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The Dodd-Frank Solution to Predatory Lending

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Introduction

This Article is part two of a two-part series exploring the dangers of predatory lending and how Dodd-Frank[1] and the Consumer Financial Protection Bureau ("CFPB") have solved predatory lending and ended the possibility of another subprime debacle. Part one covered how predatory lending harmed minority, low-income, and immigrant communities, and was a main cause of the 2008 economic collapse. Part two will show how the CFPB was built to stop and prevent predatory lending and another subprime debacle.

The enactment and implementation of Dodd-Frank and the CFPB have improved the mortgage market. However, politicians and lawmakers, notably President Donald Trump and Texas Congressman Jeb Hensarling, are rallying for a repeal of Dodd-Frank and the CFPB.[2] This Article will show that Dodd-Frank and the CFPB should not be repealed because Dodd-Frank and the CFPB have solved predatory lending and ended the possibility of another subprime debacle.

Explanation of Dodd-Frank

Dodd-Frank was enacted "to promote the financial stability of the United States by improving accountability and transparency in the financial system, to end 'too big to fail,' to protect the American taxpayer by ending bailouts, to protect consumers from abusive financial services practices, and for other purposes."[3] A major trigger of the financial crisis was that millions of families were put into mortgage loans that they could not repay unless house prices rose

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1 Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 929-Z, 124 Stat. 1376, 1871 (2010).

2 Donna Borak, *Donald Trump, Jeb Hensarling Meet on Dodd-Frank Alternative*, The Wall Street Journal (June 7, 2016), http://www.wsj.com/articles/donald-trump-jeb-hensarling-meet-on-dodd-frank-alternative-1465335535. Donald Trump and Jeb Hensarling are the two politicians and lawmakers who are calling for a repeal of Dodd-Frank and who this Article refers to.

3 *Dodd-Frank Wall Street Reform Consumer Protection Act*, United States Government Publishing Office (Aug. 13, 2016, 12:05 AM), https://www.gpo.gov/fdsys/pkg/PLAW-111publ203/pdf/PLAW-111publ203.pdf.

rapidly and borrowers were able to refinance the loans.[4] When housing prices leveled off and then fell, the mortgage market collapsed, which collapsed the housing market and the US economy.[5]

Dodd-Frank was created in response to the 2008 economic collapse with an overhaul of the mortgage market. Dodd-Frank revamped the supervision of the home lending industry by creating an agency with unified authority over mortgage lending laws. These changes dramatically improved the safety of the housing market. The CFPB has executed the reforms in Dodd-Frank to benefit homebuyers, the housing market, and the US economy.[6]

How the CFPB Has Solved Predatory Lending and Ended the Possibility of Another Subprime Debacle

A Historical Overview of the CFPB

In July 2010, Congress passed and President Obama signed the Dodd-Frank Act, which created the CFPB. The CFPB oversees federal financial laws to protect consumers' money in banks and credit unions, when consumers pay for goods and services with credit cards, and when consumers rely on loans to buy homes or pay for college.[7] Additionally, the CFPB provides consumers with the ability to compare the costs, benefits, and risks of different products effectively and to use that information to choose the product that is best for them. In lending and credit markets, the CFPB enables consumers to see what they are getting and to compare one product with another, so that markets can function effectively.[8]

To bring clarity to the marketplace, the CFPB pushes companies to reduce and simplify fine print and overly long agreements, which prevented consumers from understanding and comparing products prior to 2011. What is best for consumers is markets that make prices and financial and credit risks clear and that give consumers the basic information they need to determine who is offering the best deal. By ensuring that consumers have access to information,

4 Mike Calhoun, *Dodd-Frank Measures Fundamentally Reform the Mortgage Market*, Roosevelt Institute (Aug. 12, 2016, 10:28 PM), http://rooseveltinstitute.org/wp-content/uploads/2015/11/Calhoun_Dodd-Frank_Mortgage_Market.pdf.

5 *Id.*

6 *Id.*

7 Megan Slack, *Consumer Financial Protection Bureau 101: Why We Need a Consumer Watchdog*, whitehouse.gov (Apr. 22, 2017, 4:34 PM), https://obamawhitehouse.archives.gov/blog/2012/01/04/consumer-financial-protection-bureau-101-why-we-need-consumer-watchdog.

8 *Creating the Consumer Bureau*, Consumer Financial Protection Bureau (Aug. 11, 2016, 10:27 PM), http://www.consumerfinance.gov/the-bureau/creatingthebureau/.

the CFPB facilitates for consumers to understand the terms of deals and make financial decisions that work for themselves and for their families.[9]

The CFPB writes rules, supervises companies, enforces federal consumer protection laws, restricts unfair, deceptive, or abusive acts or practices, takes consumer complaints, promotes financial education, researches consumer behavior, monitors financial markets for new risks to consumers, and enforces laws that outlaw discrimination and other unfair treatment in consumer finance.[10] Empowering consumers to take more control over their economic lives is the CFPB's mission.[11]

New CFPB Rules Provide Better Protections for Homebuyers

On October 15, 2015, the CFPB issued final rule changes to the Home Mortgage Disclosure Act ("HMDA"), which would improve the quality and type of residential mortgage market data that lenders provide. When originally enacted in 1975, HMDA required lenders to report information about the home loans for which they received applications or that they originated or purchased. HMDA enables the public and regulators to use the information from lenders to monitor whether financial institutions serve the housing needs of their communities, assist in distributing public-sector investment so as to attract private investment to areas where investment is needed, and identify possible discriminatory lending patterns. With the HMDA rule update, the CFPB's goals were to foster a better understanding of the residential mortgage market and ensure that lenders have sufficient time to comply with mortgage lending regulations.[12]

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[9] *Building the CFPB*, Consumer Financial Protection Bureau (Apr. 22, 2017, 9:52 P.M.), *https://s3.amazonaws.com/files.consumerfinance.gov/f/2011/07/Report_BuildingTheCfpb1.pdf.*

[10] *About Us*, Consumer Financial Protection Bureau (Aug. 11, 2016, 10:29 PM), http://www.consumerfinance.gov/the-bureau/, (2016).

[11] *Id.*

[12] *CFPB Finalizes Rule to Improve Information About Access to Credit in the Mortgage Market*, Consumer Financial Protection Bureau (Aug. 11, 2016, 10:58 PM), http://www.consumerfinance.gov/about-us/newsroom/cfpb-finalizes-rule-to-improve-information-about-access-to-credit-in-the-mortgage-market/.

HMDA Rule Update

Better Information About the Mortgage Market

The final HMDA rule changes what data financial institutions must provide to improve the quality of HMDA data in the housing market.[13] These changes include:

Improving Market Information

The CFPB updated HMDA by having lenders report new information that improves public understanding of market conditions and identifies risks and discriminatory lending practices. This new information includes the property value, term of the loan, and the duration of any teaser or introductory interest rates.[14]

Monitoring Fair Lending Compliance and Access to Credit

Financial institutions must provide more information about mortgage loan underwriting and pricing such as an applicant's debt-to-income ratio, the interest rate of the loan, and the discount points charged for the loan.[15] This information will enhance the ability to screen for possible fair lending problems, helping institutions and regulators focus on the riskiest areas where fair lending problems are most likely to exist. Additionally, this information will help the CFPB monitor developments in the multifamily housing, affordable housing, and manufactured housing markets.[16] The rule also requires that lenders report information about applications and loans secured by dwellings, including reverse mortgages and open-end lines of credit.[17]

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13 *Id.*

14 *Id.*

15 *CFPB Finalizes Rule to Improve Information About Access to Credit in the Mortgage Market*, Consumer Financial Protection Bureau (Aug. 11, 2016, 10:58 PM), http://www.consumerfinance.gov/about-us/newsroom/cfpb-finalizes-rule-to-improve-information-about-access-to-credit-in-the-mortgage-market/.

16 *Id.*

17 *Id.*

Simplifying Reporting Requirements

HMDA reporting requirements were updated to streamline reporting and make it easier for financial institutions to comply with the law.[18] The final HMDA rule issued includes:

Ease Reporting Requirements for Some Small Banks and Credit Unions

The final rule retains the existing provisions that ease the burden on small banks and credit unions. Small depository institutions that are located outside a metropolitan statistical area remain excluded from coverage. Under a new standardized reporting threshold, small depository institutions with a low loan volume will not have to report HMDA data. For small lenders with few staff members, this change could ease compliance costs. The new threshold will reduce the overall number of banks and credit unions required to report HMDA data by an estimated 22 percent.[19]

Align Reporting Requirements With Industry Data Standards

In addition to collecting data under HMDA, many financial institutions collect the same or similar data for their own processing, underwriting, and pricing of loans, or to facilitate the sale of loans on the secondary market. Many of HMDA's amended requirements align with industry data standards. The CFPB anticipates that this alignment will mitigate the burden on lenders, and improve the quality and value of reported information.[20]

Title XIV Rules

Ability to Repay Standards (Regulation Z)

The CFPB amended Regulation Z to require creditors to make a reasonable, good-faith determination of a consumer's ability to repay any credit transaction secured by a dwelling, and establish protections from liability under this requirement for "Qualified Mortgages."[21] The amendments also implement

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18 *Id.*

19 *Id.*

20 *CFPB Finalizes Rule to Improve Information About Access to Credit in the Mortgage Market*, Consumer Financial Protection Bureau (Aug. 11, 2016, 10:58 PM), http://www.consumerfinance.gov/about-us/newsroom/cfpb-finalizes-rule-to-improve-information-about-access-to-credit-in-the-mortgage-market/.

21 Regulation Z standardizes the disclosure of essential information about the terms and costs of a loan provided to consumers. Although the CFPB and the Federal Reserve jointly

Section 1414 of Dodd-Frank, which limits prepayment penalties. Additionally, the amendments require creditors to retain evidence of compliance with the rule for three years after a covered loan is consummated.[22]

Escrow Requirements under TILA (Regulation Z)

Amendments to Regulation Z implement statutory changes that extend the time required to maintain a mandatory escrow account established for a higher-priced mortgage loan to five years from one year. The rule also exempts certain transactions from the statute's escrow requirement. The primary exemption applies to mortgage transactions extended by creditors that: have operated in rural or underserved areas for the preceding three years; together with their affiliates originate a limited number of first-lien covered transactions; have assets below a certain threshold adjusted annually; and together with their affiliates do not maintain escrow accounts on extensions of credit secured by real property or a dwelling that they currently service.[23]

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enforce Regulation Z, the CFPB was given the brunt of Regulation Z enforcement after the Dodd-Frank Act was passed. When originally created in 1968, Regulation Z required mortgage issuers and other lenders to provide written disclosure of important credit terms, such as interest rate and other financing charges, abstain from unfair practices, and to respond to borrower complaints about errors in billing. The goal of Regulation Z has always been a desire to tell the borrower the highest amount the borrower may possibly pay for borrowing money from an institution. Regulation Z does not tell a borrower how much the lender may charge or even how the lender may structure consumer deals. However, Regulation Z does require that the lender disclose what the lender charges the consumer in a clear and understandable manner. Leading up to 2011, there was a rise in consumer complaints of unfair, deceptive, and misleading lending and servicing practices. In 2011, the CFPB amended Regulation Z to address the misbehavior of banks and lenders and to better reflect lending practices. The CFPB amended Regulation Z to fix certain holes, such as enabling consumers to know exactly the kind of loans consumers are agreeing to, protecting the integrity of the appraisal process when a consumer's home is securing the loan, and requiring that appraisers receive customary and reasonable payments for their services. *CFPB Laws and Regulation TILA*, Consumer Financial Protection Bureau (Apr. 22, 2017, 7:47 P.M.), *https://s3.amazonaws.com/files.consumerfinance.gov/f/201503_cfpb_truth-in-lending-act.pdf*; *Why IS there a Truth in Lending Act (aka) Regulation Z?*, CCG Catalyst, (Apr. 22, 2017, 7:52 P.M.), *https://www.ccg-catalyst.com/why-is-there-a-truth-in-lending-act-aka-regula tion-z/*; *Regulation Z*, Investopedia, (Apr. 22, 2017, 7:55P.M.), *http://www.investopedia.com/ terms/r/regulation_z.asp*.

22 *The CFPB Dodd-Frank mortgage rules readiness guide*, Consumer Financial Protection Bureau (Aug. 11, 2016, 11:02 PM), http://files.consumerfinance.gov/f/201509_cfpb_readiness-guide_mortgage-implementation.pdf.

23 *Id.*

High-Cost Mortgage and Homeownership Counseling (Regulations X and Z)

The CFPB amended Regulations X and Z by expanding the types of mortgage loans subject to the protections of the Home Ownership and Equity Protection Act of 1994 ("HOEPA"),[24] revising and expanding the tests for coverage under HOEPA, and imposing additional restrictions on mortgages that are covered by HOEPA, including a pre-loan counseling requirement. The amendments impose other requirements related to homeownership counseling, including a requirement that consumers receive information about homeownership counseling providers.[25]

Mortgage Servicing Rules (Regulations X and Z)

The CFPB amended Regulations X and Z to implement Dodd-Frank's mortgage loan servicing provisions. The Regulation X amendments implement Dodd-Frank Sections addressing servicers' obligations to correct errors asserted by mortgage loan borrowers; to provide certain information requested by such borrowers; and to provide protections to such borrowers in connection with force-placed insurance. The amendments require servicers to establish reasonable steps to achieve delineated objectives, provide information about mortgage loss mitigation options to delinquent borrowers, and establish steps for providing delinquent borrowers with continuity of contact with servicer personnel capable of performing certain functions. The amendments institute procedures for reviewing borrowers' loss mitigation options. Furthermore, the amendments modify and streamline existing servicing-related Regulation X provisions.[26]

ECOA Valuations for Loans Secured by a First Lien on a Dwelling (Regulation B)

The CFPB amended Regulation B, which implements the Equal Credit Opportunity Act ("ECOA"). These revisions require creditors to provide applicants with free copies of appraisals and written valuations developed in connection with an application for a loan to be secured by a first lien on a dwelling,

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24 Title I Subtitle B of the Riegle Community Development and Regulatory Improvement Act of 1994, Pub. L. No. 103-325 §§ 151-158 (1994).

25 *Id.*

26 *Id.*

and require creditors to notify applicants in writing that appraisal copies will be provided to them promptly.[27]

TILA Appraisals for Higher-Priced Mortgage Loans (Regulation Z)

These rules require creditors to obtain a full interior appraisal by a certified or licensed appraiser for non-exempt "higher-priced mortgages." The CFPB applied these rules to all higher-priced mortgage loans ("HPMLs"), which are closed-end consumer credit transactions secured by a consumer's principal dwelling with annual percentage rates that exceed the average prime offer rate by a specified percentage. The rule also requires a second such appraisal at the creditor's expense for certain properties held for 180 days or less.[28]

Loan Originator Compensation Requirements (Regulation Z)

The CFPB amended Regulation Z to implement mandated requirements and restrictions on: loan originator compensation; qualifications of and registration or licensing of loan originators; compliance procedures for depository institutions; mandatory arbitration; and the financing of credit insurance. The amendments revise or provide additional commentary on Regulation Z's definition of a loan originator; restrictions on loan originator compensation, including prohibitions on dual compensation and compensation based on a term of a transaction or a proxy for a term of a transaction; and recordkeeping requirements. The rule also establishes tests for when loan originators can be compensated through profits-based compensation arrangements.[29]

Policy Guidance Relevant to Mortgage Brokers Transitioning to Mini-Correspondent Lenders

Due to the increased mortgage industry interest in the transition of mortgage brokers from their traditional roles to mini-correspondent lender roles, the CFPB issued Policy Guidance to address concerns about mortgage brokers who set up arrangements with wholesale lenders in which they purport to act as mini-correspondent lenders. With the Policy Guidance, the CFPB closely monitors the practices of mini- correspondents, including former mortgage brokers, to ensure that the protections afforded to consumers under federal

27 *Id.*

28 *Id.*

29 *The CFPB Dodd-Frank mortgage rules readiness guide*, Consumer Financial Protection Bureau (Aug. 11, 2016, 11:02 PM), http://files.consumerfinance.gov/f/201509_cfpb_readiness-guide_mortgage-implementation.pdf.

consumer financial law are not evaded. The CFPB pointed out that the requirements and restrictions that The Truth in Lending Act ("TILA"), Real Estate Settlement Procedures Act ("RESPA"), and their implementing regulations impose on compensation paid to mortgage brokers do not depend on the mortgage broker or mini-correspondent labels that parties use in transactions.[30]

With the Policy Guidance, the CFPB put the mortgage industry on notice that Regulation X and Regulation Z will determine the role and obligations of the parties in a mortgage transaction. The Policy Guidance also warned the mortgage industry as to when the CFPB would exercise supervisory and enforcement authority with respect to transactions involving mini- correspondent lenders.[31]

Know Before You Owe Rule

The CFPB finalized the Know Before You Owe rule that integrates the mortgage loan disclosures required under TILA and RESPA. This rulemaking was a part of the CFPB's Know Before You Owe Mortgage Initiative, which aims to help consumers comparison-shop for mortgage loans. The Know Before You Owe rule has new requirements, two disclosure forms that consumers will receive when applying for and consummating a mortgage loan, and an explanation of how to fill out and use the forms.[32]

Qualified Mortgage Rule

The CFPB rules define a new class of mortgages which borrowers who qualify are presumed to be able to repay, which are "Qualified Mortgages" ("QM"). QMs are designed to be safer and easier to understand than the loans consumers got in the lead-up to the financial crisis. Lenders who want to make a QM must follow these rules:

- A QM is a loan a borrower should be able to repay. Lenders must assess a borrower's ability to repay the loan. A QM is presumed to meet this requirement. A QM is a loan that avoids risky features. The borrower must have a total monthly debt-to-income ratio including mortgage payments of 43% or less.

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30 *Id.*
31 *Id.*
32 *Id.*

- QMs are safer, easier to understand, and cannot have risky features such as negative amortization or interest-only payments.
- A QM should be a fairer deal. The new rules limit the points and fees lenders can charge when making a QM, which responds to the extremely high points and fees some borrowers paid during the mortgage crisis. A loan over $100,000 cannot be a QM if it has points and fees that are more than 3% of the loan amount.
- QMs are easy to find. Nearly any type of lender can issue a QM.[33]

Dodd-Frank and the CFPB Are Praised By the Lending Industry, Solved Predatory Lending, and End the Possibility of Another Economic Collapse

The National Community Reinvestment Council President and CEO John Taylor applauded the CFPB.[34] Taylor stated that, "[w]e are particularly pleased that the CFPB has followed NCRC's recommendation to disaggregate the data on race and ethnicity. The CFPB also show careful consideration of potential privacy issues in this process, which should assuage any concerns surrounding the collection of the data."[35] Americans for Financial Reform stated that:

> "Taken together, this data will provide a better picture of the market and make it easier for regulators to enforce fair housing and fair lending laws; for homeowners and community groups to understand and monitor the performance of banks, lenders, brokers, and other industry players; and for all of us to work for a mortgage market that serves people fairly and helps families and communities build and preserve wealth."[36]

The CFPB's rule changes are intended to make mortgage industry underwriting more transparent, allow for a better understanding of challenges to credit access, and improve the oversight and enforcement of fair lending laws.[37] To meet the needs of consumers and help the lending industry comply with fair lending rules, the CFPB allows input from a wide range of lending

33 *Mortgage rules*, Consumer Financial Protection Bureau (Aug. 11, 2016, 11:04 PM), http://files.consumerfinance.gov/f/201312_cfpb_mortgagerules.pdf.

34 *BNA INSIGHTS: It's a New Dawn,* New Day for HMDA Reporting, Bloomberg BNA (Aug. 11, 2016, 10:46 PM), http://www.bna.com/bna-insights-new-n57982067111/.

35 *Id.*

36 *Id.*

37 *Id.*

industry stakeholders and invites the public to submit written comments on the CFPB's proposals.[38]

Dodd-Frank stops predatory lending. Section 1403 of Dodd-Frank states that, "[N]o person shall pay to a mortgage originator . . . compensation that varies based on the terms of the loan (other than the amount of the principal)."[39] Moreover, Section 1404, which creates broad private remedies for the violation of this prohibition, should stop lenders from steering prime borrowers into subprime loans.[40]

Section 1411 requires mortgage lenders to make a good faith determination that a mortgage loan can be repaid. Section 1413 enables the victim of a loan that does not comply to raise a violation of Section 1411 as a defense even against subsequent assignees, and even after the expiration of any statute of limitations. The amount of the defense includes costs and attorney fees, which should stop predatory loans. Because the Section 1413 defense can be raised against assignees and victims can collect costs and attorneys fees, securitizing predatory loans will be extremely difficult. Section 917 requires the Securities and Exchange Commission to conduct a study on financial literacy. Section 1021 requires the CFPB to perform financial education programs and promulgate regulations prohibiting abusive and predatory loans.[41]

The enactment and implementation of Dodd-Frank's mortgage provisions and creation of the CFPB has improved the mortgage market. Basic standards have ended discriminatory, greedy, and abusive practices that harmed consumers and the US economy. New attempted abusive practices face scrutiny and oversight by the CFPB. These protections make it safer for homebuyers. The reforms also protect mortgage investors and the US economy, as mortgage risks are reduced, and the mortgage market now is safer, more transparent, and more stable.[42]

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38 Brena Swanson, *CFPB will update Know Before You Owe Rule*, Housing Wire (July 29, 2016), http://www.housingwire.com/articles/37658-cfpb-will-update-know-before-you-owe.

39 Dodd-Frank Act § 1403.

40 Steven A. Ramirez, Dodd-Frank as Maginot Line, 15 Chap. L. Rev. 109, 129 (2011).

41 Ramirez, *supra* 104, at 129-130.

42 Mike Calhoun, *Dodd-Frank Measures Fundamentally Reform the Mortgage Market*, Roosevelt Institute (Aug. 12, 2016, 10:28 PM), http://rooseveltinstitute.org/wp-content/uploads/2015/11/Calhoun_Dodd-Frank_Mortgage_Market.pdf.

However, a Number of Politicians and Lawmakers Are Rallying for a Repeal of Dodd-Frank and the CFPB

The GOP's platform states that "[t]he Dodd-Frank law, the Democrats' legislative Godzilla, is crushing small and community banks and other lenders."[43] The GOP platform adds that "[t]he Great Recession may be over, but in the experience of most Americans, the economy is still sick. The federal regulatory burden has been a major contributor to that stagnation."[44]

During a meeting between top GOP politicians and lawmakers, Trump stated that he would dismantle nearly all of Dodd-Frank, without giving specifics.[45] Trump stated that his legislative proposal would "be close to a dismantling of Dodd-Frank."[46] Additionally, Trump stated that, "Dodd-Frank is a very negative force, which has developed a very bad name."[47]

Trump stated that, "it is time to repeal and replace Dodd-Frank." A number of GOP politicians and lawmakers state that, "Dodd-Frank is impeding economic growth. It's keeping people in poverty. It's keeping middle-income people trapped where they cannot get ahead. The mind-numbing complex government regulations are keeping capital on the sidelines."[48]

The GOP's plan would provide financial institutions an alternative to Dodd-Frank. Financial institutions would be allowed to opt in to the alternative plan if the institutions can surpass critical thresholds, including a 10% leverage ratio, which is a measure of capital held by a bank against its total assets and hence curbs the amount of borrowing, or leverage, banks can do. The GOP's alternative would also repeal a Dodd-Frank provision that gives regulators a role in steering financial institutions through bankruptcy if financial institutions run into severe distress, and replace the provision with a new bankruptcy code portion that would leave firms to do so on their own.[49]

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43 *The 2016 Republican Party Platform*, GOP (Aug. 13, 2016, 3:32PM), https://prod-static-ngop-pbl.s3.amazonaws.com/media/documents/DRAFT_12_FINAL[1]-ben_1468872234.pdf.

44 *Id.*

45 Donna Borak, *Donald Trump, Jeb Hensarling Meet on Dodd-Frank Alternative*, The Wall Street Journal (June 7, 2016), *http://www.wsj.com/articles/donald-trump-jeb-hensarling-meet-on-dodd-frank-alternative-1465335535.*

46 Sylvan Lane, *Trump: I'd undo 'very negative force' of Dodd-Frank*, The Hill (May 17, 2016), http://thehill.com/policy/finance/banking-financial-institutions/280245-trump-id-repeal-dodd-frank-not-an-enemy-of-feds.

47 *Id.*

48 Donna Borak, *Donald Trump, Jeb Hensarling Meet on Dodd-Frank Alternative*, The Wall Street Journal (June 7, 2016), http://www.wsj.com/articles/donald-trump-jeb-hensarling-meet-on-dodd-frank-alternative-1465335535.

49 *Id.*

The GOP's plan is to rein in the CFPB and grant regulatory relief to community banks.[50] Trump stated that, "Dodd-Frank has made it impossible for bankers to function," and added that repealing Dodd-Frank would end the CFPB.[51] According to Trump, Dodd-Frank "makes it very hard for bankers to loan money for people to create jobs, for people with businesses to create jobs. And that has to stop."[52]

Improving the GOP's Plan and Bolstering the US Economy

Dodd-Frank and Obama's Administration Have Increased Jobs and US Prosperity

The GOP's platform states that regulations must be drafted and implemented that balance legitimate consumer protection goals and job creation.[53] However, under the Obama Administration and Dodd-Frank, consumers are protected, the US economy has improved, and jobs have increased.[54] The GOP should continue President Obama and Dodd-Frank's success with improving consumer protection, strengthening the US economy, and increasing jobs.[55]

The Obama Administration can rightly claim that the US economy is the "envy of the world" because the OECD reckons that since 2008 the US economy is 11% larger, while the Eurozone and Japan have grown by a small fraction of this number.[56] The US economy has outperformed the rest of the world under President Obama.[57]

Under President Obama, more than 14 million new jobs have been created since 2008. The Administration has created over 70 straight months of job

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50 *Id.*

51 Emily Stephenson, *Wall Street bearish on Trump's call to scrap financial reform law*, Reuters (May 18, 2016), http://www.reuters.com/article/us-usa-election-trump-banks-idUSKCN0Y9329.

52 Newsmax Media, *Trump Preparing Plan to Dismantle Obama's Wall Street Reform Law*, Newsmax (May 17, 2016), http://www.newsmax.com/Headline/donald-trump-dodd-frank/2016/05/17/id/729314/.

53 *Republican Party Platform*, GOP (Aug. 13, 2016, 2:06 PM), https://prod-static-ngop-pbl.s3.amazonaws.com/docs/2012GOPPlatform.pdf.

54 Steven Ramirez, *Trump Wants to "Dismantle" Dodd-Frank and Re-ignite the Great Financial Crisis of 2008*, Corporate Justice Blog (August 9, 2016), http://corporatejusticeblog.blogspot.com/2016/08/trump-wants-to-dismantle-dodd-frank-and.html?m=1.

55 *Id.*

56 *Id.*

57 *Id.*

growth.[58] The US Department of Labor reports that the employment ratio and wages have increased. The U.S. is now creating more jobs than at any other time since the last years of Clinton's presidency.[59]

After the 2008 economic collapse, the U.S. economy has achieved the most impressive recovery among developed nations. Although the entire world was devastated by the 2008 economic collapse, the U.S. economy recovered the fastest and has grown more than any country.[60] Under President Obama, the U.S. economy produced hundreds of thousands of jobs per month, month after month.[61]

After the miraculous turnaround and performance of the U.S. economy following the 2008 financial crisis, repealing Dodd-Frank and returning to the same legal and regulatory framework that caused the 2008 economic crisis would rekindle the flames of the financial firestorm that burned consumers, the mortgage lending industry, and the economy.

Profitability Has Increased at Small Banks and Small Banks Have Not Recovered From the 2008 Economic Collapse

The GOP wants to provide regulatory relief to small banks. However, recent data show renewed profitability at small banks.[62] The remaining travails of small banks stem from low Fed interest rates as much as, or more than, Dodd-Frank.[63]

Since Dodd-Frank was passed, economic evidence shows that community banks remain strong across a range of measures, including performance, lending growth, and geographic reach.[64] Access to community banks remains robust and their services have continued to grow since Dodd-Frank was passed. Economic evidence shows that community banks remain healthy.[65]

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58 *Id.*

59 *Id.*

60 Steven Ramirez, *Trump Wants to "Dismantle" Dodd-Frank and Re-ignite the Great Financial Crisis of 2008*, Corporate Justice Blog (August 9, 2016), http://corporatejusticeblog.blogspot.com/2016/08/trump-wants-to-dismantle-dodd-frank-and.html?m=1.

61 *Id.*

62 *Id.*

63 Editorial Board, *A flawed Dodd-Frank fix*, The Washington Post (Aug. 14, 2016, 4:38PM), https://www.washingtonpost.com/opinions/a-flawed-dodd-frank-fix/2016/06/12/4e23de8c-2e76-11e6-9b37-42985f6a265c_story.html?utm_term=.0910da6c1465.

64 *Id.*

65 The White House, *The Performance of Community Banks Over Time*, Council of Economics Advisers Issue Brief August 2016 (Aug. 14, 2016, 5:26 PM), https://www.whitehouse.gov/sites/default/files/page/files/20160810_cea_community_banks.pdf.

Lending by all but the smallest community banks has increased since 2010. The annual growth rate of community bank lending in each asset range (<$100 million, $100 million-$1 billion, and $1billion-$10 billion) has increased since the 2008 financial crisis and reached levels between 3% and 9% in 2015, which is in line with rates prior to the financial crisis and well above the negative rates following the crisis. Community banks have maintained or increased their industry market share in a number of markets since 2010, when Dodd-Frank was passed.[66]

Access to bank offices remains robust. There is no evidence that Dodd-Frank has led to a decline in access to banks. Even though the number of bank offices per county has declined since its height during the real estate boom and bust in 2006-2011, the number of bank offices per county is higher than levels prior to 2006-2011.[67]

The average number of bank branches per community bank has increased. For community banks with assets in the $100 million-$10 billion range, the average number of branch offices per bank has increased since 1994.[68] For the smallest community banks, with assets less than $100 million, the number of branches per bank has remained almost unchanged over this period.[69]

The number and market share of the smallest community banks has been declining, which is due to exits and growth, whereby the bank leaves the less-than-$100 million category and enters the $100 million–$1 billion category. The vast majority of this decline occurred before the 2008 economic crisis and well over half of the exits by the smallest banks have occurred through mergers with FDIC-identified community banks.[70]

The Obama Administration has implemented Dodd-Frank in a way that has taken important policy steps to allow community banks to compete on a level playing field with large banks, including: 1) increasing deposit insurance coverage to better protect community banks' source of funding and shifting the costs of deposit insurance away from small banks toward larger banks; 2) leveling the playing field with competing nonbank lenders such as mortgage brokers; 3) making the biggest banks subject to heightened prudential standards, which helps reduce systemic risks in credit markets that can spill over onto small banks and force large institutions to bear the costs of the risks that

66 *Id.*
67 *Id.*
68 *Id.*
69 *Id.*
70 *Id.*

they create; and 4) taking steps to streamline regulation of community banks to avoid exams by multiple regulators and allow fewer exams for the smallest banks as long as they are well-capitalized and in good standing.[71]

Community banks have recovered strongly from the financial crisis and remain healthy since Dodd-Frank's implementation.[72] The growth rate of lending by community banks has risen back to pre-recession levels, profits have recovered, mid-sized and larger community banks have increased their market share in agricultural and mortgage lending, and the number of community bank failures has dropped every year since 2009. These trends suggest that the community-banking sector has been resilient in a challenging and competitive macroeconomic environment.[73]

Banking Lobbyists, Big Banks, and Consumer Advocates Do Not Want a Repeal of Dodd-Frank

U.S. banking lobbyists disagree with the GOP's call for a repeal of Dodd-Frank. U.S. banks do want changes to be made to Dodd-Frank, but after spending millions of dollars to comply with Dodd-Frank, banking lobbyists are wary of the GOP's call for Dodd-Frank to be repealed.[74] Bank lobbyists have pushed for changes to make complying easier, rather than a rewrite or repeal of Dodd-Frank.[75]

Richard Hunt, who is head of the Consumer Bankers Association, which is a Washington trade group, stated that "[t]o have an outright repeal of Dodd-Frank I don't think would serve the banking industry or consumers."[76] Hunt added that it would create a messy regulatory environment.[77] Hunt said repealing Dodd-Frank would end the CFPB and it would be unclear which agency would take over the CFPB's oversight of consumer products such as mortgages.[78]

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71 The White House, *The Performance of Community Banks Over Time*, Council of Economics Advisers Issue Brief August 2016 (Aug. 14, 2016, 5:26 PM), https://www.whitehouse.gov/sites/default/files/page/files/20160810_cea_community_banks.pdf.

72 *Id.*

73 *Id.*

74 *Id.*

75 Emily Stephenson, *Wall Street bearish on Trump's call to scrap financial reform law*, Reuters (May 18, 2016), http://www.reuters.com/article/us-usa-election-trump-banks-idUSKCN0Y9329.

76 *Id.*

77 *Id.*

78 *Id.*

The banking industry's wariness about repealing Dodd-Frank comes as critics of Wall Street comment that the GOP's proposal is a gift to big banks. Nonetheless, the U.S. financial industry has spent much of the last six years trying to push regulatory agencies to implement Dodd-Frank in ways the industry considers manageable.[79]

Big banks are pushing the GOP to drop the bill to repeal Dodd-Frank.[80] Dennis Kelleher of Better Markets, a group that favors tighter Wall Street regulation, stated that the GOP's plan would be "a slap in the face to the American people who have suffered so much from the 2008 crash."[81].

The Center for Responsive Politics estimates spending on lobbyists within the securities and investment industry fell by about 8 percent, to $97 million, between 2011 and 2015. Wall Street appears to be finding its footing while working under the regulations, as evidenced by a rise in bank lending of nearly $100 billion in the first three months of 2016, which is the biggest in the first quarter since the economic collapse.[82] Therefore, banking lobbyists, big banks, and consumer advocates being against a repeal of Dodd-Frank, the reduction in spending on lobbying in securities and investments, and the rise in bank lending in the first three months of 2016 show that the financial industry does not want a repeal of Dodd-Frank.

The Fed and FDIC's Analyses Show the Success of Dodd-Frank

The results of the Fed's latest comprehensive capital analysis and review of the 33 largest U.S. bank holding companies undermines the GOP's view of Dodd-Frank, the CFPB, and the state of banks after the economic collapse. The Fed evaluated whether banks would have sufficient capital to operate even under severe distress. The Fed's worst-case scenario assumed a global recession, negative yields on short-term U.S. Treasury securities, 10 percent unemployment, halving of stock prices, and a 25 percent drop in house values would

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79 *Id.*

80 Gina Chon, *Big Banks Back Off From Attacks on Financial Reform,* The New York Times (May 18, 2016), http://www.nytimes.com/2016/05/19/business/dealbook/big-banks-back-off-from-attacks-on-financial-reform.html?_r=0 .

81 Newsmax Media, *Trump Preparing Plan to Dismantle Obama's Wall Street Reform Law,* Newsmax (May 17, 2016), http://www.newsmax.com/Headline/donald-trump-dodd-frank/2016/05/17/id/729314/.

82 CBA in the News, *Wall Street Balks at Proposal to Repeal Dodd-Frank*, Consumer Bankers Association (June 2, 2016), http://consumerbankers.com/cba-media-center/cba-news/wall-street-balks-proposal-repeal-dodd-frank.

lead to $526 billion of losses over nine quarters, which is worse than the 2008 economic collapse.[83]

By the Fed's reckoning, banks still would have aggregate common equity tier 1 capital ratios of around 8.4 percent, which is well above the 5.5 percent reported in the first quarter of 2009. This is a testament to how Dodd-Frank has made banks safer. Under Dodd-Frank, banks have boosted their capital buffers by $700 billion. Banks currently have a capital buffer of approximately $1.2 trillion.[84]

The FDIC calculated the effective cost of paying for deposits by banks with assets over $50 billion was about 23 percent lower than for all other banks.[85] This gap is one way to quantify the benefits big banks receive – by force of the perception they will never be allowed to go belly-up – over smaller rivals.[86] However, big banks had a 38 percent advantage before Dodd-Frank was passed, which also shows Dodd-Frank's success.[87]

The GOP's Plan for a Modified Bankruptcy Process for Banks Needs to Be Retooled

The GOP wants to create a new bankruptcy section code to wind down institutions that are too big to fail. The new section would repeal Dodd-Frank's Orderly Liquidation Authority,[88] which allows regulators to seize and shut down a major financial firm on the brink of failure.[89]

While a new chapter of the bankruptcy code is theoretically attractive, most non-ideologically focused bankers and regulators struggle to see how swapping the judgment of thousands of experienced financial experts for the untested powers of bankruptcy judges would work in practice, especially given

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83 Rob Cox, *Cox: Dismantling Dodd-Frank is a Trump distraction*, Reuters (July 12, 2016), http://blogs.reuters.com/breakingviews/2016/07/12/cox-dismantling-dodd-frank-is-a-trump-distraction/.

84 *Id.*

85 *Id.*

86 *Id.*

87 *Id.*

88 Dodd-Frank § 204(d).

89 Jim Puzzanghera, *House Republican unveils plan to overhaul Dodd-Frank financial reform law*, Los Angeles Times (June 7, 2016), http://www.latimes.com/business/la-fi-dodd-frank-hensarling-20160607-snap-story.html.

the need to act swiftly to stem a global crisis.[90] Bankers and regulators have called the proposed new chapter to the bankruptcy code flawed.[91]

Therefore, the GOP's Plan to Repeal Dodd-Frank and the CFPB Is Flawed

Repealing Dodd-Frank would allow large financial institutions to return to the practices that resulted in the financial crisis. Large banks have worked hard to weaken the proposals that were enacted through Dodd-Frank, which has left the US public less safe than we ought to be. Dodd-Frank needs to be strengthened, not repealed. The GOP's economic proposals should focus on improving regulation of banks and corporations and bringing economic prosperity to those who have struggled so much in recent years while those at the top have done so well.[92]

Trump's Risky Stance and Moves Regarding Dodd-Frank and the CFPB Have Been Heavily Criticized

On April 11, 2017, Trump all but ruled out a full repeal of the Dodd-Frank Act, as Republicans prepare to make major changes to Dodd-Frank.[93] Trump told reporters, "We're doing a major elimination of the horrendous Dodd-Frank regulations, keeping some obviously but getting rid of many."[94] Then Trump stated that, "The bankers in the room will be very happy, because we are really doing a major streamlining, and perhaps elimination and replacing it with something else."[95] However, Trump provided no specifics and no plan for he wants to replace Dodd-Frank with.[96]

During his campaign trail, Trump promised to "dismantle" Dodd-Frank, but a full repeal of the law has become increasingly unlikely.[97] Bank and financial firm executives are seeking significant rollbacks to Dodd-Frank, but are not asking lawmakers to repeal Dodd-Frank altogether.[98] Republican lawmakers

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90 Rob Cox, *Cox: Dismantling Dodd-Frank is a Trump distraction*, Reuters (July 12, 2016), http://blogs.reuters.com/breakingviews/2016/07/12/cox-dismantling-dodd-frank-is-a-trump-distraction/.

91 *Id.*

92 Mark Thoma, *What a Donald Trump economy might look like*, CBS Money Watch (July 19, 2016), http://www.cbsnews.com/news/what-a-donald-trump-economy-might-look-like/.

93 Sylvan Lane, *Trump: We're 'keeping some' of Dodd-Frank*, The Hill (Apr. 22, 2017, 10:58 P.M.), http://thehill.com/policy/finance/328313-trump-were-keeping-some-of-dodd-frank.

94 *Id.*

95 *Id.*

96 *Id.*

97 *Id.*

98 *Id.*

have largely abandoned efforts to erase Dodd-Frank, but have pushed for *significant changes* to how the government monitors major banks for financial risk.[99] Additionally, Republican lawmakers have pushed for measures that subject the CFPB to greater congressional oversight.[100] Trump and his aides have not released a formal Dodd-Frank reform plan, nor have they specified what parts of the law the White House wants to change.[101]

On April 21, 2017, Trump signed an executive order to take aim at two of Dodd-Frank's pillars. Pillar one that Trump took aim at is six-month reviews of Dodd-Frank's authority for regulators to designate large firms as a risk to the financial system. Pillar two that Trump took aim at is to try to shut down large firms with minimal collateral damage if they're on the verge of failing.

Trump's executive order directs Cabinet-level reviews and does not make any substantive changes in federal policy. Trump *ordered the Treasury Department* in early February 2017 to consult with regulators on a review of the entire Dodd-Frank Act and report back in four months.

Trump's executive order on Dodd-Frank has received heavy criticism. Sen. *Sherrod Brown* (D-Ohio) criticized Trump's efforts to change the law by stating,

> "Any actions to undermine these protections encourage Wall Street's risky behavior and leave taxpayers and our economy exposed to another catastrophe."[102] Former Federal Reserve Chairman Ben Bernanke defended Dodd-Frank stating elimination would be a "major mistake."[103] Bernanke added that while "not perfect. . . [Dodd-Frank] is an essential tool for ensuring that financial stress does not escalate into a catastrophic crisis."[104]

Trump also wants to go after the orderly-liquidation authority in Dodd-Frank. One of the goals of Trump's executive order is to determine whether making changes to orderly-liquidation authority would be a superior alterna-

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99 Sylvan Lane, *Trump: We're 'keeping some' of Dodd-Frank*, The Hill (Apr. 22, 2017, 10:58 P.M.), *http://thehill.com/policy/finance/328313-trump-were-keeping-some-of-dodd-frank*.

100 *Id.*

101 *Id.*

102 Jim Puzzanghera, *Trump targets Dodd-Frank rules designed to wall off risky banks*, Los Angeles Times, (Apr. 23, 2017, 1:34 A.M.), *http://www.latimes.com/business/la-fi-trump-financial-regulation-20170421-story.html*.

103 Donna Borak, *Trump signs orders that take aim at Dodd-Frank*, CNN Money, (Apr. 23, 2017, 1:45 A.M.), *http://money.cnn.com/2017/04/21/news/trump-executive-order-taxes/*.

104 *Id.*

tive to resolve failing financial companies.[105] In April 2017, former Federal Reserve Chairman Paul Volcker expressed disbelief over the GOP's attacks on the FDIC's power to unwind a failing firm.[106] "I don't understand why?" Volcker stated.[107] Volcker added, "Is it because you don't trust the FDIC? That you're willing to take the risk. I don't understand why this is important."[108]

Trump is neglecting that a key trigger to the 2008 financial crisis was the bankruptcy filing of Wall Street investment bank Lehman Bros. in September 2008, which threw financial markets into chaos.[109] Under the liquidation authority, federal regulators would safely shut down a major financial firm in the same way the FDIC winds down failing banks.[110]

There is more that Trump's faulty economic analysis and risky financial stance ignore. In February 2017, Trump told leading corporate chief executives, including Jamie Dimon of *JPMorgan Chase* & Co. and Larry Fink of money management giant BlackRock Inc., "We expect to be cutting a lot out of Dodd-Frank because, frankly, I have so many people, friends of mine that had nice businesses, they can't borrow money."[111] Trump added, "They just can't get any money because the banks just won't let them borrow it because of the rules and regulations in Dodd-Frank."[112]

However, the facts tell a different story. A main reason for dismantling Dodd-Frank often cited by Trump — that its slew of tougher financial regulations have significantly restricted bank lending — isn't borne out by the data.[113] Commercial and industrial bank loans have increased 77% since October 2010, according to the *Federal Reserve*. Few business owners say they are having trouble getting loans, surveys show.[114] Borrowing by US households, which includes mortgages and auto and student loans, increased last year by

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105 Jim Puzzanghera, *Trump targets Dodd-Frank rules designed to wall off risky banks*, Los Angeles Times, (Apr. 23, 2017, 1:34 A.M.), *http://www.latimes.com/business/la-fi-trump-financial-regulation-20170421-story.html.*

106 *Id.*

107 *Id.*

108 *Id.*

109 *Id.*

110 *Id.*

111 Jim Puzzanghera, Trump says Businesses can't borrow because of Dodd-Frank. The numbers tell another story, Los Angeles Times, (Apr. 23, 2017, 1:32 A.M.), *http://www.latimes.com/business/la-fi-trump-bank-loans-20170226-story.html.*

112 *Id.*

113 *Id.*

114 *Id.*

the most in a decade, continuing a three-year rise.[115] Bank profits have been soaring.[116] "Nobody's come up with really solid evidence that they can point to that bank lending over the last few years has been overly constrained," stated Fred Cannon, global director of research at investment bank KBW.[117]

Since Dodd-Frank took effect in July 2010, bank lending to businesses and consumers has continued to hit new highs.[118] Former Massachusetts congressman Barney Frank, the Democrat who co-sponsored the Dodd-Frank Act, said that only one provision in the Dodd-Frank Act directly restricted lending.[119]

The Chair of the Board of Governors of the Federal Reserve System, Janet Yellen, defends the Federal Reserve's oversight of Wall Street in the years since the financial crisis, arguing banks are safer, have kept lending and remain profitable, despite claims by the Trump administration and Republican lawmakers that regulations have crippled economic growth.[120] In congressional testimony on February 14, 2017, Yellen disputed the notion that the Dodd-Frank Act has made US lenders less competitive, stating that US lenders are in far better shape than European rivals.[121]

Yellen also defended the Fed's annual assessments of whether the banks can survive severe economic slumps, stating that stress tests have been key to boosting financial stability.[122] Additionally, Yellen stated that she has seen little data substantiating assertions that small businesses cannot get loans, a frequent Republican attack on Dodd-Frank.[123]

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115 *Id.*

116 *Id.*

117 Jim Puzzanghera, Trump says Businesses can't borrow because of Dodd-Frank. The numbers tell another story, Los Angeles Times, (Apr. 23, 2017, 1:32 A.M.), *http://www.latimes.com/business/la-fi-trump-bank-loans-20170226-story.html.*

118 John W. Schoen, *Despite critics' claims, Dodd-Frank hasn't slowed lending to business or consumers*, CNBC, (Apr. 23, 2017, 2:13 A.M.), *http://www.cnbc.com/2017/02/06/despite-critics-claims-dodd-frank-hasnt-slowed-lending-to-business-or-consumers.html.*

119 *Id.*

120 Elizabeth Dexheimer and Jesse Hamilton, *Yellen Rejects Trump Attacks on Dodd-Frank, Says Banks Now Safer*, Bloomberg, (Apr. 23, 2017, 2:08 A.M.), *https://www.bloomberg.com/news/articles/2017-02-14/yellen-rejects-trump-attacks-on-dodd-frank-says-banks-now-safer.*

121 *Id.*

122 *Id.*

123 *Id.*

Recent data from the Federal Reserve Bank of St. Louis showed US commercial-bank lending at a 70-year high, climbing steadily since late-2010.[124] Democratic Senator Elizabeth Warren, who lobbied for the creation of the CFPB, accused Trump of forsaking middle and lower-income individuals to help banks.[125] Warren stated that, "The Wall Street bankers and lobbyists whose greed and recklessness nearly destroyed this country may be toasting each other with champagne, but the American people have not forgotten the 2008 financial crisis."[126]

Conclusion

Predatory lending harmed minority, low-income, and immigrant communities, and was a main cause of the 2008 economic collapse. However, Dodd-Frank and the CFPB have solved the problem of predatory lending and end the possibility of another subprime debacle.

Although the GOP has rallied to repeal Dodd-Frank and the CFPB, the GOP should focus on increasing consumer protection, improving the mortgage lending industry, and financial regulation. Because Dodd-Frank and the CFPB have helped heal communities and the US economy and will prevent another subprime debacle, Dodd-Frank and the CFPB should not be repealed.

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124 *Sarah N. Lynch* and *Lisa Lambert, Trump ignites political fight over U.S. banking law reforms*, Reuters, (Apr. 23, 2017, 2:25 A.M.), *http://www.reuters.com/article/us-usa-trump-wealth-fiduciary-idUSKBN15I199*.
125 Id.
126 Id.