NOTE

TAMING TITLE LOANS

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INTRODUCTION

FOR the poor, credit is hard to come by, and cash nearly impossible. With little or nothing to secure a loan, it is easy to see why. An individual living hand-to-mouth has few possessions she can part with, even temporarily. Take a car for instance. Someone in need of quick cash is in no position to surrender what is likely her only mode of transportation, even if it is only as short-term collateral. But such borrowers are not completely out of luck. Enter title loans: With these transactions, the borrower does not physically surrender her car, and yet she may obtain a four-figure loan. Meanwhile, the lender is secured in the event of default. It is this phenomenon that has made title lending so attractive for underprivileged consumers and so lucrative for fringe-market lenders.

To understand this apparent paradox and the consequences it can spawn, consider the following hypothetical based on a congressional anecdote.[1] You are like one of millions of Americans living paycheck-to-paycheck, and your rent is due in two days. Though usually responsible with your rent, some unexpected medical bills have made timely payment impossible this month. You do not have a credit card, and your landlord will not accept such a payment method anyway. You also do not have much in the way of collateral for a loan. You do, however, have a car. But, of course, you consider it essential. Without it, your ability to work is jeopardized. To your surprise, you find a lender willing to permit you to keep possession of your car while loaning you the $1,000 or so you need to make rent. The lender's condition is simply

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[1] See 146 Cong. Rec. 12,523 (2000) (statement of Rep. Shaw) (recounting the story of a title loan consumer in Florida).

that you repay the loan at a 300% annual interest rate in one month's time.[2]

You are smart enough to recognize that 300% APR would entail interest payments of $3,000 for a $1,000 loan—*if* the term were for a year. But because even the loan documents themselves contemplate a one-month term, you reason that this transaction will only cost you about $250.[3] Yet, where things can go wrong, they often will. This maxim is particularly true for borrowers in fringe credit markets such as these. It happens that you are not able to make the full payment at the end of the month. Your lender is willing to accept an interest-only payment and roll over the loan for another month, an option you have no choice but to accept. But with a new $250 expense (in addition to the $1,000 owed in principal) built in to an already-fragile budget, you quickly find that you may never repay this loan. Yet, every month, you make those interest-only payments for fear of losing your vehicle and your livelihood. After months of dutifully making these backbreaking payments—indeed, after four months you will have paid back about as much in interest as you borrowed—you finally miss a payment and find yourself homeless and destitute, a victim of the repossession of the only asset you owned.[4]

This scenario may sound outlandish, but it is all too common. Meanwhile, state legislators face a clear and consistent picture of the ills of this industry, yet across the nation they have prescribed inconsistent and ineffective regulatory schemes while largely grappling with the issue of whether title lending should exist at all.[5] This debate misses the mark.

[2] The interest rate on a title loan is commonly in the triple digits. See, e.g., Lynn Drysdale & Kathleen E. Keest, The Two-Tiered Consumer Financial Services Marketplace: The Fringe Banking System and Its Challenge to Current Thinking About the Role of Usury Laws in Today's Society, 51 S.C. L. Rev. 589, 599 (2000) ("[T]ypical rates on these secured loans are in the 200% to 300% range."); Jim Hawkins, Credit on Wheels: The Law and Business of Auto-Title Lending, 69 Wash. & Lee L. Rev. 535, 574 (2012) ("[T]itle lenders will generally only operate if they are permitted to charge above 200% APR.").

[3] See, e.g., Ga. Code Ann. § 44-12-131(a)(1) (West 2014) (permitting a thirty-day term); Idaho Code Ann. § 28-46-506(1) (2014) (same); Michael S. Barr, Banking the Poor, 21 Yale J. on Reg. 121, 164 (2004) (explaining that these loans are typically for one-month terms). But see Va. Code Ann. § 6.2-2215(1)(c)(viii) (West 2014) (forbidding a term shorter than 120 days).

[4] See 146 Cong. Rec. 12,523 (statement of Rep. Shaw) (2000) (recounting how the inspiration for this hypothetical found himself in such dire straits).

[5] Compare Governor Lynch's Veto Message Regarding SB 57, S. Calendar No. 36, 162nd Sess., at 2 (N.H. 2011) [hereinafter Governor Lynch's Veto], available at http://www.gencourt.state.nh.us/scaljourns/calendars/2011/SC%2036.pdf (discussing reasons for vetoing legislation that would enable title lending in New Hampshire), with 146 Cong. Rec. 12,524

Leaving these products unregulated is an abdication of legislative responsibility—an implicit nod to the industry that it is permissible to take advantage of the poor and the desperate. On the opposite end of the spectrum are those who would ban the products, but this approach is equally misguided. Title loans have the potential to produce consumer utility in the appropriate circumstances, and a flat ban is paternalistic and shortsighted. The federal government remains mostly silent on the topic. The problems with title loans are well understood, but a practical solution evades policymakers. Hiding in plain sight is a federal response to parallel problems and the corresponding creation of an entity with power—and indeed, a mandate—to regulate these transactions.

This Note will argue that the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act" or the "Act") calls for a solution to many of the practices associated with title lending, and that the Consumer Financial Protection Bureau (the "CFPB" or the "Bureau") was created with a compelling mandate to bring such solutions to life. Part I of this Note will provide an overview of title lending, and will then proceed to analyze the three most-cited problems prevalent in the industry. Specifically, these ailments include the failure of lenders to consider a borrower's ability to repay the loan, the failure of lenders to adequately disclose to borrowers the risks of these transactions, and the enigmatic "debt treadmill" spawned by monthly rollovers.

Parts II and III will combine to offer a novel contribution to the literature on title lending. Part II will identify why the CFPB is the appropriate actor to regulate title loans. But Part II will not only identify that the Bureau is the appropriate regulator; rather, it will also argue that the Dodd-Frank Act actually *mandates* that the CFPB regulate to address the concerns this Note will highlight. That is because title lending's infirmities as identified in Part I are major sources of focus in the Dodd-Frank Act's consumer-protection provisions. Finally, Part III will show how the Bureau might implement a regulatory scheme and enforcement regime that is compatible with its broad empowerment in the Dodd-Frank Act. This final Part will explore the application of Dodd-Frank-inspired solutions to the trio of title-lending issues laid out in Part I while also remaining sensitive to the fact that title loans are a unique fringe-credit product. Accordingly, Part III will tailor ideas from Dodd-Frank such

(2000) (statement of Rep. Smith) (discussing the folly of trying to help people by either limiting or prohibiting these products).

that they apply to the industry in the most practical way. Along the way, this final Part will address anticipated counters to these proposals and will submit a framework designed to please advocates of both consumer protection and consumer autonomy alike.

I. THE CURRENT FRAMEWORK

This Part discusses the current status of the title-lending industry and what the regulatory framework looks like at both the state and federal levels. The transaction of securing a title loan is fairly straightforward and uniform from state to state and dealer to dealer, but the relevant law is all over the proverbial and literal map. With trivial exceptions, the federal government has steered clear of title-lending-specific regulation. On the other hand, state laws run the gamut from de facto bans to near lawlessness in their treatment of title lending. Section A of this Part discusses the process of taking out a title loan, typical features of these products, and the types of consumers that are using them. Section B details the three core problems associated with title lending and weaves in a discussion of state law to show the ineffective and inconsistent current state of title-lending regulation. Section B also highlights the relative absence of any federal law on this subject.

A. Title Loans and Their Consumers

The process of taking out a title loan is quite straightforward—one of its main appeals for the types of borrowers that the industry aims to attract. The process of obtaining a title loan is usually brief, occupying less than an hour of a prospective borrower's time from entering a title-loan outlet to securing a loan.[6] Borrowers need to bring little more than the title to their car in order to complete the transaction. The lender then makes an assessment of the value of the car and offers a lump-sum cash loan to the borrower based on, and up to, a certain percentage of the car's value. Twenty-five to forty percent of the value of a vehicle is a commonly cited range for the amount that a lender will loan,[7] though

[6] TMX Finance, LLC, Registration Statement (Form S-4), at 40 (Apr. 19, 2011) [hereinafter TMX Finance], available at http://www.sec.gov/Archives/edgar/data/1511966/000119312511102503/ds4a.htm (noting that the "typical time for a customer to receive a loan from the time he or she enters our store is approximately 40 minutes").

[7] See, e.g., Nathalie Martin & Ozymandias Adams, Grand Theft Auto Loans: Repossession and Demographic Realities in Title Lending, 77 Mo. L. Rev. 41, 61 (2012).

this number varies somewhat across dealers and states.[8] A number of procedures that one might expect to see in a typical extension of credit are conspicuously absent. For instance, credit checks, proof of employment, income documentation, and other mechanisms designed to test the creditworthiness of the borrower are afterthoughts in this world.[9]

Most title loans call for full repayment with interest in one month's time.[10] On a standard $1,000 title loan, assuming a 300% APR, full repayment at the term's end will cost $1,250. The prospect of such an immediate balance might hint that these borrowers are defaulting en masse and losing their vehicles. Title lenders, however, are happy to accept interest-only payments and roll over the principal balance for another month on the same terms. So long as the borrower is able to make those interest payments, the risk of repossession is kept at bay. In theory, a borrower could roll over a title loan at monthly intervals for an indefinite period so long as he was making the interest payments. Some commentators have noted that not only is this practice a common one, but that it is the lenders' preference. Specifically, some have shown that lenders actually encourage and perpetuate rollovers by going as far as to actively prevent borrowers *able* to make full repayment from doing so.[11] The CFPB has even found that entities like title lenders *train* their employees to perpetuate this cycle.[12] This indifference—or preference[13]—of the lender is prevalent for much the same reason that this is a truly impractical course of action for borrowers: The interest rates are exorbitant.[14]

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[8] See, e.g., Hawkins, supra note 2, at 548–49.

[9] See Martin & Adams, supra note 7, at 62; Titlemax, http://www.titlemax.biz/ (last visited Apr. 1, 2015) (advertising prominently that one can receive a TitleMax loan without a credit check).

[10] For an example of state legislation that requires a longer period, see Va. Code Ann. § 6.2-2215(1)(c)(viii) (West 2014) (requiring that title loans contain a maturity date "which shall not be earlier than 120 days from the date the loan agreement is executed").

[11] Indeed, some even suggest that lenders deploy a litany of tricks and traps to make it nearly impossible for borrowers to repay the principal. See Nathalie Martin, Is It Literally Impossible to Pay Off a Title Loan?, Credit Slips (May 31, 2012, 3:03 PM), http://www.creditslips.org/creditslips/2012/05/is-it-literally-impossible-to-pay-off-a-title-loan.html.

[12] See ACE Collections New Hire Training: Participants Guide, Consumer Fin. Prot. Bureau, http://files.consumerfinance.gov/f/201407_cfpb_graphic_ace-cash-express-loan-process.pdf (last visited Aug. 1, 2015) (displaying a diagram the CFPB unearthed in its investigation into a payday lender for engaging in "abusive" acts and practices).

[13] See Martin, supra note 11.

[14] See, e.g., Drysdale & Keest, supra note 2, at 599 ("[T]ypical rates on these secured loans are in the 200% to 300% range.").

As one might suspect with these kinds of interest rates, title lending attracts borrowers who are severely underbanked or unbanked entirely,[15] representatives of a distinctly disadvantaged demographic.[16] As others have shown, over 40% of title loan consumers do not even have access to a *checking account*, while as many as 80% have no credit card.[17] Title loans, given their cost, represent a rather extreme form of credit. Accordingly, there are few—if any—conceivable reasons for a borrower with access to more conventional means of credit to engage in such a transaction. Further, many borrowers who enter into title loans have no job,[18] calling into question whether repayment is even possible. Members of Congress have echoed these concerns, noting that title lenders operate primarily among a distinct underclass in society and that title lenders are a "class of fringe lenders who take advantage of the lower-income consumers."[19] Despite frequent criticism of this type, the industry has grown rapidly over the past decade.[20]

B. Failures of the Current Regulatory Regime

To fully understand the current regulatory framework and its shortcomings, it is worth briefly touching on whether any states actually prohibit title loans. While "it is difficult to find any states that *explicitly* ban title lending,"[21] sufficiently stiff usury laws can operate to have the same effect. Professor Jim Hawkins has illustrated this paradigm with the following example. Alaska's interest rate cap for small loans (those under

[15] See Fed. Deposit Ins. Corp., FDIC National Survey of Unbanked and Underbanked Households 5 (2009), available at http://www.fdic.gov/householdsurvey/2009/executive_summary.pdf (discussing this demographic's use of many sister products of title loans, such as payday loans and refund-anticipation loans).

[16] See Martin & Adams, supra note 7, at 77 ("[M]ost borrowers [of a title loan] are near or below the poverty line.").

[17] See Kathryn Fritzdixon et al., Dude Where's My Car Title?: The Law, Behavior, and Economics of Title Lending Markets, 2014 U. Ill. L. Rev. 1013, 1035.

[18] See id. at 1033.

[19] 146 Cong. Rec. 12,524 (2000) (statement of Rep. Mascara).

[20] See, e.g., TMX Finance, supra note 6, at 27 (reflecting growth in profits by a factor of three over 2006–2010). For a more concrete representation of how large this market has become, see Tennessee Dep't of Fin. Insts, 2012 Report on the Title Pledge Industry 1 (2012) [hereinafter Tennessee Report] (on file with the Virginia Law Review Association). Title-lending outlets had grown in Tennessee from 703 at the conclusion of 2006 to 834 by the end of 2011. Id. Title lenders in Tennessee entered into 209,155 loans during 2010 with $158,647,157 being loaned. Id. at 5. The latter figure represents an increase of more than double from data provided only four years prior. Id. at 12.

[21] Hawkins, supra note 2, at 573 (emphasis added).

$25,000—which essentially sweeps in all title loans) is roughly 42.5% APR.[22] Because Alaska does not provide a statutory carve-out for title loans from their usury statute,[23] and because title lenders will generally refuse to lend at rates beneath 200% APR,[24] the practical effect of the usury cap is a de facto ban.[25]

With that out of the way, this Section explores the most frequently cited problems with the industry and examines how the current regulatory regime—both national and local—is allowing these practices to continue. The major concerns with title lending break down into three categories: (1) the failure of lenders to consider a borrower's ability to repay; (2) the failure of lenders to adequately disclose the risks associated with title loans; and (3) the debt treadmill that monthly rollovers create. This list is not exhaustive,[26] but this Section demonstrates that it is primarily these three issues that contribute to the growing concern about the industry. Each of the following Subsections identifies why a particular issue will often prevent title loans from operating as welfare-

[22] Id.

[23] See id. at 573–74.

[24] See, e.g., id. at 574 (referencing the findings of a National Consumer Law Center webinar). At least one report, though, suggests that 174% APR may be the true rate title lenders may need to charge in order to break even. See Tennessee Report, supra note 20, at 10 (expressing the possible APR floor in monthly terms at 14.5%).

[25] Hawkins, supra note 2, at 574. It is important to reiterate here that this Note does not advocate for usury laws or any similar type of title-lending prohibition.

[26] Notably absent from this Section is a discussion of deficiency judgments. Where a state has no laws governing title loans, or where the state's laws have not altered the UCC's defaults, Article 9 of the UCC ostensibly governs and allows lenders to go after borrowers whose cars do not satisfy the amount remaining on the loan. See U.C.C. § 9-609 (2012). This concern, to the extent that it is one, is probably overblown. Title loans are generally oversecured—save for in instances where the borrower's car experiences a rapid depreciation because of an accident—and it is unlikely that these kinds of borrowers are solvent anyway for the rare instances where the vehicle does not satisfy the amount outstanding. To the extent that some borrowers who fail to repay *are* solvent, it is not clear why legal reforms should have their protection in mind. A solvent borrower likely has access to more conventional means of credit. Even where this is not true, solvent borrowers, by definition, have the means to avoid the debt treadmill that plagues most title-loan borrowers. Concerns about repossession and its impact on destitute lenders also miss the point. The *threat* of repossession—not repossession itself—allows the title lender to profit. Moreover, there is evidence to suggest that many borrowers are *not* losing their only means of transportation to work when their cars are repossessed. See Fritzdixon et al., supra note 17, at 1038. But, even if they are, and even if we assume that repossession is widespread, the existence of title loans is premised on the notion that lenders are dealing with especially risky borrowers. Some form of security is needed. Protections against repossession are unlikely to do little more than raise the costs of title loans and decrease their availability.

enhancing transactions. Each Subsection also ties in relevant state law—or more often, the lack thereof—to illustrate the current regulatory landscape's inadequacy.

1. Repayment Ability

The ability of title lenders to lend irrespective of a borrower's ability to repay is perhaps the most troubling characteristic of these transactions. The significance of the latter two issues in this Section is reduced markedly where title lenders make loans only to those able to repay them. On just how remarkable an issue this is, one paper concluded that "of all the consumer loan products in existence, this product is the *only one* that is completely asset-based. With few exceptions, title lenders have no interest in whether the consumer . . . can afford to pay back the loan."[27]

This is not a concern among only academics. Though they are seldom a forum for resolving title-lending disputes, courts have occasionally considered the abusiveness of title lending. For instance, one court posited that a title lender behaved unconscionably when it failed to ascertain a borrower's repayment ability.[28] More notably, this element of title lending has gained considerable traction in the eyes of policymakers intent on eliminating title loans. In New Hampshire Governor John Lynch's veto message concerning a bill that would exempt title lending from the state's usury cap, Lynch premised his veto on lender disregard for repayment ability.[29] In connection with this belief, Lynch reasoned that "there is significant evidence that [title lending] would harm our state and families."[30]

Failure within the industry to consider borrower repayment ability has also drawn the ire of federal actors, even before the passage of Dodd-Frank and the creation of the CFPB. In promulgating rules that implement statutory requirements to protect members of the armed services

[27] Martin & Adams, supra note 7, at 42 (emphasis added).

[28] See In re TitleMax Holdings, LLC, 447 B.R. 896, 898 (Bankr. S.D. Ga. 2010) ("[U]nconscionability is evidenced by [Plaintiff's] belief that the Defendant knew or should have known that the borrower was unable to make the scheduled loan payments, and that it had failed to ascertain the ability to repay . . . .").

[29] Governor Lynch's Veto, supra note 5 ("[C]ompanies would be allowed to loan without any inquiry into a borrower's ability to repay the loan and would even be allowed to loan to people receiving local welfare assistance.").

[30] Id.

from these practices,[31] the Department of Defense (the "DOD") frequently referenced the failure to consider a borrower's ability to repay as one of the industry's major problems. In connection with its rulemaking, the DOD referenced a Government Accountability Office report suggesting that lending without considering a borrower's ability to repay is actually a *predatory* practice.[32] The DOD remarked that this practice "create[s] a cycle of debt for financially overburdened Service members and their families."[33] As the biggest arm of the executive branch to examine these transactions before the CFPB's creation, the DOD provides a compelling account of what most concerns federal policy makers about these loans.

A handful of states target the practice of lenders making loans to borrowers without considering repayment ability, but a close review of most statutes reveals that they are all form and no substance. For instance, Utah prohibits lending to borrowers without regard to their income, obligations, and employment status.[34] But lenders can completely bypass this restraint by simply having the borrower sign a document self-affirming an ability to repay.[35] One can imagine the shenanigans this entails inside a lender's office. For purposes of further illustration, consider South Carolina's requirement, first providing that lenders must form a "good faith belief" that the borrower can repay,[36] and then permitting satisfaction of that requirement through a similar borrower self-affirmation.[37] Among the state laws surveyed for this Note, only *one* appeared to provide a repayment ability requirement unaccompanied by an exception that swallows the rule.[38]

In addition, federal law is playing almost no role here. As the DOD regulations above allude to, federal law essentially prohibits loans of this

[31] Limitations on Terms of Consumer Credit Extended to Service Members and Dependents, 72 Fed. Reg. 50,580 (Aug. 31, 2007) (to be codified at 32 C.F.R. pt. 232).
[32] Id. at 50,581.
[33] Id. at 50,582.
[34] Utah Code Ann. § 7-24-202(3)(d) (LexisNexis 2014).
[35] § 7-24-202(4).
[36] S.C. Code Ann. § 37-3-413(3) (2015).
[37] Id.
[38] See Ill. Admin. Code tit. 38, § 110.370(a) (2015) (setting a threshold correlated to a percentage of the borrower's income). This is significant not only because it sets a certain (albeit seemingly arbitrary) income threshold, but also because it effectively requires that lenders make title loans only to borrowers who are employed or who have another regular source of income.

type from being made to *servicemen*,[39] but despite the Department of Defense's identification of title loans as "predatory" and "abusive,"[40] no federal legislation has been enacted to protect borrowers outside the military. It is worth noting that such legislation was once contemplated;[41] indeed, a bill was proposed with a 36% interest rate cap for title loans.[42] But, given that such a cap would work as a de facto prohibition on these loans, it is unsurprising that the bill never passed.

2. Disclosure Failure

The failure of the current disclosure regime, or, put differently, the failure to correct for borrower overoptimism, is a well-documented problem for credit products generally—not just title loans. Senator (then-Professor) Elizabeth Warren and Professor Oren Bar-Gill analyzed this failure of disclosure in an oft-cited article that is credited with inspiring many of the consumer-related reforms in the Dodd-Frank Act.[43] Much of the problem, the article posits, is that consumers in these transactions are seldom fully informed or fully rational, and welfare-maximizing transactions often will not take place under such circumstances.[44] It is easy to see why. Consumers in title-loan transactions are not given information on how many months it takes the average borrower to pay back a title loan, nor how much it *costs* the average borrower to fully repay a title loan. This makes comparison shopping—already notoriously difficult—all the more challenging. It is confusing for a borrower to compare the true price of securing a title loan without having a baseline for comparison, much less a clear picture of how long it will actually take to repay the loan.

As Warren and Bar-Gill note, the absence of such information is an especially acute problem with short-term, high-cost loan products like

[39] 10 U.S.C. § 987 (2012). To be clear, title loans are not completely forbidden where the borrower is a member of the armed forces. But the permissible APR is capped at 36%—an interest rate far beneath where title lending is able to thrive. See § 987(b); supra note 2 and accompanying text.

[40] Limitations on Terms of Consumer Credit Extended to Service Members and Dependents, 72 Fed. Reg. 50,580, 50,581 (Aug. 31, 2007) (to be codified at 32 C.F.R. pt. 232).

[41] See Predatory Lending Sunset Act, H.R. 5689, 111th Cong. (2010). The current status of the legislation is available at http://www.govtrack.us/congress/bills/111/hr5689.

[42] H.R. 5689 § 129B(a).

[43] Oren Bar-Gill & Elizabeth Warren, Making Credit Safer, 157 U. Pa. L. Rev. 1, 3–4 (2008).

[44] Id. at 8.

title loans. In spite of consumers *anticipating* that they will be able to repay the loan at the end of the advertised one-month term, "[m]any borrowers . . . find that paying back the entire loan . . . would leave them without funds necessary to meet basic living expenses."[45] Other scholars have leveled sharper criticisms and have laid blame at lenders' feet for more than just a failure to educate their borrowers. Specifically, some claim that the industry is rife with information manipulation. "Attention [is] a scarce resource," and title lenders operate "[b]y shrouding price terms and the likely ways the borrower will use the loan" in order to "*encourage* borrowers to underestimate the cost of the title loan."[46]

Amplifying the problems associated with poor disclosure in this arena is borrower use of "availability heuristics" to discount the possibility of certain bad outcomes and to rationalize behaving overoptimistically in regards to the possibility of a distressing event such as car repossession. The availability-heuristics theory suggests that, because borrowers do not have an experience of this sort to draw on when making the decision to take out such a loan, they are more likely to discount the likelihood of a bad outcome than its actual probability would suggest.[47] It is easy to see how this phenomenon impacts borrowers in the title-lending context. Though likely cognizant of the ramifications of a failure to make payment on a title loan, borrowers, even the type who is likely to engage in this transaction, have probably not experienced repossession.[48] Accordingly, they are prone to underestimating the chances of this event happening in the future. This serves to increase the frequency of borrowers entering into transactions that are not welfare enhancing.

[45] Id. at 55–56 (discussing this dilemma as it relates to users of payday loans).

[46] Fritzdixon et al., supra note 17, at 1049 (emphasis added).

[47] Ronald H. Silverman, Toward Curing Predatory Lending, 122 Banking L.J. 483, 546 (2005) (discussing this phenomenon in the context of mortgage loans secured by a principal residence). "Since relatively few borrowers, even among lower- to modest-income folk, experience foreclosure . . . it is more likely that such inexperience will lead to unrealistic optimism about the ability to avoid this uncommon event." Id.; see also Fritzdixon et al., supra note 17, at 1049 ("[F]ederal disclosure laws . . . do not, for the most part, require that lenders disclose any pattern of usage information to inform borrowers about the likely consequences of having taken out a loan. More importantly, laws do not generally require price disclosures be made upfront . . . ."). There is no reason to believe that car repossession represents a situation that is analytically distinct for these purposes.

[48] Indeed, a borrower who *has* experienced repossession via a default on a title loan would seem the *most* unlikely type of consumer to ever enter into such a transaction again. One cannot secure a title loan without a car.

Certain features of title loans take advantage of this availability-heuristics phenomenon. For instance, title lenders advertise heavily the speed of these transactions, the ability to maintain car possession, and large loan amounts that are available.[49] Less salient, though, are the chances of repossession and an estimation of how long the borrower will likely take to repay the loan.[50] As other commentators have noted, this information imbalance is "exacerbated by the inclination of many abusive lend[ers] . . . to obscure or to misrepresent certain especially burdensome loan terms and conditions."[51] Importantly, most observers regard as inadequate the impact of the Federal Truth in Lending Act ("TILA"[52]) in this arena.[53] Further, state disclosure regimes are no better.

State law here is as defunct and scattered as it is with regard to repayment ability. Many states do not require any form of title-loan-specific disclosure, while others require language that reads more like boilerplate than a warning.[54] Some states *do* have unique disclosure requirements geared toward title loans, but even their efficacy is questionable. Virginia, for instance, requires disclosure via a fourteen-point all-caps warning at signing.[55] The contents of the disclosure will seem unusual to the uninitiated in these kinds of high-cost loan products, containing such language as "THE INTEREST RATE ON THIS LOAN IS HIGH" and "YOU SHOULD TRY TO REPAY THIS LOAN AS

[49] See Fritzdixon et al., supra note 17, at 1048.
[50] Id. at 1049.
[51] See Silverman, supra note 47, at 542.
[52] 15 U.S.C. §§ 1601–1693 (2012).
[53] See, e.g., Silverman, supra note 47, at 567 (listing such failures of TILA as a lack of requirement to disclose all relevant borrowing costs, the unaddressed problem of borrowers not receiving information about what competitors or the market more broadly is charging for loans, and borrower inability to process information in the way TILA mandates it be disclosed); see also Tania Davenport, An American Nightmare: Predatory Lending in the Subprime Home Mortgage Industry, 36 Suffolk U. L. Rev. 531, 547–48 (2003) (listing similar shortcomings); Christopher L. Peterson, Truth, Understanding, and High-Cost Consumer Credit: The Historical Context of the Truth in Lending Act, 55 Fla. L. Rev. 807, 903 (2003) (explaining that TILA has "not lived up to its potential" because it does not create "practical contractual understanding on the part of vulnerable debtors").
[54] For instance, Florida's title-loan statute requires that lenders produce a general disclosure to borrowers notifying them that should they "fail[] to repay the full amount of the title loan on or before the end of the maturity date or any extension of the maturity date and fail[] to make a payment on the title loan within 30 days after the end of the maturity date . . . the title loan lender may take possession of the borrower's motor vehicle." Fla. Stat. § 537.008(2)(c) (2014).
[55] Va. Code Ann. § 6.2-2215(1)(e) (West 2014).

QUICKLY AS POSSIBLE."[56] But disclosure of this sort is too little too late. It is too little because title lenders control the manner in which borrowers are presented with the disclosure. And it is too late because the disclosure often comes on the precipice of the completion of the transaction. Simply put, no good salesman will let a mandatory piece of paper torpedo a transaction with a borrower who was desperate enough to enter a title-lending outlet in the first place. Save for the contents of one disclosure scheme discussed in Part III of this Note, no state's disclosure requirement surveyed for this Note accomplishes anything more than inserting a single piece of cautionary paper between borrowers and title loans.

Finally, the role federal law currently plays is a peripheral one. As mentioned above, TILA operates as relevant regulation. But TILA is more of a nuisance than a real safeguard. It does little beyond requiring that lenders disclose the costs associated with the loan as a standardized APR.[57]

3. Rollovers and the Debt Treadmill

A product of the former two factors, though analytically distinct, is the problem of rollovers and the frequency with which title-loan borrowers are making interest-only payments each month. No doubt, one can conceive of situations where title loans are welfare-enhancing and logical transactions. Taking out a $1,000 title loan to account for an unexpected medical expense, even where $1,250 is required for repayment the next month, is likely reasonable and welfare-enhancing when the consumer has no other means of accessing credit. This picture of rationality, though, begins to crumble in the face of repeated monthly rollovers. What cannot be logical or welfare-enhancing is to take that same $1,000 loan and make payments of $250 a month ad infinitum, especial-

[56] Id.; see also S.C. Code Ann. § 37-3-413(6) (2014) ("THIS IS A HIGHER INTEREST LOAN. YOU SHOULD GO TO ANOTHER SOURCE IF YOU HAVE THE ABILITY TO BORROW AT A LOWER RATE OF INTEREST. YOU ARE PLACING YOUR VEHICLE AT RISK IF YOU DEFAULT ON THIS LOAN.").

[57] See, e.g., Hawkins, supra note 2, at 572. While it was once a matter of debate whether the Truth in Lending Act applied to title lenders, particularly those that operate under the pawn laws of certain states, that debate has largely been put to rest. See Burnett v. Ala Moana Pawn Shop, 3 F.3d 1261, 1262 (9th Cir. 1993).

ly where the loan proceeds are not even directed at an urgent expense.[58] Yet this is a reality of title lending and is frequently regarded as the most puzzling aspect of these transactions.

Though industry abuses like repeat rollovers are seldom a topic for litigation, even the judiciary has shown scorn for this feature of the loans. As one court has concluded, borrowers are being "driven onto a perpetual debt treadmill."[59] This observation is not without empirical merit. In a recent study, the Tennessee Department of Financial Institutions found that an incredible 59.2% of title loans are rolled over four or more times.[60] At a hypothetical 300% interest rate, and assuming interest-only payments at the monthly rollover, these borrowers pay *at least* an amount equal to the principal in interest before paying off the loan. Moreover, a ridiculous 31.7% of the loans in this study were rolled over eight or more times, and at a number that almost requires suspension of disbelief, 2% more than 20 times.[61] Only *12%* (!) of title loans in the report were paid off in the contemplated one-month period.[62] This juxtaposes sharply with recent research indicating that almost 60% of title-loan borrowers *anticipate* that they will make repayment within three months.[63]

The federal government has also taken note of the rollover problem. The aforementioned DOD regulations list repeat rollovers as a significant concern,[64] and representatives in Congress have emphasized this feature as a particularly compelling reason for regulating title loans.[65] Scholarship has taken up the mantle too, generally citing the pattern of rollovers and the corresponding debt treadmill it creates as a counterargument against most of the supposed benefits that title loans and prod-

[58] See Fritzdixon et al., supra note 17, at 1036–37 (listing such recurring monthly expenses as rent, mortgage, and utilities, in addition to *gifts*, as accounting for over 50% of the reasons for taking out a title loan).

[59] Wis. Auto Title Loans, Inc. v. Jones, 714 N.W.2d 155, 179 (Wis. 2006) (Butler, J., concurring).

[60] Tennessee Report, supra note 20, at 7.

[61] Id.

[62] Id.

[63] See Fritzdixon et al., supra note 17, at 1042–43.

[64] Limitations on Terms of Consumer Credit Extended to Service Members and Dependents, 72 Fed. Reg. 50,580, 50,581 (Aug. 31, 2007) (to be codified at 32 C.F.R. pt. 232).

[65] 146 Cong. Rec. 12,523 (2000) (statement of Rep. Shaw) (chronicling the story of a borrower who ended up destitute trying to make the interest-only payments on a title loan with a 350% APR).

ucts like them can provide to consumers.[66] When only 12% of these loans are paid off in one month, the argument that they are welfare-enhancing transactions, or even that they are short-term transactions, begins to fall apart. Our hypothetical borrower of $1,000 at a 300% interest rate could pay $1,000 in *interest* in only four months even if she pays the loan off entirely in the fifth. Including the interest for the fifth month, she will have repaid $2,250 for a loan taken out five months prior in the amount of $1,000.

State responses to this issue are less inept than their counterparts concerning disclosure and repayment ability, but the states that have recognized that rollovers are a major problem have taken wildly divergent approaches to addressing them. First, a glance at an ineffective framework is in order. Idaho's attempt at remedying the problem is illustrative. After a third rollover, Idaho requires that debtors make a payment of 10% of the principal in addition to the interest payment.[67] Ostensibly, this kind of requirement should result in the eventual termination of the loan to the lender's satisfaction, as opposed to the hypothetical never-ending treadmill of interest-only payments. The problem with this provision is that, if the debtor is *unable* to make such a payment, the lender is permitted to "defer any required principal payment until a future date," putting the borrower right back at square one.[68] While Idaho also provides that interest is no longer permitted to accrue on any such deferred principal,[69] this only reduces the lender's incentive to work with the borrower. Such a scenario, where the lender has little left to gain from the arrangement, is more likely to result in repossession than any contemplated benefit for the consumer.

Other states have imposed requirements with more teeth and ostensibly better terms for borrowers, but their lack of unifying features demonstrates how tricky this problem is. For instance, Georgia targets the issue of rollovers by halving the amount of permissible interest on title loans after the third renewal.[70] South Carolina takes a much more aggressive approach, limiting the number of permissible rollovers to a total of six, providing that interest may not accrue thereafter and requiring that debtors then be permitted to pay off the principal over the

[66] See, e.g., Drysdale & Keest, supra note 2, at 605–10.
[67] Idaho Code Ann. § 28-46-506(3) (2014).
[68] Id.
[69] Id.
[70] Ga. Code Ann. § 44-12-131(a)(4)(B) (2014).

course of six equal monthly payments.[71] Dramatically illustrating the divergent state treatment, Utah's only requirement is that "the person receiving the title loan [must] request[] a rollover of the title loan" in order to obtain one.[72]

II. DODD-FRANK AND THE BUREAU

This Part begins by demonstrating that, while it has not yet taken any such action, the CFPB is empowered to regulate title-loan transactions. There is no explicit mention in the Dodd-Frank Act of title loans, but, as this Part will show, the Act quite clearly gives the Bureau broad powers over them. This Part then proceeds to suggest that not only does the Dodd-Frank Act empower the Bureau to regulate these kinds of transactions, but that the Act actually *mandates* that the Bureau address them. The Dodd-Frank Act outlines a broad and aggressive agenda for the CFPB, and title loans fit squarely within what the Act was designed to capture. Finally, this Part discusses how the Act evidences concern over repayment ability, disclosure failure, and the growth of abusive practices like rollovers in the consumer-protection context. Sections of the Act apart from the section creating the Bureau strongly indicate that Congress was targeting the very types of practices highlighted in Section I.B of this Note when it enacted the landmark legislation.

A. The Empowerment of the Bureau

It is difficult to convey just how broadly the Dodd-Frank Act swept when it empowered the CFPB to regulate consumer credit transactions. The prologue to the Act lists only four purposes for the legislation, one of which is "protect[ing] *consumers* from abusive financial services practices."[73] A look at the statutory definitions serves as an appropriate starting point in understanding the scope of the Bureau's power. The Dodd-Frank Act provides the Bureau with jurisdiction over "any person that engages in offering or providing a consumer financial product or service."[74] Consumer financial products and services include extensions

[71] S.C. Code Ann. § 37-3-413(2) (2014).
[72] Utah Code Ann. § 7-24-202(3)(a) (LexisNexis 2014).
[73] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (emphasis added).
[74] 12 U.S.C. § 5481(6)(A) (2012).

of credit[75] when they are used "primarily for personal, family, or household purposes."[76] One might question whether title loans qualify as an extension of credit under the Act, but Dodd-Frank's broad definition of credit, including the act of "incur[ring] debt and defer[ring] its payment,"[77] clearly covers title loans.[78]

Moreover, the Act provides no carve-out for title lenders or any exemption that might be construed to include title lenders. Dodd-Frank, quite carefully and thoroughly, enumerates certain specific industries that are not subject to the Bureau's jurisdiction. While the Act also lists certain industries that *are* subject to CFPB oversight, without including title lending, the exclusions provide a more complete picture of what kind of activities and industries the Bureau is prohibited from reaching. Those not subject to Bureau jurisdiction include real estate brokers, manufactured-home retailers, accountants, lawyers, and persons already subject to the regulation of certain specified other agencies.[79]

Further, reference to the powers that Dodd-Frank withheld from the Bureau helps illuminate just how *broadly* the CFPB may act in its regulation of title loans. Dodd-Frank specifically reserved one particular power from the Bureau—the power to impose usury limits.[80] The power to impose usury limits would essentially give the Bureau power to ban title lending altogether.[81] Such an authority is properly viewed as the pinnacle of any power that could have been given to a consumer protection agency like the CFPB. The express withholding of this power—but no others—suggests that not only may the Bureau regulate title loans, but that it may also wield broad authority over these transactions. Moreover, the withholding of this power makes sense given Congress's earlier refusal to enact an interest-rate cap on title loans.[82]

[75] § 5481(15)(A)(i).
[76] § 5481(5)(A).
[77] § 5481(7).
[78] One might wonder at this point whether a title loan secured for purposes of financing a small business would fall under the Bureau's jurisdiction. This Note takes the position that it would not.
[79] 12 U.S.C. § 5517 (2012).
[80] § 5517(o).
[81] See supra notes 21–25 and accompanying text.
[82] See supra notes 41–42 and accompanying text.

B. Dodd-Frank's Mandate

More controversial than suggesting merely that the Bureau is empowered to regulate title loans is the notion that Dodd-Frank in many ways actually requires the Bureau to do so. One might suspect that given the several years since the creation of the Bureau, during which it has not yet regulated title loans or brought any enforcement actions against title lenders, the idea that there is some sort of "mandate" to supervise them is farfetched. Yet its delay in acting is explainable. The Bureau likes to cast itself as a "data-driven" agency that puts a premium on being careful and well informed before wading into new consumer-protection territory.[83] However, the patience of some of the Bureau's benefactors—including Senator Warren—has run thin. A recent letter from several senators to the Bureau is indicative of the expectations that the Bureau has not fulfilled. Specifically, the letter notes that the Bureau was "established precisely to crack down on these types of predatory practices."[84]

The provisions of Dodd-Frank concerning how the Bureau is to monitor consumer financial products and services serve to underscore just how much is expected of the Bureau in this arena. The statute speaks in terms of what the Bureau is *required* to do, directing that the CFPB "*shall* monitor for risks to consumers" in these markets.[85] The risk factors that the Bureau is directed to look for read like a laundry list of concerns associated with title loans. For instance, Dodd-Frank requires that the Bureau consider products that (1) consumers do not fully understand; (2) are inadequately regulated by current law; or (3) disproportionately affect underserved consumers.[86] As Part I of this Note illustrated, title loans contain all of these characteristics. The lack of consumer understanding is reflected by their frequent failure to follow the one-month repayment schedule they sign up for. State law has proven incapable of

[83] See Consumer Fin. Prot. Bureau, Consumer Financial Protection Bureau Strategic Plan: FY 2013 – FY 2017 (2013), available at http://www.consumerfinance.gov/strategic-plan/ ("The CFPB is a data-driven agency.").

[84] Press Release, United States Senator Dick Durbin, Senators Push CFPB to Crack Down on Predatory Payday Loans (May 14, 2014) (internal quotation marks omitted), available at http://www.durbin.senate.gov/public/index.cfm/pressreleases?ID=5bc3b8a9-40d6-48d6-afe0-21760ab70418.

[85] 12 U.S.C. § 5512(c)(1) (2012) (emphasis added).

[86] § 5512(c)(2).

protecting title-loan borrowers. Underserved borrowers are the primary clientele for these transactions.[87]

Further, while the Dodd-Frank Act may not have expressly referenced title loans, it made clear that the Bureau *must* seek out and identify fringe-credit products of that nature. The Act spells out few requirements in terms of how the Bureau must substantively pursue its mission, but in one particularly noteworthy section it compels the agency to create a research unit whose purpose is to identify products like title loans that may adversely affect consumers.[88] The statute reads, "The [Bureau] *shall* establish a unit" designed to identify and report on certain features of consumer financial service products.[89] The features that Congress expressly enumerated, again, read like a veritable laundry list of the elements of the title-loan industry. For instance, the Bureau's unit is directed to report on consumer awareness and understanding of (1) disclosure forms; (2) costs and risks associated with a given product; and (3) the experiences of unbanked and underbanked consumers.[90]

To be clear, these aforementioned duties are not functions that the Bureau is simply authorized to undertake. Rather, Bureau action is compelled by the unmistakable language of the statute. One might suppose, though, that this does not establish that the Bureau may aggressively regulate title loans. A mandate to monitor and identify products like title loans hardly empowers the Bureau to affect their terms. Yet looking at one specific power delegated to the Bureau helps tell a more complete picture of Dodd-Frank's mandate. Specifically, the Act prohibits all covered entities under the Bureau's jurisdiction from engaging in "unfair, deceptive, or abusive acts or practice[s],"[91] and empowers the Bureau to prohibit such acts and practices in a variety of ways.[92] This prohibition and corresponding power are taken up in more depth below. For now, it suffices to say that the Bureau *must* identify and monitor products like title loans. Further, Dodd-Frank expresses an implied skepticism of such products and prohibits them from containing unfair, deceptive, or abusive traits. Finally, the Bureau is tasked with ensuring that these products do not contain such traits. What Dodd-Frank does not

[87] See supra note 15 and accompanying text.
[88] 12 U.S.C. § 5493(b)(1) (2012).
[89] Id. (emphasis added).
[90] Id.
[91] 12 U.S.C. § 5536(a)(1)(B) (2012).
[92] § 5531.

mandate is *how* the Bureau should fulfill this duty. There the Bureau is given considerable discretion. That the Bureau must take *some* action, however, seems clear. And although the Dodd-Frank Act does not specify what form that action must take, it does identify consumer-loan characteristics that the action must be directed toward. Part III of this Note explores in more detail how the Bureau might regulate these products. For now, it suffices to say that their abstention is impermissible.

C. Dodd-Frank and the Title-Lending Trifecta

This Section builds on the prior two by showing that Dodd-Frank actually took aim at the specific problems that plague title loans, albeit in other contexts. As the prior two Sections demonstrated, the Act—quite broadly—empowers the Bureau to regulate title loans and mandates that the Bureau take action in this arena. An examination of other sections in the landmark legislation compels the conclusion that not only does the Act require Bureau interference in a broad and abstract sense, but also that the Bureau should be seeking to address the three issues outlined in Part I of this Note.

1. Repayment Ability

The Dodd-Frank Act treats lender consideration of repayment ability as a standalone concern among the many substantive requirements that the Act imposes on lenders. It is difficult to overstate just how significant a feature this is in the Act. The statute's marriage to assessing borrower repayment ability can be seen most clearly in the context of its sections concerning residential mortgages. Dodd-Frank's framework concerning *minimum* standards for residential mortgage loans features repayment ability as its touchstone.[93] Many of the Act's consumer protections in the residential-mortgage context concern only loans that are considered "high-cost."[94] This underscores how critical repayment ability is in the Act. The requirement that lenders loan in accordance with a borrower's repayment ability—far from just applying to certain "high-cost" mortgages—applies to residential mortgage loans of all stripes. It is not hard to see why. Requiring lenders to consider repayment ability

[93] 15 U.S.C. § 1639c(a) (2012).
[94] § 1639.

has been a concern of "consumer advocates, legislators, and regulators" for over twenty years.[95]

The legislative history of the Act also reflects this concern with repayment ability. As many recognized, imposing this requirement helps "ensure that . . . loan[s] cannot have any predatory characteristics."[96] The bill's protagonists lauded the requirement for this very effect.[97] Even the Bureau has acknowledged that concern over borrower repayment ability is a key component of Dodd-Frank. In the Bureau's words, loans "made solely against collateral . . . and without consideration of ability to repay" were a major concern for legislators when Dodd-Frank was enacted.[98] Moreover, even the Home Ownership and Equity Protection Act—the weaker federal forerunner to Dodd-Frank's residential mortgage protections—recognized asset-based lending as predatory.[99]

Though the Act chiefly requires repayment ability assessments to be made in connection with residential mortgages, there is little reason to suggest that the requirement cannot be applied in other settings. As the legislative history helps demonstrate, failure to consider borrower repayment ability is a suspect practice no matter the product in question. Congress's decision to explicitly require it for residential mortgage loans does not reflect that this is its only appropriate use. Far from it, the Act—with its broad delegation of power to the Bureau—is more appropriately viewed as delegating the decision of which industries to apply this requirement upon to the more expert and informed CFPB.

2. Disclosure

The section of the Act concerning the creation of the Bureau highlights improved disclosure as a goal of special significance. So obsessed is the Act with the concept of better informing consumers about the risks of products like title loans that the word "disclosure" is mentioned *eighty-eight times* alone in the section of the Act that created the Bu-

[95] Ability-to-Repay and Qualified Mortgage Standards Under the Truth in Lending Act (Regulation Z), 78 Fed. Reg. 35,430, 35,438 (June 12, 2013) (to be codified at 12 C.F.R. pt. 1026).

[96] 155 Cong. Rec. E1085 (daily ed. May 7, 2009) (statement of Rep. Van Hollen).

[97] See id.

[98] Ability-to-Repay and Qualified Mortgage Standards Under the Truth in Lending Act (Regulation Z), 78 Fed. Reg. at 6410 (Jan. 30, 2013).

[99] S. Rep. No. 110-251, at 83 (2007).

reau.[100] One particular provision of the Act sums up this objective nicely, the full text of which empowers the Bureau to

> prescribe rules to ensure that the features of any consumer financial product or service, both initially and over the term of the product or service, are fully, accurately, and effectively disclosed to consumers in a manner that permits consumers to understand the costs, benefits, and risks associated with the product or service, in light of the facts and circumstances.[101]

While the Act left much of the implementation of this objective to the Bureau's discretion, it saw fit to spell out specific details for one industry: Dodd-Frank requires that a special disclosure precede the consummation of any "high-cost mortgage loan."[102] Importantly, the disclosure is shockingly simple. The disclosures in these transactions must inform borrowers that they are not required to follow through with the loan and that, if they do and if they default, they may lose their home.[103] Crucially, the requirement also shields against the possibility that a lender will simply slip the disclosure in among a number of sheets that must be signed at closing. This is because the disclosure must be given three days before the loan is completed.[104]

These provisions standing alone give a sufficiently clear picture of Congress's concern with disclosure. But even more was contemplated in this area. A provision that never made it into the final bill called for disclosures that would have served to enhance the ability of consumers to comparison-shop riskier credit products against ones that were ostensibly safer.[105] The provision would have required lenders to simultaneously offer a "standard consumer financial product or service" in conjunction with offering an "alternative consumer financial product or service."[106] The former types of products and services were to be defined by their transparency, low risk, and ability to facilitate compari-

[100] Consumer Financial Protection Act of 2010, Pub. L. No. 111-203, tit. X, 124 Stat. 1955, 1955–2113 (2010). This count includes derivatives of the term such as "disclose" and excludes reference to other statutes containing the word "disclosure" in their title.
[101] 12 U.S.C. § 5532(a) (2012).
[102] 15 U.S.C. § 1639(a)–(b) (2012).
[103] § 1639(a).
[104] § 1639(b)(1).
[105] H.R. 3126, 111th Cong. § 136 (2009).
[106] § 136(b)(1).

son,[107] while the latter were defined to sweep in products such as title loans. For ease of reference, let us call this provision the "plain-vanilla" provision.[108]

An example outside the credit context is illustrative of how the plain-vanilla provision may have been designed to work. Suppose you are trying to buy a cell phone at a local retailer. Suppose also, counterfactually, that cell phone retailers do not display their phones along with the features and prices of those phones throughout a showroom—instead, you must go through a salesman in order to survey the possibilities and make a purchase. In a universe without a corresponding plain-vanilla provision at work, perhaps you leave the store with a new phone that supposedly features all manner of bells and whistles. But you do not know if you got a good deal. In an alternative universe, this time with the plain-vanilla provision in place, the salesman could not proceed with the sale of the supposedly cutting-edge phone without *also* showing you the price and features of an industry-standard, generic, run-of-the mill cell phone. Presumably, this latter phone will be one with which you are familiar. You may still proceed with the flashier purchase, but you will be doing so having seen another option that facilitates comparison.

Of course, this provision does not exist in Dodd-Frank. But that hardly means the Bureau is not empowered to pursue similar options. Again, the omission of this provision from the Act can be viewed as a delegation to the more expert CFPB on whether it is the most appropriate means of implementing effective disclosures. Moreover, some have suggested that variants of plain vanilla *do* in fact exist in the Dodd-Frank Act as it was enacted.[109] And the Act still quite clearly directs the Bureau to address the types of disclosure issues that plain vanilla was targeting. "The Bureau is authorized to . . . ensur[e] that . . . consumers are provided with timely and understandable information to make responsi-

[107] § 136(a).

[108] See, e.g., Adam Levitin, QM Isn't "Plain Vanilla," Credit Slips (Nov. 4, 2013, 9:02 AM), http://www.creditslips.org/creditslips/2013/11/qm-isnt-plain-vanilla.html (using this terminology).

[109] See Joe Adler, How Bank-Defeated "Plain Vanilla" Requirements Live On, Nat'l Mortg. News (Mar. 27, 2015), http://www.nationalmortgagenews.com/features/How-Bank-Defeated-Plain-Vanilla-Mortgage-Requirements-Live-On-1039717-1.html (explaining how the Act's "qualified residential mortgage" provision effects a similar outcome as to what plain vanilla was geared toward).

ble decisions about financial transactions."[110] Crucially, the Act imposes no substantive limitations on how the Bureau is to go about achieving this goal. The Act plainly does not limit the Bureau's powers vis-à-vis disclosure,[111] and where Congress intended to limit substantive powers of the Bureau it did so explicitly.[112] Additionally, it is clear from the legislative history that enhanced disclosure was intended to be a central mission for the Bureau[113] and that this focus on disclosure was contemplated even among title loans specifically.[114] Further, Senator Warren, the proverbial mother of the CFPB, considered more effective disclosures to be one of the primary purposes of the agency.[115]

3. Rollovers

In contrast to disclosure and repayment ability, the Act's concern with rollovers is not as apparent. Rollovers are an issue in only certain types of credit products, and borrowers have at least some control, on an individual basis, over their frequency. In short, they are a context-dependent problem. It is perhaps unsurprising, then, that Dodd-Frank did not lay down any sweeping or rigid prohibitions on rollovers. Understanding Dodd-Frank's mandate in this area is thus more of a puzzle. But, while Congress's concern is less obvious, it is not missing. The CFPB's most expansive grant of power—the power to identify and prohibit unfair, deceptive, and *abusive* acts and practices[116]—offers compelling insight into Congress's concern, as well as a powerful mechanism for addressing rollovers.

To appreciate how this language might sweep in rollovers, some context is necessary. First, the concept of "abusive" acts and practices is new to consumer-protection law. For several decades, consumer-

[110] 12 U.S.C. § 5511(b)(1) (2012); see also § 5511(b)(5) (stating that the Bureau is authorized to ensure that "markets for consumer financial products and services operate transparently").

[111] § 5517.

[112] See, e.g., § 5517(o) (prohibiting the Bureau from imposing usury limits).

[113] 156 Cong. Rec. S3021 (daily ed. May 3, 2010) (statement of Sen. Durbin) ("[W]e will have one agency . . . to protect us from the tricks and traps into which we can run. There will be more complete disclosure . . . . We are not going to create any kind of guardian angel society. People may still make a bad decision, but they will do it with their eyes wide open . . . .").

[114] Id.

[115] Elizabeth Warren, Unsafe at Any Rate, 5 Democracy J. 8, 18 (2007).

[116] 12 U.S.C. § 5531(a) (2012).

protection laws have prohibited "unfair" and "deceptive" acts and practices.[117] Discerning what Congress intended this new term to sweep in is a subject of much speculation. There are hints, however, to suggest that repeat rollovers are exactly the type of practice that may fit under the umbrella of "abusiveness," yet not those of "deceptiveness" or "unfairness." To oversimplify slightly, rollovers are not an issue that could be subject to a labeling of "unfairness" because the term has long been understood to encompass acts and practices that consumers cannot reasonably avoid.[118] While many consumers in these transactions do not anticipate finding themselves in a situation necessitating repeat rollovers, that does not make it an unavoidable one. Further, "deceptiveness" also offers no solution to the dilemma. Deceptive acts are ones plagued by lying and dishonesty.[119] These attributes may be present in certain instances, but the very process of a title-lending transaction is not one that is characterized by overt deception. Thus abusiveness presents itself as an option. But does it really work? And did Congress contemplate this type of behavior when it gave the Bureau power to prohibit such acts and practices?

Thus far what should be clear is that "abusive" acts and practices must add something new to the arena of consumer protection. Congress did not insert this term into the statute accidentally, nor is its coupling of the term with "unfair" and "deceptive" a product of chance. Congress clearly intended to prohibit more activity than is already swept in by the relatively broad and decades-long "unfair" and "deceptive" prohibitions. To begin determining what new activity may be subject to the prohibition, the statutory definition of "abusive" offers the best starting point.

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[117] See, e.g., Rebecca Schonberg, Introducing "Abusive": A New and Improved Standard for Consumer Protection, 100 Calif. L. Rev. 1401, 1409–15 (2012) (detailing differences between the latter and the former).

[118] See 15 U.S.C. § 45(n) (2012). In order to identify an unfair act or practice one must also consider whether the act or practice produces countervailing benefits to consumers. Id. The term thus contains two distinct limiting principles—the act or practice must be one that consumers cannot reasonably avoid, and it must not produce countervailing benefits—that significantly limit the types of activities that the CFPB could prohibit under the header.

[119] See, e.g., Schonberg, supra note 117, at 1409–11 (explaining why the prohibition on deceptive acts is unlikely to affect title loans and analogous products like payday loans). The key difference between the deceptive and abusive standards is that the former is triggered only where a lender "affirmatively misrepresent[s] or conceal[s] information," while the latter sweeps in lenders who "take[] unreasonable advantage of a lack of understanding." Id. at 1411 (internal quotation marks omitted).

Dodd-Frank establishes four independent triggers to define what constitutes an abusive act or practice. First, any act or practice that "materially interferes with the ability of a consumer to understand a term or condition" of a covered product or service can be considered abusive.[120] The statute's remaining three triggers all deal with a covered entity taking "unreasonable advantage" of particular consumer traits.[121] Those consumer traits are (1) a lack of understanding about material aspects of the product or service; (2) an inability to protect one's own interests; and (3) reasonably relying on the lender to act in the consumers' best interests.[122] A natural gateway into regulation of these transactions is presented by the possibility that title lenders take unreasonable advantage of consumer lack of understanding about material aspects of the product. The amount of time it takes to repay a title loan is seemingly a material aspect of these transactions, yet borrowers are woefully uninformed about this component of title loans. From that lack of understanding spring rollovers.

Dodd-Frank leaves further fleshing out of this term to the Bureau, and its first enforcement action charging that an entity engaged in abusive acts and practices is particularly revealing. There the target of the Bureau's action was a debt-relief company—ostensibly a company engaged in transactions with the same kinds of disadvantaged borrowers with whom title lenders operate.[123] The Bureau's abusive-acts-and-practices claim was premised on the fact that the defendant was knowledgeable about its clients' poor financial situations.[124] Despite being privy to this knowledge, the defendant enrolled them in costly, and ultimately unaffordable, debt-relief services.[125] Crucial to the finding of abusiveness, the Bureau reasoned that the defendant *knew* that its consumers had a slim likelihood of successfully completing a debt-relief program, given their financial situations.[126] This vindicated the Bureau's theory that the

[120] 12 U.S.C. § 5531(d)(1) (2012).
[121] § 5531(d)(2).
[122] Id.
[123] Consumer Fin. Prot. Bureau v. Am. Debt Settlement Solutions, No. 9:13-cv-80548-DMM, slip op. at 2 (S.D. Fla. June 7, 2013).
[124] Id.
[125] Id. at 2–3.
[126] Id. at 8–9.

debt-relief company was taking unreasonable advantage of its consumers' lack of understanding about the service they purchased.[127]

As this enforcement action demonstrates, the conditions necessary to find that a covered entity has taken unreasonable advantage of a consumer's lack of understanding are wide-ranging. There was no allegation that the consumers of the debt-relief services had a "lack of understanding" in regard to what kind of service they were being sold, but rather an allegation of a lack of understanding about their prospects of being able to fulfill the *terms* of the service in order to reap its benefits. A comparison to the typical consumer of a title loan is irresistible. While ostensibly not lacking an understanding about the service they are purchasing—it is, after all, just a one-month loan with a high interest rate—they *do* lack an understanding about their prospects of being able to meet the terms of the loan as it is contemplated at origination (*repayment* within one month).[128] There is also little doubt that lenders are benefitting from this lack of understanding.[129] Moreover, recent scholarship has suggested that title lending is an obvious industry within which the Bureau can further crystallize its power to prohibit abusive acts and practices.[130]

III. A TEMPLATE FOR BUREAU REGULATION AND ENFORCEMENT

Thus far this Note has discussed Bureau power to regulate title loans in the abstract. This Note has identified its powers, its mandate, and the elements of title loans that sensible regulation should take into account. This Part moves into a more detailed and specific discussion of *how* the Bureau might regulate these products. Specifically, this Part proposes unique mechanisms designed to counter each of the three major frailties identified with title lending, as laid out in Part I of this Note.

[127] Complaint at 15, *Am. Debt Settlement Solutions*, No. 9:13-cv-80548-DMM; see also 12 U.S.C. § 5531(d)(2)(A) (2012) (defining taking unreasonable advantage of consumers as encompassing consumers' "lack of understanding . . . of the material risks, costs, or conditions of [a] product or service").

[128] Given the frequency of these rollovers and the percentage of consumers who will pay *at least* an amount in interest equal to the principal, it is hard to submit another explanation for why a borrower would enter into one of these transactions. See, e.g., supra notes 60–62 and accompanying text; see also Drysdale & Keest, supra note 2, at 606–07 (detailing the plights of several consumers who have paid an amount equal to the principal balance on their title loan several times over in interest).

[129] See, e.g., Drysdale & Keest, supra note 2, at 608 (discussing how lenders have no incentive to discourage rollovers and that their main source of revenue is in fact from rollovers).

[130] See, e.g., Schonberg, supra note 117, at 1438–39 (making this observation).

First, it is worth highlighting a preliminary question that policymakers must first address: specifically, whether title lending should be permitted to exist at all. Underlying that question is whether title loans can enhance consumer utility in appropriate settings. Of course, as this Note has explained, the CFPB does not have the power to set usury caps, and thus the notion that it can *ban* title lending altogether is suspect. Nonetheless, an answer to this preliminary question helps guide one's view on what is, and what is not, effective regulation. Many states have answered this question in the negative, effectively removing title loans from their markets.

This Part and its proposed regulations approach the problem with a different answer in mind. There are compelling arguments to be made for the availability of title loans. Restricting title loans and analogous products like payday loans through de facto usury bans will likely shut certain borrowers out of the credit market altogether or force them into even shadier black-market transactions. Such a policy treads dangerously close to the line of hurting the same people it is designed to help. As members of Congress noted when a federal title-lending statute was contemplated over a decade ago, "unscrupulous lenders who take advantage of needy borrowers" will be in no one's good graces.[131] Yet improper legislation and regulation could "reduce the number and availability of lenders" and "harm those who most need access."[132] Moreover, there is a "convenience [to] short-term lending: [I]t is . . . quick, and hassle-free."[133] There has even been scholarship suggesting that the availability of short-term, high-cost loan products like title loans may provide welfare enhancement in the form of fewer foreclosures and larcenies in the aftermath of natural disasters.[134] Others have highlighted the unique benefits associated with title loans in particular, noting that they contain lower interest rates than payday loans, allow for higher loan amounts, and constitute borrowing against one's current wealth (their fully owned car) as opposed to future wealth in the payday loan arena (future paychecks).[135] Banning these products, either explicitly or through the functional equivalent of a usury cap, is thus misguided. And in order to

[131] 146 Cong. Rec. 12,524 (2000) (statement of Rep. Smith).
[132] Id.
[133] Drysdale & Keest, supra note 2, at 606.
[134] See generally Adair Morse, Payday Lenders: Heroes or Villains?, 102 J. Fin. Econ. 28 (2011) (examining this phenomenon as it pertains to payday loans).
[135] See Todd Zywicki, Money to Go, 33 Reg. 32, 34 (2010).

maintain the availability of title loans, regulations should be low cost and conducive to easy compliance.

On the other hand, title-lending regulation would be pointless if it were so narrow and lender friendly so as to produce no substantive constraints and allow for easy evasion. As Senator (then-Professor) Warren argued, "regulatory inertia" can set in when "consumer protection law is based on a series of highly targeted statutes."[136] Hyperspecific legislation has dominated the arena of consumer protection for decades,[137] and yet complaints about lending abuses are still rampant. Narrow legislation targeting discrete practices fosters easy compliance but also easy evasion of the real goals. This dynamic has played itself out at the state level, where title lenders have regularly operated around weak or overly specific laws and regulations.[138]

Creating a structure that both effectively protects consumers and permits the continued existence of title lending is no easy task for regulators. Yet this final Part proposes a framework that is designed to please advocates on both sides of the aisle. The objective is to eliminate the inefficiencies in the market while still permitting the market to operate. As much of this Note has demonstrated, one of the core inefficiencies is borrower irrationality and borrower misunderstanding. Admittedly, remedying that inefficiency requires a touch of paternalism. But it can take on a form that has succeeded in other markets, and it can serve to make title loans a safer and more utility-enhancing product for consumers.

A. Imposing a Reasonable-Ability-to-Repay Requirement

Depending on what form this concept takes, imposing such a requirement on lenders could be a low-cost and close-to-no-cost proposition. Dodd-Frank requires mortgage lenders to consider a broad panoply of factors when determining repayment ability,[139] but such a requirement for title lenders need not be so onerous. Credit checks,[140] for instance, need not be mandated. There is little doubt that borrowers in these transactions have decrepit credit scores—hence their decision to engage with

[136] Bar-Gill & Warren, supra note 43, at 84.
[137] The Truth in Lending Act, Fair Credit Reporting Act, Fair Debt Collections Practices Act, and Home Ownership and Equity Protection Act stand as some of the more notable testaments to this fact. Id.
[138] See, e.g., Hawkins, supra note 2, at 576–79 (documenting this evasion).
[139] 15 U.S.C. § 1639c(a)(3) (2012).
[140] Id.

such an extreme form of credit.[141] Bypassing this requirement as part of a reasonable-ability-to-repay mandate would help ensure that the cost of such an inquiry remains low.

In fact, real progress is possible even if *many* of the traditional procedures associated with assessing repayment ability are cut. If the regulation simply took on the form of a monthly-income requirement, there is an argument to be made that the cost for lenders to implement such an approach would come tantalizingly close to zero. The idea is simple. Borrowers present a paycheck and the amount a lender can give becomes a function of the borrower's documented income. Illinois already employs such an approach, requiring that title lenders loan no more than 50% of a borrower's total monthly income.[142] This mechanism has the added benefit of being a familiar one to the Bureau. The agency has already adopted such an approach for residential mortgage loans, using a 43% debt-to-monthly-income threshold as a safe harbor for lenders.[143] While detractors of this kind of regulation may be quick to point to the dissimilarities between title loans and residential mortgage loans, the differences may serve only to make the approach a more practical one here, rather than one borrowed from an insufficiently similar context. In the case of a thirty-year mortgage, a prospective borrower's income and debts at the time of loan application offer only a *prediction* about long-term repayment ability. By contrast, with title loans there is little risk that the employment status of the borrower will change between day one and day thirty.

Admittedly, there are other frailties to consider; 50% of a borrower's monthly income represents a buzzsaw when perhaps a scalpel is needed. That percentage may already be locked up in mortgage payments,[144] and much of the remaining 50% may be allocated toward inflexible expenses, such as food and gasoline. More data are needed in order to set an appropriate income threshold, but perfection is an unattainable goal. It would represent a tremendous improvement over the current state of affairs to have income verification *alone*, irrespective of a percentage-based formula. Lending to borrowers who are jobless and without any income stream would cease, and while some may claim that barring title loans even from these consumers is undesirable, it is surely an im-

[141] See, e.g., supra notes 15–19 and accompanying text.
[142] Ill. Admin. Code tit. 38, § 110.370(a) (2015).
[143] 12 C.F.R. § 1026.43(e)(2)(B)(vi) (2014).
[144] Or, probably more accurately for these types of borrowers, rent payments.

provement over the blanket bans that state usury caps pose. Moreover, Bureau regulations could take on a form that is specific enough to foster easy compliance but amorphous enough that lenders could not devise an escape hatch. The concept is simple—title lending to borrowers who cannot objectively make repayment should not exist—and the Bureau exists as an active and responsive agency to ensure that that purpose is not subverted.[145]

B. An Effective Disclosure Regime

Disclosure inadequacies represent the kind of "low-hanging fruit" that the Bureau can rapidly improve. Effective regulations that change consumer behavior and correct for irrational decision making are possible, all the while imposing costs on lenders that are vanishingly small. Mandated disclosures are usually well tolerated by lenders, and there already exist examples that can act as templates in an effort to create a disclosure regime that exceeds the effectiveness of TILA.

Dodd-Frank's disclosures for high-cost mortgages, with their three-day waiting period, as well as a regime in Texas that facilitates comparison-shopping in these kinds of fringe-credit products, can provide the building blocks for the Bureau in implementing an effective disclosure scheme. A disclosure that the lender is required to give to the borrower at signing, à la TILA, is naturally going to have limitations. Borrowers often do not have the patience or even the desire to process information that essentially operates only as a final obstacle to their receiving a loan. Moreover, a lender is likely to treat it similarly, as a final obstacle to overcome (or rather, to get a signature on) before completing a transaction. Thus Dodd-Frank's requirement that a powerful warning[146] be given three days[147] before loan consummation provides a starting point for an effective title-lending disclosure regime. Three days is probably excessive for these purposes, but a one-day period can further the same goal. While a consumer contemplating a title loan is likely desperate, it is difficult to imagine how a twenty-four-hour waiting period may thwart one's attempt to, say, mitigate an emergency when the lack of such a waiting period would have caused no such hardship.

[145] For a discussion of providers of financial products and services subverting state legislation, see Warren, supra note 115, at 15.
[146] See supra notes 102–03 and accompanying text.
[147] 15 U.S.C. § 1639(b)(1) (2012).

Still, a "warning" disclosure—even with a waiting period—is unlikely, on its own, to combat the overoptimism and irrational decision making that plague products like title loans.[148] There, plain vanilla[149] and a set of Texas regulations that operate in a similar fashion act as exemplars for an effective disclosure regime. Texas requires not just standard disclosure of interest rates or APR, but also of the fees that would accumulate by rolling over a title loan at statutorily specified intervals.[150] The statute also mandates that prospective borrowers be given information on typical repayment patterns for title loans.[151] One can imagine the significance of disclosing such data. When a consumer sees that nearly one out of every three of these transactions ends in the borrower repaying the loan in triplicate, they may devote the level of critical thinking that entering into this transaction requires.[152] Further, research indicates that in the context of short-term, high-cost loans, information about one's peers' repayment patterns may influence one's own behavior.[153] And, perhaps most crucially, Texas requires that fees associated with title loans be disclosed side by side with those associated with "other alternative forms of" credit.[154]

A coupling of Dodd-Frank's advance-disclosure warning with a Texas-like super-disclosure could effectuate a real course correction in the overoptimism and irrationality that affect consumers of high-cost, short-term loans. While no disclosure system can guarantee that every transaction is welfare-enhancing, this would represent a tremendous step forward from the status quo. In mimicking the Texas template and merging it with an advanced-disclosure requirement on the order of twenty-four hours, the Bureau could require that title-loan consumers be given data on the length of time the average consumer takes to repay the loan and the consequence in fees above and beyond what the contract contemplates that such a time period would entail. An illustration here is useful. Our hypothetical borrower of $1,000 at 300% APR could be shown that the average loan is paid off in, say, five months. This disclosure would

[148] See supra Subsection I.B.2.
[149] See supra notes 105–08 and accompanying text.
[150] Tex. Fin. Code Ann. § 393.223(a)(2) (West 2014).
[151] § 393.223(a)(3).
[152] See Tennessee Report, supra note 20, at 7 (indicating that over thirty percent of borrowers rolled over their title loans eight or more times).
[153] See Marianne Bertrand & Adair Morse, Information Disclosure, Cognitive Biases, and Payday Borrowing, 66 J. Fin. 1865, 1889 (2011).
[154] Tex. Fin. Code Ann. § 393.223(a)(1).

come with costs associated with such a repayment period. Assuming interest-only payments for the first four months, the borrower would be informed that repayment, on this schedule, would cost $2,250.

Further, while the Texas statute and Dodd-Frank's seeming plain-vanilla provision disagree on what the benchmark comparison service or product should be in this context,[155] it does not really matter so long as there *is* a comparison. If a lender is required to disclose the cost of a title loan alongside average APR rates for a credit card, even if the borrower in question has no access to a credit card, the borrower would at least be able to compare the product in question (a title loan) with one that they were more familiar with (credit cards). It is one thing to see that it will cost $250 in order to take out a $1,000 one-month loan, but it is another entirely to realize that the rate you will pay is some *ten times* the rate that you might pay on a credit product that your peers and colleagues use regularly. Of course, this kind of disclosure will not prevent all welfare-reducing transactions, but that misses the point. Consumers will enter into these transactions with their eyes wide open. And the requirement on lenders is such a f one that it is difficult to fathom how the benefits would not outweigh the costs.

C. Rollovers as an Abusive Practice

The prior two Sections suggest that their respective recommendations can be implemented at little to no cost to lenders. The same is not necessarily true for rollover restrictions, making this a particularly delicate topic. This is especially true if the Bureau is to go after this feature of title loans under its power to prohibit abusive acts and practices. Critics lament the Bureau's power in this arena as standardless and opaque,[156] a characterization that contributes to significant fear and uncertainty about potential over-regulation of products and services under this power.[157]

[155] Texas requires "other *alternative* forms of" credit. Id. (emphasis added). The Dodd-Frank provision that did not make it into the final bill would have required a "*standard* consumer financial product or service." H.R. 3126, 111th Cong. § 136 (2009) (emphasis added).

[156] See, e.g., How Will the CFPB Function Under Richard Cordray: Hearing Before the Subcomm. on TARP, Fin. Servs. & Bailouts of Pub. & Private Programs of the H. Comm. on Oversight & Gov't Reform, 112th Cong. 57 (2012) [hereinafter Cordray Hearing] (statement of Rep. Ross) ("[T]here are little, if any, standards by which your regulatory control should be exercised.").

[157] See id. at 44 (statement of Rep. Maloney).

In a subcommittee hearing in January of 2012, Bureau Director Richard Cordray suggested that the Bureau was not considering promulgating rules under the abusive heading.[158] Responding to an inquiry on whether enforcement actions would instead operate as a means of setting policy, Cordray responded, somewhat paradoxically, that enforcement actions would be reserved for "clear violations of law" and that, accordingly, they would not be used to set policy.[159] But in the context of the Bureau's first enforcement action under its power to prohibit abusive acts and practices,[160] that statement simply does not make sense. There the Bureau *did* effectively set policy, and put on notice an entire industry that had to that point not been on the consumer-protection radar.

There is, however, virtue to the Bureau's proclivity for enforcement actions over rulemaking, especially with regard to products like title loans. The most prudent course of action with regard to rollovers may not be rulemaking, but rather using the frequency of rollovers as a *proxy* for determining whether an enforcement action under the abusive-acts-and-practices prohibition is appropriate. Defining with any degree of specificity what constitutes an abusive act or practice is a fool's errand, and even Director Cordray has acknowledged as much.[161] Moreover, Cordray has cryptically suggested that if businesses "stay away from pretty outrageous practices" they "should be pretty safe."[162] While that kind of uncertainty may chill business activity, it does not entail the kind of compliance issues associated with broad rulemaking on what constitutes "abusiveness" in the title-loan context, much less the debate over just where the "abusive" line should be drawn. There are no doubt some who think the *entire* industry is abusive.[163] Others, as state laws indicate, draw the line for rollovers at various points as measured by both months and interest rate.[164] Moreover, some may conclude that certain interest rates are abusive, though the Bureau has no power to set usury rates.[165]

[158] Id. at 65 (statement of Richard Cordray, Director, CFPB).

[159] Id.

[160] See supra notes 123–27 and accompanying text.

[161] Cordray Hearing, supra note 156, at 69 (statement of Mr. Cordray) (remarking that defining abusiveness "is going to have to be a fact and circumstances issue; it is not something we are likely to be able to define in the abstract").

[162] Id. at 71.

[163] See e.g., Infographic: Car-Title Lending is a Road to Nowhere, Center for Responsible Lending, http://www.responsiblelending.org/resources/infographics/infographic-car-title-lending.html (last visited Aug. 19, 2015) (making this point).

[164] See supra notes 67–72 and accompanying text.

[165] 12 U.S.C. § 5517(o) (2012).

By using rollovers as a proxy for determining where enforcement actions are appropriate, the Bureau can set up an incentive system for title lenders where they can compete on a reduced likelihood of their borrowers' incurring substantial rollovers. In this way, rather than issuing stiff and arbitrary points where a title loan (or any short-term, high-cost loan product for that matter) would be considered abusive, the Bureau can simply set up a system of enforcement that would encourage lenders to improve the state of the industry on their own. With access to lender-specific data of the kind contained in the Tennessee Department of Financial Institutions Report,[166] the Bureau can target lenders that have particularly alarming rollover rates as compared to their peers. In this way, nothing about the industry is per se illegal, but nothing is per se valid either—at least as long as the industry operates along the precipice of what many consider to be abusive and predatory behavior.

All costs incurred in attempts to "comply" with this regime would be solely at the lender's discretion and would ostensibly go toward improving the product that is being offered to the consumer. Accordingly, any given title lender could operate under a presumption that it was complying with the Bureau's abusive-acts-and-practices prohibition so long as the customers of rival lenders were rolling over their loans more frequently. Those lenders with the greatest frequencies would either need to take affirmative measures to reduce rollovers or incur the wrath of a Bureau enforcement action. As those on that outer boundary cease to operate in such fashion, those lenders just one step removed would then be on notice that *they* were the occupants of the outer boundary, and a similar pattern could repeat itself until the Bureau was satisfied that industry-wide rates of rollovers had been reduced to more reasonable levels. Indeed, the Bureau has already targeted excessive rollovers in the analogous payday-lending context through enforcement actions under its power to prohibit abusive acts and practices.[167]

CONCLUSION

Whether you are a zealous advocate of consumer autonomy or a believer that products with the abusive potential of title loans should be banned entirely, the notion that the Consumer Financial Protection Bu-

[166] Tennessee Report, supra note 20.

[167] See Consent Order, ACE Cash Express, Inc., CFPB File No. 2014-CFPB-0008 (July 10, 2014), http://files.consumerfinance.gov/f/201407_cfpb_consent-order_ace-cash-express.pdf.

reau can—and indeed, must—regulate these products is irresistible. The Bureau is a powerful new agency with a broad mandate to rein in predatory consumer financial products and services, and a number of legislators have taken a keen interest in making sure the Bureau fulfills its responsibilities. Crafting an effective regulatory regime must predominate in the discussion, and as this Note demonstrates, there is a wide range of manifestations for such a regime.

This Note tentatively concludes that any effective framework must continue to allow title loans to exist and underprivileged borrowers to have access to them. There are abuses in the industry which should draw the scorn of any observer—lending to those who objectively *cannot* make repayment, for instance—but these products may also be the only buffer between some consumers and an eviction. This Note proposes a scheme for maximizing the potential of these products while readily acknowledging that filtering out all of the good from the bad is a tall task.