mortgages . . .”); Illinois Department of Financial and Professional Regulation, Findings from the HB 4050 Predatory Lending Database Pilot Program 5 (2007) (study of Chicago borrowers finds that many of the borrowers could have qualified for a “more affordable loan had they been better informed about what was available to them”); Michael S. Barr, Credit Where It Counts: the Community Reinvestment Act and Its Critics, 80 N.Y.U.L.Rev. 513, 556 (2005); Gretchen Morgenson, Inside the Countrywide Lending Spree, N.Y. Times, Aug. 26, 2007 (Countrywide’s “incentive system also encouraged brokers and sales representatives to move borrowers into the subprime category, even if their financial position meant that they belonged higher up the loan spectrum.”); Affidavit of Ton Paschal in City of Baltimore v. Wells Fargo (“I . . . regularly saw minority customers who had good credit scores and credit characteristics in subprime loans who should have qualified for prime or [Fair Housing Act] loans.”).

<sup>24</sup> See generally Alan M. White & Cathy Lesser Mansfield, Literacy & Contract, 13 Stan. L. & Pol’y Rev. 233 (2002); President George W. Bush, White House Press Conference, Aug. 9, 2007, available at [www.whitehouse.gov/news/releases/2007](http://www.whitehouse.gov/news/releases/2007) (“We’ve had a lot of really hardworking Americans sign up for loans, and the truth of the matter is they probably didn’t fully understand what they were signing up for.”); Federal Reserve Board, Truth in Lending, 73 Fed. Reg. 44,522, 44,525-26 (July 30, 2008) (“Consumers who do not fully understand such terms and features, however, are less able to appreciate their risks . . . [f]or example, the payment may increase sharply and a prepayment penalty may hinder the consumer from refinancing to avoid the payment increase. Thus, consumers may unwittingly accept loans that they will have difficulty repaying.”); Statement of Peter Orszag, CBO Budget Director, State of the US Economy and Implications for the Federal Budget: Hearing Before the H. Comm. on the Budget, 110<sup>th</sup> Cong., 6 (Dec. 5, 2007) (“some borrowers lacked a complete understanding of the complex terms of their mortgages and assumed mortgages that they would have trouble repaying.”); Michael S. Barr, Sendhil Mullainathan, & Eldar Shafir, Behaviorally Informed Financial Services Regulation 8 (2008) (“a central problem [of the Mortgage Crisis] was that many borrowers took out loans that they did not understand and could not afford.”); Elizabeth Renuart and Diane E. Thompson, The Truth, The Whole Truth, and Nothing But the Truth: Fulfilling the Promise of Truth in Lending, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1021318](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1021318) (“The lender-created complexity of mortgage loans now exceeds what . . . even highly educated consumers are capable of comprehending.”); Todd J. Zywicki, The Law and Economics of Subprime Lending, --- Colo. L. Rev. --- (forthcoming), available at

that are inherently unfair; or cure substantive defects in products whose individual attractiveness may be high for particular groups, but whose social impact is “toxic” on a large scale. Thus, so-called “exploding ARMs” may be appropriate for those who reasonably expect a substantial increase in income by the time the payments leap, such as medical residents, but are not suitable for those whose income is more stable and who are unlikely to find substantial payment increases affordable.<sup>25</sup> The literature encouraging a standard-setting approach, and reporting on its effective use in other nations, supports the case for its adoption here.<sup>26</sup>

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[http://ssrn.com/abstract\\_id=1106907](http://ssrn.com/abstract_id=1106907) (“Having gone through the experience once, second-time homebuyers rarely even closely examine their loan documents. Nor is it likely that even if they did take the time to examine their documents, . . . most borrowers would be unable to comprehend most of their terms.”); Norman I. Silber, “Thriving on Adversity: Corporate Treatment and Mistreatment of Consumers in the Wake of Hurricane Katrina, ---Loyola Consumer L.Rev. --- (forthcoming)(many hurricane victims deferred payments without appreciating that greater interest would accrue as a result); Allen J. Fishbein & Patrick Woodall, *Exotic or Toxic? An Examination of the Non-Traditional Mortgage Market for Consumers and Lenders 2* (Consumer Federation of America 2006) (“more vulnerable consumers—first time homebuyers, unsophisticated financial consumers, and consumers traditionally underserved by the mortgage market, especially lower-income and minority consumers . . . are less likely to understand . . . the complexity of the mortgage vehicles they are offered . . .”); Kathleen C. Engel and Patricia A. McCoy *A Tale of Three Markets: The Law and Economics of Predatory Lending*, 80 *Tex. L. Rev.* 1255, 1286 (2002) (“the victims of predatory lenders sign documents without having a clear sense of the terms of the contracts, how much they borrowed, what they purchased, the terms of repayment, or the risks they assumed.”); Statement of Ken Logan, Chairman-Elect, National Home Equity Mortgage Association, at the Federal Reserve Board Public Hearing, *Building Sustainable Homeownership: Responsible Lending and Informed Consumer Choice 92* (July 11, 2006) (“few borrowers fully understand the residential transaction or the disclosures.”).

<sup>25</sup> According to the Center for Responsible Lending, terms that increase the risk of foreclosure include “adjustable interest rates, balloon payments, prepayment penalties, and loans with limited documentation of borrowers’ loan qualifications.” Ellen Schloemer, Wei Li, Keith Ernst, & Kathleen Keest, *Center for Responsible Lending, Losing Ground: Foreclosures in the Subprime Market and Their Cost to Homeowners 5* (2006)

<sup>26</sup> See, e.g., Jean Braucher, *Delayed Disclosure in Consumer E-Commerce as an Unfair and Deceptive Practice*, 46 *Wayne L. Rev.* 1805 (2000); Richard B. Cappalli, *Arbitration of Consumer Claims: The Sad Case of Two-Time Victim Terry Johnson or Where Have You Gone Learned Hand?*, 10 *BU Pub Int. L. J.* 366, 400-01 (2001); Jon D. Hanson and Douglas A. Kysar, *Taking Behavioralism Seriously: The Problem of Market Manipulation*, 74 *NYU L Rev* 630, 654-66, 722 (2002); Samuel Issacharoff & Erin F. Delaney, *Credit Card Accountability*, 73 *U. Chi. L. Rev.* 157, 168-75 (2006); Norman I. Silber, *Observing Reasonable Consumers: Cognitive Psychology, Consumer Behavior and Consumer Law*, 2 *Loy. Consumer L. Rev.* 69, 74 (1990); Norman I. Silber, *Late Charges, Regular Billing, and Reasonable Consumers: A Rationale for a Late Payment Act* (2008); Jeff Sovern, *Towards a New Model of Consumer Protection: The Problem of Inflated Transaction Costs*, 47 *Wm and Mary L. Rev.* 1635 (2006); Cass R. Sunstein, *Boundedly Rational Borrowing*, 73 *U Chi L Rev* 249, 268 (2006); Lauren E. Willis, *Decisionmaking and the Limits of Disclosure: The Problem of Predatory Lending: Price*, 65 *Md. L. Rev.* 707 (2006).

## **Conclusion**

We urge Congress to take swift action to pass legislation that contains the tools needed to move forward past the mistakes that have undermined our economic stability and toward a better future for consumers and the nation.

For further information, please send an email to Professor Norman I. Silber at [Norman.I.Silber@hofstra.edu](mailto:Norman.I.Silber@hofstra.edu) or to Professor Jeff Sovernj at [sovernj@stjohns.edu](mailto:sovernj@stjohns.edu).

Respectfully,<sup>27</sup>

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**Endorsement by Academics Who Conduct Research in Consumer Matters**

**April 18, 2010**

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