V. Credit Risk Retention Requirements

A. Introduction

On July 21, 2010, President Barack Obama signed the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank" or "Act") into law.[1] Section 941 of the Act requires federal agencies to issue credit risk retention requirements and amends Section 3(a) of the Securities Exchange Act of 1934.[2] A Notice of Proposed Rulemaking ("NPR") issued on April 29, 2011, outlines potential regulations and offers a glimpse of the coming regulatory scheme.[3] This article discusses the purposes of the risk retention requirements, briefly summarizes the important elements of the currently proposed regulations and concludes with a discussion of several important criticisms of the risk retention requirements.

B. Background and Purpose of the Credit Risk Retention Requirements

Under the traditional mortgage-lending model, the originate-to-hold model, a mortgage lender retains the loan and any risk associated with that loan.[4] Because originate-to-hold lenders retain

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[1] Helene Cooper, *Obama Signs Overhaul of Financial System*, N.Y. TIMES, July 21, 2010, http://www.nytimes.com/2010/07/22/business/22regulate.html (reporting that "President Obama signed a sweeping expansion of federal financial regulation.").

[2] *See* 15 U.S.C.A. § 78c(a)(77) (West 2011) (providing for regulation of credit risk retention).

[3] This NPR was issued by the Department of the Treasury, the Governors of the Federal Reserve System, the Federal Deposit Insurance Commission, the Securities and Exchange Commission, the Federal Housing Finance Agency, and the Department of Housing and Urban Development (collectively, "Agencies"). Credit Risk Retention, 76 Fed. Reg. 24,090 (proposed Apr. 29, 2011) (proposing rules to implement credit risk retention requirements).

[4] *See* ROBERT W. KOLB, THE FINANCIAL CRISIS OF OUR TIME 17 (2011) (stating that the lender "would typically hold the mortgage in its own portfolio of assets for the life of the loan and would service the loan itself by collecting payments on the loan, including escrow payments for taxes and insurance").

risk of borrower default, these mortgage originators have an incentive to write higher-quality loans.[5]

In recent years, mortgage lenders increasingly relied upon an originate-to-distribute model, a model partially responsible for the 2008 financial crisis.[6] Critics point to the originate-to-distribute model as a cause for the increase in sub-prime lending.[7] In an originate-to-distribute transaction, the mortgage originator sells the loan to third parties; these third parties frequently, in the case of the recent financial crisis, securitize the loans and sell them again.[8] The initial lender retains none of the risk of borrower default.[9] Thus, lenders have little incentive under the originate-to-distribute model to make high-quality loans with low risk of default because, by selling those loans to third parties, they completely eliminate their exposure to loss.[10] The originate-to-distribute model of mortgage lending

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[5] *See* Amiyatosh Purnanadam, *Originate-to-Distribute Model and the Subprime Mortgage Crisis*, 24 REV. FIN. STUD. 1881, 1882 (2011) (highlighting an originator's decreased incentive to investigate borrower default risks as "the distance between the originator and the ultimate holder of risk increases").

[6] *See* S. REP. NO. 111-176, at 39-44 (2010) (discussing the history and causes of the financial crisis, including the "downturn in the housing market that in turn exposed a raft of unsound lending practices . . . [that] ultimately led to the failure of a number of companies heavily involved in making or investing in subprime loans").

[7] *See id.* at 128 (2010) ("[T]he originate-to-distribute model] led to significant deterioration in credit and loan underwriting standards, particularly in residential mortgages.").

[8] *See generally* Frank J. Fabozzi & Vinod Kothari, *Securitization: The Tool of Financial Transformation*, (Yale ICF Working Paper No. 07-07, 2007), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_ id=997079 (explaining the securitization process and discussing its advantages).

[9] *See Understanding the Implications and Consequences of the Proposed Rule on Risk Retention: Hearing Before the Subcomm. on Capital Markets and Gov't Sponsored Entities of the H. Comm. on Fin. Services*, 112th Cong. 327 (2011) [hereinafter *Understanding the Implications of Risk Retention*] (prepared statement of Julie Williams, First Senior Deputy Comptroller and Chief Counsel, Office of the Comptroller of the Currency) ("Loan originators were able to underwrite low quality or even fraudulent loans for sale through securitization, without any exposure of the originator or securitizer to the future credit risk of the loans.").

[10] *See* Purnanadam, *supra* note 5, at 1882 ("If the ultimate holders of credit risk do not completely appreciate the true credit risk of mortgage loans, then

provides an incentive for originators to lend to risky borrowers and decreases the overall quality of loans.[11]

The risk retention requirements in Section 941 of the Act are designed to improve the overall quality of loans by requiring parties to retain some exposure to borrower default.[12] If parties must retain some exposure to borrower default, the theory is that they will be less inclined to write sub-prime mortgages.[13] The initial comment period for the proposed regulations was scheduled to end June 10, 2011, but was extended to August 1, 2011, due to the complexity of the proposed regulations.[14] Final regulations have yet to be adopted.

C. Overview of the Proposed Regulations

The proposed regulations set out a number of potential ways for securitizers to comply with the Act by retaining some of the default risk. The Act distinguishes between originators and securitizers when assigning risk.[15] The Act defines a securitizer as "an issuer of an asset-backed security . . . or a person who organizes and initiates an asset-backed securities transaction."[16] Originators, on

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it is easy to see the resulting dilution in the originator's screening incentives.").

[11] *See* Purnanadam, *supra* note 5, at 1882 ("[B]anks with aggressive involvement in the OTD market had lower screening incentives, which in turn resulted in the origination of loans with excessively poor soft information by these banks.").

[12] *See* S. REP. NO. 111-176, at 129 ("Securitizers who retain risk have a strong incentive to monitor the quality of the assets they purchase from originators.").

[13] *Id.* (explaining that "originators (defined as persons who through the extension of credit or otherwise create financial assets that collateralize an asset-backed security, and sell assets to a securitizer) will come under increasing market discipline because securitizers who retain risk will be unwilling to purchase poor-quality assets").

[14] Credit Risk Retention, 76 Fed. Reg. at 34,010 (proposed June 10, 2011) (extending the comment period to August 1, 2011).

[15] *See* 15 U.S.C.A. § 78o-11(a) (West 2011) (amending the Securities Exchange Act of 1934 to define securitizer as "an issuer of an asset-backed security . . . or a person who organizes and initiates an asset-backed securities transaction" and originator as "a person who . . . through the extension of credit or otherwise, creates a financial asset that collateralizes an asset-backed security and . . . sells an asset directly or indirectly to a securitizer").

[16] *Id.*

the other hand, "through the extension of credit or otherwise, creat[e] a financial asset that collateralizes an asset-backed security and . . . sells an asset directly or indirectly to a securitizer."[17] In the proposed regulations, the securitizer, not the originator, will retain the risk.[18]

Due to the diversity of assets that can be securitized, the NPR includes a number of different ways for securitizers to fulfill this risk retention requirement.[19] The proposed regulations set out four general ways for securitizers to retain risk and four additional avenues of risk retention for specific types of asset-backed securities.[20] The four general options for risk retention that the NPR proposes are: (1) vertical; (2) horizontal (as a residual interest, or in a cash reserve account); (3) L-shaped; and (4) representative sample.[21]

Vertical risk retention is the most straightforward risk retention option and requires a securitizer to retain a five percent interest in all tranches of a security.[22] Securitizers can fulfill the horizontal risk retention option in two different ways: straightforward horizontal retention and horizontal cash reserve

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[17] *Id.*

[18] *See* Credit Risk Retention, 76 Fed. Reg. at 24,098-99; *see also* S. REP. NO. 111-176, at 129 (2010) ("[The Dodd-Frank Act] does not require that the regulations impose risk retention obligations on originators.").

[19] *See* Credit Risk Retention, 76 Fed. Reg. at 24,101 ("The options in the proposed rules are designed to take into account the heterogeneity of securitization markets and practices, and to reduce the potential for the proposed rules to negatively affect the availability and costs of credit to consumers and businesses.").

[20] *See* MAYER BROWN, OVERVIEW OF THE PROPOSED CREDIT RISK RETENTION RULES FOR SECURITIZATIONS 5 (Apr. 8, 2011) [hereinafter MAYER BROWN White Paper], *available at* http://www.mayerbrown.com/publications/article.asp?id=10782 (detailing five general ways to retain risk, with other options available for specific asset classes). Due to their similarities, this article includes the horizontal cash reserve fund option as a subset of horizontal retention techniques.

[21] Credit Risk Retention, 76 Fed. Reg. at 24,100-06 (advancing the vertical, horizontal, L-shaped, and representative sample options); *see also* MAYER BROWN White Paper, *supra* note 20, at 34-35.

[22] *See* Credit Risk Retention, 76 Fed. Reg. at 24,101-02 (proposed Apr. 29, 2011). For a more accessible discussion of the proposed risk retention options, see EDWARD E. GAINOR & CHARLES A. SWEET, BINGHAM MCCUTCHEN LLP, A GUIDE TO THE PROPOSED CREDIT RISK RETENTION RULES FOR SECURITIZATIONS (Apr. 4, 2011) [hereinafter BINGHAM White Paper], *available at* http://www.bingham.com/Media.aspx?MediaID=12273.

account.[23] Straightforward horizontal risk retention requires the securitizer to retain a five percent interest in the first-loss tranche.[24] With the horizontal cash reserve account option, the securitizer would create an account equal to the par value of five percent of the securities in the first-loss tranche, the same amount as would be required if she opted for the straightforward option.[25] The horizontal cash reserve account would be used to satisfy any obligations that the securities would otherwise be unable to satisfy and "would be exposed to the same credit risk as a sponsor holding an eligible horizontal residual interest."[26]

The L-shaped option combines the horizontal and vertical options. Under the L-shaped option, securitizers must retain a vertical slice equal to 2.5% of all tranches and a horizontal slice equal to 2.564% of the first-loss tranche.[27] The final general option, the representative sample, allows a securitizer to retain a randomly selected basket of assets from the general pool of assets.[28] The proposed regulations set out rules that ensure the risk retained by the securitizer through this random pool of assets is substantially equal to the risks of the securities issued.[29] Securitizers retaining risk pursuant to the regulations by any method are prohibited from hedging away that risk.[30]

The proposed regulations also contain exemptions from risk retention requirements for qualified assets, government sponsored

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[23] *See* BINGHAM White Paper, *supra* note 22, at 8-9 (discussing horizontal risk retention).

[24] *See* Credit Risk Retention, 76 Fed. Reg. at 24,102-03 (discussing horizontal risk retention).

[25] *Id.*

[26] BINGHAM White Paper, *supra* note 22, at 9.

[27] *See* Credit Risk Retention, 76 Fed. Reg. at 24,103-04 (discussing the L-shaped risk retention option).

[28] *See id.* at 24,104-06 (discussing the representative sample risk retention option).

[29] *See id.* at 24,104-06 (permitting securitizers to meet risk retention requirements "by retaining a randomly selected representative sample of assets that is equivalent, in all material respects, to the assets that are transferred to the issuing entity and securitized").

[30] *See id.* at 24,115-17 (prohibiting "a sponsor or any consolidated affiliate from hedging the credit risk the sponsor is required to retain under the rule").

entities and resecuritizations, as well as other statutory exceptions.[31] Securities backed by asset types that meet preset qualifications will have relaxed retention requirements.[32] A large portion of the proposed regulation sets out standards for qualified residential mortgages.[33] Securities backed by residential mortgages with, among other things, a favorable borrower credit history, a low loan-to-value ratio and regular payment terms will be completely exempt from the risk retention requirements.[34] The regulations set forth similar characteristics for commercial loans, commercial real estate loans and automobile loans, allowing for securities backed by these asset classes to qualify for a partial exemption.[35] The regulations permit these exceptions because of the importance of high credit availability in these sectors and because of the lower risk of borrower default.[36] For those same reasons, the regulations permit exceptions in the case of securitizations guaranteed by government-sponsored entities (namely Fannie Mae and Freddie Mac), securitizations of farm loans, securitizations guaranteed by the federal government and qualified scholarship-funding bonds.[37]

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[31] *See* MAYER BROWN White Paper, *supra* note 21, at 26 ("The proposed rules create an exemption from the risk retention requirements for securitization transactions in which the ABS interests are backed by qualifying assets meeting specified underwriting criteria.").

[32] The characteristics of a qualified asset, as set out in the proposed regulations, are highly detailed and unique to each asset type. Due to the length and specificity of these characteristics, they are outside the scope of this article. For a more in-depth discussion of asset qualification, see Credit Risk Retention, 76 Fed. Reg. at 24,117-42; CADWALADER, WICKERSHAM & TAFT LLP, PROPOSED CREDIT RISK RETENTION REQUIREMENTS FOR ASSET-BACKED SECURITIES TRANSACTIONS 20 (Apr. 6, 2011), *available at* http://www.cadwalader.com/assets/client_friend/040611ProposedABSCreditRiskRetentionReqs.pdf.

[33] *See* Credit Risk Retention, 76 Fed. Reg. at 24,117-29 (discussing qualifying residential mortgages).

[34] *Id.*

[35] *Id.* at 24,129-36.

[36] *See* S. REP. NO. 111-176, at 131 (2010) (discussing the policy considerations involved in the exceptions, granting the power to create exceptions that "help ensure high underwriting standards, encourage appropriate risk management practices, improve access to credit on reasonable terms, or are otherwise in the public interest").

[37] Credit Risk Retention, 76 Fed. Reg. at 24,136-41.

D. Criticism

Given their broad scope, the precise consequences of the risk retention regulations are difficult to predict.[38] However, critics of the proposed regulations have identified some potential flaws in the requirements. The two most prevalent criticisms are that the regulations will be ineffective and that the regulations will stifle securitization.

Critics of risk retention requirements question the effectiveness of such regulation. As an initial matter, academic literature on the effectiveness of risk retention as applied to asset-backed securities is limited and data that could be used to analyze this issue is not readily available.[39] One recent study, however, examines the performance of asset-backed securities, using the relation of the securitizer to the originator to judge the importance of skin-in-the-game.[40] The study looked for a correlation between originator retention and loss; if having skin in the game worked as an incentive to write better loans, originator retention should correlate with lower losses.[41] Originator retention did, in fact, correlate with lower losses;

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[38] *See*, *e.g.*, MAYER BROWN White Paper, *supra* note 21, at 32 (stating that the regulations will be "the most far-reaching substantive regulations ever applied to the market for asset-backed securities").

[39] *See* TIMOTHY F. GEITHNER, FINANCIAL STABILITY OVERSIGHT COUNCIL, *Macroeconomic Effects of Risk Retention Requirements* 6 (Jan. 2011), *available at* http://www.treasury.gov/initiatives/wsr/Documents/Section%20946%20Risk%20Retention%20Study%20%20(FINAL).pdf ("[A]cademic literature on risk retention with respect to asset-backed securitization is limited. Moreover, available information is insufficiently robust to allow for a quantitative comparable analysis for proactively adjusting mortgage origination requirements . . . .").

[40] *See* Cem Demiroglu & Christopher M. James, Works of Friction? Originator-Sponsor Affiliation and Loses on Mortgage-Backed Securities (Jan. 20, 2011) (unpublished manuscript), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1787813) (examining "how originator risk retention is related to the structure, pricing, and performance of securitized pools of residential mortgages created during the 2003–2007 period").

[41] *See* Christopher M. James, *FRBSF Economic Letter: Mortgage-Backed Securities: How Important is "Skin in the Game"?*, FED. RESERVE BANK OF S.F. (Dec. 13, 2010), http://www.frbsf.org/publications/economics/letter/2010/el2010-37.html (citing Demiroglu & James, *supra* note 40) ("[In 'Works of Friction,'] Demiroglu and James . . . examine the relationship

losses in affiliated deals—deals with skin-in-the-game—were roughly half as much as losses with unaffiliated deals.[42]

Even assuming the effectiveness of skin-in-the-game, critics note that the underwriting requirements to qualify for partial exemption from risk retention requirements are too restrictive to be of any use.[43] If the requirements for qualifying assets are too stringent, securitizers won't be able to use the exception and will have to retain risk.[44] The requirements for a qualified residential mortgage are particularly high; a representative from the Mortgage Bankers Association testified that "80 percent of loans sold to Fannie Mae or Freddie Mac over the past decade would not meet these requirements."[45] Although some mortgages would qualify, mortgages that did not would cost more (because the securitizers would have to retain risk), disproportionately impacting low- and moderate-income borrowers.[46] Indeed, even creditworthy potential homeowners will have to wait longer to qualify for a qualified residential mortgage

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between performance, pricing, and distance from loss for a sample of Alt-A MBS.").

[42] *Id.* (finding "loss rates for affiliated deals average less than half the rates for mixed or unaffiliated deals").

[43] MAYER BROWN White Paper, *supra* note 21, at 39 (stating that current underwriting criteria are too restrictive for exemptions from risk retention requirements to be useful).

[44] *Id.* at 27 (observing that "the preliminary impression of most market participants is that the specified underwriting criteria are far too restrictive and inflexible to provide sponsors with meaningful access a qualifying asset exemption").

[45] *Understanding the Implications of Risk Retention*, *supra* note 9, at 88 (prepared statement of Henry V. Cunningham, Jr., Mortgage Bankers Association).

[46] *Id.* at 209 (prepared statement of Ellen Harnick, Senior Policy Counsel, Center for Responsible Lending) (stating that the rules, as proposed, would "exclude much of the middle class, along with large numbers of credit worthy families of color and low- and moderate-income borrowers, from access to QRMs"); *see also "Risk Retention" Proposal Triggers Industry Outcry*, INMAN NEWS (Mar. 30, 2011), http://www.inman.com/news/2011/03/30/risk-retention-proposal-triggers-industry-outcry ("A proposal that would require that companies securitizing mortgages retain 5 percent of the risk on all but the safest loans could leave borrowers who are unable to put at least 20 percent down on a home purchase paying higher fees and interest rates . . . .").

under the proposed regulations.[47] The regulations are in their preliminary stages, though, and the Agencies may relax the standards for qualifying asset classes.

Another concern, which was raised by minority senators in the initial Senate committee report, is that the risk retention requirements would stifle the market for securitization.[48] While the minority senators' criticism that the requirement was a "one-size-fits-all" solution is somewhat ameliorated by the flexibility of the proposed regulations, they also warned that such a requirement could have unexpected consequences on bank balance sheets.[49] This concern was echoed by former Comptroller of the Currency, John C. Dugan, who noted that the combination of new accounting and regulatory rules could force banks to keep all loans on their balance sheets.[50] This would lead to a reduction in securitizations and an

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[47] *Understanding the Implications of Risk Retention*, *supra* note 9, at 302 (prepared statement of Kevin Schneider, President, Mortgage Insurance Companies of America) (observing that "at a typical savings rate, it would take a family earning $50,000 a year, more than eleven years to save a 20% down payment [as proposed in the NPR] on a $153,000 home (the median priced existing house sold in the U.S. in 2010)").

[48] S. REP. NO. 111-176, at 245 (2010) (asserting that as a result of "one-size-fits-all" risk retention requirements, "[s]ecuritizations would . . . become economically unworkable").

[49] *See id.* ("[R]isk retention requirement[s] could force [an] entire securitization to be retained on bank balance sheets for accounting and capital purposes.").

[50] John C. Dugan, Comptroller of the Currency, Office of the Comptroller of the Currency, Dep't of the Treasury, Remarks before the American Securitization Forum (Feb. 2, 2010) (transcript available at http://www.occ.gov/news-issuances/speeches/2010/pub-speech-2010-13.pdf) ("[W]here a securitizer retains a material risk of loss on loans transferred in a securitization, the new accounting and regulatory capital rules may require that *all* loans in the securitization vehicle be kept on the bank's balance sheet.") (emphasis in original). Although an in-depth discussion of the complex relationship between accounting standards and risk retention is outside the scope of this article, the general concern is that, due to recent amendments to Accounting Standards Codification Topic 810 and Topic 860 that already moved many off-balance sheet asset-backed securities transactions on-balance sheet, requiring securitizers to retain risk may disqualify certain transactions from sale accounting treatment. For a more comprehensive discussion, see BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, REPORT TO THE CONGRESS ON RISK RETENTION

increase in the cost of borrowing.[51] Given the important role credit plays in key sectors like housing, a reduction in credit could be devastating to the recovery effort.[52]

Critics prefer increased transparency to risk retention requirements.[53] These critics of the proposed regulation believe that greater transparency allows for more accurate pricing of asset-backed securities—although the extent to which some information can be made available to the securitizer is unknown.[54] Because the cost of acquiring important personal information about a borrower's default risk can be high (e.g., characteristics such as credit history are relatively easy for originators to determine and transmit to securitizers, while characteristics such as a borrower's job security are much more costly and problematic), originators that are likely to securitize loans are less likely to gather such information in the first place.[55] In increasing the collection, availability and disclosure of

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67-75 (2010), *available at* http://www.federalreserve.gov/boarddocs/rptcongress/securitization/riskretention.pdf.

[51] *See* Dugan, *supra* note 50 (arguing that risk retention requirements could reduce the amount of securitizations, which in turn could reduce the amount of available credit).

[52] *See* Adam Tempkin, *Risk-retention Uproar Raises Eyebrows*, REUTERS (June 7, 2011), http://www.reuters.com/assets/print?aid=USN0711944220110607 (stating that numerous lawmakers wrote the Agencies to request "dilution of the risk retention rule and broadening of the QRM [Qualified Residential Mortgage] definition to avoid constricting access to credit and impeding the housing market's recovery").

[53] *Id.* ("Some critics say that risk retention is not needed at all, and that increased transparency is the only thing that might have helped to avoid the crisis.").

[54] *Transparency as an Alternative to Risk Retention: Hearing Before the Subcomm. on TARP, Fin. Services and Bailouts of Public and Private Programs of the H. Comm. on Oversight and Gov't Reform*, 112th Cong. 17 (2011) [hereinafter *Transparency*] (statement of Anthony Sanders, Distinguished Professor of Real Estate Fin., George Mason University) ("Greater transparency would permit more accurate pricing. Greater transparency potentially reduces the asymmetric information between securityzers and investors."); Purnanadam, *supra* note 5, at 1882 ("While some of these characteristics are easy to credibly communicate to third parties, there are soft pieces of information that cannot be easily verified by parties other than the originating institution itself.").

[55] *See* Uday Rajan, Amit Seru, & Vikrant Vig, *The Failure of Models that Predict Failure: Distance, Incentives and Defaults* 6-7 (Univ. of Chi. Booth Sch. of Bus. Initiative on Global Mkts., Paper No. 26, 2010), *available at*

information, the Agencies would allow investors to make informed decisions about the level of risk they are willing to undertake.[56] With increased transparency comes need for need clear and uniform standards, without which the information is less valuable.[57]

E. Conclusion

The proposed regulations requiring risk retention are as complex and nuanced as the asset-backed securities themselves. The NPR posits four potential ways to retain risk, as well as four additional avenues specific to certain asset classes. Certain types of assets, including residential mortgages and commercial loans, that meet stringent criteria to ensure high loan quality will qualify for relaxed retention requirements.

Critics of the proposed regulations argue that the regulations will not affect the overall quality of loans. Further, they claim that the regulations will stifle the securitization market and freeze credit in key industries. The exceptions for qualified assets are too strict to be of any use, and will not help to free up credit in the areas specifically targeted by the exceptions. Accounting principles may cause additional, unexpected interference with the risk retention requirement. Critics advocate instead for increased transparency and disclosure of information about the underlying assets.

The complex nature of asset-backed securities and the current state of uncertainty surrounding the regulations render any prediction about their effects speculative at best. Only when the final

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http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1296982 (stating that a lender has little incentive to acquire personal information if the loans will ultimately be securitized, and hypothesizing that "once the lender starts to ignore the unreported information . . . in its own decision on whether to offer a loan, the quality of the loan pool will worsen").

[56] S. REP. NO. 111-176, at 245 (2010) ("The SEC, a disclosure regulator, should focus its efforts on improving disclosure about the underlying assets in a securitization pool to enable investors to conduct due diligence, rather than instilling in investors a sense of complacency by an arbitrary risk retention requirement.").

[57] *Transparency*, *supra* note 54 at 24 (statement of Joshua Rosner) ("Without a common language and agreement on the meanings of fundamental concepts the value of data is diminished. Conversely, if everybody is using common language—in loan origination or securitization—then it becomes very hard to game the system.").

regulations are issued can there be a more accurate answer as to the ramifications of the Dodd-Frank credit risk retention requirement.

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