Pump the Brakes: What Financial Regulators Should Consider in Trying to Prevent a Subprime Auto Loan Bubble

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The possibility of a subprime auto finance bubble gives financial regulators an opportunity to navigate a burgeoning crisis in real time. Lessons learned from the 2008 financial crisis and the implementation of the Dodd-Frank Act prompt the question whether financial regulators should adopt an ability-to-repay rule for auto lending similar to the Consumer Financial Protection Bureau's Mortgage Ability-to-Repay Rule. In determining whether to adopt a rule, financial regulators should consider how, if at all, enforcement and adjudication could help stabilize the increasingly risky auto finance market. For both enforcement and rulemaking, the role of private attorneys general could prove critical to deterring abusive lending and cooling off a dangerously permissive market.

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However, crucial differences between houses and cars as both financial assets and consumer goods demand that regulators proceed with caution. Limiting access to automobile credit could have more disastrous and far-reaching consequences for household incomes and access to public services than limiting access to mortgages. The substitutability of mortgages and rent payments has no good analogue in automobile finance. Furthermore, the ease of vehicle repossession presents both a need for regulation and a risk for regulators: the more efficient repossession standards are, the more likely a subprime "bubble" will burst at an earlier stage in its development, which reduces systemic risk. Financial regulators should bring these asset distinctions to the fore when crafting a response to the current auto market's widespread subprime lending and alarming default rates. Regulators can and should more aggressively enforce existing consumer protection standards, such as prohibitions against unfair, deceptive, and abusive practices, to reduce the risk of predatory auto lending which ignores consumers' ability to repay.

INTRODUCTION

Between taking the bus two hours each way to get to work and relying on friends and family to drive her seven-year-old son to asthma treatments, Tiffany Lee needed a car.[1] Ms. Lee had three children, bad credit, and earned $27,000 a year.[2] When she left Repossess Auto Sales in Hawthorne, CA, she had put $3,000 down on a 2007 Ford Fusion with high mileage, agreeing to pay $387 a month—in cash, at the dealership—for four years.[3] The salesman had sold Ms. Lee on a 20.7 percent interest rate: almost "triple the national average for a used-car loan."[4] Altogether, Ms. Lee would pay $14,000 for a car with a $7,500 Kelley Blue Book value.[5] After about a year and a half, she could no longer handle her loan payments and filed for personal bankruptcy.[6] The dealership called her, offering to refinance the loan and even "throw in a free smog check."[7] Once she walked inside to speak with the sales manager about a possible solution, dealership attendants blocked her car in with other vehicles, trapping her children inside the car in the process.[8] In declarations filed with the bankruptcy court, the

1. Ken Bensinger, *A Vicious Cycle in the Used Car Business*, L.A. TIMES, (Oct. 30, 2011), http://www.latimes.com/projects/la-fi-buyhere-payhere/ [https://perma.cc/XM8B-VB6Q].
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*; *Schedule D, Creditors Holding Secured Claims (bankruptcy form)*, L.A. TIMES (Oct. 28, 2011), http://documents.latimes.com/tiffany-lee-experience/#document/p1[https://perma.cc/R7JF-JACG].
6. Bensinger, *supra* note 1.
7. *Id.*
8. *Id.*

dealership admitted that its employees "tricked Ms. Lee to come into the dealership" and "the vehicle was blocked in and we Repossessed said vehicle."[9] Ms. Lee sued and later settled the case for an undisclosed amount.[10]

From the lows of the Great Recession, the number of new car loans has surged to all-time highs.[11] A government bailout and increased public spending have pulled the American auto industry back from a "near-death experience," with consumers pouring money into cars.[12] Parallel with the increase in consumer demand, the rate of lending to subprime borrowers, who represent the highest risk of nonpayment and have the lowest credit scores, has soared.[13] Subprime lending has no uniform definition across firms or sectors. In consumer settings, a FICO score below 660 is often used as a benchmark, but other highly adverse credit history, such as the enforcement of a judgment, foreclosure, repossession, or charge-off in the past two years or bankruptcy in the last five, can also act as indicators of low creditworthiness.[14] Collectively, lending to this borrower group is referred to as subprime lending. Lending in anticipation of an even higher rate of default is sometimes called "deep subprime lending," a practice that uses a benchmark FICO in the mid-500s or below.[15]

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9. The Repossession, *in Tiffany Lee's Experience*, L.A. TIMES 7 (Oct. 28, 2011), http://documents.latimes.com/tiffany-lee-experience/#document/p1 [https://perma.cc/J3G9-82K3] (Statement of Shirley Hampton-Crittenden, Corporation Collection Manager for MXNXOXP, INC DBA Repossess Auto Sales).

10. Lee Settles Suit, *in id.* (Notice of Voluntary Dismissal Without Prejudice of Adversary Proceeding).

11. *Automobile Loans Origination Activity: Volume of loans originated*, CONSUMER FIN. PROTECTION BUREAU (Oct. 13, 2017), https://www.consumerfinance.gov/data-research/consumer-credit-trends/auto-loans/origination-activity/#anchor_lending-levels [https://perma.cc/FFP6-SECV] [hereinafter *Automobile Loans Origination Activity*] (showing that per-month auto lending volume has recovered from a low of $21.1 billion in January 2010 to $43.1 billion in January of 2017); *see also* Bd. of Governors of the Fed. Reserve Sys. (US), *Motor Vehicle Loans Owned and Securitized, Outstanding [MVLOAS]*, FED. RES. BANK OF ST. LOUIS (Oct. 20, 2017), https://fred.stlouisfed.org/series/MVLOAS [https://perma.cc/67PD-S4KU] [hereinafter *Motor Vehicle Loans Owned and Securitized*] (showing that total "Motor Vehicle Loans Owned and Securitized, Outstanding" rose from a low of $698.4 billion in Q3 2010 to a high of $1.1 trillion in Q2 2017).

12. Gabrielle Coppola & Matt Scully, *Why America's Auto Debt Boom Fuels Bubble Talk*, BLOOMBERG L. (Mar. 23, 2017), https://www.bloomberg.com/news/articles/2017-03-23/why-america-s-auto-debt-boom-fuels-bubble-talk-quicktake-q-a [https://perma.cc/FX2Q-VX9Z].

13. *See* Jeff Desjardins, *Subprime Auto Loans: A Shifting Market*, VISUAL CAPITALIST (Jan. 24, 2017), http://www.visualcapitalist.com/subprime-auto-loans [https://perma.cc/7ECU-HMCV] (displaying an infographic drawn from Equifax Automotive data that estimates that the subprime portion of the total auto loan market grew from 13.5 percent in 2010 to 18 percent in 2016); *see also Subprime Loan*, LENDING TREE (Nov. 27, 2017), https://www.lendingtree.com/glossary/what-is-subprime-loan [https://perma.cc/6WEW-SJQ6] (defining a subprime loan as lending to a borrower with a FICO score below 660 or other negative credit characteristics, such as a foreclosure in the previous 24 months or a bankruptcy in the last 60 months).

14. *Expanded Guidance for Subprime Lending Programs*, FED. DEPOSIT INS. CORP. (Jan. 31, 2001), https://www.fdic.gov/news/news/press/2001/pr0901a.html [https://perma.cc/75KR-56Z9].

15. Federal Reserve Bank of Richmond, *Subprime Securitization Hits the Car Lot*, ECON FOCUS, (Q3 2017), https://www.richmondfed.org/publications/research/econ_focus/2017/q3/feature1 [https://perma.cc/4452-4KZL].

As subprime lending increased, commentators began to worry. Financial journalists and securities analysts alike have noted the likelihood of widespread fraud in subprime credit applications.[16] Worse yet, lenders do not seem to be slowing down. Despite repeated warnings over the last two years, certain aspects of subprime loans, such as the length of their repayment terms and the percentage of borrowers with no credit score at all, have become more deeply subprime.[17] A recent Moody's study found that one of the largest subprime auto lenders in the United States, Santander Consumer USA, sold over $1 billion of auto loan-backed securities in May 2017 in which the lender only verified the incomes of 8 percent of the underlying borrowers.[18] Despite falling unemployment and rising wages, the percentage of borrowers at least ninety days behind on their car payments in 2017 rose to the highest level seen since 2010.[19]

Large banks and major consumer lenders have capitalized on the demand for easy credit, employing abusive financing and repossession techniques to squeeze value out of a fragile market. Tiffany Lee's story is far from rare. Subprime lenders often price their loans so that they will profit from the down payment and loan origination fees alone, even if the borrower defaults in less than a year.[20] Lenders are able to do this precisely because of the inflated prices on used car inventories;[21] repossessed cars are barely marked down when resold because of high demand.[22] Lenders contract "repo men" to repossess vehicles and accept fines from any illegal self-help repossessions as a cost of doing business,[23] and in many states they can remotely trigger starter-interrupt devices which prevent the car's engine from restarting.[24] Section 9-609 of the Uniform Commercial Code ("UCC") permits a secured creditor to repossess collateral

16. *See* Matt Scully, *Auto Loan Borrowers May Be Gaming Their Credit Scores, UBS Says*, BLOOMBERG MKT.S (May 17, 2017) https://www.bloomberg.com/news/articles/2017-05-17/auto-loan-borrowers-may-be-gaming-their-credit-scores-ubs-says [https://perma.cc/LF4L-FUD3].

17. *See infra* Part I.A, pp. 1353–1359.

18. Matt Scully, *Auto Lender Santander Checked Income on Just 8% in Subprime ABS*, BLOOMBERG MKT.S (May 22, 2017), https://www.bloomberg.com/news/articles/2017-05-22/subprime-auto-giant-checked-income-on-just-8-of-loans-in-abs [https://perma.cc/4V7A-AGLW].

19. Andrew Haughwout et al., *Just Released: Auto Lending Keeps Pace as Delinquencies Mount in Auto Finance Sector*, FED. RES. BANK OF N.Y. (Nov. 27, 2017), http://libertystreeteconomics.newyorkfed.org/2017/11/just-released-auto-lending-keeps-pace-as-delinquencies-mount-in-auto-finance-sector.html [https://perma.cc/QR9Z-56YE].

20. *See* Bensinger, *supra* note 1.

21. *Used Vehicle Value Index*, MANHEIM, https://publish.manheim.com/en/services/consulting/used-vehicle-value-index.html [https://perma.cc/C7Y9-86N7].

22. *Id.*

23. United States v. Consumer Portfolio Services, Inc., No. 8:14-cv-00819-ABC-RNB (C.D. Cal. June 11, 2014), *see also Auto Lender Will Pay $5.5 Million to Settle FTC Charges It Harassed Consumers, Collected Amounts They Did Not Owe,* FED. TRADE COMMISSION (May 29, 2014), http://www.ftc.gov/news-events/press-releases/2014/05/auto-lender-will-pay-55-million-settle-ftc-charges-it-harassed [https://perma.cc/S99Y-LXRU] [hereinafter *Auto Lender Will Pay*]..

24. *Auto Lender Will Pay*, *supra* note 23; *see also* Kwesi D. Atta-Krah, *Preventing a Boom from Turning Bust: Regulators Should Turn Their Attention to Starter Interrupt Devices before the Subprime Auto Lending Bubble Bursts*, 101 IOWA L. REV. 1187, 1222 (2016).

"without judicial process, if it proceeds without breach of the peace" or to "render the collateral unusable" without repossessing it.[25] This is known as a "self-help" repossession because the creditor does not proceed through judicial process.[26] Aggressive repossession tactics, such as tricking a borrower with the promise of refinancing, keep costs low and margins high, allowing subprime auto lenders to plan on borrower default and still profit.[27] By planning on default, subprime auto lenders have demonstrated a reckless disregard for a borrower's ability to repay, flooding the credit markets with consumer loans on constant verge of default. If enough of these loans default at once, a cycle of default could begin. Such a mass default would drive down used car prices, dampening trade-ins and refinancing, and cause a much greater level of default.

Some state and federal consumer finance regulators have proactively investigated and brought enforcement actions against unscrupulous auto lenders. The attorneys general of Delaware and Massachusetts have sued and settled with Santander under a legal theory that the lender's irresponsible auto financing and securitization practices violated the Delaware Consumer Fraud statute.[28] Some state legislatures have restricted the use of starter-interrupt devices.[29] The Federal Trade Commission ("FTC") has targeted subprime auto lenders' use of self-help repossessions and deceptive sales tactics as violations of the Fair Debt Collection Practices and the Federal Trade Commission Acts.[30] The Consumer Financial Protection Bureau ("CFPB") has brought over a dozen auto lending discrimination cases under the Truth in Lending Act and the Consumer Financial Protection Act.[31] However, very little enforcement has focused on the reckless underwriting standards themselves.[32] Without reckless underwriting, subprime lenders would not be able to initiate profit-generating abusive collections and repossession tactics in the first place. Abusive lending practices are symptoms of a structural problem: that subprime lenders can profit on transactions with

25. Atta-Krah, *supra* note 24, at 1202 (citing U.C.C. § 9-609 (AM. LAW. INST. & UNIF. LAW COMM'N 2010)).

26. *Id.*

27. Atta-Krah, *supra* note 24.

28. Delaware Department of Justice, *Santander Consumer USA Holdings, Inc. to Pay $2.875 Million to Delaware Consumers Over Sub-Prime Auto Loans*, DELAWARE.GOV (March 29, 2017), https://news.delaware.gov/2017/03/29/sc-2 [https://perma.cc/3T4A-AL5G].

29. Atta-Krah, *supra* note 24, at 1207–08 (noting that California, Colorado, and Connecticut only allow the use of starter interrupt devices where the borrower's right to cure under § 6-6-09 of the Universal Commercial Code is preserved and their consent is obtained, while Kansas and Iowa have issued informal advisory opinions in lieu of formal regulations).

30. *See* United States v. Consumer Portfolio Services, Inc., No. 8:14-cv-00819-ABC-RNB 2 (C.D. Cal. June 11, 2014).

31. *See infra*, Part III, pp. 1365-1371 (examining how the CFPB has enforced the Dodd-Frank Act against predatory auto lenders).

32. *Id.*

economically desperate borrowers even if they are confident that the borrowers will never be able to pay back their loans.[33]

The federal mortgage Ability-to-Repay/Qualified Mortgage Rule provides a template for one national approach to remedying risky underwriting in auto finance. Authorized by the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") and implemented by the CFPB in 2014, the Ability-to-Repay Rule addressed a similar problem in the housing market.[34] It requires mortgage lenders to make a reasonable, good-faith determination that a borrower has the reasonable ability to repay their loan.[35] If the borrower can prove the lender did not have a reasonable belief when the loan was originated that the borrower could repay the mortgage, the lender may be liable for statutory damages "equal to the sum of all finance charges and fees paid by the consumer," in addition to damages, court costs, and attorneys' fees.[36] The impact of the rule is difficult to measure; it has likely significantly restricted subprime borrowers' access to credit, but also reduced credit risk.[37]

Auto finance ability to repay should receive more regulatory attention both because of the devastating effect a mass default could have on consumer wealth and the abusive lending techniques to which borrowers are exposed due to lenders' disregard for their ability to repay. Financial regulators should use the CFPB's experience with the mortgage Ability-to-Repay Rule to formulate rules and pursue enforcement, but with the understanding that cars and houses are financed differently.

Regulation of the car credit market could have very different effects; mortgages have readily available substitutes in the form of rental housing, while car transactions do not. For most consumers, obtaining the use of a car is either a financed transaction (a loan or lease) or is prohibitively expensive (a rental car). Rental housing, by contrast, is not typically a financed transaction. Limiting subprime auto lending could drive consumers out of the car market entirely, whereas mortgages encourage renting rather than owning a home. Furthermore, cars are essential income-producing assets, whereas rental homes are primarily consumption goods with long-term capital investment potential. Limiting subprime auto credit could prevent members of economically vulnerable populations from accessing work and social services.[38]

33. *See infra*, Part I.A.5, pp. 1357–59 (detailing each level of subprime lenders' profitable system of abusive lending practices).

34. Ability-to-Repay and Qualified Mortgage Standards Under the Truth in Lending Act, 78 Fed Reg. 6407, 6408 (Jan. 30, 2013) (amending 12 C.F.R. pt. 1026).

35. *Id.* at 6408.

36. *Id*. at 6416 (explaining that the statute of limitations for violating the ability-to-repay requirement is three years from the date of violation, and a violation of the rule can be asserted as a defense in a foreclosure action brought by the lender against the borrower).

37. *See infra* pp. 1371–75 (exploring implications of the Ability-To-Repay/Qualified Mortgage Rule for access to credit and overall credit safety).

38. For example, cities and counties throughout California administer "welfare-to-work" programs that require commuting to job training with the eventual goal of full-time employment. *See*

This Note examines how reckless auto loan underwriting has created tremendous risk for consumers. It recommends that financial regulators enforce existing consumer protection standards, such as prohibitions against unfair, deceptive, and abusive practices, to reduce the risk of predatory auto lending which disregards consumers' ability to repay, while accounting for the differences between the car and housing markets. Part II lays out the state of the auto finance industry, explaining how new subprime lenders and abusive collections and repossession techniques have driven the car market post-recession. Part III describes what regulatory attention has been paid to the auto finance industry and to which aspects. Part IV explores an ability-to-repay rule as a possible solution to the consumer risk posed by subprime lending practices. Finally, Part V recommends that financial regulators focus on auto loan underwriting and cautions against formulating a response that will unduly limit vital car credit.

I.
WHILE THE AUTO FINANCE MARKET HAS RECOVERED SINCE THE GREAT RECESSION, SUBPRIME LENDING PRACTICES PRESENT RISKS TO CONSUMERS AND THE ECONOMY

The automobile finance market has recovered significantly since the Great Recession, which followed the 2008 financial crisis, but its recovery has been marred by risky loan terms, widespread fraud, and underqualified borrowers. New auto industry players—independent auto finance entities and Buy-Here-Pay-Here dealers—have led the push into subprime lending. Because of longer-term loans to borrowers with lower credit scores and lax income verification, the auto loan market shows signs of instability. Despite high rates of default,[39] lenders still turn a profit.[40] Aggressive repossession and collections tactics, combined with the steadily increasing price of used cars, allow subprime lenders to maintain market share even when they make loans to borrowers they expect to default. This profit-despite-default business model is flooding the market with risky loans and threatening a bubble, which, if popped, could trigger a wave of defaults.

Calworks Welfare-To-Work Program, CONTRA COSTA COUNTY EMP. & HEALTH SERV. (Mar. 7, 2019), https://ehsd.org/benefits/calworks-welfare-to-work-program [https://perma.cc/85PX-YDJG].

39. Haughwout et al., *supra* note 19 (showing the highest rates of default since the 2008 Financial Crisis).

40. *Santander Consumer USA Holdings Inc. Reports Second Quarter 2018 Net Income of $335 million*, SANTANDER CONSUMER USA (July 25, 2018), http://investors.santanderconsumerusa.com/news/news-releases-details/2018/Santander-Consumer-USA-Holdings-Inc-Reports-Second-Quarter-2018-Net-Income-of-335-million/default.aspx [https://perma.cc/C29H-2QZL] (showing that Santander Consumer USA's "earnings were up 26 percent from 2Q 2017" for a net income of $335 million).

A. Auto Lending Has Grown, But Become Much More Subprime, Since the Recession

The auto finance industry has boomed since the Great Recession.[41] The CFPB estimates that per-month auto lending volume has recovered from a low of $21.1 billion in January 2010 to $43.2 billion in January 2017.[42] The St. Louis Federal Reserve Bank's FRED database shows that auto lending surpassed its 2005 all-time high of $823 billion; total auto loans owned and securitized now stand at $1.11 trillion.[43] That represents a nearly 34 percent increase.[44] Lenders have also gradually approved larger loans for individual borrowers. Between December 2010 and December 2016, the average amount financed on a new car loan rose from $25,261 to $29,468.[45] Low interest rates in the economy as a whole[46] and government support for major manufacturers[47] have spurred consumer demand and the resulting recovery.

However, during the recovery, lending became riskier and borrowers less qualified across the board. Between 2010 and 2015, the average credit score for a borrower of a new car loan declined every year, settling over twenty points below where it started.[48] Creditworthiness in the used car loan market, where most subprime borrowing occurs, also dropped significantly between 2010 and 2015.[49] More vehicles became encumbered by debt than ever before; the percentage of vehicles with financing rose every year between 2010 and 2015 for both new and used cars.[50] The length of these loans has also grown longer. In pre-crisis 2006, the average loan term was 60.67 months. In 2017 it was 68.80 for new cars, and 66.72 for used.[51] In sum, loan periods have become longer, the

41. *Consumer Credit Trends: Growth in Longer-Term Auto Loans*, CONSUMER FIN. PROTECTION BUREAU (Nov. 1, 2017) (explaining that "auto lending experienced" a "rapid increase" for "most of this decade").

42. *Automobile Loans Origination Activity*, *supra* note 11.

43. *See Motor Vehicle Loans Owned and Securitized*, *supra* note 11.

44. *Id.*

45. Bd. of Governors of the Fed. Reserve Sys. (US), *Average Amount Financed for New Car Loans at Finance Companies [DTCTLVENANM]*, FRED, FED. RES. BANK OF ST. LOUIS (Nov. 10, 2017), https://fred.stlouisfed.org/series/DTCTLVENANM [https://perma.cc/SJT9-KGNG].

46. Bd. of Governors of the Fed. Reserve Sys. (US), *Effective Federal Funds Rate [FEDFUNDS]*, FRED, FED. RES. BANK OF ST. LOUIS (Nov. 29, 2017), https://fred.stlouisfed.org/series/FEDFUNDS [https://perma.cc/9DDC-4LDD].

47. David E. Sanger, David M. Herszenhorn, & Bill Vlasic, *Bush Aids Detroit, but Hard Choices Wait for Obama*, N.Y. TIMES (Dec. 19, 2008), http://www.nytimes.com/2008/12/20/business/20auto.html?_r=2&hp [https://perma.cc/GS4C-MVVK] (detailing the federal government's bailout of the "Big Three" Detroit automakers).

48. MELINDA ZABRITSKI, STATE OF THE AUTOMOTIVE FINANCE MARKET FOURTH QUARTER 2015, EXPERIAN AUTOMOTIVE 18 http://www.experian.com/assets/automotive/quarterly-webinars/experian-auto-2015-q4.pdf [https://perma.cc/V3FJ-JQA6] [hereinafter ZABRITSKI, STATE OF THE AUTOMOTIVE FINANCE MARKET] (showing a decline in average borrower FICO score of 11 points for used cars during the same period).

49. *Id.*

50. *Id.* at 5.

51. *Compare* MELINDA ZABRITSKI, RIDING OUT THE STORM: AN INSIDE LOOK AT CREDIT, RISK AND DELINQUENCY, EXPERIAN AUTOMOTIVE 14 (2008) (on file with the author) [hereinafter

lenders more aggressive, the borrowers less qualified, and the assets more encumbered.

1. New Lenders in the Auto Market

As the market has recovered, more aggressive kinds of auto lenders have emerged, even as the traditional players have retained their dominance. The two biggest types of lenders in the auto finance market, traditional banks and so-called "captives"—finance entities owned by national auto manufacturers—have maintained their market share, especially in the sale of new vehicles. In pre-recession 2006, banks and captives held a combined 62.3 percent of all auto loans;[52] as of the second quarter of 2017, they held 62.5 percent.[53] Even though creditworthiness in the subprime sector has deteriorated, total market share of subprime and prime loans has remained relatively constant as well. Subprime loans have been "fairly steady at around 24 percent" of the "total outstanding auto loan balance . . . since about 2011."[54]

However, different lenders now originate and hold these loans. The post-recession auto market saw the rise in prominence of nonbank auto finance entities, displacing some of the business traditionally done by credit unions.[55] There are two types of nonbank auto entities: independent auto finance companies and Buy-Here-Pay-Here dealerships. A typical independent financing company is either a consumer credit-focused spinoff of a big bank or a non-affiliated lender that makes and services subprime loans in its own right.[56] The two largest finance companies in the auto lending industry are Santander Consumer USA and Credit Acceptance Corporation.[57] A Buy-Here-Pay-Here ("BHPH") dealership is one that services all the loans it originates, typically at high interest rates and with very aggressive debt collection and repossession practices.[58]

ZABRITSKI, RIDING OUT THE STORM] *with* MELINDA ZABRITSKI, STATE OF THE AUTOMOTIVE FINANCE MARKET: A LOOK AT LOANS AND LEASES IN Q2 2017 20–21, EXPERIAN AUTOMOTIVE, http://www.experian.com/assets/automotive/quarterly-webinars/2017-Q2-SAFM_recording.pdf [https://perma.cc/R4CY-D7VR] [hereinafter ZABRITSKI, STATE OF THE AUTOMOTIVE FINANCE MARKET].

52. ZABRITSKI, RIDING OUT THE STORM, *supra* note 51, at 6.

53. ZABRITSKI, STATE OF THE AUTOMOTIVE FINANCE MARKET, *supra* note 51, at 12.

54. Haughwout et al., *supra* note 19.

55. *Compare* ZABRITSKI, RIDING OUT THE STORM, *supra* note 51, at 14, *with* ZABRITSKI, STATE OF THE AUTOMOTIVE FINANCE MARKET, *supra* note 48, at 13 (showing the deterioration of credit union market share over time).

56. *See* Nick Zulovich, *Top 20 Finance Companies by Market Share in Q4*, SUBPRIME.COM (Mar. 28, 2017), http://www.autoremarketing.com/subprime/top-20-finance-companies-market-share-q4 [https://perma.cc/98VW-NBD3].

57. *Id.*

58. *Buy Here Pay Here*, INVESTOPEDIA, (Oct. 14, 2018) http://www.investopedia.com/terms/b/buy-here-pay-here.asp [https://perma.cc/G34J-ZE24]; *see* Bensinger, *supra* note 1 (detailing the predatory practices of BHPH dealerships).

Independent finance companies and BHPH dealerships have a much larger appetite for subprime lending than banks and captives. While deep subprime loans made up around 1 percent and subprime loans made up around 12 percent of the risk profiles of banks and credit unions in 2015, deep-subprime loans alone constituted 20.1 percent of the BHPH industry and 11.3 percent of the independent auto finance industry.[59] As new risk-hungry lenders pushed out risk-averse credit unions, a significant portion of subprime auto lending growth during the early recovery drove these new, more aggressive lenders. The New York Federal Reserve Bank noted that independent auto finance lending to nonprime, subprime, and deep subprime lenders "more than doubled" during the recovery.[60] Other commentators report that the number of auto loans made to borrowers with credit scores below 660 "has nearly doubled since 2009—a much greater increase than in any other loan type."[61]

As these newer, more aggressive auto finance entities have grabbed market share from more traditionally risk-averse credit unions, the market has experienced levels of default and delinquency not seen since the trough of the Great Recession. Despite record delinquencies, subprime lenders have barely slowed their loan origination.[62] How can this be? According to neoclassical economic assumptions, rising delinquencies should slow down origination activity, just as it did during the Great Recession. Yet, both ninety day delinquencies and subprime originations are near their all-time highs.[63]

2. *Profit Despite Default*

These record-breaking rates for loan delinquencies and new subprime auto loans may be because the new subprime lenders—BHPH dealerships and independent auto finance companies—profit despite borrower default through a slew of abusive and deceptive sales, repossession, and collections tactics. Auto lenders can extract value using these tactics at each stage in the process: sales, financing, repossession, and collections. Each practice that unfairly profits subprime lenders at the expense of borrowers in default provides a financial incentive for lenders to make more and more high-risk subprime loans. These tactics simultaneously increase the harm for individual consumers and the risk of default in the entire market. Regulators have responded to these practices by

59. ZABRITSKI, STATE OF THE AUTOMOTIVE FINANCE MARKET, *supra* note 48, at 20 (showing a chart displaying the relative "risk distribution of market share" by lender type).

60. Andrew Haughwout et al., *Just Released: Looking Under the Hood of the Subprime Auto Lending Market*, LIBERTY STREET ECONOMICS (Aug. 14, 2014), http://libertystreeteconomics.newyorkfed.org/2014/08/just-released-looking-under-the-hood-of-the-subprime-auto-lending-market.html#.VBmRQPldU2K [https://perma.cc/7N8D-XNY6].

61. Alice Holbrook, *Is There a Subprime Auto Loan Bubble?*, USA TODAY (Sept. 27, 2014), https://www.usatoday.com/story/money/personalfinance/2014/09/27/subprime-auto-loan/16272641 [https://perma.cc/64XM-45FB].

62. *See* Haughwout et al., *supra* note 19.

63. *See id.*

limiting or outlawing their use. However, lenders' indifference to consumers' ability to repay their loans—the gateway to profit-extracting techniques—has largely escaped regulatory oversight.

3. Sales

At the sales stage, dealers use tactics like "yo-yo financing" to deceive customers into entering into a financing agreement in which they do not know the final terms. In "yo-yo financing," a salesperson guarantees the borrower that the dealer's third-party lender is certain to approve the financing under the terms to which the dealer and the borrower have just agreed.[64] The initial loan terms are very inexpensive for the kind of borrowers that subprime dealers target. The borrower accepts, driving off in the car and planning to commute with it as soon as possible.[65] The dealer has tricked the borrower; they allowed the borrower to drive off without finalized financing so that the borrower would get attached to the car.[66] After the subprime dealer fails to secure financing on the terms promised, they take the rejection back to the borrower.[67] The dealer insists that, to get approved, the borrower must buy add-on products—such as additional insurance or warranty coverage, or devices which make repossession easier[68]—in order to get approved.[69] Finally, they reveal to the borrower what they've known all along: the original contract had too low an interest rate and too small a down payment.[70] Not wanting to relinquish the car they were depending on, borrowers frequently accept the higher interest rate and larger down payment.[71] The final loan terms are for a larger principal amount and a higher interest rate than expected or initially bargained for, and such borrowers become less likely to pay off the loan.

64. Colleen Tressler, *FTC to Auto Dealers: Don't Toy with Yo-Yo Financing* FED. TRADE COMMISSION CONSUMER INFO. (May 29, 2014), https://www.consumer.ftc.gov/blog/2016/09/ftc-auto-dealers-dont-toy-yo-yo-financing [https://perma.cc/6DL8-WKKP].

65. *Avoiding a Yo-Yo Financing Scam*, FED. TRADE COMMISSION, https://www.consumer.ftc.gov/media/video-0141-avoiding-yo-yo-financing-scam [https://perma.cc/QRU6-WJEN].

66. *FAQ: Can The Dealer Increase the Interest Rate After I Drive the Vehicle Home?*, CONSUMER FIN. PROTECTION BUREAU (Aug. 5, 2016), https://www.consumerfinance.gov/ask-cfpb/can-the-dealer-increase-the-interest-rate-after-i-drive-the-vehicle-home-en-831/ [https://perma.cc/Z7XC-RC68].

67. *FTC Charges Los Angeles-Based Sage Auto Group with Using Deceptive and Unfair Sales and Financing Tactics*, FED. TRADE COMMISSION (Sept. 29, 2016), https://www.ftc.gov/news-events/press-releases/2016/09/ftc-charges-los-angeles-based-sage-auto-group-using-deceptive [https://perma.cc/NDZ2-28HW] [hereinafter *FTC Charges Los Angeles-Based Sage Auto Group*].

68. *See infra* Part I.A.4, pp. 1357.

69. *FTC Charges Los Angeles-Based Sage Auto Group, supra* note 67.

70. *See id.*

71. Complaint at 23, FTC v. Universal City Nissan, No. 2:16-cv-07329 (C.D. Cal. Sept. 29, 2016).

4. *Repossession*

In order to profit, subprime auto dealers must account for the risk of default and price the car loans they provide accordingly. However, as interest rates on the riskiest subprime car loans hit 20 percent, 25 percent, or even 30 percent, borrowers might get sticker shock, even on the second pass when they are already in possession of the car. Lenders have come up with ways to increase the chance of recovery rather than increase the price. One way in which lenders increase the chance of recovering their investment is to reduce the cost of repossession. When a borrower defaults, lenders must find and take possession of the car. Paying investigators or employees to scour the city for the car takes time and money that otherwise would go directly to the dealer's bottom line.

Subprime lenders make use of myriad techniques to ensure that they can efficiently repossess a car and recover as much money as possible. GPS tracking devices, which enable lenders to monitor vehicle locations, and starter-interrupt devices, which empower lenders to remotely disable the ignition system in financed cars so they cannot be restarted, make the assets easier (and less costly) to repossess.[72] Combined with ordinary deception like that perpetrated on Tiffany Lee,[73] subprime lenders have made repossession a routine part of an ordinary business practice. Repossession allows a subprime lender to recover value from the transaction while still retaining the down payment and various fees from a loan in default. In addition, the dealer retains commissions or profits from the add-ons sold in yo-yo financing schemes. The borrower will repossess the car, sell it at a repossession sale, and then put the proceeds towards the outstanding balance on the loan. Furthermore, because of the high ratio of financed money to the asset value of the car, the borrower will likely have a deficiency. The money made from the repossession sale does not cover the outstanding balance on the loan. That is where the collections process comes in.

5. *Debt Collection*

Even when the underlying value of the car has not depreciated much (as is the case in repossession of a typical used car after a few months of payments), and even when the lender can charge the next borrower the same price,[74]

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72. Atta-Krah, *supra* note 24, at 1189.

73. *See* Bensinger, *supra* note 1.

74. Typical used cars lose value sharply during the first five years after purchase. During the post-recession period, used car prices in general have risen by an average of 4 percent every year since 2013. USED CAR REPORT: Q3 2018, EDMUNDS (2018), https://static.ed.edmunds-media.com/unversioned/img/car-news/data-center/2018/nov/used-car-report-q3.pdf [https://perma.cc/8MUX-5754]. Because subprime and deep subprime borrowers typically drive older cars, the rate of increase in used car inventory prices has often met or exceeded the yearly depreciation values of these cars. Thus, resales can occur at higher nominal, and even real, prices despite the declining age of the car. In one well-documented case reported by the Los Angeles Times, *see* Bensinger, *supra* note 1, and spotlighted in HBO's *Last Week Tonight*, a single car can sell at the same or a similar price for years despite its depreciating value. *See also Oldsmobile Intrigue Sales Records*, L.A. Times (Aug.

subprime lenders will use aggressive debt collection practices to collect loan balances. This is so even though the lenders knowingly created this deficit by over-financing borrowers with bad credit, charging exorbitant interest rates, and taking advantage of uninformed borrowers by tacking on fees and add-on products to the principal amount of the loan. Normally, a company would fail if it consistently financed more than it could collect based on the repossession of its collateral, but subprime auto lenders have circumvented this issue by streamlining both the collections stage and the aggressive sales and repossession stages of their businesses. Many subprime lenders keep attorneys on staff, reducing legal and collections agency fees and increasing profits.[75] For example, Credit Acceptance Corporation, the second largest nonbank subprime auto lender in the United States, relies heavily on wage garnishment to generate profits.[76] Credit Acceptance employs a strategy of aggressive legal collections, suing thousands of borrowers a month with auto-signed legal documents, raising regulatory concerns over how closely its attorneys are scrutinizing each complaint before filing.[77] According to a 2009 FTC Report, between 60 percent and 95 percent of debt collection lawsuits result in default judgements because debtor-defendants do not respond or mount a defense, making the debt collection litigation stage of the subprime auto lending cycle especially dangerous for borrowers.[78] The company's business model is essentially to entice customers into a debtor relationship where the borrower gets the benefit of the financed asset for a very short time (in one third of cases, under a year);[79] by the time Credit Acceptance files its debt collection lawsuit, the car will have long been repossessed. Many subprime borrowers find themselves repaying car loans years—even decades—after their car has been repossessed.[80] This is classic predatory lending. The harm created by the unaffordable car loan far outweighs the short-term benefit the consumer received from the car's use.

14, 2012), http://documents.latimes.com/oldsmobile-intrigue-sales-records/?23document/p12/a67373 [https://perma.cc/8WX6-R3TW].

75. Bensinger, *supra* note 1 ("Some keep lawyers on staff, filing dozens of lawsuits each month to recoup unpaid balances and garnish debtors' wages. One high-volume dealership, Neil's Finance Plaza of Kansas City, Mo., has filed more than 6,000 lawsuits since 1995 through an affiliate, seeking unpaid balances from customers who defaulted, records show.").

76. *Credit Acceptance Corporation: Company Lending Data Shows Importance of Wage Garnishment to Business Model; Signs of Problematic Practices Create Regulatory Risk*, THE CAPITOL FORUM 1–2 (Dec. 8, 2016).

77. *Id*. at 3–4.

78. *Id.*

79. *See* WILLIAM ADAMS, LIRAN EINAV & JONATHAN LEVIN, LIQUIDITY CONSTRAINTS AND IMPERFECT INFORMATION IN SUBPRIME LENDING, NAT'L BUREAU OF ECON. RESEARCH, WORKING PAPER NO. 13067, 2007, http://www.nber.org/papers/w13067 [https://perma.cc/67L5-FFXX]. ("Repayment is highly uncertain: more than half of the loans default, and the majority of these default within the first year of repayment.").

80. Jessica Silver-Greenberg & Michael Corkery, *The Car Was Repossessed, but the Debt Remains*, N.Y. TIMES (June 18, 2017), https://www.nytimes.com/2017/06/18/business/dealbook/car-loan-subprime.html [https://perma.cc/5WBA-GXA9].

6. Ability to Repay and Consumer Abuse

For every dollar of value a subprime lender can extract through deception or abuse, the less creditworthy a borrower needs to be to obtain the same loan terms. While lenders may justify this policy as ensuring the availability of credit for the most low-income individuals with the most need for a car, borrowers are only exposed to these tactics because subprime lenders have little financial incentive to consider potential borrowers' ability to repay. Targeting sales, repossessions, and collections techniques leads to a game of legal cat and mouse between regulators and subprime lenders. States and the federal government regulate; subprime lenders navigate the regulation and invent new ways of extracting profit from vulnerable subprime borrowers. If lenders were not allowed to ignore borrowers' ability to repay, borrowers who are certain to default would not be exposed to the universe of abusive techniques described above. This would deprive subprime lenders of the opportunity to profit from consumer abuse.

B. Risky Auto Lending Presents the Possibility of Mass Default with Disastrous Consequences for Consumers

Auto lending's echoes of the mortgage crisis make market commentators very nervous because risky auto lending increases the likelihood of an asset bubble. Here, an "asset bubble" refers to financing practices like risky lending that cause high demand for used cars, resulting in inflated prices. Because subprime lenders can profit despite default (using the techniques outlined above), they have a financial incentive to originate loans that are likely to default. Poorly verified loans destined to fail will eventually burst the bubble.

If the default rates are much higher than expected—as they have already been for much of Santander's recent lending—lenders would repossess a record number of cars. A higher supply of repossessed cars would cause used car prices to fall,[81] mirroring the glut of end-of-lease used cars which entered the market in late 2016 and early 2017.[82] As with leases, larger inventories of used cars would push down prices on not only used cars, but also on new cars through a substitution effect.[83] Lower prices would increase the loan-to-value ratios on borrowers' loans and make it much harder for those on the cusp of default to

81. Adam Copeland, Wendy Dunn, & George Hall, *Inventories and the Automobile Market*, 42 RAND J. OF ECON. 122–23 (Spring 2011) (finding, among other effects, that rapid increases in automobile inventory cause same-year, same-model price declines).

82. Nick Carey, *U.S. Used-Car Glut is a Dealer's Dream, Automakers' Nightmare*, REUTERS BUS. (May 11, 2017), https://www.reuters.com/article/us-autos-used-analysis/u-s-used-car-glut-is-a-dealers-dream-automakers-nightmare-idUSKBN1880KE [https://perma.cc/282W-6M7E].

83. *Cars Whose Leases are Up Flood the Market, Pushing Prices Down*, L.A. TIMES (May 27, 2017), http://www.latimes.com/business/autos/la-fi-hy-used-cars-20170526-story.html [https://perma.cc/8TVN-KWHB].

refinance or trade-in for a more affordable vehicle.[84] The subsequent defaults could trigger still deeper price falls, as a wave of repossessions would further increase the supply of used cars in the market.[85] The feedback loop would continue, making it difficult for even upper-subprime or nonprime consumers to refinance or trade in their car if they fall behind on payments.[86] The outflow of durable assets from the poorest households in the country would cause significant hardship, making it more difficult for breadwinners to commute to work, caregivers to seek treatment for their ailing dependents, and heads of household to apply for and maintain eligibility in public benefit programs such as Temporary Assistance for Needy Families (TANF).[87] Not only would allowing subprime lenders to continue issuing loans without regard for borrowers' ability to repay expose the most vulnerable individual consumers to abusive sales, repossession, and collections techniques, it would also increase the chances of mass default and a subprime auto loan bubble. Mass default would hurt subprime lenders and would bury subprime borrowers in debt and make their lives much more difficult. Financial regulators should consider ways to improve and standardize auto loan underwriting to mitigate the use of abusive lender tactics and prevent the possible mass default on the horizon.

II.
REGULATIONS AND ENFORCEMENT ACTIONS TARGET SUBPRIME AUTO LENDERS' QUESTIONABLE FINANCING AND REPOSSESSION TACTICS, BUT NOT THE LAX UNDERWRITING STANDARDS WHICH SUSTAIN THEIR BUSINESS MODEL

In the face of subprime lending models that rely on abusive business practice to profit despite default, regulators at the state and federal level have targeted these business practices directly. States have passed laws limiting abusive repossession practices. The FTC and CFPB have investigated and brought Dodd-Frank Act and other enforcement actions against subprime lenders

84. *See 'Trade-in Treadmill' Increases Credit Risk for Auto Lending Sector*, MOODY'S INVESTOR SERV. (Mar. 27, 2017), https://www.moodys.com/research/Moodys-Trade-in-treadmill-increases-credit-risk-for-auto-lending--PR_363998 [https://perma.cc/CS3T-9HSY].

85. Annalyn Kurtz, *Why the Auto Industry is on the Brink of a Decline*, FORTUNE (April 12, 2017), http://fortune.com/2017/04/12/auto-industry-decline/ [https://perma.cc/HNU5-WB4N]; *see also* Matt Turner, *'Subprime Credit Losses are Accelerating': There's a Problem in the Auto Loan Market*, BUS. INSIDER (Mar. 22, 2017), http://www.businessinsider.com/fitch-on-auto-loan-market-2017-3/#the-subprime-auto-loan-delinquency-rate-is-moving-higher-1 [https://perma.cc/54AY-NW3Y] (explaining how increased vehicle supply through loan defaults "pushes down residual values for cars" and makes it more difficult for consumers to trade in).

86. *See* Turner, *supra* note 85.

87. *See Shifting into Gear: A Revised Guide to Creating or Improving a Car Ownership Program* 2, NAT'L CONSUMER L. CTR. (Apr. 17, 2014), http://www.workingcarsforworkingfamilies.org/images/files/shifting-into-gear.pdf [https://perma.cc/B859-E5DV] (explaining that "welfare recipients who own cars are more likely to be employed, work more hours, and earn more" and that "only about 25 percent of jobs in low and middle-skill industries are accessible via public transit within 90 minutes for typical metropolitan commuters).

who use deceptive or discriminatory sales and financing practices. A business model predicated on lending to borrowers with an inability to repay drives and increases the use of the abusive practices outlined in Part I, yet in only one instance has any government actor attempted to write auto finance ability-to–repay regulations.

A. States

Since the end of the Great Recession, state attorneys general have aggressively targeted deceptive and unfair sales, financing, repossession, and collections tactics in the auto finance market. According to defense-side law firm Goodwin Procter, state attorneys general accounted for over 75 percent of civil penalties and restitution paid out in auto finance enforcement cases in 2015, 2016, and 2017.[88] Apart from a single instance,[89] states have not adopted auto ability-to-repay rules or brought enforcement actions against a lender's failure to make an ability-to-repay assessment since the recession.[90]

During a burst of regulatory enthusiasm in 2015, New York concluded a major enforcement action against subprime auto lenders based on fraudulently marketed add-on products and services and introduced eleven pieces of legislation addressing common subprime finance strategies.[91] These bills addressed mark-ups and deceptive financing, proposed putting a cap on loan-to-value ratios, and regulating starter-interrupt and GPS tracking devices, among other practices common among subprime lenders.[92] However, even at the height of New York's regulatory attention, neither the enforcement actions nor the proposed bills would have mandated that auto lenders assess a consumer's ability to repay their loan.

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88. *Consumer Finance 2017 Year in Review*, GOODWIN PROCTER (Feb. 22, 2018), https://www.lenderlawwatch.com/2018/02/22/goodwin-releases-annual-review-of-key-developments-within-the-consumer-financial-services-industry [https://perma.cc/J363-VFFG]; *Consumer Finance 2016 Year in Review*, GOODWIN PROCTER (Feb. 2, 2017), https://www.lenderlawwatch.com/2017/02/02/goodwin-releases-review-of-major-developments-impacting-the-consumer-financial-services-industry/ [https://perma.cc/B5J3-TN2U]; *Consumer Finance 2015 Year in Review*, Goodwin Procter (Feb. 24, 2016), https://www.goodwinlaw.com/news/2016/02/02_24_2016-goodwin-procter-releases-2015-yearend-review-on-major-developments [https://perma.cc/6VWH-CP2U].

89. *See infra* Part II.D, pp. 1364.

90. *See* John Redding et al., *Ability-To-Repay Enforcement Comes to Auto Finance*, LAW360 (Apr. 25, 2017), https://www.law360.com/articles/916579/ability-to-repay-enforcement-comes-to-auto-finance [https://perma.cc/5JE7-NY5F] (observing that the Delaware and Massachusetts joint settlement with Santander Consumer USA represents novel territory for state enforcement in auto finance).

91. *Senators Klein & Savino Reveal Top Predatory Subprime Auto Lending Practices in New York*, NYC.GOV (Apr. 30, 2015) https://www1.nyc.gov/site/dca/media/pr043015.page [https://perma.cc/928Y-L73K].

92. *Id.*

B. FTC

The Federal Trade Commission ("FTC") enforces consumer protection laws and brings administrative actions and lawsuits against auto dealers and financiers under the Federal Trade Commission Act's "unfair or deceptive acts or practices" (UDAP) standard.[93] Recently, the FTC opened an investigation into Credit Acceptance Corporation's (the second-largest nonbank subprime auto lender) use of starter-interrupt and GPS tracking devices.[94] The Commission has also brought many UDAP cases against auto lenders based on unfair or deceptive financing,[95] debt collection[96] and repossession practices.[97] These enforcement actions demonstrate a common FTC approach: utilizing the UDAP standards to target actual or constructive fraud. Through its actions regarding starter-interrupt and GPS devices, the FTC also utilizes the unfair standard, as making the inclusion of such a device a condition for financing leaves consumers little choice but to auction away their privacy in exchange for getting to work or accessing social services. However, no FTC case has ever used the UDAP standard to police auto finance ability to repay.

C. CFPB

Since its inception in 2010, the CFPB has aggressively prosecuted violations of federal consumer financial protection laws and designated unscrupulous lending practices as "abusive." Newly created at the CFPB's founding, the "abusive" designation is more expansive than the traditional UDAP standards; it captures practices that "take unreasonable advantage of . . . the inability of the consumer to protect the interests of the consumer in selecting or using a consumer financial product or service."[98] The Bureau has previously

93. The Act directs the FTC to prevent covered financial institutions from "using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in and affecting commerce" unless "the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or competition." 15 U.S.C. § 45 (a)(1)(2), (n) (2012). Federal courts have largely upheld the FTC's use of its powers under 15 U.S.C. § 53(b) to seek temporary and permanent injunctions, asset freezes, and monetary equitable relief in Article III courts without going through an initial Article I administrative hearing process. *See* FTC v. World Travel Vacation Brokers, Inc., 861 F.2d 1020, 1024–28 (7th Cir. 1988); FTC v. U.S. Oil & Gas Corp., 748 F.2d 1431, 1432–35 (11th Cir. 1984) (per curiam); FTC v. H.N. Singer, Inc., 668 F.2d 1107, 1110–13 (9th Cir 1982). The FTC may also use the UDAP standards as a basis for rulemaking. 15 U.S.C. § 57(a).

94. *See* Credit Acceptance Corporation, Current Report (Form 8-K), SEC EDGAR SYSTEM (Nov. 1, 2016), https://www.sec.gov/Archives/edgar/data/885550/000088555016000148/0000885550-16-000148-index.htm [https://perma.cc/S5LJ-DCJP].

95. Stipulated Order for Permanent Injunction and Monetary Judgment as to Settling Defendants, FTC v. Universal City Nissan, Inc, No. 2:16-cv-07329 (C.D. Cal. Mar. 21, 2017).

96. *See, e.g.,* Consent Order, United States v. Asset Acceptance, LLC, No. 8:12-cv-00182-JDW-EAJ (M.D. Fla Jan 1, 2012).

97. *See, e.g.* Consent Order, United States v. Consumer Portfolio Services, Inc., No. 8:14-cv-00819-ABC-RNB (C.D. Cal June 11, 2014).

98. 12 U.S. § 5531 (d)(2)(B) (2012); *see In re* Y King S Corp d/b/a Herbies Auto Sales*,* No. 2016–CFPB–0001 (Jan. 1, 2016).

used its abusive designation powers to bring enforcement action based on a lender's disregard for borrowers' ability to repay, though not in the auto finance context.[99] In *Ace Cash Express*, the CFPB sued a payday lender that was pressuring borrowers to take out new loans when they could not afford to repay outstanding loans.[100] Despite the borrowers' "demonstrated inability to repay," the lender made the hard sell in order to pick up fees and add-ons.[101] The CFPB identified this disregard for ability to repay as abusive.[102] Though a new payday loan to repay an old payday loan is more akin to refinancing in the automobile context, the principle is the same: lending with reckless disregard for borrowers' ability to repay can be an abusive financial practice.

However, a review of the CFPB's auto industry enforcement activity indicates that auto loan enforcement is somewhat low priority and has never focused on the ability of borrowers to repay car loans. Over the CFPB's life, enforcement actions against auto lenders have comprised only 6.67 percent of its total docket,[103] although auto loan debt accounts for 10 percent of all consumer debt and about 32 percent of all non-mortgage debt.[104] As of July 21, 2016, the CFPB had only brought 13 enforcement actions against auto lenders out of 135 total actions.[105] By contrast, the CFPB had brought 39 actions against mortgage lenders, 26 against credit card companies, and 26 against debt collectors.[106] Since July 21, 2016, the CFPB has brought 60 additional enforcement actions, but *none* against auto finance companies.[107] Looked at another way, the CFPB has only brought 5 cases against auto lenders since the promulgation of its rule defining a market for larger participants in auto financing.[108]

99. *In re* ACE Cash Express, Inc., No. 2014–CFPB–0008 (July 8, 2014).

100. *Id.*

101. *Id.* at 11.

102. *Id.*

103. By combining a search on the CFPB's enforcement database and the numbers from a recent law review analysis, it appears that 13 of the CFPB's 195 total enforcement actions were against auto lenders. Donald C. Lampe & Ryan J. Richardson, *The Consumer Financial Protection Bureau at Five: A Survey of the Bureau's Activities*, 21 N.C. BANKING INST. 85, 121 (2017) (displaying relative enforcement frequency on "Table 7, CFPB Resolved Public Enforcement Actions by Product Type and Year, as of July 21, 2016"); *Enforcement Actions*, CONSUMER FIN. PROTECTION BUREAU (Nov. 29, 2017), https://www.consumerfinance.gov/policy-compliance/enforcement/actions [https://perma.cc/XN9D-ZNWM] (showing no auto finance enforcement actions since July 21, 2016).

104. Christopher L. Peterson, *Consumer Financial Protection Bureau Law Enforcement: An Empirical Review*, 90 TUL. L. REV. 1057, 1089 (2016); *see also Quarterly Report on Household Debt and Credit: 2017 Q2*, FED. RES. BANK OF NEW YORK: CONSUMER CREDIT PANEL (Aug. 2017), https://www.newyorkfed.org/microeconomics/hhdc.html **[https://perma.cc/56FX-T64D]** (noting that car loans made up about 10 percent of all consumer debt and about 32 percent of all non-mortgage debt).

105. Lampe & Richardson, *supra* note 103.

106. *Id.*

107. *Enforcement Actions*, *supra* note 103.

108. Lampe & Richardson, *supra* note 103; Peterson, *supra* note 104; *Enforcement Actions*, *supra* note 103.

D. Regulating Auto Finance Ability to Repay

Only one case demonstrates an attempt to regulate auto finance ability to repay. On March 27, 2017, the attorneys general of Delaware and Massachusetts entered into a consent decree with Santander Consumer USA ("SC") concerning SC's "reckless" origination of consumer auto loans it knew borrowers were not likely to repay.[109] Both states found that SC's "limited requests for income documentation, . . . failure to audit Delaware Direct Performance Management [DPM] dealers, as well as SC's purchasing loans with excessive predicted default rates (in some cases over 50%) resulted in SC recklessly causing the origination of *unfair* Delaware loans, including certain loans that the borrowers are not likely to be able to repay."[110] Delaware sued SC using a Delaware statute similar to the federal UDAP standards in the Federal Trade Commission Act, which bans deceptive or fraudulent business practices in the sale, lease, or purchase of merchandise.[111] SC agreed to pay $2.875 million in restitution to affected consumers and $1 million in civil penalties to Delaware's consumer protection fund.[112]

Apart from the remarkable lawsuit against Santander, regulators have neglected auto finance ability to repay as an avenue for direct regulation and enforcement. Instead, the FTC and states like Delaware have utilized the traditional UDAP standards or state analogues to mitigate symptoms of subprime auto lenders' depend-on-default business model like yo-yo financing, harassing debt collection, and repossession via starter-interrupt devices, rather than addressing their cause. Wage garnishment, repossession and resale, and mass debt collection transform borrower default and its attendant consumer harms (unemployment, isolation, lack of access to medical care and social services) into subprime lender profits. The CFPB has used the Dodd-Frank Act's abusive standard to prevent reckless disregard for borrowers' ability to repay, but never in the auto-lending context. Even if the CFPB had used the abusive standard in this way in one out of the thirteen enforcement actions it has brought against auto lenders, the Bureau's enforcement focus would still be disproportionately low for the amount of auto debt American consumers hold. Delaware and Massachusetts have blazed a trail for other states to use the unfair prong of UDAP or state analogues to enforce some form of auto finance ability to repay

109. Del. Dept. of Justice, *supra* note 28.

110. *In re* Santander Consumer USA Holdings, Inc., No. 17-17-17001637 at ¶ 43 (Mar. 29, 2017) (emphasis added) (explaining that the Direct Performance Management dealers, or "DPM" dealers, targeted in the Delaware state suit experienced "higher levels of delinquency, default, and other issues."; SC waived income verification on about 14 percent of the DPM dealers' loans, and testified that it expected default rates of 42 percent).

111. Delaware's Consumer Fraud statute bans "[t]he act, use or employment by any person of any deception, fraud, false pretense, false promise, misrepresentation, or the concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale, lease or advertisement of any merchandise, whether or not any person has in fact been misled, deceived or damaged thereby." 6 Del. C. 1953 § 2513(a) (2018).

112. *In* re Santander Consumer USA Holdings, Inc., No. 17-17-17001637 at ¶43.

on behalf of consumers, but so far, their joint 2017 action against Santander is an isolated incident. This area is ripe for regulation.

III.
CONSUMER FINANCE REGULATORS SHOULD ATTEMPT TO REDUCE THE RISK OF PREDATORY AUTO LENDING THAT DISREGARDS CONSUMERS' ABILITY TO REPAY WITHOUT UNDULY LIMITING AUTO CREDIT

The existing subprime auto lending model harms consumers and threatens the entire car market's stability. Lenders' disregard for borrowers' ability to repay exposes consumers to value extraction techniques key to subprime lender profits. Because lenders can profit despite borrower default, they originate riskier loans. A mass default could lead to record repossessions and a crash in the auto market. Rather than play a game of regulatory cat-and-mouse with symptomatic business practices, regulators should confront their cause and consider directly regulating ability to repay. Requiring lenders to perform a case-by-case assessment of a borrower's ability to repay could reduce risk in the market and prevent the exploitation of borrowers in default.

A. Assessing the CFPB's Ability-to-Repay Rule for Home Mortgages as a Model for the Subprime Auto Finance Sector

In 2008 and 2009, the United States experienced an unprecedented and rapid decline in the housing market.[113] Trillions of dollars' worth of asset-backed securities made up of toxic mortgages stopped paying investors when the default rates were much higher than expected.[114] Investors sold off the asset-backed securities[115] wherever they could, but many were forced to accept the sudden worthlessness of the securities.[116] In response to higher defaults, banks

113. The causes and conditions of the 2008 Financial Crisis are still hotly debated among economists and policymakers. *See* Mark Thomas*, What Caused the Financial Crisis? Don't Ask an Economist*, FISCAL TIMES (Aug. 30, 2011), https://www.thefiscaltimes.com/Columns/2011/08/30/What-Caused-the-Financial-Crisis-Dont-Ask-an-Economist [https://perma.cc/U9NF-N998]. This broad overview is intended to introduce the CFPB's Mortgage Ability-to-Repay Rule so that it can be hypothetically applied to the auto lending context.

114. Antony Page, *Revisiting the Causes of the Financial Crisis*, 47 IND. L. REV. 37, 45–46 n. 62 (2014) (describing how mortgage-backed security values declined steeply, threatening the solvency of major institutional investors like Bear Stearns and Goldman Sachs); Michael Simkovic, *Competition and Crisis in Mortgage Securitization*, 88 IND L. J. 213, 243, fig. 11 (2013) (depicting extremely high rates of default, ranging from 8.9 percent for Prime to 32.6 percent for Subprime, for non-government guaranteed mortgage backed securities during the Financial Crisis).

115. Page, *supra* note 114, at 43 (explaining how "[i]nvestors panicked all over the world, trying to flee risky assets and not knowing what financial institutions were really at risk").

116. *See The Financial Crisis: A Timeline of Events and Policy Actions*, FED. RES. BANK OF ST. LOUIS, https://www.stlouisfed.org/financial-crisis/full-timeline [https://perma.cc/RVP6-P67W] (marking the failure of several institutional investors in mortgage-backed securities, including July 31, 2007, when Bear Stearns filed bankruptcy for two hedge funds heavily invested in the MBS sector); *see also BNP Paribas Investment Partners Temporaly Suspends the Calculation of the Net Asset ValueoOf the Following Funds: Parvest Dynamic ABS, BNP Paribas ABS EURIBOR and BNP Paribas ABS EONIA*, BNP PARIBAS (Aug. 9 2007), https://group.bnpparibas/en/press-release/bnp-paribas-

foreclosed on a record number of homes, flooding the housing market with increased supply.[117] This drove housing prices down even further, precipitating yet another wave of defaults by borrowers who could not refinance their homes to maintain increasingly difficult-to-pay mortgages.[118] The cycle repeated itself until housing prices had fallen over 30 percent from their peak, and residential housing investment had fallen by half.[119]

In the lead-up to the crisis, mortgage originators increasingly accepted borrowers with extremely poor credit or no credit, attempting to mitigate the risk by charging high and adjustable interest rates.[120] The banks then repackaged these loans as derivative financial products: bonds which paid out when the

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investment-partners-temporaly-suspends-calculation-net-asset-funds-parvest-dynamic-abs-bnp-paribas-abs-euribor-bnp-paribas-abs-eonia [https://perma.cc/EZL5-SP8S] (a press release from BNP Paribas suspending redemptions of shares in mutual funds heavily invested in mortgage-backed securities).

117. NATIONAL FORECLOSURE REPORT: TEN YEARS LATER, CORE LOGIC (Mar. 2017), https://www.corelogic.com/research/foreclosure-report/national-foreclosure-report-10-year.pdf [https://perma.cc/72FN-PGXL] (showing that banks' foreclosure inventory reached 1,563,000 unsold homes during January 2011); Jeff Cox, *US Housing Crisis is Now Worse than Great Depression*, CNBC (June 14, 2011), http://www.cnbc.com/id/43395857 [http://perma.cc/N7NM-QJRP] (arguing that the United States' "foreclosure problem is unlikely to get any better with 4.5 million households either three payments late or in foreclosure proceedings"); *see also* Andrew Haughwout et al., *Real Estate Investors, the Leverage Cycle, and the Housing Market Crisis*, FED. RES. BANK OF N.Y. STAFF REP., No. 514, at 2 (Sept. 2011), https://www.newyorkfed.org/medialibrary/media/research/staff_reports/sr514.pdf [https://perma.cc/5KGK-598L] (describing how, as of the fourth fiscal quarter of 2010, "nearly 2.8 million homes [had] gone through foreclosure, and another 2 million homes [were] in the process of foreclosure").

118. FDIC, CRISIS AND RESPONSE: AN FDIC HISTORY 5 (Nov. 30, 2017) https://www.fdic.gov/bank/historical/crisis/chap1.pdf [https://perma.cc/2L7C-TYHL] (explaining that, as "house prices began to fall, many homeowners became unable to meet mortgage payments on their existing loans or refinance into a new loan, and mortgage defaults rose rapidly").

119. U.S. Bureau of Econ. Analysis, *Changes in Net Stock of Produced Assets (Fixed Assets and Inventories*, U.S. DEPT. OF COM., https://www.bea.gov/iTable/iTable.cfm?ReqID=19&step=3&isuri=1&1921=miscpublic&1903=178#reqid=19&step=3&isuri=1&1921=miscpublic&1903=178 [https://perma.cc/KJ6W-9HCV].

120. Joint Ctr. for Hous. Studies of Harvard University, *The State of the Nation's Housing* 2 (2008), http://www.jchs.harvard.edu/sites/default/files/son2008.pdf (explaining that "subprime mortgages and other products that helped buyers stretch their incomes were available as never before. In the hope of higher returns, lenders extended credit to borrowers previously unable to qualify for loans. Subprime mortgages rose from only 8 percent of originations in 2003 to 20 percent in 2005 and 2006, while the interest-only and payment-option share shot up from just 2 percent in 2003 to 20 percent in 2005."); *see also* FIN. CRISIS INQUIRY COMM'N, FINAL REPORT OF THE NATIONAL COMMISSION ON THE CAUSES OF THE FINANCIAL AND ECONOMIC CRISIS IN THE UNITED STATES 70, fig. 5.2 (2011) https://fcic.law.stanford.edu/report [https://perma.cc/Y4DP-8C7M] [hereinafter FCIC REPORT] (chart demonstrating that, every year between 2004 and 2006, subprime lending constituted over 20 percent of all mortgage lending value); Simkovic, *supra* note 114, at 227 (explaining the "proliferation of nontraditional mortgage loan features, such as adjustable rate mortgages (ARMs), interest only mortgages, pay option mortgages, and mortgages with large final payments known as balloon payments.").

mortgage borrowers they represented paid.[121] These bonds were repackaged and manipulated to make yet other derivative products, such as collateralized debt obligations:[122] financial derivative products that banks claimed had "diversified" risk despite being made up of different subprime mortgage-backed securities.[123] Both private investors on Wall Street and institutional investors, such as state and municipal pension funds, purchased trillions of dollars' worth of these financial products.[124] The sudden revelation of their insolvency was not only a sign of mass default and the economy sliding into recession, but also an outright devastation of savings and retirement wealth for the American public.[125]

1. Dodd-Frank

In the aftermath of the crash, Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act to prevent a repeat of the mortgage crisis.[126] Dodd-Frank enacted a comprehensive set of reforms to the financial services industry and established the CFPB, a new administrative agency charged with protecting consumers from unfair, deceptive, or abusive financial practices.[127] In sections 1411 and 1412 of Dodd-Frank, Congress targeted the source of the home mortgage bubble and asset-backed securities bonanza that led to the 2008 Financial Crisis by amending the Truth in Lending Act ("TILA") to require creditors to "make a reasonable and good faith determination based on verified and documented information, that the consumer has a reasonable ability to repay" all loans secured by a dwelling.[128] Dodd-Frank also created a safe harbor from lender liability for "qualified mortgages" that met certain standards of reliability.[129] Congress delegated the authority "to interpret those requirements and to provide guidance to the industry and consumers" to the

121. FCIC REPORT, *supra* note 120, at 73, fig. 5.3 (showing a graphic that explains how various tranches of mortgage debt were packaged into mortgage-backed securities); Simkovic, *supra* note 114, at 214–15 (describing the process and purpose of mortgage securitization).

122. FCIC REPORT, *supra* note 120 at 128, fig. 8.1 (showing a graphic that explains how different mortgage-backed securities were financially engineered into more exotic derivative products, such as CDOs).

123. Page, *supra* note 114, at 45 ("Moreover, these securities were often seen as facilitating diversification, which would be good for the financial institution.").

124. FDIC, CRISIS AND RESPONSE, *supra* note 118, at 6, 26 (discussing how "the rise in defaults" undermined "the value of trillions of dollars of mortgage-backed securities").

125. Fabian T. Pfeffer et al., *Wealth Disparities Before and After the Great Recession*, 650 ANN. AM. ACAD. POL. SOC. SCI. 98 (2013) ("Between 2007 and 2011, one fourth of American families lost at least 75 percent of their wealth, and more than half of all families lost at least 25 percent of their wealth. Multivariate longitudinal analyses document that these large relative losses were disproportionally concentrated among lower income, less educated, and minority households.").

126. Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, 12 U.S.C. § 5301 et seq. (2012).

127. *The Bureau*, CONSUMER FIN. PROTECTION BUREAU, https://www.consumerfinance.gov/about-us/the-bureau [https://perma.cc/3VLD-EB7L].

128. 15 U.S.C. § 1639c(a)(1) (2012).

129. *Id.* § 1639(b).

CFPB.[130] The CFPB then undertook an administrative rulemaking process to flesh out what constituted a good faith assessment, and what standards would qualify a mortgage for protection from civil liability.

B. Proposing an Auto Finance Ability to Repay Rule

Instead of bringing enforcement actions against lax underwriting standards under UDAP, Dodd-Frank abusive standards, or state law analogues on an ad-hoc basis, consumer finance regulators could formulate an ability-to-repay rule for auto financing that resembles the regulations restricting balloon payment loans, mortgages, or credit cards.[131] As explained in Part II.C.,[132] the "abusive" label denotes a practice that "takes unreasonable advantage of . . . the inability of the consumer to protect the interests of the consumer in selecting or using a consumer financial product or service."[133] The CFPB has issued Final Rules addressing consumers' ability to repay a loan for several different consumer financial products, including mortgages,[134] credit cards,[135] and loans involving balloon payments like payday loans.[136] However, the CFPB has also designated ability-to-repay practices as abusive through its organic rulemaking power. The "Payday, Vehicle Title, and Certain High-Cost Installment Loans" Final Rule identifies as abusive the practice of making balloon payment loans "without reasonably determining that consumers have the ability to repay the loans according to their terms."[137]

The mortgage Ability-to-Repay Rule provides a good example of how a strong auto finance rule could work. Consumer finance regulators could emulate the CFPB's existing ability-to-pay rules and write regulations restricting the origination of subprime auto loans without an assessment of a borrower's ability to repay through standard-setting. The CFPB's Ability-to-Repay mortgage rule requires lenders to make a "reasonable, good faith determination" of a borrower's ability to repay the mortgage; noncompliant lenders are civilly liable to borrowers for damages and court costs, and to the CFPB, among other relevant

130. Sanford Shatz & Justin Angelo, *The Consumer Financial Protection Bureau's Ability-to-Repay/Qualified Mortgage Rule*, 69 BUS. LAW. 539, 540 (2014).

131. Ability-to-Repay and Qualified Mortgage Standards Under the Truth in Lending Act, 78 Fed Reg. 6407, 6620 (Jan. 30, 2013) (amending 12 C.F.R. pt. 1026); *see also* Obrea O. Poindexter & Matthew W. Janiga, *The CFPB Amends Regulation Z's Credit Card Issuer Ability-to-Pay Requirements*, 69 Bus. Law. 593 (2014).

132. *See supra* Part II.C, pp. 1362–64.

133. 12 U.S.C. § 5531(d)(2)(B); *see In re* Y King S Corp d/b/a Herbies Auto Sales*,* No. 2016–CFPB–0001 (Jan. 1, 2016) (explaining that "[a]n act or practice is abusive if it 'takes unreasonable advantage of . . . the inability of the consumer to protect the interests of the consumer in selecting or using a consumer financial product or service . . . .").

134. Ability-to-Repay and Qualified Mortgage Standards Under the Truth in Lending Act, 78 Fed Reg. at 6,620.

135. 12 C.F.R. § 1026 (2018).

136. Payday, Vehicle Title, and Certain High-Cost Installment Loans, 82 Fed. Reg. 54,472, 54472-475 (Nov. 17, 2017) (to be codified at 12 C.F.R. pt. 1041).

137. *Id.*

regulators, for statutory penalties.[138] Lenders must use verifiable information such as paystubs and tax records.[139] Borrowers can sue noncompliant lenders for rescission of contract and even restitution of all associated finance charges,[140] resulting in essentially interest-free mortgage financing for the borrower.[141] To encouraging creditors to avoid such liability, the Ability-to-Repay Rule creates a safe harbor from civil liability for creditors who follow strict mortgage underwriting standards.[142] If the lender follows these strict mortgage underwriting standards, the loans constitute "qualified mortgages" and receive a rebuttable presumption of soundness, mitigating the threat of substantial civil liability and rescission.[143]

1. An Auto Lending Ability-to-Repay Rule Would Reduce Credit Risk

An auto lending ability-to-repay rule modelled on the CFPB's existing mortgage rule would reduce the risk of an auto loan "bubble" and the subsequent effect a mass default would have on subprime auto borrowers caught up in the trade-in and refinancing mechanism. Under the terms of the CFPB's Ability-to-Repay mortgage rule, traditional auto lenders, as well as the nonbank auto finance companies such as Santander, identified as "larger participants," would either have to establish their own reasonable, good faith procedures for assessing borrowers' ability to repay or adhere to strict underwriting standards prescribed by the government. Compliance would almost assuredly reduce the number of risky loans made by supervised entities.[144] For many subprime lenders it would represent a sea change.[145]

Another advantage to a potential auto loan rule similar to the mortgage rule would be its enlistment of private market actors to police predatory lending and over-lending. The mortgage Ability-to-Repay Rule gives a private right of action

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138. *See* Ability-to-Repay and Qualified Mortgage Standards Under the Truth in Lending Act, 78 Fed Reg. at 6408; Poindexter & Janiga, *supra* note 131.

139. Ability-to-Repay and Qualified Mortgage Standards Under the Truth in Lending Act, 78 Fed Reg. at 6459.

140. Shatz & Angelo, *supra* note 130, at 546.

141. *Id.*

142. Ability-to-Repay and Qualified Mortgage Standards Under the Truth in Lending Act, 78 Fed Reg. at 6408.

143. *Id.*

144. Aurel Hizmo & Shane Sherlund, *The Effects of the Ability-to-Repay / Qualified Mortgage Rule on Mortgage Lending,* FEDS NOTES. WASHINGTON: BD. OF GOVERNORS OF THE FED. RES. SYS. (Nov. 16, 2018), https://www.federalreserve.gov/econres/notes/feds-notes/effects-of-the-ability-to-repay-qualified-mortgage-rule-on-mortgage-lending-20181116.htm [https://perma.cc/YA2Y-M5TQ] (concluding that the ATR Mortgage Rule reduced the incidence of high debt-to-income mortgage loans among lending subject to the rule and "significantly increased the cost of credit" for those loans.); *cf.* Marsha J. Courchane et al., *A Tale of Two Tensions: Balancing Access to Credit and Credit Risk in Mortgage Underwriting*, CHARLES RIVER ASSOCIATES (Jan. 7, 2015), http://www.crai.com/publication/tale-two-tensions-balancing-access-credit-and-credit-risk-mortgage-underwriting [https://perma.cc/QC3M-UYCN] (discussing how tightening mortgage underwriting standards have denied access to credit to minorities and the poor following the recession).

145. *See supra* notes 48–53.

to borrowers.[146] A right to rescission of the contract and restitution of the finance charge would, if applied to auto finance, encourage private actors to carefully watch auto finance lenders for risky or loose underwriting practices. The United States has a tradition of regulation by private action. Fee-shifting provisions,[147] whistleblower bounties,[148] and more all contribute to the American legal system's bent towards policing by private right of action.[149] A right to rescission and restitution like that created by the mortgage rule would amplify the effects of proscribing loose auto underwriting standards, likely eliminating a greater portion of risk through the enlistment of private actors.

2. *An Auto Lending Ability-to-Repay Rule Could Restrict Access to Crucial Car Credit*

An auto ability-to-repay rule may have high costs in terms of consumer access to credit and political feasibility. Economists who have studied the mortgage Ability-to-Repay Rule argue there is evidence that tightening mortgage underwriting standards during and after the 2008 Financial Crisis caused credit access to "declin[e] dramatically" for African-American and Latino borrowers, and for borrowers living in low-income communities or communities of color.[150] After the CFPB's rule, mortgage seekers were "excluded from the market" in a way "not necessarily outweigh[ed]" by the "benefits of reduced foreclosures."[151] Using complex models for utility-producing credit, some economists estimate that today "many loans are not being made that should be" made.[152] Goodman estimates that if the loose underwriting standards from 2001 had been used throughout the post-recession years of 2009-2015, more than 6.3 million additional mortgages would have been made.[153] For households with FICO scores below 660, mortgages have become "next to impossible to secure."[154]

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146. *See supra* notes 36, 118–120.

147. Barbara Warnick Thompson, *Attorneys' Fees in Class Action Shareholder Derivative Suits*, 9 DEL. J. CORP. L. 671 (1984).

148. Joel D. Hesch, *Breaking the Siege: Restoring Equity and Statutory Intent to the Process of Determining* Qui Tam *Relator Awards under the False Claims Act*, 29 T. M. COOLEY L. REV. 217 [vi] (2012).

149. CHRISTOPHER HODGES, LAW AND CORPORATE BEHAVIOR: INTEGRATING THEORIES OF REGULATION, ENFORCEMENT, COMPLIANCE AND ETHICS (2015).

150. Courchane et al., *supra* note 144, at 8.

151. *Id.* at 7.

152. Laurie S. Goodman, *Quantifying the Tightness of Mortgage Credit and Assessing Policy Actions*, 37 B. C. J. L. & SOC. JUST. 235, 266 (2017).

153. Laurie Goodman, Jun Zhu & Bing Bai, *Overly Tight Credit Killed 1.1 Million Mortgages in 2015*, URBAN INSTITUTE (Nov. 21, 2016), https://www.urban.org/urban-wire/overly-tight-credit-killed-11-million-mortgages-2015 [https://perma.cc/79U8-PAQB].

154. Patricia A. McCoy, *Has the Mortgage Pendulum Swung Too Far? Reviving Access to Mortgage Credit*, 37 B. C. J. L. & SOC. JUST. 213, 234 (2017) (referencing Neil Bhutta & Daniel Ringo, *Effects of the Ability to Repay and Qualified Mortgage Rules on the Mortgage Market*, FEDS NOTES WASHINGTON: BD. OF GOVERNORS OF THE FED. RES. SYS. (Dec. 29, 2015), https://www.federalreserve.gov/econresdata/notes/feds-notes/2015/effects-of-the-ability-to-repay-and-

How much of this trend is attributable to the Ability-to-Repay Rule itself is unclear. Many factors are at work: a backlog of foreclosures, impaired credit, reduced originations to young adults, risk aversion by consumers and lenders, and, in the opinion of some, the "obsolete business model of for-profit mortgage lenders."[155] The Rule did not take effect until 2014.[156] Economists Neil Ringo and Daniel Bhutto did not find significant evidence that it had tightened access to credit,[157] but their study was conducted at the end of the first year in which the Rule was effective.[158] Since 2014, the housing market has heated up considerably, and no further study has been conducted. Furthermore, it is likely that the Ability-to-Repay Rule's standards were less stringent than lenders' voluntary underwriting policies due to the damage to confidence caused by the 2008 financial crisis.[159] Other economists view the Rule as a "cyclicality" tool to limit credit.[160]

The 2017-2018 car market is not like the post-Great Recession mortgage market. Subprime lenders are still making record volumes of loans to less creditworthy borrowers than ever before.[161] Despite high default rates, lenders' confidence appears unshaken. Applying the Ability-to-Pay Rule to mortgages made during the booming 1997-2003 housing market, the CFPB found that that a full "8% would not have complied with the final rule."[162] Also, while mortgages may be "next to impossible" to get for borrowers with lower than a 660 FICO score, many subprime auto loan borrowers have scores over 100 points lower.[163] An auto loan ability-to-repay rule could have the unintended effect of overly restricting access to credit, putting personal transportation beyond the reach of those in low-income communities who need it most.

Such a disproportionate impact is especially troubling given the difference between consumer options in the housing and auto markets. Renting provides an obvious and immediate alternative to paying a mortgage or owning a home. But while car leases might appear to offer a comparable alternative in the auto

qualified-mortgage-rules-on-the-mortgage-market-20151229.html [https://perma.cc/V2S3-4DQ7]; Goodman, *supra* note 152, at 239.

155. McCoy, *supra* note 154 at 234.

156. Ability-to-Repay and Qualified Mortgage Standards Under the Truth in Lending Act, 78 Fed Reg. 6407, 6408 (Jan. 30, 2013) (amending 12 C.F.R. pt. 1026).

157. Bhutta & Ringo, *supra* note 154.

158. *Id.*

159. McCoy, *supra* note 154, at 132.

160. *See* Patricia A. McCoy & Susan M. Wachter, *Why Cyclicality Matters to Access to Mortgage Credit*, 37 B.C. J.L. & SOC. JUST. 361, 394 (2017).

161. *See supra* Part I, pp. 1354-55.

162. SEAN M. HOSKINS, CONG. RESEARCH SERV., R43081, THE ABILITY-TO-REPAY RULE: POSSIBLE EFFECTS OF THE QUALIFIED MORTGAGE DEFINITION ON CREDIT AVAILABILITY AND OTHER SELECTED ISSUES 14 (2014).

163. Amy Martin, *U.S. Auto Loan ABS Tracker: January 2017*, S&P GLOBAL RATINGS: RATINGSDIRECT (Feb. 7, 2017), https://www.spratings.com/documents/20184/908542/US_SF_Webcast_Auto_2.pdf/dc4ffd9a-d775-4d03-8801-7d175f6557ef [https://perma.cc/RN2N-XZTA].

market,[164] they have more in common with an auto loan than with a rental agreement for a house or an apartment. Unlike rental agreements for housing, auto loans require the extension of credit.[165] This critical similarity between auto leasing and auto lending is underscored by the fact that the CFPB groups both financing practices together in its rule regulating larger market participants in auto financing.[166] This is because cars (and their associated loans) are not a substitutable financial transaction like rental housing for mortgages, but are instead an essential for working Americans. Approximately "85 percent of the U.S. workforce" uses a car to commute to work.[167] Furthermore, that number is actually higher for low-income and minority families, making the need particularly great for families "who live or work beyond the reach of public transit systems."[168] While limiting subprime borrowing in the housing market may prevent individuals and families from building intergenerational wealth through home ownership,[169] the impact of limiting car credit could be more immediate and devastating for many low-income people. It could prevent some of the most resource-poor individuals from commuting to work or a higher-paying job, or make doing so costlier or more difficult.[170] The potential for ripple effects are enormous; an increase in poverty is not out of the question.[171]

Consumer credit advocates argue that restricting this kind of credit is beneficial because predatory loans are a "welfare *reducing* provision of credit"[172]

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164. *See* LEASE MARKET REPORT JANUARY 2017, EDMUNDS 2 (Jan. 2017), https://dealers.edmunds.com/static/assets/articles/lease-report-jan-2017.pdf [https://perma.cc/T5RQ-EZ59] (showing that leases have grown from their 2006 high of 20 percent of all new vehicle transactions to 31 percent in 2016).

165. *See Leasing vs. Buying a New Car*, CONSUMER REPORTS (Sept. 19, 2017), https://www.consumerreports.org/buying-a-car/leasing-vs-buying-a-new-car [https://perma.cc/H594-PHHA] (explaining the differences between car loans and leases).

166. Defining Larger Participants of the Automobile Financing Market and Defining Certain Automobile Leasing Activity as a Financial Product or Service, 80 Fed Reg. 37,495, 37,496 (June 30, 2015) (amending 12 C.F.R. pts. 1001, 1090).

167. *See* Nat'l Consumer Law Ctr., Comments Regarding 12 CFR Parts 1001 and 1090 Defining Larger Participants of the Automobile Financing Market and Defining Automobile Leasing Activity as a Financial Product or Service 2 (Dec. 8, 2014), http://www.nclc.org/images/pdf/rulemaking/comment-auto-lending-dec2014.pdf [https://perma.cc/948B-DLDP].

168. *Id.*

169. THOMAS P. BOEHM & ALAN M. SCHLOTTMANN, HOUSING AND WEALTH ACCUMULATION: INTERGENERATIONAL IMPACTS, 3, JOINT CTR. FOR HOUS. STUD. OF HARVARD UNIV., LOW-INCOME HOMEOWNERSHIP WORKING PAPER SERIES NO. 01-15, 2001 (demonstrating how children of homeowners are more likely to own a home and attain higher income levels).

170. *See Shifting into Gear, supra* note 87, at 2 (explaining that "welfare recipients who own cars are more likely to be employed, work more hours, and earn more" as well as have shortened "periods of unemployment and increas[ed] earnings").

171. Casey Dawkins et al., *Vehicle Access and Exposure to Neighborhood Poverty: Evidence from the Moving to Opportunity Program*, 55 J. OF REGIONAL SCI. 687–707 (2015) (finding that "vehicle access substantially elevates a household's likelihood of accessing and staying in a low-poverty neighborhood").

172. DONALD P. MORGAN, STAFF REPORT: DEFINING AND DETECTING PREDATORY LENDING, FED. RES. BANK OF N.Y., NO. 273 1 (2007) (on file with author); *see also* Raphael W. Bostic et al., *State*

that make the borrower worse off. Predatory loans are widely studied, and their impact is controversial.[173] Economists generally regard some predatory loans, such as payday loans, as likely to reduce welfare because the money lent "does not contribute to the borrower's ability to generate income flows from which loan repayments can be made."[174] Instead, payday loans are used for consumption, and while the loans serve a consumption smoothing function,[175] they do not produce income. Car use and ownership *do* increase borrowers' ability to generate future income, as they are essential to the work and welfare ecosystems in the US.[176] There is little consumer economics scholarship about whether subprime car loans increase or decrease welfare overall; many scholars argue that measuring predatory lending's welfare effects in any industry is inherently "uncertain."[177] Financial regulators would be conducting a very costly experiment indeed if they adopted an auto ability-to repay rule modeled after the mortgage rule, only to discover its benefits are outweighed by the restrictions in credit access for subprime borrowers who need vehicles for vital income-producing uses.

Finally, for the foreseeable political future, a federal rule that imposes a strict, across-the-board standard on the auto lending industry would be politically infeasible. The Congressional Review Act enables Congress to repeal new major administrative rules by a simple majority vote in both chambers; in October 2017, Congress rescinded a CFPB rule limiting arbitration agreements between banks and their customers.[178] The prescription of mandatory underwriting standards would inflame anti-regulation Members of Congress and incite them to undermine or repeal the rule.[179] Showing Congress and the Executive Branch's current appetite for further regulation in the auto lending industry, in

and Local Anti-Predatory Lending Laws: The Effect of Legal Enforcement Mechanisms, 60 J. OF ECON. & BUS. 47 (2008).

173. *See*, *e.g.*, Kathleen C. Engel & Patricia A. McCoy, *Turning a Blind Eye: Wall Street Finance of Predatory Lending*, 75 FORDHAM L. REV. 2039 (2007) (finding that a significant portion of subprime mortgage origination resulted in welfare reduction); *but see generally* Sumit Agarwal et al., *Predatory Lending and the Subprime Crisis*, 113 J. OF FIN. ECON. 29, 31 (2014) (explaining that "evaluation of welfare gains or losses stemming from [predatory lending] is fraught with difficulties").

174. Paulo L. dos Santos & Ingrid Harvold Kvangraven, *Better than Cash, but Beware the Costs: Electronic Payments Systems and Financial Inclusion in Developing Economies*, 48 DEV. & CHANGE 205, 219 (2017).

175. *Id.*

176. *Shifting into Gear, supra* note 87, at 2.

177. DARIA ROITHMAYR ET AL., CAT AND MOUSE: THE EVOLUTIONARY DYNAMICS OF GETTING AROUND THE LAW 12, CTR FOR L. & SOC. SCI., RESEARCH PAPERS SERIES NO. CLASS 16-25, LEGAL STUDIES RESEARCH PAPERS SERIES NO. 16-27, 2017 (on file with author).

178. *See* Andrew Ackerman & Yuka Hayashi, *Congress Makes It Harder to Sue the Financial Industry*, WALL STREET J. (Oct. 24, 2017), https://www.wsj.com/articles/congress-votes-to-overturn-cfpb-arbitration-rule-1508897968 [https://perma.cc/397D-9JPL].

179. Steve Eder et al., *Republicans Want to Sideline This Regulator. But It May Be Too Popular*, N.Y. TIMES (Aug. 31, 2017) https://www.nytimes.com/2017/08/31/business/consumer-financial-protection-bureau.html [https://perma.cc/Z2EV-MR37] (reporting that anti-regulatory congresspersons have called the CFPB "a tyranny" and coordinated efforts to shut down rulemaking procedures).

May 2018 President Trump signed a Congressional Review Act resolution overturning CFPB guidance banning racial and ethnic discrimination in auto lending.[180] Rulemaking is time-consuming and expensive, and rules that one administration promulgates can be rescinded by its successors. At a time when the CFPB Director appears less amenable to consumer concerns, such a rule may be a waste of resources at best and politically impossible at worst.

IV.
TO MITIGATE AN AUTO FINANCE BUBBLE, REGULATORS SHOULD PRIORITIZE ENFORCEMENT AGAINST RISKY UNDERWRITING PRACTICES

Financial regulators should make it a priority to regulate irresponsible auto loan underwriting to prevent mass default and stop the new subprime auto lenders' predatory business model. However, they must bear in mind the differences between cars and houses as financial assets in order to avoid limiting credit access to vulnerable populations. An enforcement approach can likely achieve a balance between deterring unacceptably risky underwriting and preserving credit access.

A. The Enforcement Approach Can Achieve Deterrence Without Unduly Restricting Access to Credit

More aggressive enforcement under existing laws, such as the Federal Trade Commission Act's UDAP standards, Dodd-Frank's abusive practices standard, or similar state laws, would limit unnecessarily risky subprime lending and securitization without limiting credit access to the same extent a CFPB auto ability-to-repay rule would.

Unlike a new law or administrative regulation which would have to delineate what counts as a reasonable, good faith assessment of a borrower's ability to repay, enforcement actions are discretionary and flexible. A broad auto finance ability-to-repay rule would affect a market where credit is desperately needed by marginalized borrowers, and the welfare effects of predatory lending are unclear.[181] If the standard set is too strict or too lenient, the cost and time required to issue a proposed amended rule, hold public hearings, and solicit and respond to public comments under the Administrative Procedure Act would delay or discourage the Bureau from pursuing revisions.[182] In contrast, regulators have broad discretion to initiate enforcement actions against the underwriting

180. S.J.Res. 57 Signing Statement, WHITE HOUSE (May 21, 2018), https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-signs-s-j-res-57-law [https://perma.cc/HW5U-X4CB]; *see* Mark Huffman, *Trump Signs Resolution Overturning CFPB Auto Lending Rule*, CONSUMER AFF. (May 22, 2018), https://www.consumeraffairs.com/news/trump-signs-resolution-overturning-cfpb-auto-lending-rule-052218.html [https://perma.cc/NA79-GXEV] ("[T]he agency's acting director, Mick Mulvaney . . . said the auto lending rule, implemented by the CFPB during the Obama administration, 'seemed like a solution in search of a problem.'").

181. *See supra* Part III.B.2, pp. 1368-74.

182. 5 U.S.C. § 553 (2012).

practices they consider most unfair or abusive. An enforcement approach is less likely to lock the auto finance market into a regulatory regime that excludes poor borrowers, as regulators can scale their responses up or down from case to case.

If the auto finance ability-to-repay rule were similar to the mortgage rule, it would grant private actors a right to enforce ability-to-repay violations themselves and recover substantial damages, including equitable relief and court costs. Like attorneys' fees in shareholder lawsuits[183] or percentage recovery in whistleblower actions,[184] the mortgage rule's private right of action incentivizes plaintiffs' attorneys to bring suit. As far as shareholder suits and whistleblower actions are concerned, the incentives work.[185] There is little data available about how many private actions plaintiffs have brought under the mortgage Ability-to-Repay Rule seeking rescission or otherwise, so the impact of a private attorney general provision in an auto ability-to-repay rule must be extrapolated from analogous contexts and the rule's overall effect so far. The mortgage rule's overall effect has been clear: credit has been significantly limited for marginalized borrowers and mortgage lending has become less risky.[186] Part of this restriction can surely be attributed to the private right of action deterring lenders from making loans without regard for borrowers' ability to repay.

An enforcement approach would differ from a rulemaking approach because it would not carry the threat of civil liability to private actors. Enforcement, which does not have the extra threat of civil liability from private actors, would measurably reduce the probability and cost of being found liable in a lawsuit. According to regulatory deterrence research, and in line with classical economic assumptions, firms respond to reduced liability from enforcement by increasing the covered risky activity.[187] While this would normally be a disadvantage to a deterrence-based approach, the concern for access to car credit makes it preferable to the alternative. Combined with the flexibility mentioned above, the lower government-only deterrence effect would likely limit access to credit only to the extent such credit reduces rather than enhances consumer welfare. The two differences combine to make the enforcement approach a fine-tuned tool to build the ideal balance between preserving credit access for subprime borrowers and mitigating harm to consumers, instead of a blunt instrument like regulation.

183. Thompson, *supra* note 147.

184. Hesch, *supra* note 148, at [vi].

185. *See Litigation Activity Indices*, STANFORD L. SCH.: SECURITIES CLASS ACTION CLEARINGHOUSE (Nov. 27, 2017), http://securities.stanford.edu/litigation-activity-indices.html [https://perma.cc/FHJ4-DHLR] (reviewing the high number of shareholder suits brought every year).

186. *See supra* Part III.B.2, pp. 1370-74.

187. *See* John T. Scholz, *Cooperation, Deterrence, and the Ecology of Regulatory Enforcement*, 18 L. & SOC. REV. 179, 224 (1984); *see also* Hodges, *supra* note 149, at Part B.6 (reviewing empirical literature on regulatory deterrence and penalties).

B. An Enforcement Approach Can Overcome Objections That the Market Will Correct Itself

Free market advocates who oppose either solution make the counterargument that the auto finance market will self-correct. Despite the dire portrait of the auto loan market between 2010 and 2015 and its similarity to the pre-crisis mortgage market, there are critical differences between mortgages and auto loans. These differences support the position that the auto loan market does not need stricter mandatory auto loan underwriting regulations like the CFPB's Ability-to-Repay mortgage rule or more heavy-handed enforcement.

1. Asset Differences

A lender's decision to refinance or repossess an asset is influenced by very different asset characteristics in the vehicle context. It was easier and more profitable for the banks to refinance mortgages or extend credit than to foreclose on a home, whereas car repossession is easier and more profitable than constant refinancing.[188] The mobility of cars as assets facilitates self-help repossessions, and technological means, such as starter interrupt devices, to disable use of the car during default.[189] By contrast, mortgage lenders do not have access to the nearly-instant self-help repossession that auto lenders do. Mortgage lenders must proceed through a more extensive statutory process to disable (change the locks on) and repossess (evict and foreclose on) a house. As pointed out by the Financial Crisis Inquiry Commission, banks were financing toxic mortgages on the assumption that house prices would continue to rise, and rapidly.[190] Land has an indefinite useful life. Mortgages and auto loans are different, in that automobiles necessarily depreciate in utility and price over time. Even though a used car may continuously float around the same price after resale,[191] the general rule for cars is the opposite for houses and the land they sit on. Consequently, most of the elaborate refinancing schemes that defined the delay of default and foreclosure are impossible to do with cars, which necessarily lose value over time.

Although the ease of repossession and gradual default may be enough to prevent the level of systemic risk seen during the financial crisis, it is unlikely they will be able to prevent the loss of welfare for borrowers. As losses from auto loan asset-backed securities have climbed and delinquencies jumped during early 2017, lenders have decreased subprime and deep subprime originations,[192]

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188. FCIC REPORT, *supra* note 120, at 12.
189. Attah-Krah, *supra* note 24, at 1222.
190. FCIC REPORT, *supra* note 120, at 104–09.
191. *See 'Trade-in Treadmill'*, *supra* note 84.
192. ZABRITSKI, STATE OF THE AUTOMOTIVE FINANCE MARKET, *supra* note 51, at 17.

while repossessions have soared.[193] Auto lenders have conducted over 1.8 million repossessions already in 2017: a number very near the 1.9 million repossessions that occurred in 2009 at the trough of the recession.[194] These repossessions and delinquencies are taking place amidst historically low unemployment[195] and wages that are finally beginning to pick up in the American economy.[196] One could fairly wonder: how would this paper-thin auto financing market fare if there were a full-blown recession?

2. *The Market is Still Declining*

Furthermore, the case for market self-correction on abusive loan terms is weaker than it looks. Even as the industry appears to be self-policing, certain loan terms are nevertheless getting worse. Financial services company UBS's monthly car dealer survey that "found almost a third of the dealers questioned reported tighter credit standards, the highest level measured in the survey since 2009."[197] Yet, the CFPB recently released a report highlighting the increasing commonality of risky long-term auto loans.[198] Whether the marginal reversal in the risk of subprime auto loans since 2016 is a permanent change or a temporary dip remains to be seen. Because a campaign of target enforcement is likely to have less of a credit-restricting effect,[199] and because certain loan terms remain risky in the face of rising defaults, regulators like the CFPB, the FTC, and the states should use their statutory supervision and enforcement powers to mitigate that risk.

Finally, regulators should pursue more aggressive enforcement actions because lenders can weather high delinquencies while borrowers cannot. Santander, and similarly large players in the subprime auto market, have an outsized influence on the risk of both the underlying loans and the asset-backed securities they support. Enforcement is unlikely to deter traditional depository institutions with robust risk management programs, such as General Motors

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193. *See* Manheim Press Room, *2017 Used Car Market Report*, MANHEIM 54 (Nov. 26, 2017), https://publish.manheim.com/content/dam/consulting/2017-Manheim-Used-Car-Market-Report.pdf [https://perma.cc/25S2-5UMZ].

194. *Id.* at 59.

195. U.S. Bureau of Labor Statistics, *Civilian Unemployment Rate [UNRATE]*, FRED, FED. RES. BANK OF ST. LOUIS (Nov. 28, 2017), https://fred.stlouisfed.org/series/UNRATE [https://perma.cc/Z2Z8-SSJV] (showing that civilian unemployment has reached a low of 4.1 percent).

196. U.S. Bureau of Labor Statistics, *Employed Full Time: Median Usual Weekly Real Earnings: Wage and Salary Workers: 16 Years and Over [LES1252881600Q]*, FRED, FED. RES. BANK OF ST. LOUIS (Nov. 28, 2017), https://fred.stlouisfed.org/series/LES1252881600Q [https://perma.cc/44B3-GH8Q] (showing that real earnings only surpassed their pre-recession peak in 2016).

197. Phil LeBeau, *Lenders Hit the Brakes on Subprime Auto Loans*, CNBC (June 7, 2017), https://www.cnbc.com/2017/06/07/lenders-hit-the-brakes-on-subprime-auto-loans.html [https://perma.cc/MTS5-5RQJ].

198. *Consumer Credit Trends: Growth in Longer-Term Auto Loans*, CONSUMER FIN. PROTECTION BUREAU (Nov. 1, 2017) (explaining that "auto lending experienced" a "rapid increase" for "most of this decade").

199. *Id.*

Financial, from making profitable subprime loans. Despite a recent trend reversal, other major subprime lenders continue to poorly verify, or obscure their programs for verifying, the incomes of their borrowers.

If, as was recently the case, losses are higher than expected, the banks can adjust their pricing models. The margins on recent subprime asset-backed securities are wide; even if a third of the borrowers in the most recent Santander issuance default, its investors will still make money.[200] The subsequent risk to borrowers themselves remains, however, as does the potential burden on the economy. The potential for a repossession cycle that drives down prices and forces yet further defaults builds, and taxpayers are stuck footing the systemic risk bill. The CFPB should not allow these institutions to continue issuing securities without firmer oversight.

Today, there are several enforcement opportunities for loose subprime auto loan underwriting standards. Lenders like Exeter Auto,[201] CPS Auto,[202] and DriveTime[203] originate huge quantities of deep subprime auto loans, but enforcement has not yet focused enough on the underwriting standards themselves. Instead, enforcement actions have focused on discrete practices, such as abusive debt collection and yo-yo financing,[204] or discrimination under the Equal Credit Opportunity Act.[205] Regulators should investigate the income verification policies of major subprime lenders. The resulting enforcement and deterrence would likely diminish the risk to consumers of poorly-verified subprime loans without denying access to credit on the scale that an ability-to-repay rule would.

CONCLUSION

The rise of subprime auto lending presents a risk of mass default to auto loan consumers. Auto lenders profit when borrowers default by employing abusive financing, repossession, and collections practices. These subprime lenders have fueled the subprime auto bubble by exhibiting a reckless disregard

200. *See* Amy S. Martin, *Presale Report: Drive Auto Receivables Trust 2017-3*, S&P GLOBAL RATINGS: RATINGSDIRECT TBL. 6 (Oct. 12, 2017), https://www.spratings.com/documents/20184/769219/DriveAutoReceivablesTrust20173/841a50e2-a31c-4a4c-b5ce-d9e86d3e99c9 [https://perma.cc/S34V-MMKC].

201. *See* ROBERT JORGENSEN, EXETER AUTOMOBILE RECEIVABLES TRUST 2017-3, S&P GLOBAL RATINGS: RATINGSDIRECT (Sept. 7, 2017), https://www.standardandpoors.com/en_US/delegate/getPDF?articleId=1911443&type=17G7&subType=Disclosure%20Report [https://perma.cc/SMV6-TPM6].

202. INES A. BEATO, PRESALE REPORT: CPS AUTO RECEIVABLES TRUST 2017-D, S&P GLOBAL RATINGS: RATINGSDIRECT (Oct. 5, 2017), (on file with author).

203. TIMOTHY J. MORAN, PRESALE REPORT: DT AUTO OWNER TRUST 2017-4, S&P GLOBAL RATINGS: RATINGSDIRECT (Nov. 2, 2017), https://www.spratings.com/documents/20184/769219/DTAutoOwnerTrust20174/22804e4c-0845-49af-a7bb-044aabd7a0e8 [https://perma.cc/4EZM-FVLN].

204. *In re* DriveTime Auto. Grp., Inc., No. 2014-CFPB-0017 (Nov. 17, 2014).

205. *See Enforcement Actions*, *supra* note 103.

for borrowers' ability to repay their loans. Regulatory neglect of borrowers' ability to repay has increased the risk of a mass default and subsequent devastation of consumer wealth.

In a way, Tiffany Lee was lucky. She took the dealership to court and recovered some money. But there are millions of borrowers like Tiffany who are not so lucky. They are hustled into loans they cannot repay because lenders can still profit from the transaction. Such loans fill these borrowers with hope but leave them with an empty bank account, no car, and the possibility of a lifetime of debt. Many consumers need cars, and they cannot be blamed for trying to get them—to take their kids to school, to get to work, and to receive public benefits and socials services. It should be safer for consumers to get a car loan, and safety for individual subprime borrowers can make the market safer, too.

Regulators should focus on auto borrowers' ability to repay. State and federal regulators have new ways of policing ability to repay, and they should use them to create a safer auto finance market for consumers. Despite this call to action, regulators must bear in mind that overburdening private actors can deprive economically disadvantaged consumers of access to essential credit. Accounting for the differences between auto loans and mortgages, regulators should pursue an aggressive enforcement agenda focused on big subprime auto lenders' underwriting standards. Investors and consumers alike benefit when auto loan risks are better assessed. The only parties that do not benefit from stronger underwriting oversight are the subprime auto lenders extracting value from defaulting borrowers at the expense of both systemic risk and consumer welfare. Consumers not as fortunate as Tiffany Lee do not have their story heard; they have their wages garnished. Regulators must act on the knowledge that ability to repay is a crucial nexus for avoiding the harm of abusive techniques and mitigating systemic risk. Auto lenders have a responsibility, and, in the age of the CFPB, a legal duty to take care when lending. Consumer finance regulators should show them how.