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Mortgage Borrowing: A Comparative Analysis of National Regulatory Approaches to Loans and Lenders in Canada and the United States

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Note

Mortgage Borrowing: A Comparative Analysis of National Regulatory Approaches to Loans and Lenders in Canada and the United States

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The United States' recent experience with escalating home mortgage default and foreclosure rates is cause for great concern. Home ownership is regarded as a pillar of the traditional American dream, and for many homeowners their home is their single greatest asset. In exploring what can be done to stem the growing tide of defaults and foreclosures which are inhibiting the ability of many Americans to realize their dream of home ownership, it is useful to compare the approach of the United States with the approach of its neighbor to the north. While Canada's market structures and political institutions are similar to those of the United States, Canadian homeowners have not been subject to the rapid increase in default and foreclosure rates, and have not been exposed to the related growth in the subprime lending market.

The first part of this Note lays out the some of the approaches Canada and the United States take in regulating mortgage loans and the mortgage lending business. This section also discusses the recent experiences of these countries in terms of the size and growth of subprime lending markets, and the corresponding rates of mortgage default and foreclosure. The second part of this Note contrasts the Canadian and American approaches, identifying the most important disparities between these regulatory frameworks and suggesting where the approach of one country has a comparative advantage over that of the other. Finally, this Note concludes that the Canadian

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model has several important advantages in the areas of cost of credit disclosure regimes, mortgage broker registration and oversight frameworks, and limitations on the availability of mortgage loan products. Although regulatory efforts in these areas alone cannot represent a comprehensive approach to reform of the mortgage lending industry in the United States, the Canadian model can be of some use in improving the experiences of U.S. mortgage loan consumers.

I. NATIONAL REGULATORY APPROACHES & RECENT EXPERIENCES

A. THE CANADIAN APPROACH

Much like the United States, Canada's system of government is federal in nature. Under the Canadian Constitution, power is shared between the central Canadian government and the provincial or territorial governments, with each having its own realm of authority.[1] This system of dual sovereignty is relevant to Canada's approach to mortgage borrowing and predatory lending. Under the Canadian Constitution the federal government has the exclusive authority to legislate on matters of financial interest,[2] while provincial authorities have the power to make laws in relation to property and civil rights.[3] Accordingly, both federal and provincial legislatures have a realm of authority by which they can address the problems created by abusive lending practices. However, as the Canadian Center for Elder Law has noted, "[n]either of these sources contains a statute that is geared to address concerns about predatory lending. Instead, rules of general application (some of which are very old) must be fitted to a given situation."[4]

1. *See* Constitution Act, 1867, 30 & 31 Vict. Ch. 3, § 91 (U.K.), *as reprinted in* R.S.C., No. 5 (Appendix 1985) ("It shall be lawful for the Queen . . . to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.").

2. *Id.* § 91(19).

3. *Id.* § 92, 92(13) ("In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say . . . Property and Civil Rights in the Province.").

4. CAN. CTR. FOR ELDER LAW, STUDY PAPER ON PREDATORY LENDING ISSUES IN CANADA 8–9 (2008) [hereinafter CAN. CTR. FOR ELDER LAW]. The Canadian Center for Elder Law is a non-profit charitable organization that addresses legal issues pertinent to the lives of Canada's elderly citizens, and seeks to influence legal

Under its authority to legislate on matters of interest, Canada's federal legislature has adopted two laws designed to combat abusive lending practices: the Interest Act and the creation of criminal interest rate under the usury laws.[5] The primary goals of the Interest Act[6] are to require adequate cost of credit disclosure for loans secured by real property,[7] limit penalties on late payments,[8] and limit penalties on pre-payments.[9] The efficacy of this law in combating abusive lending has been questioned by suggestions that it was adopted in response to lending practices which are no longer relevant and that court cases have significantly limited its scope.[10] The utility of the criminal interest rate provisions in combating abusive lending practices is also unclear. The Canadian Criminal Code[11] defines criminal interest as "an effective annual rate of interest . . . that exceeds sixty per cent . . . ."[12] However, as the Canadian Center for Elder Law has stated, it would be unusual for a lender to structure a mortgage loan in violation of the clear prohibition of this section.[13]

In the absence of more substantial protections against predatory lending at the federal level, Canadian borrowers may have to turn to provincial legislation for remedies when they fall

reforms to benefit elder rights issues. *See* Canadian Center for Elder Law, About, http://www.bcli.org/ccel/about (last visited Oct. 1, 2009).

5. CAN. CTR. FOR ELDER LAW, *supra* note 4, at 9–12.

6. Interest Act, R.S.C., ch. I-15 (1985) (Can.).

7. *See id.* § 6 ("[N]o interest whatever shall be chargeable, payable or recoverable on any part of the principal money advanced, unless the mortgage . . . contains a statement showing the amount of the principal money and the rate of interest chargeable thereon, calculated yearly or half-yearly, not in advance.").

8. *See id.* § 8(1) (limiting the interest chargeable on payments in arrears to that chargeable against the principal not in arrears).

9. *See id.* § 10 (stating that, on mortgages with terms in excess of five years, borrowers are entitled to pay the balance of principal and interest charges accrued to the time of payment and by doing so avoid future interest charges, but requiring a payment of three months future interest to take advantage of this provision).

10. CAN. CTR. FOR ELDER LAW, *supra* note 4, at 10 ("The *Interest Act* was primarily aimed at some very specific abusive practices that . . . are merely of historical concern today . . . . A stream of court cases has served to limit its scope even further.").

11. Criminal Code, R.S.C., ch. C-46 (1985) (Can.).

12. *Id.* § 347(2).

13. CAN. CTR. FOR ELDER LAW, *supra* note 4, at 11 ("The section could be of use in egregious cases of predatory lending, but it would probably be a rare lender that would deliberately structure a mortgage loan carrying an annual rate of interest over 60 percent.").

victim to abusive lending practices in the mortgage market.[14] For the purpose of demonstrating typical consumer protection laws enacted by provincial legislatures, this Note focuses on the laws of British Columbia. British Columbia is home to more than 4,380,300 people, over 13% of Canada's population, making it the third most populous province.[15] Additionally, it boasts the fourth highest growth rate among Canadian provinces and territories, growing faster than both of the more populated provinces of Ontario and Quebec.[16] This high growth rate seems likely to exacerbate the problems caused by lax consumer protection regimes in the mortgage lending market. The Canadian Center for Elder Law has identified four provincial legislative enactments that may be effective in combating abusive lending practices: (1) cost of credit disclosure laws, (2) unconscionable acts and practices laws, (3) the Mortgage Brokers Act, and (4) the Financial Institutions Act.[17] This Note will focus on the first three of these enactments, as the utility of the Financial Institutions Act in combating predatory lending seems doubtful.[18]

Under the cost of credit disclosure provisions in the Business Practices and Consumer Protection Act,[19] a creditor entering into a fixed credit agreement, including a mortgage loan, must make substantial initial disclosures regarding a wide range of terms, from the annual interest rate and method of compounding interest to the conditions under which the borrower may make pre-payments.[20] Additionally, if the interest rate on the loan is a floating rate, the lender must provide the borrower an annual statement disclosing the

14. The Canadian Center for Elder Law has concluded that, "[t]he past 30 years have seen a steady drain of initiative in this area from the federal to the provincial level." CAN. CTR. FOR ELDER LAW, *supra* note 4, at 12 (citing Jacob Ziegel, *Is Canadian Consumer Law Dead?*, 24 CAN. BUS. L.J. 417 (1994–1995)).

15. *See* STATISTICS CAN., REPORT ON THE DEMOGRAPHIC SITUATION IN CANADA 2005 AND 2006, at 6 (2008).

16. *See id.*

17. CAN. CTR. FOR ELDER LAW, *supra* note 4, at 12.

18. *See id.* at 17 ("The prohibition against unfair contracts under the *Financial Institutions Act* is of unknown value, especially given its apparent lack of use to date. It must be borne in mind that many predatory lenders are not credit unions, trust companies, or insurance companies and therefore fall outside the scope of this Act.").

19. Business Practices and Consumer Protection Act, 2004 S.B.C., ch. 2, §§ 66–70 (B.C.).

20. *See id.* § 84(a)–(r) (detailing requirements of the initial disclosure statements). This provision could also fairly be characterized as a "truth-in-lending law." *See* CAN. CTR. FOR ELDER LAW, *supra* note 4, at 13.

effective interest rate.[21] For interest rates that are not floating, but which are subject to increase, similar disclosure requirements apply.[22] Several other miscellaneous reporting requirements are imposed by this statute,[23] creating a broad-based disclosure regime aimed at informing consumers of mortgage loans about the terms of their agreements. The Business Practices and Consumer Protection Act also contains provisions relating to deceptive acts or practices on the part of borrowers.[24] This Act gives Canadian courts a considerable degree of latitude in fashioning equitable remedies in cases where deceptive acts or practices have been found.[25] Additionally, these provisions have the effect of shifting the burden of proof to the lender whenever a charge of violation of this Act is levied against it.[26]

The Mortgage Brokers Act[27] creates a system of oversight of persons engaged in both lending money under mortgage instruments and arranging these transactions.[28] Under the Act, once the Registrar of Mortgage Brokers has received a sworn complaint the Registrar may investigate into a wide range of the broker's affairs, including the broker's books, reports, communications, and transactions.[29] Following an

21. Business Practices and Consumer Protection Act, 2004 S.B.C., ch. 2, § 85(1) (B.C.).

22. *Id.* § 85(2).

23. *See, e.g.*, *id.* §§ 86–87, 89 (discussing disclosure requirements for increases in outstanding principals, amendments, and mortgage loan renewals).

24. *See id.* §§ 4–10; *see also* CAN. CTR. FOR ELDER LAW, *supra* note 4, at 14 (discussing unconscionable or deceptive acts or practices legislation in force in British Columbia). For the purposes of the Act, "deceptive act or practice" is defined as "(a) an oral, written, visual, descriptive or other representation by a supplier, or (b) any conduct by a supplier that has the capability, tendency or effect of deceiving or misleading a consumer or guarantor." Business Practices and Consumer Protection Act, 2004 S.B.C., ch. 2, § 4(1) (2004) (B.C.).

25. *See* Business Practices and Consumer Protection Act, 2004 S.B.C., ch. 2 § 10(2) (B.C.) (allowing the court to set aside or alter all or part of an agreement made, or suspend the rights and obligations of the parties, among other remedies).

26. *Id.* § 9(2) ("If it is alleged that a supplier committed or engaged in an unconscionable act or practice, the burden of proof that the unconscionable act or practice was not committed or engaged in is on the supplier.").

27. Mortgage Brokers Act, R.S.B.C., ch. 313 (1996) (B.C.).

28. The Mortgage Broker's Act uses a broad definition of "mortgage broker" that reaches a large variety of individuals involved in this business. Among other activities that cause one to be labeled a "mortgage broker" are holding oneself out as such, buying or selling mortgage instruments, earning in excess of $1,000 per year as consideration for arranging mortgages, or lending money on the security of ten or more mortgages. *See id.* § 1.

29. *See id.* § 6(2).

investigation, the Registrar may suspend or cancel the broker's registration for a variety of reasons, such as a finding that "the person is a party to a mortgage transaction which is harsh and unconscionable or otherwise inequitable."[30] Notably, however, the Registrar is unable to disclose whether a particular mortgage broker is under investigation,[31] leaving borrowers vulnerable to unscrupulous lenders while investigations are underway.

The federal and provincial legislation detailed above seems to be aimed at fully informing Canadian consumers about the loan products they are receiving, and regulating the behavior of the mortgage industry professionals who are responsible for delivering those products to the borrowers. In addition, certain other restrictions have the practical effect of constraining and limiting the types of mortgage instruments that are marketed to Canadian home buyers. The Canadian Bank Act[32] prohibits banks from issuing mortgage loans for home purchases where more than 80% of the value of the home is being financed.[33] However, an exception is made for loans where the amount in excess of this statutory limit on financing is secured by mortgage insurance from a Canadian government agency or authorized insurer.[34] In general, a home buyer will still be required to make a 5% down payment on the residence to qualify for mortgage insurance.[35] However, on dwellings with more than two units a 10% down payment is required to qualify.[36] Presumably, the effect of these mortgage insurance requirements is to ensure that homeowners establish some degree of equity investment in their homes.

30. *Id.* § 8(1)(c).

31. Fin. Inst. Comm'n, The Role of the Registrar of Mortgage Brokers, http://www.fic.gov.bc.ca/responsibilities/mortgagebrokers/overview.htm (last visited Oct. 1, 2009) ("The Registrar can not disclose if a mortgage broker is under investigation.").

32. Bank Act, 2009 S.C., ch. 46 (Can.).

33. *Id.* § 418 (1) ("A bank shall not make a loan in Canada on the security of residential property . . . if the amount of the loan . . . would exceed 80 percent of the value of the property at the time of the loan.").

34. *See id.* § 418(2), (2)(b) ("Subsection (1) does not apply in respect of . . . a loan if repayment of the amount of the loan that exceeds the maximum amount set out in subsection (1) is guaranteed or insured by a government agency or a private insurer approved by the Superintendent.").

35. Can. Mortgage and Housing Corp., General Requirements, http://www.cmhc-schl.gc.ca/en/co/moloin/moloin_003.cfm (last visited Oct. 1, 2009).

36. *Id.*

B. THE CANADIAN EXPERIENCE

At the time of the 2006 Canadian Census, 68.4% of Canadian households owned their homes, representing the highest rate of homeownership since 1971.[37] Of those households owning their home, 57.9% had a mortgage, representing the highest proportion of mortgage holders since 1981.[38] Thus, it appears that home ownership plays an important role in the lives of most Canadians and that Canadian home purchases are increasingly being accomplished through long-term financing. In addition, home purchase rates in Canada appear to be on the rise. The Canada Mortgage and Housing Corporation reported that in 2007, 7% of all households reported buying a home in the previous year, up from 6% of households in 2006.[39] Notwithstanding these high rates of homeownership, rates of mortgage default in Canada appear to be below 1% across all lending categories.[40] While the subprime default rates are considerably higher than prime default rates, at 2.1%, they still remain relatively low.[41] Additionally, subprime borrowers account for only about 5% of all mortgages written in Canada,[42] further reducing the impact of defaults on the Canadian economy.

C. THE AMERICAN APPROACH

In many ways, the United States' approach to mortgage loans and lenders has been similar to that of Canada. At least two prominent federal laws provide cost of credit disclosure schemes that are applicable to the mortgage lending industry. The first of these is the Truth in Lending Act, which was enacted in 1968.[43] The stated purpose of the Truth in Lending

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37. STATISTICS CAN., CHANGING PATTERNS IN HOMEOWNERSHIP AND SHELTER COSTS, 2006 CENSUS 6 (2006).

38. *Id.*

39. CAN. MORTGAGE AND HOUS. CORP., RENOVATION AND HOME PURCHASE REPORT 7 (2008).

40. Janet Whitman, *Housing Slump Deepens*, NAT'L POST (Can.), Oct. 9, 2008, at FP5 ("In Canada, there are signs the real-estate market is slowing, but that mortgage defaults aren't expected to become commonplace.").

41. Paul Brent, *How Canada Avoids U.S. Problems*, TORONTO STAR, Apr. 30, 2007, at F07 (comparing the mortgage default experiences of the United States and Canada).

42. *The U.S. Subprime Mortgage Meltdown: Will it Spread to Canada?* CBC NEWS, Aug. 31, 2007, http://www.cbc.ca/news/background/personalfinance/mortgage-meltdown.html.

43. Truth in Lending Act, 15 U.S.C. §§ 1601–1667f (2006).

Act is "to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit . . . ."[44] This law specifically applies to mortgages in which the points and fees payable at or before closing exceed 8% of the total loan amount, or $400.[45] While the Truth in Lending Act does not itself set specific disclosure requirements, it requires the Board of Governors of the Federal Reserve System (the Board) to do so.[46] The Act allows the Board to provide for adjustments and exceptions for certain types of transactions as determined by the Board, but specifically exempts qualifying mortgage transactions from this grant of discretionary authority.[47] The regulations promulgated by the Board to implement the Truth in Lending Act are known collectively as Regulation Z.[48] Under Regulation Z, creditors are required to make initial disclosures clearly and conspicuously in writing and in a form that the borrower can retain.[49] Specific disclosures and terms are made applicable to home equity lines of credit,[50] variable-rate mortgages,[51] and closed-end home mortgages.[52]

In addition to the Truth in Lending Act, protections are afforded to home loan consumers by the Real Estate Settlement Procedures Act (RESPA).[53] Rather than focusing on disclosure of the general terms of the mortgage loan, RESPA seeks to address the abusive terms that were increasingly imposed at

44. *Id.* § 1601(a).

45. *Id.* § 1602(aa)(1)(B)(i)–(ii).

46. *See id.* § 1604(a) ("The Board shall prescribe regulations to carry out the purposes of this subchapter.").

47. *See id.*

48. Regulation Z, 12 C.F.R. § 226.1(a) (2009) (stating that the regulation was promulgated to implement the Federal Truth in Lending Act).

49. *Id.* § 226.5(a)(1) ("The creditor shall make the disclosures required by this subpart clearly and conspicuously in writing, in a form that the consumer may keep.").

50. *See id.* § 226.5b(d)(3) (requiring creditors to disclose, among other things, a statement that the creditor is acquiring a security interest in the consumer's dwelling and that the consumer may lose their dwelling in the event of defaulting on the loan).

51. *See id.* § 226.19(b) (mandating disclosure of the terms by which the interest rate is determined and the frequency of interest rate and payment changes).

52. *See id.* § 226.32(d) (prohibiting the imposition of balloon payments, negative amortizations, increased interest rates following a default, and pre-payment penalties on most loans).

53. Real Estate Settlement Procedures Act of 1974, 12 U.S.C. §§ 2601–2617 (2006).

settlement of the loan.[54] Specifically, RESPA prohibits kickback arrangements for business referrals on products and services of "federally related" mortgage loans.[55] Presumably, kickback arrangements constrain competition for loan products and services, raising the overall cost of borrowing. RESPA provides for serious criminal penalties upon a violation, including up to $10,000 in fines and one year in prison.[56] Additionally, RESPA does not preempt more stringent state regulation in this area.[57] Thus, federal legislation has been aimed at fully informing consumers of the terms of their loans, and prohibiting lenders from engaging in specifically enumerated abusive practices.

In stark contrast to the division of regulatory frameworks found in Canada's federal and provincial system, state legislative attempts to impose disclosure regimes have been limited in effect by the policies of federal regulators. In 2003, in response to the state of Georgia's efforts to regulate National City Bank, the Department of Treasury, through the Office of the Comptroller of the Currency, issued a preemption order stating that nationally chartered banks would not be subject to the fair lending laws promulgated by state legislatures.[58] Accordingly, if states are going to play a role in regulating unfair or deceptive issuance of home loans, they will likely have to address the issue from another perspective.

Many states have decided to take up this battle using licensing statutes which require mandatory registration of

54. *See id.* § 2601(a) ("The Congress finds that significant reforms in the real estate settlement process are needed to insure that consumers . . . are protected from unnecessarily high settlement charges caused by certain abusive practices that have developed in some areas of the country.").

55. *See id.* § 2607(a) ("No person shall give and no person shall accept any fee, kickback, or thing of value . . . that business incident to or a part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person."). The term "federally related mortgage" is broadly defined, and includes loans made, in whole or in part, by creditors insured by the Federal Deposit Insurance Corporation, or that are intended to be sold to a federal housing corporation. *See id.* § 2602(1).

56. *Id.* § 2607(d)(1).

57. *Id.* § 2607(d)(6) ("No provision of State law or regulation that imposes more stringent limitations on affiliated business arrangements shall be construed as being inconsistent with this section.").

58. *See* Preemption Determination and Order, 68 Fed. Reg. 46264-02 (Office of the Comptroller of the Currency, Dep't. of the Treasury Aug. 5, 2003) (exempting National City Bank from operation of the Georgia Fair Lending Act based on principals of supremacy, finding that nationally chartered banks derive their authority from federal law).

brokers doing business within the state.[59] As a key link between mortgage products and consumers, mortgage brokers play an important role in the way that many consumers access these products. Accordingly, regulation of mortgage brokers can be a vital tool in promoting fair lending practices. For purposes of comparison, the focus here will be on Minnesota's version of broker registration, the Minnesota Mortgage Originator and Servicer Licensing Act.[60] Under this framework, the Commissioner of Commerce is given broad authority to regulate participants in the mortgage lending industry.[61] Additionally, mortgage lenders and servicers operating within the state are required to abide by a standard of conduct which is made operative through a long list of prohibited practices.[62] Mortgage brokers are also subjected to a fiduciary duty of care through the creation of an agency relationship with the borrower.[63] Finally, the statute gives a private right of action and offers courts several categories of remedial damages to award.[64]

Finally, the United States mortgage market is notable for its less stringent controls on the amount a mortgage loan consumer may borrower relative to the value of their home. Although private banks require a borrower to obtain private mortgage insurance on loans in excess of 80% of the market value of the home,[65] government housing corporations Fannie Mae and Freddie Mac, until recently, would purchase loans that

59. Lawrence Hansen, *In Brokers We Trust—Mortgage Licensing Statutes Addressing Predatory Lending*, 14 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 332, 338 (2005) (stating that most states have such laws, and while they have historically been aimed at registration, they are increasingly imposing duties on the part of brokers toward their clients).

60. Minnesota Mortgage Originator and Servicer Licensing Act, MINN. STAT. §§ 58.01–.18 (2007).

61. *See id.* § 58.12 (establishing that, among other remedies, the commissioner may bar any person from engaging in residential mortgage origination or servicing).

62. Among other prohibitions, mortgage lenders and servicers are prohibited from making mortgages with intent that the borrower not repay it, resulting in foreclosure, arranging for a mortgage which is less advantageous than the borrower could have qualified for, or "churning," where a new loan provides no tangible or reasonable benefit to the borrower over their existing loan. *Id.* § 58.13.

63. *Id.* § 58.161 ("A mortgage broker shall be considered to have created an agency relationship with the borrower in all cases . . . . ").

64. *Id.* § 58.18 (mandating an award of actual and incidental damages, statutory damages, punitive damages where appropriate, and court costs and attorneys' fees).

65. *See* Sarah Max, *Home Buying With No Money Down*, CNN.COM, Dec. 23, 2003, http://money.cnn.com/2003/12/23/pf/yourhome/nodownpayment/ ("[P]rivate lenders still require that borrowers who put down less than 20 percent pay PMI, which protects them if you default on your loan.").

were up to 103% of the market value of the home.[66] Government agencies, including the Department of Housing and Urban Development (HUD), have been accused of fostering irresponsible policies toward the issuance of loans to borrowers who were unable to repay, in order to increase access to home loans for low-income families.[67]

D. THE AMERICAN EXPERIENCE

In 1994, the ratio of subprime mortgages to all originations was around 5%,[68] making the size of the U.S. subprime mortgage market comparable to that of Canada.[69] A mere two years later, the ratio of subprime originations to all mortgages had grown to 9%.[70] The growth in subprime lending continued, and in 1999 one source estimated the ratio of subprime originations at 13%.[71] By 2000, the ratio had reached an astounding 20% of the entire market for mortgage loans.[72] Accordingly, the U.S. mortgage market has become much more heavily leveraged with subprime debt than the Canadian market.[73]

In 2007, delinquency rates on subprime mortgages were reported at 16%, triple the delinquency rate on subprime loans just two years earlier.[74] In January of 2008, the number of subprime loans in delinquency had reportedly risen to 21% and

66. *See id.* (noting that Fannie Mae and Freddie Mac would lend up to 103% of the home's value in order to cover closing costs associated with the purchase).

67. *See* Carol D. Leonnig, *How HUD Mortgage Policy Fed the Crisis*, WASH. POST, June 10, 2008, at A1 ("[HUD] neglected to examine whether borrowers could make the payments on the loans that Freddie and Fannie classified as affordable.").

68. Jay MacDonald, *Watch out for Bad-Loan Signals*, BANKRATE.COM, June 15, 2004, http://www.bankrate.com/brm/news/mortgages/20040615a1.asp.

69. *See supra* text accompanying note 42.

70. *See* Veena Trehan, *The Mortgage Market: What Happened?*, NPR.ORG, Apr. 26, 2007, http://www.npr.org/templates/story/story.php?storyId=12561184 ("Subprime loans expanded to 20 percent of the mortgage market in 2006, from 9 percent a decade earlier.").

71. *See* MacDonald, *supra* note 68.

72. *See* Trehan, *supra* note 70.

73. *See* discussion *supra* Part I.B.

74. Ben S. Bernanke, Chairman, Bd. of Governors of the Fed. Reserve Sys., Speech at the Economic Club of New York: The Recent Financial Turmoil and Its Economic and Policy Consequences (Oct. 15, 2007), *available at* http://www.federalreserve.gov/newsevents/speech/bernanke20071015a.htm ("The rate of serious delinquencies has risen notably for subprime mortgages with adjustable rates, reaching nearly 16 percent in August, roughly triple the recent low in mid-2005.").

foreclosure rates were rising as well.[75] By May of 2008, the delinquency rate was around a staggering 25% among subprime borrowers.[76]

E. SUMMARY

Both Canada and the United States have approached the issue of regulating mortgage loans and mortgage lenders from a variety of angles. Federal and provincial/state legislation supplement one another to address the issues of cost of credit disclosure, imposition of unfair fees and interest rates, and licensing and supervision of persons and institutions involved in lending on the security of residential property. Nonetheless, these two countries have experienced vastly disparate rates of delinquency and foreclosure, especially in subprime lending markets. Inquiring more closely into the terms and implementation of the regulatory frameworks in Canada and the United States offers insight into this disconnect.

II. COMPARING THE APPROACHES OF CANADA AND THE UNITED STATES

A. COST OF CREDIT DISCLOSURE REGIMES

As noted above, both Canada and the United States have implemented statutory cost of credit disclosure regimes that require lenders to inform borrowers of certain loan terms before they enter into a mortgage loan. In the abstract, consumers who have greater access to the terms of their borrowing transactions and the obligations they incur should be better able to select an appropriate loan package for themselves. Informed mortgage loan consumers should also be better able to compare the terms of various loan offers in order to select the most advantageous offers and root out those with unfair terms.[77] If

75. Ben S. Bernanke, Chairman, Bd. of Governors of the Fed. Reserve Sys., Speech at the Women in Housing and Finance and Exchequer Club Joint Luncheon: Financial Markets, the Economic Outlook, and Monetary Policy (Jan. 10, 2008), *available at* http://www.federalreserve.gov/newsevents/speech/bernanke20080110a.htm.

76. Ben S. Bernanke, Chairman, Bd. of Governors of the Fed. Reserve Sys., Speech at the Columbia Business School's 32nd Annual Dinner: Mortgage Delinquencies and Foreclosures (May 5, 2008), *available at* http://www.federalreserve.gov/newsevents/speech/Bernanke20080505a.htm ("About one quarter of subprime adjustable-rate mortgages are currently 90 days or more delinquent or in foreclosure.").

77. *See* Truth in Lending Act, 15 U.S.C. § 1601(a) (2006) (stating that the

Canada's success, vis-à-vis the United States, in controlling the growth of the subprime lending market and default and foreclosure rates can be attributed to a more robust or more effective cost of credit disclosure regime, the United States may benefit from modeling the Canadian regime where Canada's federal and provincial legislation provides greater efficacy.

In enforcing the provisions of the Truth in Lending Act, the Federal Trade Commission (FTC) is vested with broad powers to equitably resolve disputes over inadequate disclosures. The Act gives the FTC the authority and responsibility to ensure compliance.[78] The enforcement mechanisms available to the FTC include adjustment of the terms of the loan if the actual terms of the loan differ from those terms disclosed to the consumer in advance.[79] In addition, creditors who knowingly and willfully violate the disclosure requirements of the Truth in Lending Act may be subject to criminal liability for their conduct. The Act provides for imposition of a fine up to $5,000, up to one year imprisonment, or both.[80]

British Columbia's Business Practices and Consumer Protection Act ("Consumer Protection Act"), discussed above, also provides a remedial clause. The Consumer Protection Act provides that a creditor who violates terms of the Act must compensate the borrower for the loss sustained.[81] The Act also provides that the amount of losses owed to the borrower may be set off against any money then due and payable under the loan and against the principal owed on the loan.[82] Initially, this statute seems to be somewhat less punitive than its counterpart in the United States, the Truth in Lending Act.[83] However, another section of the Consumer Protection Act provides an additional means by which a borrower may obtain damages.

Truth in Lending Act is intended to facilitate the informed use of credit, allowing borrowers to compare the various credit terms available to them and to protect the borrower against unfair practices).

78. *Id.* § 1607(c) ("All of the functions and powers of the Federal Trade Commission under the Federal Trade Commission Act are available to the Commission to enforce compliance by any person with the requirements imposed under this subchapter . . . .").

79. *Id.* § 1607(e)(1)–(2) (allowing the Commission to require an adjustment of finance charges and interest rates so that the consumer does not pay an amount or a percentage which is in excess of the term actually disclosed).

80. *Id.* § 1611.

81. Business Practices and Consumer Protection Act, 2004 S.B.C., ch. 2, § 105(1) (B.C.).

82. *Id.* § 105(1)–(2).

83. *See, e.g.*, Truth in Lending Act, 15 U.S.C. 1611 (2006).

Under the damages section, borrowers can seek equitable remedies including injunctions against the creditor, and return of any property that was acquired by the creditor as a result of the contravention of the Act.[84] Additionally, in a court proceeding for equitable relief, courts are directed to favor the interests of consumers over the interest of businesses.[85] Accordingly, it will be easier for Canadian consumers victimized by unfair trade practices to obtain injunctive relief when a violation of the cost of credit disclosure regime is established.

Despite the fact that British Columbia's Consumer Protection Act affords courts great latitude in fashioning appropriate relief for violations of its disclosure requirements, it seems, at first, hard to argue that the Truth in Lending Act is any less deterrent in its operation, given that it provides for potential criminal liability in addition to judicial alteration of loan terms. However, while the potential for damages and injunctive relief provides an effective deterrent against unscrupulous behavior by lenders in Canada, penalties under the Truth in Lending Act may do little to discourage institutional lenders who ultimately cannot be imprisoned. Nonetheless, if the remedies allowed by these cost of credit disclosure statutes cannot account for disparate experiences in the United States and Canada, a closer look into the substance of the disclosure requirements imposed by each is warranted.

With regard to the timing of required disclosure statements, the Consumer Protection Act of British Columbia provides that the required disclosures must be made at least two days prior the date on which the borrower incurs any obligation to the creditor in relation to the mortgage loan.[86] By way of contrast, Regulation Z requires that the disclosures be made prior to the consummation of the transaction, or within three days of receiving the borrower's application.[87] While the timing of the disclosures under British Columbia's Consumer Protection Act will always result in the borrower receiving the disclosures with sufficient time to review the terms before consummation of the agreement, the Truth in Lending Act appears to allow a lender

84. Business Practices and Consumer Protection Act, 2004 S.B.C., ch. 2, § 171 (B.C.).

85. *Id.* § 172(5)(a) ("[T]he court must give greater weight and the balance of convenience to the protection of consumers than to the carrying on of the business of a supplier . . . .").

86. *Id.* § 66(3).

87. Regulation Z, 12 C.F.R. §§ 226.17(b), 226.19(a) (applying to both mortgage and closed-end credit transactions).

to spring the disclosure statement on the borrower just prior to the signing of the documents. Borrowers are entitled to read through the provisions prior to consummating the deal, but this puts those borrowers at a disadvantage in terms of having sufficient time to reflect on the loan terms and comparison shop. Imposing a timing requirement for disclosure statements which ensures that consumers will have adequate time to review their agreement, such as the two-day advance period imposed by British Columbia, is one way to provide for more integrity in the United States' mortgage lending market.

In other respects, these cost of credit disclosure regimes differ only slightly in substance, and where they do it is often the case that the requirements of the United States' Truth in Lending Act seem more likely to affect full disclosure to consumers than British Columbia's Consumer Protection Act. For example, the regulations implementing the Truth in Lending Act require that the disclosures under that Act "shall be grouped together, shall be segregated from everything else, and shall not contain any information not directly related to the disclosures required . . . ."[88] Under the Consumer Protection Act, "[a] disclosure statement or a statement of account may be a separate document or part of another document."[89] There seems to be an advantage to requiring that the disclosure statements be made as part of a separate document in order to make them more conspicuous and more likely to be noticed and reviewed by the consumer. Since British Columbia's approach affords the lender more discretion in determining how to present the required disclosures to the borrower, it seems more susceptible to the opportunistic behaviors of predatory lenders who would likely seek to minimize the consumer's interaction with the materials. In this regard, it would not seem advisable for the United States to adopt an approach similar to that of British Columbia to supplant its current requirement of separate provision of the required disclosures.

In changing the approach of the United States' cost of credit disclosure regime, it would be best to focus on those reforms providing consumers with required disclosures farther in advance than current regulations require, and revising the remedial portions of the Act to reflect the reality that institutional lenders will not be deterred by the threat of

88. *Id.* § 226.17(a).

89. Business Practices and Consumer Protection Act, 2004 S.B.C., ch. 2, § 67(2) (B.C.).

criminal penalties. In this regard, it may be more effective to increase the potential civil liability and supplement the ability of courts to fashion equitable relief, similar to the abilities of courts under British Columbia's Consumer Protection Act.[90] Additionally, the United States could create a presumption in favor of the consumer or require courts to favor the interests of consumers over those of businesses as British Columbia has done by legislative enactment.[91] In short, greater attention to adequate and timely disclosure of information and more effective and responsive remedial action by courts for violations of disclosure requirements may play an important part in reducing the number of homes in the United States subject to default and foreclosure proceedings.

B. MORTGAGE BROKER LICENSING REGIMES

In addition to the cost of credit disclosure regimes noted above, both Canada and the United States rely on mortgage broker licensing statutes to combat abusive lending practices which are more likely to result in default and foreclosure proceedings. By imposing registration requirements on individuals and institutions who are involved in the procurement of home mortgage financing, these statutes make it possible to oversee the conduct of these actors. If it can be shown that the mortgage broker licensing regimes used in Canada are more robust or extensive than those used in the United States, this may suggest that the United States should follow Canada's lead in subjecting these actors to heightened oversight and discipline for conduct that falls outside of permissible norms.

As noted above, this Note focuses on the mortgage broker licensing regimes of Minnesota as representative of how these regimes operate in the United States. That framework will be contrasted with the Mortgage Brokers Act of British Columbia. The Minnesota Mortgage Originator and Servicer Licensing Act (Minnesota Mortgage Originator Act) requires that certain persons obtain a license from the Commissioner prior to engaging the mortgage origination and servicing transactions. However, there are important limitations on who is required to

90. *See id.* § 171 (allowing a person injured by a contravention of the Consumer Protection Act to bring suit against a supplier, reporting agency, collector, bailiff, or licensed broker).

91. *See supra* note 85 and accompanying text.

register under this Act. The statute creates two classes of licensed persons, mortgage originators and mortgage servicers.[92] Only business associations that are also approved as mortgagees by HUD or the Federal National Mortgage Association can qualify as mortgage originators.[93] Accordingly, individual actors are only reached through the mortgage servicer licensing requirements. There is an important limitation on the scope of both of these licensing requirements. Both sets of requirements exempt financial institutions that are overseen and regulated by a federal agency.[94] These exemptions from coverage may very well be required by principals of supremacy of federal law. The Department of the Treasury has stated that fair lending laws enacted by state legislatures cannot be enforced against federally chartered banks because those institutions derive their authority from federal law.[95] It seems very likely that any attempt by state legislatures to regulate the lending activities of institutions subject to federal oversight would be rejected on similar grounds. As a result the scope of state mortgage broker regulation may be limited to this extent in the United States.[96]

Unlike its counterpart in the United States, which is defined more by exemptions than inclusions, British Columbia's Mortgage Brokers Act uses a broad definition of "mortgage broker," encompassing anyone who lends money, their own or someone else's, in whole or in part secured by a mortgage; anyone who receives consideration for arranging such a transaction; anyone who holds themselves out to be a broker of mortgages; and even anyone who collects money secured by mortgages.[97] This broader definition is also subject to a

92. Minnesota Mortgage Originator and Servicer Licensing Act, MINN. STAT. § 58.04 subdivs. 1–2 (2007).

93. *Id.* § 58.04 subdiv. 1(b).

94. *Id.* § 58.04 subdivs. 1(c)(2), 2(b)(4); *See also id.* § 58.02 subdiv. 10 ("The term 'financial institution' also includes a subsidiary or operating subsidiary of a financial institution or of a bank holding company as defined in the federal Bank Holding Company Act . . . if the subsidiary . . . can demonstrate to the satisfaction of the commissioner that it is regulated and subject to active and ongoing oversight and supervision by a federal banking agency . . . or the commissioner.").

95. *See* Preemption Determination and Order, *supra* note 58.

96. Notably, although exempted individuals and institutions are not required to be registered under the Act, the Act still purports to impose all of the requirements of the Act on all the actors exempted. This may mean that a cause of action under Minnesota Mortgage Originator Act still exists against an individual who is not required to be registered according to the terms of this section. *See* Minnesota Mortgage Originator and Servicer Act, MINN. STAT. § 58.05 subdiv. 1 (2007).

97. *See supra* note 27 and accompanying text.

narrower set of exemptions,[98] ensuring that a broader range of non-traditional lenders will fall within the purview of the Act. Accordingly, this is an area where the Canadian approach may result in a more effective system of oversight and regulation. Nonetheless, the approach in Minnesota remains fairly broad, and given principles of supremacy, the Minnesota Mortgage Brokers Act is probably crafted to be as broad as possible. Absent a change in supremacy approaches or the enactment of federal mortgage broker registration acts, this is one area where the United States approach probably cannot profitably be made more similar to that of Canada.

Beyond the registration requirements, the Minnesota Mortgage Originator Act gives plenary powers to the Commissioner to take a number of actions against licensees for a wide range of conduct that the Commissioner may find inconsistent with the obligations of a mortgage originator or servicer. Likewise, under British Columbia's Mortgage Brokers Act, the Registrar is entitled to suspend or cancel an individual's or an institution's registration for a wide variety of reasons. Under the British Columbia Act, the Registrar may take action against a registered broker when he determines that there has been a violation of the Act; when there has been a violation of certain relevant provisions of the Business Practices and Consumer Protection Act (discussed above); when the person is a party to an unconscionable or inequitable mortgage transaction; or when the person is conducting their business in a prejudicial manner.[99] Accordingly, the Registrar is able to take action against a registered person for a great number of transactions that affect the person's performance as a mortgage broker.

Arguably, however, the Minnesota Mortgage Originators Act is even broader in terms of the situations which vest the Commissioner with the power to act against a licensee. As an initial step, the Commissioner must find that an order affecting the suspension, revocation, or similar sanction, is in the public interest.[100] This is a standard that will not be difficult to meet in the vast majority of situations that meet the requirements of the second step. In the second step, the Commissioner is

98. *See* Mortgage Brokers Act, R.S.B.C., ch. 313, § 11 (1996) (B.C.).

99. *Id.* § 8(1)(a)–(f).

100. Minnesota Mortgage Originator and Servicer Act, MINN. STAT. § 58.12 subdiv. 1(b) (2007) ("In order to take the action . . . the commissioner must find: (1) that the order is in the public interest.").

entitled to suspend or revoke a license for any of the situations under which the Registrar may do so under the British Columbia Act; and, in addition, for certain conduct unrelated to the licensee's business in the mortgage lending industry. For example, a license may be revoked for any person convicted of a crime involving "moral turpitude,"[101] engaging in deceptive acts or practices—whether or not related to mortgage lending[102]—or even "engaged in an act or practice . . . that demonstrates untrustworthiness, financial irresponsibility, or incompetence."[103] These provisions allow the Commissioner to sanction a licensed mortgage broker for almost any undesirable conduct since the scope of the situations that trigger the Commissioner's ability to do so extend beyond the mortgage lending business. This should, in theory, give the Commissioner a greater ability to "weed out" undesirable characters from the mortgage lending industry.[104] Since the Minnesota Mortgage Originator Act is broader than Mortgage Broker's Act in this scenario, it would not seem advisable to conform the Minnesota Act to its British Columbia counterpart.

In addition to the scope of conduct that triggers the Commissioner's ability to take action against a licensee under the Minnesota Mortgage Originator Act, there is an additional reason to indicate that the Act is a sufficient measure in combating abusive lending when compared to British Columbia's Mortgage Brokers Act. The Minnesota Mortgage Originator Act creates a private right of action for violations of its terms.[105] Importantly, this private right of action is not available against banks, savings banks, or credit unions chartered under state or federal law,[106] but provides ample recourse for borrowers who have been victimized by other actors in the mortgage lending process. Since the extent of damages

101. *See id.* § 58.12 subdiv. (b)(2)(vi).
102. *See id.* § 58.12 subdiv. (b)(2)(iv).
103. *Id.* § 58.12 subdiv. (b)(2)(v).
104. Thus, an individual performing mortgage origination services, even if not technically a mortgage originator himself, could be barred from engaging in future mortgage origination services where the individual submitted loan applications with false, misleading, or deceptive statements and directed a title company employee to falsify title work. Pomrenke v. Commissioner, 677 N.W.2d 85, 92 (Minn. Ct. App. 2004).
105. *See* Minnesota Mortgage Originator and Servicer Act, MINN. STAT. § 58.18 subdiv. 1 (2007) ("A borrower injured by a violation of the standards, duties, prohibitions, or requirements of [this Act] shall have a private right of action . . . .").
106. *Id.* § 58.18 subdiv. 4.

available under this section is very broad,[107] it should provide a sufficient deterrent effect against violations of the Act, in addition to the deterrent effect of likely suspension or revocation of the licensee's license by the Commissioner.

This is an area where an important difference exists between the approach of British Columbia and that of Minnesota. While British Columbia's Mortgage Broker's Act does not create a private right of action, that Act does provide for the imposition of potentially very large civil and criminal penalties against an individual or institution found to have violated provisions of the Act. On a first offense, whether the violating registrant is a corporation, other business association, or an individual, a penalty of up to $100,000 may be imposed, and, in the case of an individual, this penalty may be supplemented by a term of imprisonment of up to two years.[108] For subsequent offenses, the penalty is increased to $200,000 per offense, and individuals continue to face the threat of imprisonment for up to two years per offense.[109] While the nature of the available recourse for violations of this law is different than under the British Columbia Act, being public rather than private, the large amount of monetary penalties that an offender faces, in addition to the threat of criminal penalties, would seem to be no less deterrent than the private right of action that violators face under the Minnesota Mortgage Originator Act.

Although the Minnesota Mortgage Originator Act appears to be sufficiently broad and comprehensive in its treatment of mortgage broker licensing, there are significant dissimilarities between that Act and the Mortgage Brokers Act of British Columbia. In this respect, the British Columbia Act enjoys some advantages over the Minnesota Act. Mortgage broker registration and licensing regimes in the United States may benefit from the experiences of the Canadian registration regimes by seeking to broaden the class of individuals and institutions over whom the Act authorizes supervision. Since the Minnesota Act appears to be broader, on its face, than the British Columbia Act in terms of what types of conduct vest the Commissioner with remedial powers under the Act, it is unlikely that the Minnesota Act would benefit from being brought closer in line with the British Columbia Act in that

107. *See supra* note 64 and accompanying text.
108. *See* Mortgage Brokers Act, R.S.B.C., ch. 313, § 22(2) (1996) (B.C.).
109. *Id.*

regard. Finally, the British Columbia Act may enjoy an advantage in terms of the penalties that are allowed against violating mortgage brokers. The Minnesota Act could seek to impose civil penalties on institutions, and possibly even criminal penalties on individuals, in addition to allowing for a private right of action when violations of the Act occur.

III. ADDITIONAL RESTRICTIONS ON LOAN PRODUCTS

This Note has indicated certain areas in which the Canadian approach to regulation of mortgage loans and mortgage lenders and brokers has advantages over the approaches of the United States at both the federal and state levels. This has included suggestions that the approach of the United States could benefit from being brought into line with the Canadian approach in terms of mortgage broker licensing frameworks and cost of credit disclosure regimes. This section seeks to identify important disparities in the approaches of the United States and Canada to regulating the types of mortgage loan products that are permitted to be marketed to consumers.

As discussed above, the Canadian Bank Act is an important piece of federal Canadian legislation that has the practical effect of restraining the availability of financial products secured by residential homes. Under that Act, borrowers must make a large down payment or, alternatively, acquire mortgage insurance, and at any rate the borrower will usually need at least a 5% down payment.[110] Since borrowers will, thus, have at least some degree of equity in their home, they will be the first to lose on their investment in the event that the loan goes into default, the lending institution initiates foreclosure proceedings, and the home is sold for less than the full purchase price of the home. In theory this should incentivize conservative borrowing since consumers will want to be certain that they can stay current with their mortgage obligations. In addition, when mortgage loan consumers find themselves in a situation where staying current on their obligations is becoming more difficult, this substantial exposure to equity loss should tend to cause consumers to address their mortgage loan obligations before turning to other creditors. This ought to limit the number of

110. *See* Can. Mortgage and Housing Corp., *supra* note 35 ("You will typically have a down payment of at least 5% of the purchase price of the dwelling, depending on the dwelling type."). *See also supra* Part I.A.

defaults and resulting foreclosures under Canadian mortgage instruments.

The approach of the United States in this area has been decidedly less conservative. While borrowers in the United States are usually required to obtain mortgage insurance on loans in excess of 80% of the home's market value,[111] as in the Canadian mortgage market, the quasi-governmental entities Fannie Mae and Freddie Mac would purchase home mortgage loans in the secondary mortgage market for up to 103% of the market value of the home.[112] It is easy to see the effect of this permissive secondary purchase structure on the availability of mortgage products to consumers. Rather than protecting, at a minimum, the 5% initial equity rate present in Canadian mortgage packages, this lending structure allows borrowers in the United States to acquire negative equity. Borrowers are able to owe more on their home loans than the home is worth. Accordingly, the incentive structure present in the Canadian system, outlined above, is absent from the mortgage market in the United States. In the event that a borrower defaults on her loan, the lending institution initiates foreclosure proceedings and sells the home at below the purchase price. A borrower with no equity in their home loses nothing personally. This removes the incentive for consumers to borrow conservatively, fearing that they will lose their own equity investment in a home on which they would not be able to keep up with the payments. Additionally, when the borrower is placed in a situation where paying their bills became difficult, that borrower may very well be more willing to walk away from the home and allow the lending institution to take all of the down-side on the investment. Indeed, there is evidence that this is what is happening in many of the areas of the United States which are being hardest hit by the down-turn in the housing market.[113]

111. *See supra* note 65 and accompanying text.

112. *See supra* note 66 and accompanying text.

113. *See* John Leland, *Faced with Mortgage Default, Some U.S. Homeowners Walk Out*, N.Y. TIMES, Feb. 29, 2008, at A1 (profiling a business that assists homeowners in abandoning their homes and mortgage obligations and stating, "In an era in which new types of loans allowed many home buyers to move in with little or no down payment, and to cash out any equity by refinancing, the meaning of homeownership and foreclosure have [sic] changed . . . ."); *When Homeowners Walk Away: New Research Reveals More Than 25 Percent of Mortgage Loan Defaults Are Strategic*, REUTERS, June 26, 2009, http://www.reuters.com/article/pressRelease/idUS131544+26-Jun-2009+PRN20090626 [hereinafter *When Homeowners Walk*

While it is true that many borrowers in Canada do not need to invest a great deal of equity in their home in order to obtain financing, it may be the case that even this minimal amount of equity interest in the borrower's home is an important factor in encouraging staying current with one's mortgage obligations. Although not all borrowers in the United States elect to purchase their homes with no down payment, that trend is growing and the amount of equity investment is diminishing.[114] This is likely an area in which the Canadian approach to mortgage lending has significant advantages to the approach of the United States in terms of promoting stability and conservative borrowing in the mortgage market.

III. CONCLUSION

The approaches of Canada and the United States towards the regulation and oversight of mortgage loans and mortgage lending practices have a great deal in common. Both frameworks seek to protect home mortgage loan consumers from unfair and abusive practices by requiring certain disclosures to be made to borrowers regarding the cost of credit of the loan products being considered. Both Canada and the United States impose certain duties and limitations on the conduct of mortgage brokers. Finally, both countries seek to limit the types of loan products that may be offered for sale to consumers by imposing mortgage insurance requirements on the proceeds of a loan which are in excess of 80% of the secured property's market value at the time the loan is issued. Notwithstanding the substantial overlap of regulatory frameworks between these countries, Canada has had substantially less exposure to escalating default and foreclosure rates, and has seen essentially no growth in the subprime lending market.

This Note has identified certain contexts in which the Canadian approach to mortgage loans and lenders offers advantages over the approach of the United States. In some situations, it may be an advantage for the United States, both at

Away] (examining "American homeowners' propensity to default when the value of a mortgage exceeds the value of their house, even if they can afford to pay their mortgage.").

114. *See When Homeowners Walk Away, supra* note 113 (stating that in 2008 29% of borrowers put no money down, that the median down payment was 9%, compared with 20% in 1989, and that the median down payment for first time borrowers was only 2%).

the federal and state levels, to bring its approach more in line with that of Canada. These instances include broadening the scope of the cost of credit disclosure laws to ensure that consumers receive disclosure statements sufficiently in advance to be able to fully evaluate the loan and any alternatives, imposing criminal liability on individual mortgage brokers who violate the provisions of applicable mortgage broker registration statutes, and imposing more effective caps on the maximum loan amounts in order to ensure that borrowers maintain a higher degree of equity in their homes. This Note has addressed only a segment of the issues that are relevant to mortgage lending, and comprehensive approaches to the rapidly evolving crisis in the United States will have to take into account other factors, such as the incentives created by the securitization of home mortgage loans. Nevertheless, implementing these changes may play an important role in controlling the default and foreclosure rates in the United States.