THE CONSUMER FINANCIAL PROTECTION BUREAU: AN INTRODUCTION

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I. Introduction

In the wake of the financial crisis of 2008, Congress undertook a major overhaul of financial regulation, culminating in the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the "Dodd-Frank Act"). The Dodd-Frank Act covers an incredibly wide range of financial regulatory issues, from systemic risk to debit card swipe fee regulation, but perhaps the most important reform—and certainly the most immediately tangible one—was the creation of the Consumer Financial Protection Bureau ("CFPB"). The CFPB is an independent bureau housed within the Board of Governors of the Federal Reserve (the "Fed"), [1] itself an independent regulatory agency. The CFPB has a wide regulatory ambit with rulemaking, supervision, and enforcement authority over nearly all firms involved in consumer financial services, irrespective of their particular legal form.[2] While there has been a great deal of journalistic coverage of the CFPB, there is no single overview work on this powerful new agency. This Article is meant to provide a legal and political overview of the CFPB, covering its history, structure, powers, and ongoing politics.

II. History and Policy Behind the CFPB

A. Consumer Finance Regulation Before the CFPB

Consumers use a wide range of financial products and services in order to transact and manage risks in their lives. They use these products and services to pay for purchases and otherwise transfer value (payments); to advance funds from the present to the future (savings and investment); to advance funds from the future to

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[1] *Consumer Financial Protection Bureau*, FED. REG., https://www.federalregister.gov/agencies/consumer-financial-protection-bureau (last visited Apr. 1, 2013).

[2] *See About Us*, CONSUMER FIN. PROTECTION BUREAU, http://www.consumerfinance.gov/the-bureau/ (last visited Apr. 1, 2013).

today (borrowing); and to manage risks (insurance).[3] A wide variety of entities either supply consumers with products that perform these functions or advise consumers on which products to use.

Prior to the New Deal, the consumer finance business was run almost entirely through state-law entities: individuals, state-chartered banks, thrifts, credit unions, finance companies, insurance companies, and retailers.[4] The federal government played almost no role in consumer protection in the financial arena. Instead, consumer protection in general, including in financial services, was part of the general police power of the states.[5]

Pre-New Deal state regulation of consumer finance took three main forms. First, state tort and contract law provided protections against fraud, misrepresentation, and other forms of unfair dealing.[6] Second, every state had a usury statute that limited the maximum legal rate of interest for certain types of borrowing transactions.[7] And third, state law often restricted the types of products that state-chartered financial institutions were permitted to offer. While these restrictions often had consumer protection benefits, they were designed first and foremost to protect the solvency of financial institutions by limiting the types of risks they could assume. Enforcement of consumer finance regulation was primarily a private affair, although usury was sometimes a criminal matter.

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[3] Peter Tufano, *Consumer Finance*, 1 ANN. REV. FIN. ECON. 227, 229 (2009).

[4] The sole exception prior to the New Deal was for national banks, which played a relatively minor role as direct consumer finance lenders. Commercial banks (state and federally chartered) provided only 1% of consumer installment credit in 1929 and less than 7% even as late as 1938. DUNCAN MCC. HOLTHAUSEN ET AL., THE VOLUME OF CONSUMER INSTALLMENT CREDIT, 1929–1938, at 98 (1940). Instead, national banks' importance in consumer finance was as lenders to consumer finance companies. 3 JOHN M. CHAPMAN ET AL., COMMERCIAL BANKS AND CONSUMER INSTALMENT CREDIT 21, 193 (1940).

[5] ADAM J. LEVITIN, THE CONSUMER FINANCIAL PROTECTION AGENCY 3 (2009), *available at* http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Financial_Reform/Pew-Levitan-CFPA.pdf (briefing paper prepared for the Pew Economic Policy Department's Financial Reform Project).

[6] *Id*.

[7] 3 CHAPMAN, *supra* note 4, at 47.

The institutional and regulatory framework for consumer finance began to change during the New Deal and World War II, with the federal government assuming an increasingly important role. Federal charters became available for new types of financial institutions[8] and the federal government got into the business of insuring or guaranteeing deposits and mortgage loans and then later the business of making or guaranteeing student loans.[9] With chartering and insurance came federal regulation, sometimes preempting state regulation, sometimes co-existing with it. At first this federal regulation was, like state financial institution regulation, aimed primarily at ensuring the solvency of federally chartered or insured institutions.[10]

For example, restrictions on the rate of interest federally insured banks could pay on deposits were aimed at preventing bank failures.[11] While bank failures harmed consumers, the main policy concern was not the "plight of individual depositors" so much as the systemic effect of bank failures because of contraction of the

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[8] Home Owners' Loan Act of 1933, Pub. L. No. 73-43, § 5, 48 Stat. 128, 132 (1933) (codified as amended at 12 U.S.C. §§ 1461–1468c (2006)) (creating federal thrift charter); Federal Credit Union Act, Pub. L. No. 73-467, § 4, 48 Stat. 1216, 1217 (1934) (codified as amended at 12 U.S.C. §§ 1751–1795k) (creating federal credit union charter).

[9] Banking Act of 1933, Pub. L. No. 73-66, § 8, 48 Stat. 162, 168 (codified as amended in scattered sections of 12 U.S.C.) (creating federal deposit insurance); National Housing Act, Pub. L. No. 73-479, § 402, 48 Stat. 1246, 1256 (1934) (codified as amended at 12 U.S.C. §§ 1701–1749aaa-5) (creating Federal Savings and Loan Insurance Corporation); Servicemen's Readjustment Act of 1944, Pub. L. No. 78-346, §§ 500–505, 58 Stat. 284, 291–93 (1944) (codified as amended in scattered sections of 38 U.S.C.) (allowing the Veterans Administration to extend mortgage loan guarantees); National Defense Education Act of 1958, Pub. L. No. 85-864, §§ 201–209, 72 Stat. 1580, 1583–87 (1958) (repealed 1986) (creating the first federal direct student loan program).

[10] Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189, 1251 (1986).

[11] *See* Banking Act of 1933 § 11, 12 U.S.C. § 371a (prohibiting payment of interest on demand deposits by Federal Reserve System member banks), *repealed by* Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), Pub. L. No. 111–203, § 627(a)(1), 124 Stat. 1376, 1640 (2010) (effective July 21, 2011) (codified in scattered sections of the U.S. Code); Regulation Q, 12 C.F.R. § 217 (1979), *repealed by* 76 Fed. Reg. 42,015, 42,020 (July 18, 2011).

monetary supply.[12] To be sure, deposit insurance also had an important collateral effect of consumer protection.[13] Similarly, the federal government's intervention in housing finance, including interest rate caps on mortgages insured by the Federal Housing Administration or Veterans' Administration,[14] was deliberately aimed at fostering the use of long-term, amortized mortgages because of their macroeconomic stability benefits.[15] These stability benefits were the aggregate result of the individual consumer protection benefits from these mortgages.[16] Ultimately, though, the protection of individual consumers was not a feature of New Deal financial regulation.

World War II saw further federal involvement in the regulation of consumer credit. This was done explicitly for purposes of furthering the war effort.[17] These regulations, which existed with

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[12] Carter H. Golembe, *The Deposit Insurance Legislation of 1933: An Examination of Its Antecedents and its Purposes*, 75 POL. SCI. Q. 181, 192–93 (1960).

[13] Rabin, *supra* note 10, at 1251.

[14] Servicemen's Readjustment Act of 1944, Pub. L. No. 78-346, § 100, 58 Stat. 284 (1944) (creating the Veterans' Administration); National Housing Act, Pub. L. No. 73-479, § 1, 48 Stat. 1246 (1934) (creating a Federal Housing Administration).

[15] *See* Adam J. Levitin & Susan M. Wachter, *The Public Option in Housing Finance*, 46 U.C. DAVIS L. REV. (forthcoming 2013). The rate caps can also be seen as a type of credit rationing in the face of limited underwriting information.

[16] *Id.*

[17] Soldiers' and Sailors' Civil Relief Act of 1940, Pub. L. No. 76-861, 54 Stat. 1178, 1179–91 (restricting debt collection against military servicemembers, their dependents, guarantors and sureties and capping interest on their debts at 6%), *amended by* Soldiers' and Sailors' Civil Relief Act Amendments of 1942, Pub. L. No. 77-732, 56 Stat. 769 (1942); Exec. Order No. 8843, 6 Fed. Reg. 4035, 4035–37 (Aug. 13, 1941) (authorizing Federal Reserve to regulate consumer credit in order to suppress consumer demand for durables the production of which would claim resources needed for national defense); Regulation W: Consumer Credit, 27 FED. RES. BULL. 837, 839–48 (1941) (regulating maturity terms and loan-to-value ratio for various types of installment credit); Statement by the President Upon Approving Resolution Continuing Regulation of Consumer Credit, 1947 PUB. PAPERS 379 (Aug. 8, 1947) (signing statement indicating President's preference for indefinite continuation of Regulation W and urging lenders to "avoid undue relaxation of terms"). The regulation of consumer credit authorized by Executive Order 8843, known as

minor interruptions until 1952, were aimed at reducing consumer demand so that war production would not have to compete with private consumption. While there were collateral consumer protection benefits from reducing the availability of credit, the policy goal was otherwise.

Starting in 1938, the Federal Trade Commission ("FTC") began to have authority to proscribe "unfair or deceptive acts or practices" ("UDAP").[18] The FTC's jurisdiction extended to retail and non-bank credit, which was quite common at the time. Banks, however, were explicitly exempted from the FTC's new authority.[19] Prior to 1975, federally chartered and federally insured financial institutions were not subject to federal prohibitions on unfair and deceptive acts and practices.[20] In practice, however, federal bank regulators had a great deal of moral suasion to affect federally chartered or insured banks' behavior, and federal bank regulators did

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Regulation W, was superseded in 1947, *see* Act of Aug. 8, 1947, Pub. L. No. 80-386, 61 Stat. 921 (1947) (setting Nov. 1, 1947, expiration date for Regulation W), reauthorized in 1948, *see* Act of Aug. 16, 1948, Pub. L. No. 80-905, 62 Stat. 1291 (1948) (sunset on June 30, 1949), reauthorized again in 1950, *see* Defense Production Act of 1950, Pub. L. No. 81-774, §§ 601–05, 64 Stat. 798, 812–15 (1950) (sunset on June 30, 1951); 36 FED. RES. BULL. 1177 (1950), extended in 1951, *see* Act of June 30, 1951, Pub. L. No. 82-69, 65 Stat. 110 (1951) (extending sunset to July 31, 1951), further extended and amended by the Defense Production Act Amendments of 1951, Pub. L. No. 82-96, §§ 106, 111, 65 Stat. 131, 137–38, 144 (1951) (sunset on June 30, 1952), discontinued by regulation in 1952, *see* 38 FED. RES. BULL. 497 (1952), and ultimately repealed by the Defense Production Act Amendments of 1952, Pub. L. No. 82-429, § 116, 66 Stat. 296, 305 (1952).

[18] Wheeler-Lea Act of 1938, Pub. L. No. 75-447, § 2, 52 Stat. 111, 111 (1938) (codified as amended at 15 U.S.C. § 45 (2006)). The FTC had already been experimenting with using its "unfair competition" power to address some of the issues covered by its UDAP power. *See* Legislation, The Federal Trade Commission Act of 1938, 39 Colum. L. Rev. 259, 260 (1939).

[19] Wheeler-Lea Act § 3.

[20] Magnuson-Moss Warranty Act, Pub. L. No. 93-637, § 202, 88 Stat. 2183, 2196 (1974) (codified as amended at 15 U.S.C. § 57a(f)), *amended by* Dodd-Frank Act, Pub. L. No. 111-203, § 1100H, 124 Stat. 1376, 2094, 2113 (2010). Every state eventually adopted "Little FTC Acts" that included UDAP provisions of various sorts. Henry N. Butler & Jason S. Johnston, *Reforming State Consumer Protection Liability: An Economic Approach*, 2010 COLUM. BUS. L. REV. 1, 12–13 (2010).

have the power to take away federally chartered banks' charters. Moreover, starting in 1966, federal bank regulators had the power to order banks to cease and desist from "unsafe and unsound practices."[21]

The federal government began to play an increasingly large role in the regulation of key areas of consumer finance starting with the landmark Consumer Credit Protection Act of 1968.[22] Since then, the federal government has played a major or exclusive regulatory role for consumer payments, consumer lending, bank deposits, debt collection and credit reporting, consumer goods warranties, and various associated areas, such as certain types of insurance or interstate sales.

Prior to the creation of the CFPB, federal responsibility for consumer financial protection was divided among a large number of regulatory agencies.[23] Some of these agencies had the ability to promulgate regulations, some also exercised supervisory authority over financial institutions, and some only enforced existing regulations.[24] Sometimes authority was over a class of institutions, and sometimes it was over a particular type of product.[25] Thus, responsibility for consumer protection was split among the:

- Office of the Comptroller of the Currency (national banks, federally chartered branches, agencies of foreign banks);
- Office of Thrift Supervision (federal thrifts and thrift holding companies);
- National Credit Union Administration (federal credit unions and federally insured state credit unions);
- Federal Reserve Board (bank holding companies, state-chartered member banks, nonblank subsidiaries of bank holding companies, Edge and agreement corporations, branches and agencies of foreign banking organizations operating in the United States and their parent banks,

[21] Financial Institutions Supervisory Act of 1966, Pub. L. No. 89-695, §§ 101, 102, 202, 80 Stat. 1028, 1028–53 (1966) (codified as amended in scattered sections of 12 U.S.C.).
[22] Pub. L. No. 90-321, 82 Stat. 146 (1968) (codified as amended in scattered sections of 15 and 18 U.S.C.).
[23] LEVITIN, *supra* note 5, at 1.
[24] *Id.* at 3.
[25] *Id.*

Equal Credit Opportunity Act rulemaking, and some aspects of checks and electronic payment systems);

- Federal Deposit Insurance Corporation (state-charted insured banks and insured branches of foreign banks);
- Federal Housing Finance Agency (the mortgage industry in general through Federal Home Loan Banks, Fannie Mae and Freddie Mac);
- The Department of Housing and Urban Development (real estate settlement procedures and FHA-insured mortgage loans; Fair Housing Act regulation);
- Veterans Administration (now the Department of Veterans Affairs) (VA-guaranteed mortgage loans);
- Internal Revenue Service (tax preparers);
- Federal Trade Commission (non-banks, including debt collectors);
- Department of Defense (payday lending to active duty military and their family members); and
- Department of Justice (residual anti-fraud authority and Fair Housing Act enforcement).[26]

This poorly coordinated federal regulatory mélange co-existed uneasily with state regulation and enforcement by state attorneys general and state bank regulators, as well as private litigation.[27] States, however, were increasingly excluded from consumer financial services regulation because of federal preemption, with the preempted state protections rarely replaced with equivalent federal protections.[28]

By the 2000s, problems with the consumer financial protection regime were beginning to show. Consumer complaints about credit card and payday lenders were rampant;[29] consumer bankruptcy filings, a barometer of household financial health, were steadily rising;[30] and an alarming shift had occurred in mortgage finance toward riskier, exotic products.[31] While federal regulators

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[26] *Id.* at 3.
[27] *Id.* at 6.
[28] *Id.*
[29] KATHLEEN C. ENGEL & PATRICIA A. MCCOY, THE SUBPRIME VIRUS: RECKLESS CREDIT, REGULATORY FAILURE, AND NEXT STEPS 64 (2011).
[30] *Id.* at 65.
[31] *Id.* at 61.

were well aware of these changes,[32] they did little to prevent them, even when directed to do so by Congress.[33] To the contrary, some federal bank regulators engaged in an aggressive campaign to preempt state laws that would have restricted more aggressive forms of lending.[34]

B. Problems with the Regulatory Architecture

The pre-CFPB consumer financial protection regime had four major structural flaws:

- consumer protection was an "orphan" mission that had no regulatory "home" in any single agency;[35]
- consumer protection was often subordinated to regulatory concerns about bank profitability;[36]
- there was a lack of regulatory expertise in consumer financial issues;[37] and
- the diffusion of regulatory responsibility created regulatory arbitrage opportunities that fueled a race to the bottom.[38]

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[32] *See, e.g.*, Julie L. Williams, Acting Comptroller of the Currency, Remarks at the BAI National Loan Review Conference 1 (Mar. 21, 2005), *available at* http://www2.occ.gov/news-issuances/speeches/2005/pub-speech-2005-34.pdf.
[33] ENGEL & MCCOY, *supra* note 29, at 194–96 (detailing the Fed's failure to adopt mandated regulations under the Home Owners Equity Protection Act).
[34] *See, e.g.*, ENGEL & MCCOY, *supra* note 29, at 157–87 (detailing deregulation via preemption and lack of enforcement in the housing market); Arthur E. Wilmarth, Jr., *The OCC's Preemption Rules Exceed the Agency's Authority and Present a Serious Threat to the Dual Banking System and Consumer Protection*, 23 ANN. REV. BANKING & FIN. L. 225, 274 (2004) (describing how under OCC rules "state laws apply *only if they are helpful to national banks*; all state laws placing limitations or 'conditions' on the business of national banks are preempted" (emphasis in original)).
[35] LEVITIN, *supra* note 5, at 4.
[36] *Id.*
[37] *Id.* at 5.
[38] *Id.* at 6.

1. Consumer Protection as an Orphan Mission

Prior to the CFPB, consumer financial protection regulation was divided among multiple federal and state agencies.[39] This fractured authority created a number of regulatory problems. First, it made consumer protection an orphan mission that tended to "fall between the cracks" because no agency had an exclusive role of consumer protection in financial services.[40] Only the Federal Trade Commission (the "FTC") had consumer protection as its primary role, but the FTC had very limited jurisdiction in financial services.[41] The FTC lacked authority over federally chartered or insured banks, thrifts, or credit unions, so only bit players in financial services were within its regulatory ken.[42] Because consumer protection was everyone's responsibility, it became no one's responsibility, and regulatory accountability and performance suffered.[43]

2. Consumer Protection Subordinated to Regulatory Concerns About Bank Profitability

The leading entities in the consumer finance system are banks, frequently with federal charters. Federal banking regulators—the Federal Reserve Board (the "Fed"), the Federal Deposit Insurance Corporation (the "FDIC"), the National Credit Union Association ("NCUA"), the Office of the Comptroller of the Currency (the "OCC"), and the Office of Thrift Supervision (the "OTS")—all had consumer financial protection responsibilities for the particular types of entities they regulated.[44] Consumer financial protection, however, was not their only, or even primary, mission. Instead, their primary mission was bank safety-and-soundness.[45] The safety-and-soundness mission conflicted with the consumer protection mission.[46] Safety-and-soundness ultimately means

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39 *Id.* at 3.
40 *Id.* at 4.
41 *Id.*
42 *Id.*
43 *Id.*
44 *Id.* at 3.
45 *Id.* at 4.
46 *Id.*

profitability.[47] Only profitable financial institutions can be safe-and-sound. If a financial institution is insufficiently profitable (even if solvent), it will have trouble attracting capital.

Unfair, deceptive, and abusive practices can be highly profitable, even accounting for regulatory and reputational risk. Indeed, that is the very reason to engage in them.[48] Placing the safety-and-soundness mission together in a single agency with the consumer protection mission ensured a conflict in which one mission would inevitably trump the other. Consumer protection was routinely lost out and was subordinated to bank profitability concerns, except when the most egregious practices were at stake.[49]

The subordination of consumer protection to bank profitability may also have been the result of the "capture" of financial regulators by financial services industry interests. "Capture" refers to the situation in which a regulator acts in the interests of the industry it regulates, rather than in the public interest.[50] Revolving door employment contributes to capture problems in bank regulation as in other areas of regulation. Federal bank regulators would often leave government employment to find employment at banks, as bank lobbyists, as bank consultants, or as bank lawyers. Regulators might then attempt to curry favor with future employers by adopting regulatory stances favorable to those future employers, such as lax consumer protection.[51]

3. Regulators with Limited Experience

Another effect of the fracturing of the consumer financial protection mission was that it limited agency expertise. Because no agency had market-wide consumer protection responsibility, no agency had the incentive to develop deep expertise in consumer finance, be it in data collection and analysis, consumer product testing, or litigation.[52] Empirical analysis is critical for making consumer finance policy; theoretical economics are an insufficient guide in complex market situations. Empirical analysis, however,

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[47] *Id.*
[48] *Id.*
[49] *Id.*
[50] *See* Adam J. Levitin, *Hydraulic Regulation: Regulating Credit Markets Upstream*, 26 YALE J. ON REG. 143, 159 (2009).
[51] *See id.* at 159–60 (discussing regulatory capture in banking regulation).
[52] *See* LEVITIN, *supra* note 5, at 5.

requires data, but federal regulators collected surprisingly little information on consumer financial products. The federal government lacked any firm statistics on the total volume of credit card debt, on checking account overdrafts, on payday loans, on refund anticipation loans, or auto title loans, much less their terms and performance.[53] For mortgages, there were no market-wide government statistics on terms, performance, or foreclosures.[54] At best, particular agencies collected data on particular aspects of the businesses of their regulated entity, but there was no coordination between regulators to produce an economy-wide empirical picture of consumer finance.[55]

Prior to the CFPB, the regulatory agencies tasked with consumer financial protection lacked not only data, but also dedicated teams of economists, statisticians, psychologists, market experts, and attorneys to analyze the data that was available. For example, in 2009, only 12 of the 128 economists on the Federal Reserve Board's research and statistics staff listed consumer finance as a focus, even though approximately 70% of GDP consists of consumer spending.[56] Other federal bank regulators had fewer staffers working full-time on consumer finance, and none had sizeable enforcement staffs.[57] Again, in contrast, the FTC, which had a wealth of consumer protection litigation experience, lacked jurisdiction over banks.[58]

4. Opportunities for Regulatory Arbitrage

The splintered regulatory environment produced opportunities for regulatory arbitrage by financial institutions. The result was a race to the bottom among competing regulators. Federal bank regulators competed with state regulators and each other for

[53] *See id.*
[54] Prior to amendment by the Housing and Economic Recovery Act of 2008, Pub. L. No. 110-289, 122 Stat. 2654 (codified in scattered sections of the U.S. Code), the Home Mortgage Disclosure Act of 1975, Pub. L. No. 94-200, 89 Stat. 1125 (codified at 12 U.S.C. §§ 2801–2810 (2006)), ("HMDA") collected only very limited data on mortgage interest rates for "high cost" mortgage loans. Since 2008, HMDA has tracked further data fields, but still provides a very incomplete picture of mortgage lending and performance.
[55] LEVITIN, *supra* note 5, at 5.
[56] *Id.*
[57] *See id.*
[58] *See supra* text accompanying notes 41–42.

bank chartering business, as banks can, and do, switch their charters between regulators.[59]

Maintaining chartering business is crucial for bank regulatory agencies both because their primary authority is largely coextensive with chartering and because some regulators receive the majority of their budgets from chartering fees, rather than Congressional appropriations.[60] A bank regulator that sought more vigorous consumer-protection regulations or enforcement would put the entities it regulated at a disadvantage relative to those regulated by others, which might trigger charter-flight to other regulators. Likewise, a bank regulator might be able to attract more chartering business and a greater budget through with a laxer approach to consumer protection regulation.[61]

The effects of chartering competition can be seen in the fate of state usury laws. As mentioned above, usury laws cap the maximum rate of interest legally permitted on loans. In 1978, the Supreme Court's held in *Marquette National Bank of Minneapolis v. First of Omaha Service Corp*. that the usury ceiling applicable to the lending operations of national banks was that of the state in which the bank was located, rather than the state of the borrower.[62] *Marquette* meant that national banks could base themselves in states, like Delaware and South Dakota, that have either high or nonexistent usury ceilings, and then export the rate ceilings when doing business in other states.

Marquette thus set off a regulatory race to the bottom. First, banks began to switch to federal charters and relocate operations in states with high or no usury ceilings.[63] Some states responded by eliminating or raising usury ceilings in order to retain national bank operations.[64] Others adopted parity laws that allowed state-chartered banks to charge interest up to the rate permitted to national banks.[65]

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[59] *Id.* at 6.

[60] *See, e.g.*, Oren Bar-Gill & Elizabeth Warren, *Making Credit Safer*, 157 U. PA. L. REV. 1, 93 (2008) ("Assessments comprise 95% of OCC's budget, with the twenty largest national banks covering nearly three-fifths of these assessments.").

[61] *See* LEVITIN, *supra* note 5, at 6.

[62] Marquette Nat'l Bank of Minneapolis v. First of Omaha Serv. Corp. 439 U.S. 299 (1978). National banks have a federal charter from the OCC.

[63] Levitin, *supra* note 51, at 158.

[64] *Id.*

[65] *Id.*

Subsequently, federal bank regulators expanded their regulatory definition of interest to cover various bank fees.[66] The result was that usury laws and the ability of states to regulate financial services fees were effectively eviscerated, not as the result of a considered policy decision, but as a result of the Supreme Court's interpretation of passing language in the National Bank Act of 1864, a statute passed to create a financing mechanism for the Civil War.

The combination of preemption and federal chartering significantly undermined the traditional state consumer protection regime built on private law enforcement, usury statutes, and activities restrictions. Private law enforcement via tort and contract suits was always an impractical method of consumer protection because of the economics of litigation small dollar, often "negative value," claims.[67] Class actions address some of the litigation economics problem, but procedural limitations on class actions coupled with the expanded use of binding mandatory arbitration limit their effectiveness. Federal preemption often kept the states from undertaking public enforcement actions, and federal enforcement was rare prior to the CFPB.[68] *Marquette* and subsequent case law largely eliminated the reach of state usury statutes. And the institutional shift from state-entities to federally chartered entities meant that state activity restrictions no longer applied to many financial institutions, while federal regulation was more permissive, in part because of chartering competition.[69]

C. Creation of the CFPB

The flaws in the consumer financial protection system prompted Harvard Law School Professor Elizabeth Warren to call

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[66] *See* Smiley v. Citibank (South Dakota), N.A., 517 U.S. 735, 744–45 (1996) (deferring to the OCC's regulatory determination that the term "interest" in the National Bank Act encompasses credit-card late-payment fees).

[67] Henry N. Butler & Joshua D. Wright, *Are State Consumer Protection Acts Really Little-FTC Acts?* 12 (Nw. Univ. Sch. Of Law Faculty Working Paper No. 41, 2010), *available at* http://scholarlycommons.law.northwestern.edu/facultyworkingpapers/41 ("Suits involving common law actions were often uneconomical for the aggrieved consumer because of high burdens of proof and difficulty of establishing damages.").

[68] Levitin, *supra* note 51, at 145.

[69] *Id*. at 194.

for a Financial Product Safety Commission.[70] Warren argued that consumers should be protected from dangerous financial products just as they are from dangerous consumer products, not only by tort law, but also by regulation.[71] She contended that just as it is not possible to buy a toaster with a one-in-five chance of exploding, so too it should not be possible to obtain a financial product with a one-in-five chance of causing serious harm to the consumer.[72] In Warren's view, too many consumers were ending up with mortgages or credit cards that were causing more harm than good.[73] Warren argued that the existing financial regulatory framework was incapable of meeting the challenge, and called for a new regulatory agency made equal to the task.[74]

While Warren's proposal for a CFPB pre-dated the financial crisis of 2008, the crisis created the political opening for turning Warren's proposal into law. Legislation to create a CFPB had been in the works in the summer of 2008 and was formally introduced in September 2008, at the height of the financial crisis.[75] This early legislation, based closely on Warren's proposal, did not move, but when the Obama Administration presented its proposal for a major overhaul of the financial regulatory system,[76] a major plank was the creation of a consumer financial protection agency. The Obama

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[70] *See generally* Elizabeth Warren, *Unsafe at Any Rate*, DEMOCRACY, Summer 2007 (describing why regulation of financial products is needed). Warren's article's title was a play on Ralph Nader's 1965 book UNSAFE AT ANY SPEED about the safety problems in the design of American automobiles, which contributed to the creation of the Consumer Product Safety Commission in 1972; *see also* Bar-Gill & Warren, *supra* note 60, at 1–2; Heidi Manadanis Schooner, *Consuming Debt: Structuring the Federal Response to Abuses in Consumer Credit*, 18 LOY. CONSUMER L. REV. 43, 82 (2005) (arguing that the FTC's authority should be expanded to cover banks).

[71] Bar-Gill & Warren, *supra* note 60, at 6.

[72] *Id.* at 7.

[73] *Id*. at 56.

[74] *Id*. at 98.

[75] Consumer Credit Safety Commission Act of 2008, H.R. 7258, 110th Cong. (2008) ("To provide individual consumers of credit with better information and stronger protections, and to provide sellers of consumer credit with more regulatory certainty.").

[76] DEP'T OF THE TREASURY, FINANCIAL REGULATORY REFORM: A NEW FOUNDATION 55–70 (2009), *available at* http://www.treasury.gov/initiatives/Documents/FinalReport_web.pdf.

Administration's draft proposal—primarily the work of Assistant Secretary for Financial Institutions Michael Barr and Deputy Assistant Secretary for Consumer Protection Eric Stein—became the template for both the House and Senate versions of the legislation, albeit with important distinctions. The Obama Administration's proposal would have given the agency authority over the Community Reinvestment Act and would have given it a so-called "plain vanilla" power, to designate certain consumer financial products as "standard" products and mandate that they be offered when "alternative" products were offered in order to facilitate comparison shopping.[77] Both of these features derived from Barr's academic work and were not part of the original Elizabeth Warren proposal or the legislation introduced in 2008. The "plain vanilla" provision became a particular lightning rod for opposition because it would have required financial institutions to offer particular products that they would not have otherwise offered.[78]

The CFPB was one of the most controversial and hard-fought parts of the legislation that became the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010. Proponents of what became the CFPB argued that the existing regulatory architecture was so flawed that it could not but produce regulatory failures like the mortgage bubble that precipitated the financial crisis of 2008.[79]

The financial services industry fought vigorously against the creation of the CFPB, aided by ideologically anti-regulatory allies. The CFPB's opponents argued that the new agency would herald a new age of the "nanny state" that would impose enormous regulatory costs on consumer financial transactions resulting in less consumer choice, higher costs of financial products, and less product availability, particularly for consumers of lesser means.[80] The

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[77] *See id.* at 66–70 ("Rigorous application of the Community Reinvestment Act (CRA) should be a core function of the CFPA."). Notably, this "plain vanilla" concept was formerly required by the Federal Home Loan Bank Board, which required federal thrifts that offered adjustable-rate mortgages to also offer borrowers fixed-rate mortgages. 12 C.F.R. § 545.6-4(a) (1980); 45 Fed. Reg. 79,493 (Dec. 1, 1980).

[78] LEVITIN, *supra* note 5, at 13.

[79] *Id*.

[80] David S. Evans & Joshua D. Wright, *The Effect of the Consumer Financial Protection Agency Act of 2009 on Consumer Credit*, 22 LOY. CONSUMER L. REV. 277, 280 (2010) (arguing that the CFPA would "create a

CFPB's opponents also argued that it was a mistake to separate consumer protection from bank safety-and-soundness because the two concerns needed to be balanced.[81] Another argument raised by CFPB opponents was that consumer protection (or at least fair lending policies) could actually compromise bank safety-and-soundness by forcing banks to imprudently extend credit.[82]

In addition to these more general arguments, CFPB opponents also emphasized four very focused concerns.

First, the legislation's opponents were concerned by the agency's proposed power to prohibit "unfair, deceptive, or abusive acts and practices" or UDAAP.[83] The legislation's opponents argued that these were overly vague terms—especially the relatively novel term "abusive"— that gave the agency tremendous discretion about what products and practices it would prohibit.[84]

The concern about the scope of the UDAAP power was exacerbated by a second concern regarding the agency's accountability. The CFPB was deliberately designed to be a highly independent agency. As discussed in the following section, the CFPB is not subject to congressional appropriations and has a unitary directorship, rather than a bipartisan committee structure like some other regulatory agencies (for example, the SEC). CFPB opponents feared that the lack of political accountability combined with far-reaching regulatory powers would result in an agency that could engage in extreme and onerous regulation that would reduce the

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'supernanny' agency . . . designed to substitute the choice of bureaucrats for those of consumers").

[81] *Legislative Proposals to Improve the Structure of the Consumer Financial Protection Bureau: Hearing Before the Subcomm. on Fin. Inst. and Consumer Credit of the H. Comm. on Fin. Servs.*, 112th Cong. 9 (2011) [hereinafter *Legislative Proposals Hearing*] (statement of Leslie R. Andersen, American Bankers Association) (arguing that separating "consumer protection from bank safety and soundness" is problematic).

[82] Less charitably, one might suggest that the CFPB's financial services industry opponents were worried that they could not capture the CFPB in the same way they had other bank regulators.

[83] 12 U.S.C. § 5511 (b)(2) (Supp. V 2011).

[84] *Legislative Proposals Hearing*, *supra* note 81, at 68 (prepared statement of Leslie R. Andersen, American Bankers Association) (arguing that the term abusive "opens wide all manner of after-the-fact excuses for rewriting conditions of transactions entered into by customers who had complete information and competitive alternatives.").

profitability of the financial services industry.[85] Industry opposition to the CFPB on this ground crystallized around concerns that Elizabeth Warren, an extremely articulate critic of certain financial industry practices, might direct the agency. Warren became the banking industry's bogeyman, which in turn exacerbated opposition to the CFPB.

The general concern about regulatory burdens also manifested itself as a third concern specifically regarding small financial institutions: community banks and credit unions. The United States has a unique financial institutions ecosystem with nearly 16,000 depositaries, most of which are quite small.[86] While small financial institutions play a minimal role in the economy, they are seen as generally consumer-friendly and have an outsized and popular political voice; they are present in every congressional district and their officers are typically leaders in the community in the way a branch manager of a mega-bank is not. The business model of small depositaries has been under severe pressure for some time, and many small financial institutions are worried that any increase in their regulatory burdens will make it that much harder to remain profitable and independent.[87]

Finally, opposition to the CFPB also came from certain businesses, such as auto dealers, that were previously not subject to significant regulation, such as supervisory examinations of books and records. While these businesses did not object to a CFPB per se, they objected to being subject to its regulation.

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[85] *Legislative Proposals Hearing*, *supra* note 81, at 63 (prepared statement of Leslie R. Andersen, American Bankers Association) (contending that the CFPB's "boundless grant of agency discretion . . . could fundamentally alter the financial choices available to customers").

[86] Approximately half are credit unions. *Compare Statistics on Banking*, FDIC, http:// www2.fdic.gov/SDI/SOB (last visited Apr. 30, 2013) (select "All FDIC-Insured Institutions" for Industry and "12/31/2012" for Report Date; then click "Run Report") (listing 7,083 FDIC insured financial institutions as of the end of 2012), *with id.* (finding there were 7,357 FDIC insured institutions in 2011). The number of banks has fallen from nearly 13,853 in 1992 to around 7,000 today. *See id.* (select "12/31/1992" for Report Date).

[87] *See, e.g.*, *Legislative Proposals Hearing*, *supra* note 81, at 110 (statement of Lynette W. Smith, National Association of Federal Credit Unions) (arguing that "unnecessary Dodd-Frank related compliance costs" will be "burdensome and expensive" for credit unions).

Despite the financial services industry's strong opposition, the CFPB was included in the Dodd-Frank Act in July 2010. As discussed below, the scope of the agency's jurisdiction was limited in certain ways to reflect the concerns of small banks and previously unregulated entities, but the agency exists with a high degree of independence and significant regulatory power over almost the entire consumer financial services industry (excluding most types of insurance and securities/commodities investment).

III. Agency Structure

The CFPB has a unique structure among federal regulatory agencies. From the very beginning the CFPB's structure has been at the center of the political debates about the agency. During the debate over what became the Dodd-Frank Act, consumer advocates urged a more independent agency, fearing industry capture and heavy-handed political interference by Congress and the White House.[88] In particular, consumer advocates were concerned about deregulatory pushes during Republican administrations. The financial services industry, on the other hand, argued for greater checks on the CFPB's authority and greater political control, presumably with an eye toward influencing that political control.[89]

Originally conceived of as a free-standing cabinet-level agency, the CFPB was placed in the Fed as a compromise worked out between Representative Barney Frank (D-Mass.) and Senator Bob Corker (R-Tenn.).[90] Frank agreed to put the CFPB in the Federal Reserve Board[91] rather than let it exist as a free-standing or cabinet agency, but this diminution in prestige was offset by the benefits of

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[88] Shahien Nasiripour, *Fight for the CFPA Is 'A Dispute Between Families and Banks,' Says Elizabeth Warren*, HUFFINGTON POST, http://www.huffingtonpost.com/2010/03/03/fight-for-the-cfpa-is-a-d_n_483707.html (last updated May 25, 2011, 4:40 PM).

[89] *See Enhanced Consumer Fin. Prot. After the Fin. Crisis: Hearing Before the S. Comm. on Banking, Hous. and Urban Affairs*, 112th Cong. 79 (2011) [hereinafter *Enhanced Consumer Fin. Prot. Hearing*] (describing "unprecedented lack of checks and balances in the CFPB's current structure").

[90] *See, e.g.*, Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 73 (2010) (explaining that proponents of CFPB were pushed "to give up on a freestanding agency to get the legislation passed in the Senate.").

[91] 12 U.S.C. § 5491(a) (Supp. V 2011).

being housed in the Federal Reserve: CFPB budgetary independence from the congressional appropriations process,[92] independent agency status,[93] a higher pay-scale for employees,[94] and avoidance of regular OMB cost-benefit analysis.[95]

While technically a bureau in the Fed, the CFPB has complete regulatory independence from the Board of Governors of the Federal Reserve.[96] The CFPB is headed by a single Director appointed by the President (with the advice and consent of the Senate).[97] The CFPB Director is appointed for a five-year term and is removable only for cause.[98]

The CFPB is not funded through the congressional appropriations process. Instead, the CFPB is funded by the Fed, which must transfer to the CFPB an inflation-adjusted sum equal to 12% of the Federal Reserve's 2009 annual operating expenses.[99] The Federal Reserve's 2009 operating expenses were $3.649 billion,[100] so the CFPB's annual budget is $437.88 million, adjusted for inflation annually according to the Bureau of Labor Statistics' employment cost index for total compensation for State and local government workers.[101] To the extent that this inflation adjustment measure often lags real inflation, the CFPB's real spending power will decline over time. On the other hand, unused excess funds transferred from the Federal Reserve are not returned to the Treasury, but are instead invested for the CFPB, which may draw on the funds in the future.[102] The CFPB's budget is expressly exempt from appropriations

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[92] *Id*. § 5497(a)(2)(A).
[93] *Id*. § 5491(a).
[94] *Id*. § 5941(b)(4); § 5493(a)(2).
[95] *Id*. § 5512(b)(2)(A).
[96] *Id*. § 1012(c)(2).
[97] *Id*. § 5491(b)(2).
[98] *Id*. § 5491(c)(1)–(3).
[99] *Id.* § 5497(a)(1)–(2). The CFPB may also receive an additional appropriation of up to $200 million annually for its first five years of operations. *Id.* § 5497(e)(2). Additionally, civil penalties obtained by the CFPB that are not used for compensation of victims of consumer financial protection law violations may be used to fund consumer education and financial literacy programs. *Id.* § 5497(d).
[100] BD. OF GOVERNORS OF THE FED. RESERVE SYSTEM, 96TH ANNUAL REPORT 186–87 (2009) *available at* http://www.federalreserve.gov/boarddocs/rptcongress/annual09/pdf/ar09.pdf.
[101] 12 U.S.C. § 5497(a)(2)(B).
[102] *Id*. §§ 5497(b)(3), (c)(2).

review.[103] Thus, while the CFPB's budget is not subject to the opaque horse-trading of the appropriations process, it is capped, and will likely diminish depending on inflation.

The CFPB's budget enables the CFPB, like some other financial regulators, to pay its employees salaries that are more competitive with the private sector than typical federal government salaries.[104] The goal of these higher salaries is to make the agency competitive for labor with the entities it regulates by enabling the CFPB to maintain a skilled workforce with high morale that is not trying to curry favor with regulated entities in order to create remunerative exit opportunities.[105]

Despite this independence, important restrictions exist on the CFPB's actions. The CFPB is still bound by its statutory authorities and the Administrative Procedure Act (APA), as well as SBREFA review panels for its rulemakings (explained below), and Financial Stability Oversight Counsel (FSOC) veto review.[106] The CFPB must make particular findings in order to exercise its authority to restrict or prohibit acts and practices as unfair, deceptive, or abusive.[107] The CFPB is also prohibited from imposing usury caps[108] and from regulating non-financial businesses.[109] While the CFPB's budget is not determined by congressional appropriations, neither are the budgets of other federal bank regulators. The CFPB's budget, however, is the only one subject to a cap[110] or to an annual audit by the Government Accounting Office.[111]

Despite its freedom from the congressional appropriations process, the CFPB is subject to considerable oversight from Congress. The CFPB Director must make periodic reports to

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[103] *Id*. § 5497(a)(2)(C).
[104] *Id*. § 5493 (a)(2).
[105] *See Who's Watching the Watchmen? Oversight of the Consumer Fin. Prot. Bureau: Hearing Before the Subcomm. On TARP, Fin. Servs. and Bailouts of the Pub. and Private Programs of the H. Comm. on Oversight and Gov't Reform,* 112th Cong. 28 (2011) [hereinafter *Watchmen Hearing*] (statement of Elizabeth Warren) (explaining banking regulators are paid more partly because "the competition for those jobs includes people who are in the financial services industry").
[106] For FSOC veto review, see 12 U.S.C. § 5513.
[107] *Id.*
[108] *Id*. § 5517(o).
[109] *Id*. § 5517(a).
[110] *Id*. § 5497(a)(2).
[111] *Id*. § 5497(a)(5)(A).

Congress and appear before congressional committees.[112] Finally, the CFPB is subject to moral suasion. Although the President may only dismiss the Director for cause, history suggests there are few individuals that would refuse a Presidential request to resign even if they were within their legal rights to do so.[113]

Table 1 shows in succinct form that the CFPB and other federal agencies share several key oversight devices: APA rulemaking, APA adjudication, congressional oversight, simple Congressional majority override of rulemakings under the Congressional Review Act,[114] and moral suasion by the administration. Beyond that, there is variation in oversight devices. The CFPB is not subject to all of the same oversight devices as the other agencies, but it is certainly subject to significant additional oversight via the annual GAO audit, Office of Information and Regulatory Affairs ("OIRA") SBREFA reviews, a budgetary cap, and the FSOC veto. This is far greater oversight than there is for the other federal bank regulators—OCC, the Fed, and the FDIC—or for the SEC. The particular oversight mechanisms that apply to the CFPB are detailed below.

[112] *Id*. § 5496(a)–(b).

[113] *Id.* § 5491(c)(3) ("Removal for cause. The President may remove the Director for inefficiency, neglect of duty, or malfeasance in office."); *see also* Humphrey's Ex'r v. United States, 295 U.S. 602, 629 (1935) (holding that removal of officers of independent agencies may be restricted to "for cause" removal).

[114] 5 U.S.C. §§ 801–808 (2006).

Table 1. Comparison of Oversight of CFPB and Other Agencies[115]

	EPA	FDIC	FRB	FTC	OCC	SEC	SSA	CFPB
APA Rulemaking	YES	YES	YES	YES	YES	YES	YES	YES
APA Adjudication	YES	YES	YES	YES	YES	YES	YES	YES
Budget Subject to Appropriations	YES			YES		YES	YES	
Budget Capped								YES
OIRA Review of Economically Significant Regulations	YES						YES	
OIRA SBREFA Review	YES							YES
Statutory Cost-Benefit Analysis for Certain Regulations				YES		YES		YES
FSOC Veto								YES
Annual GAO Audit								YES
Term in Office <5 Years	YES							
5-member Commission		YES	YES	YES		YES		
Bipartisan Representation Requirement		YES		YES				
Presidential Removal without Cause	YES				?			
Congressional Oversight	YES	YES	YES	YES	YES	YES	YES	YES
Congressional Review Act Override of Rulemakings	YES	YES	YES	YES	YES	YES	YES	YES
Moral Suasion by Administration	YES	YES	?	YES	YES	YES	YES	YES

IV. Agency Powers

The CFPB has rulemaking, supervision, and enforcement authority over an extremely broad swath of the consumer financial services industry, but the extent of its rulemaking, supervision, and enforcement powers do not all align. The CFPB's rulemaking powers cover more entities than its enforcement powers, and its enforcement powers cover more entities than its supervision powers. These powers are all subject to a variety of limitations, not only in the scope of the entities subject thereto, but also in the procedures the

115 A memorandum opinion from the Department of Justice's Office of Legal Counsel assumes as a passing point that the OTS Director (and presumably the Comptroller of the Currency) serves at the pleasure of the President, but the United States Code is silent on the matter. *See* Memorandum Opinion from the Gen. Counsel, Dep't of the Treasury, and Chief Counsel, Office of Thrift Supervision on Post Employment Restriction of 12 U.S.C. § 1812(e) (Sept. 4, 2001), *available at* http://www.justice.gov/olc/2001/otspost2.pdf. The OCC was subject to OIRA review of economically significant regulations prior to 2011. *See infra* note 182.

CFPB must use when exercising the powers. Rulemaking, supervision, and enforcement are each reviewed in turn.

A. Rulemaking

1. Rulemaking Authority

The CFPB is authorized to engage in rulemaking under "Federal consumer financial law."[116] "Federal consumer financial law" is defined to include two distinct sets of authority: the CFPB's organic authority under the Consumer Financial Protection Act (Title X of Dodd-Frank) and authority under certain preexisting federal laws that have been transferred to the CFPB.[117] The CFPB's organic rulemaking authority is limited to defining certain acts and practices as unfair, deceptive, or abusive;[118] mandating disclosures;[119] requiring registration of certain non-banks;[120] and restricting pre-dispute arbitration.[121] The organic powers are separate from and cumulative to the CFPB's authority under the transferred federal statutes, which are referred to as "enumerated consumer laws."[122] The "enumerated consumer laws" cover some eighteen different statutes, including the Consumer Leasing Act, the Electronic Fund Transfer Act, the Equal Credit Opportunity Act, the Fair Credit Billing Act, the Fair Credit Reporting Act, the Gramm-Leach-Bliley Act's privacy provisions, the Home Owners Protection Act, the Home Ownership and Equity Protection Act, the Fair Debt Collection Practices Act, the Real Estate Settlement Procedures Act, the Truth in Lending Act, and the Truth in Savings Act.[123] Some of these statutes already contain authorization to prescribe disclosures; the CFPB's organic disclosure power[124] is a separate font of authority.

The scope of the rulemaking authority depends on whether the CFPB proceeds under its organic powers or under an enumerated

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[116] 12 U.S.C. § 5512(a) (Supp. V 2011).
[117] *Id*. § 5481(14).
[118] *Id*. § 5531(d); § 5536(a)(1)(B).
[119] *Id*. § 5532(a).
[120] *Id*. § 5512(c)(7).
[121] *Id*. § 5518(b).
[122] *Id*. § 5481(12).
[123] *Id*. § 5481(12).
[124] *Id*. § 5532.

consumer law. The CFPB's organic rulemaking authority—other than its disclosure power—is limited to "covered persons" and "service providers."[125]

Therefore, to understand the scope of the CFPB's supervision and organic rulemaking authority, we must turn to the definitions of "covered persons" and "service providers," which requires a tour through the definitional section of the Consumer Financial Protection Act.[126]

"Covered person" is defined as "any person that engages in offering or providing a consumer financial product or service" and any affiliate of such a person if the affiliate acts as a servicer provider to the covered person.[127] A "consumer financial product or service" is then defined as "any financial product or service" (a defined term)[128] that "is offered or provided for use by consumers primarily for personal, family, or household purposes" or certain ancillary services provided in connection with the offering or provision of a consumer financial product.[129]

The Consumer Financial Protection Act contains an extensive definition of "financial product or service."[130] For a product to be a "consumer financial product" it must not only be in the statutory list,[131] but also be offered or provided for use by consumers primarily for personal, family, or household purposes.[132] The Act defines "financial product or service" as covering

[125] *Id*. § 5531; § 5532 (disclosure power limited to "consumer financial products and services"); § 5536 (prohibited acts for covered persons and service providers). The CFPB's disclosure power is not explicitly limited to covered persons, only to "consumer financial products and servicers," *id.* § 5532(a), but a "covered person" is one who "offers or providers a consumer financial product or service" *id.* § 5481(6).

[126] *Id.* § 5481.

[127] *Id*. § 5481(6).

[128] *Id*. § 5481(15).

[129] *Id*. § 5481(5).

[130] *Id*. § 5481(15).

[131] *Id.*

[132] *Id*. § 5481(5).

- extensions, servicing, brokerage, and sales of credit;[133]
- certain finance leases;[134]
- real estate settlement services other than appraisals and insurance;[135]
- deposit taking;[136]
- transmission and exchanging of funds;[137]
- provision of stored value or payment instruments;[138]
- check cashing, collection, and guarantee services;[139]
- provision of payments or financial data processing products by technological means;[140]
- financial advisory services;[141]
- collecting, analyzing, maintaining, or providing consumer report or account information for use in offering or providing other consumer financial products or services, except to the extent it is to be used in-house or by an affiliate;[142] and
- debt collection.[143]

The CFPB is also authorized to expand the definition to prevent evasion or to ensure that all consumer products offered by banks are covered.[144] The effect of this definition is to give the CFPB authority over several major functions of consumer finance: deposits and safekeeping; payments; credit and leases; debt collection; and advisory services. Excluded are nondeposit investments (including money market funds) and insurance.[145] The business of insurance is defined as "the writing of insurance or the reinsuring of risks by an insurer, including all acts necessary to such writing or reinsuring and

[133] *Id*. § 5481(15)(A)(i).
[134] *Id*. § 5481(15)(A)(ii).
[135] *Id*. § 5481(15)(A)(iii).
[136] *Id*. § 5481(15)(A)(iv).
[137] *Id*.
[138] *Id*. § 5481(15)(A)(v).
[139] *Id*. § 5481(15)(A)(vi).
[140] *Id*. § 5481(15)(A)(vii).
[141] *Id*. § 5481(15)(A)(viii).
[142] *Id*. § 5481(15)(A)(ix).
[143] *Id*. § 5481(15)(A)(x).
[144] *Id*. § 5481(15)(A)(xi).
[145] *Id*. § 5481(15)(c).

the activities relating to the writing of insurance or the reinsuring of risks."[146]

Critically, the CFPB's authority under enumerated consumer laws covers some entities that are not providing "consumer financial products or services," particularly insurers. The CFPB has authority under the Home Owners Protection Act to regulate certain requirements and disclosures relating to private mortgage insurance.[147] Private mortgage insurance itself, however, which would likely not be considered a "consumer financial product or service" because of the insurance exclusion.[148] Similarly, the Interstate Land Sales Act covers pure sale and leasing activities not considered "consumer financial products or services."[149]

In addition to covered persons, the CFPB can also exercise its organic rulemaking authority over "service providers," a term defined by the Act.[150] A "service provider" is a person that provides a "material service to a covered person in connection with the offering or provision by such covered person of a consumer financial product or service."[151] It includes a person who "participates in designing, operating, or maintaining the consumer financial product or service" or one who "processes transactions relating to the consumer financial product or service (other than unknowingly or incidentally transmitting or processing financial data in a manner that such data is undifferentiated from other types of data of the same form as the person transmits or processes)."[152] Excluded from the definition are general ministerial support services and the provision of advertising time or space.[153]

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[146] *Id*. § 5481(3).
[147] *Id.* § 5481(12)(g) (defining the Home Owners Protection Act as an enumerated consumer law).
[148] *See id.* § 4901(13) (2006) (defining private mortgage insurance).
[149] *See, e.g.*, 15 U.S.C. § 1703 (prohibiting various practices in regard to sale or lease of lots).
[150] 12 U.S.C. § 5481(26) (Supp. V 2011).
[151] *Id*. § 5481(26)(A).
[152] *Id*. § 5481(26)(A)(i)–(ii).
[153] *Id*. § 5481(26)(B).

2. Administrative Procedure Act

Like all federal agencies, the CFPB's rulemaking is subject to the Administrative Procedure Act.[154] This means that CFPB rulemaking must proceed with public notice of proposed rulemakings, provision of an opportunity for the public to comment on the proposal, and publication of the final rule before its effective date.[155]

Like other federal agencies, the CFPB's rulemaking activities are subject to judicial review under standard administrative law jurisprudence. Parties therefore have the ability to challenge CFPB rulemaking as exceeding the scope of Congress's delegation of authority to the agency or as arbitrary and capricious implementations.[156] Under this standard administrative law jurisprudence, the CFPB's formal rulemaking interpretations of the Consumer Financial Protection Act and the enumerated consumer laws receive substantial judicial deference,[157] while its less formal interpretations (such as opinion letters) receive less deference.[158] The CFPB also receives deference for its interpretations of its own rulemakings unless they are "plainly erroneous or inconsistent with the regulation."[159]

3. Small Business Regulatory Enforcement Fairness Act

Unlike most agencies, however, the CFPB is subject to a set of further restrictions and review on its rulemaking authority. The first of these are the requirements of the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA").[160] SBREFA is a set

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[154] Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.).
[155] 5 U.S.C. § 553 (2006).
[156] *See* Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971) (arbitrary and capricious review of rulemakings).
[157] *See* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).
[158] *See* Christensen v. Harris County, 529 U.S. 576 (2000); Skidmore v. Swift & Co. 323 U.S. 134 (1944).
[159] *See* Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945).
[160] Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121, 110 Stat. 857-874 (codified at 5 U.S.C. §§ 801–808 (2006), 15 U.S.C. § 657 (2006)).

of amendments to the Regulatory Flexibility Act ("RFA"),[161] which requires agencies to undertake certain procedural steps to encourage them to minimize the cost of rules on small entities. The RFA requires all agencies to include an initial and final regulatory flexibility analysis with any rulemaking that describes the impact of the rule on small entities,[162] unless "the head of the agency certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities."[163] The RFA also requires that for "any rule . . . which will have a significant economic impact on a substantial number of small entities" the small entities are given an opportunity to participate in the rulemaking.[164] The RFA does not prescribe a particular method of participation in the rulemaking, which can involve anything from publication notice to conferences to simply flagging in the rule that it may affect many small entities.[165] SBREFA adds additional requirements to the RFA for three "covered agencies," the CFPB, the EPA, and OSHA.[166] Additional SBREFA provisions were added in 2010 that apply solely to the CFPB.[167]

Prior to the publication of a proposed rulemaking, the CFPB—like the EPA and OSHA—is required to provide the Small Business Administration ("SBA") with information on the rule's potential impact on small entities.[168] The SBA then has fifteen days to identify representative small entities for the purpose of obtaining advice and recommendations on the proposed rule.[169] Additionally, the CFPB must convene a review panel (known as a SBREFA panel) comprised of personnel from the CFPB, the Office of Information and Regulatory Affairs ("OIRA," a White House-based office headed by a presidential political appointee), and the SBA's Chief Counsel for Advocacy,[170] which must report on the comments on the small entity representatives.[171] The SBREFA panel has sixty days to report

[161] Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164 (1980) (codified as amended at 5 U.S.C. §§ 601–612 (2006)).
[162] 5 U.S.C. §§ 603–604.
[163] *Id*. § 605(b).
[164] *Id*. § 609(a).
[165] *Id.*
[166] *Id*. § 609(d).
[167] *Id*. §§ 603(d), 609(d) (2006 & Supp. V 2011).
[168] *Id*. § 609(b)(1) (2006).
[169] *Id*. § 609(b)(2).
[170] *Id*. § 609(b)(3).
[171] *Id*. § 609(b)(4).

on the comments of the small entity representatives and its own findings on regulatory flexibility, and the CFPB is required to modify the proposed rule when appropriate.[172]

The SBREFA panel process occurs prior to any publication of a proposed rule (although it may occur after an advanced notice of a proposed rulemaking). When the proposed rule is published, it must include an initial regulatory flexibility analysis, unless the rule is certified not to have "a significant economic impact on a substantial number of small entities."[173] The initial regulatory flexibility analysis requires various disclosures about the impact of the rule on small entities.[174] In addition to these standard disclosures, the CFPB (unlike any other agency) must also include a description of "any projected increase in the cost of credit for small entities," "any significant alternatives to the proposed rule" which would accomplish its objectives while minimizing the increase in the cost of credit for small entities, and any advice and recommendations from the small business representatives consulted under the SBREFA process.[175] Similarly, in addition to the usual requirements for a final regulatory flexibility analysis, the CFPB alone must include a description of the steps it has taken to minimize any additional cost of credit for small entities.[176] Small entities that are adversely affected by the final rule may seek judicial review of the regulatory flexibility analysis process,[177] but the review is only for procedural compliance with the RFA, not with the SBREFA panel process and not for whether the agency in fact has minimized costs to small entities.

The RFA and SBREFA processes are designed to increase regulatory sensitivity to the regulatory burden of small entities, but they also create regulatory transaction costs and delay rulemakings. In many cases, delay can effectively prevent rulemakings from ever happening. The rulemaking process has a varying timeframe, but the mean rulemaking takes around eighteen months, with the median rulemaking taking around a year from the notice of proposed rulemaking, which may itself not occur until quite a while after an

[172] *Id*. § 609(b)(5).
[173] *Id*. §§ 609(a)–(b).
[174] *Id*. § 603(b)–(c).
[175] *Id*. § 603(d).
[176] *Id*. § 604(a)(6).
[177] *Id*. § 611.

agency has started to examine an issue.[178] The SBREFA process typically adds a few months to a rulemaking.[179] While this may not seem like much time, there could be a change in CFPB personnel (or in Congress) in the interim. To the extent that the CFPB's top staffers are political appointees, the typical "tour of duty" is around two years.[180] A change in personnel can derail a rulemaking. Some might suggest SBREFA's ultimate purpose was to create regulatory transaction costs and serve as a delaying mechanism or "speed bump" to discourage regulation in general, rather than actually protecting the interests of small businesses by encouraging carefully tailored legislation.

The SBREFA process also raises a separation of powers issue. The CFPB is the only "independent agency" subject to SBREFA. The mandatory review by OIRA and the SBA, both parts of non-independent executive agencies, may raise separation of power issues that do not exist for EPA and OSHA, both of which are also non-independent executive agencies. It is not clear who would have legal standing to object to this arrangement. The explicit move to involve the highly politicized OIRA in the CFPB's rulemaking process is particularly noteworthy because the CFPB would, as an independent agency, otherwise not be subject to OIRA review. Even so, OIRA's power is limited in regard to the CFPB. While OIRA—and thus the President— can express its opinion on proposed CFPB rulemakings via the SBREFA process, it does not have a veto over

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[178] Jason Webb Yackee & Susan Webb Yackee, *Delay in Notice and Comment Rulemaking: Evidence of Systemic Regulatory Breakdown, in* REGULATORY BREAKDOWN: THE CRISIS OF CONFIDENCE IN U.S. REGULATION (Cary Coglianese ed.) 163, 169 (2012) (length of rulemakings). There is considerable timetable variation among agencies in the rulemaking process. *Id.* at 170. Many rulemaking initiatives never result in a notice of proposed rulemaking (NPRM); the figures cited above are for *successful* rulemakings that made it as far as an NPRM, but do not include those rulemakings that were not finalized and those that did not result in NPRMs.

[179] *Road to Rulemaking: The Steps OSHA Takes to Issue a New Standard*, NAT'L SAFETY COUNCIL, http://www.nsc.org/safetyhealth/Pages/Road-to-rulemaking-The-steps-OSHA-takes-to-issue-a-new-standard513.aspx#.UX9TLWQhR4E (last visited Apr. 30, 2013).

[180] THE PRESIDENTIAL APPOINTEE INITIATIVE, A SURVIVOR'S GUIDE TO PRESIDENTIAL NOMINEES 16 (2000), *available at* http://whitehousetransitionproject.org/nfo/SoftwareGuide/AppointeeSurvival.pdf.

CFPB rulemakings, unlike for non-independent executive agency rulemakings.[181]

4. Cost-Benefit Analysis

Because the CFPB is an independent agency, its rulemakings are not formally subject to cost-benefit analysis that is required of executive agencies per Executive Order.[182] (It is not clear whether this Executive Order could be applied to independent agencies.) The CFPB is, however, required by statute to undertake a cost-benefit analysis of its rulemakings.[183] When prescribing a rule, the CFPB must consider "the potential benefits and costs to consumers and covered persons, including the potential reduction of access by consumers to consumer financial products or services resulting from such rule" as well as the impact on small depositaries and rural consumers.[184] Critically, this cost-benefit analysis requirement

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[181] *See* Exec. Order No. 12866 (Sept. 30, 1993), 58 FED. REG. 51735 (1993) (providing for OIRA review of executive agency rulemakings).

[182] Exec. Order No. 12,866, 3 C.F.R. 638 (1993), *reprinted as amended in* 5 U.S.C. § 601 (2006); *see also* Exec. Order No. 12,291, 3 C.F.R. 127 (1982) (mandating cost-benefit analysis); Exec. Order No. 12,498, 3 C.F.R. 323 (1986) (requiring agencies to submit annual regulatory plans and undertake cost-benefit analysis); Exec. Order No. 13,563, 76 Fed. Reg. 3821 (2011) (reaffirming and expanding Executive Order 12,866); Exec. Order No. 13,579, 76 Fed. Reg. 41,587 (2011) (urging that "Independent regulatory agencies, no less than executive agencies, should promote [the] goal[s]" of Executive Order 13,563). Prior to the Dodd-Frank Act, the OCC and the now-defunct Office of Thrift Supervision were subject to cost-benefit analysis as part of OIRA review of proposed regulations. The Dodd-Frank Act designated the OCC, like other federal bank regulators, as an "independent regulatory agency," thereby putting it outside of the scope of the Executive Orders on regulatory cost-benefit analysis. Dodd-Frank Act, Pub. L. No. 111-203, § 315, 124 Stat. 1376, 1524, 2111 (2010). Additionally, joint rulemakings by these agencies and independent agencies appear to have gone through OIRA cost-benefit analysis. *Id.* § 315, 124 Stat. at 1524 (codified at 44 U.S.C. § 3502(5) (Supp. V 2011)). The NCUA appears to be treated as an independent agency although it is not listed as one in 44 U.S.C. § 3502(5).

[183] 12 U.S.C. § 5512(b)(2) (Supp. V 2011).

[184] *Id.* Particular rulemakings also require more specific cost benefit analysis. *Id.* §§ 5512(d) (subsequent review of significant rulemakings); 5531(c)(1) (cost-benefit analysis for "unfairness" actions); 5551(c) (cost-benefit analysis for rulemakings undertaken in response to state action). It is

applies only to rulemakings and not to enforcement decisions or settlements, and this may create an incentive for the agency to set policy through enforcement actions, rather than through rulemakings.

5. Subsequent Review of Significant Rulemakings

The CFPB is required to undertake a subsequent review of every "significant" rule or order within at least five years of its issuance.[185] The term "significant" is not defined by statute, but the review of these "significant" rules or orders is mandatory.

6. Financial Stability Oversight Council Veto

Finally, the CFPB's rulemakings are subject to a veto by the Financial Stability Oversight Council ("FSOC").[186] The FSOC is a "Justice League" of financial regulators tasked with preventing systemic risk.[187] The FSOC is chaired by the Treasury Secretary, who is one of ten voting members along with the Federal Reserve Board Chairman, the Comptroller of the Currency, the CFPB Director, the SEC Chairperson, the FDIC Chairperson, the CFTC Chairperson, the FHFA Director, the NCUA Chairperson, and an independent, presidentially appointed insurance expert.[188]

If any of the FSOC's members petition for a review of a CFPB rulemaking, the FSOC may, by a two-thirds majority,[189] veto the rulemaking or any provision thereof if the rulemaking or provision "would put the safety and soundness of the United States banking system or the stability of the financial system of the United States at risk."[190] In other words, the FSOC may only veto CFPB regulations if they would create systemic risk.

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not clear how quantitative or detailed the CFPB's cost-benefit analysis must be.

185 *Id.* § 5512(d).

186 *Id*. § 5513.

187 Alan W. Avery et al., *Dodd-Frank Act Attempts to Curtail Systemic Risk*, 127 BANKING L.J. 766, 767 (2010) (describing the FSOC as at the "core of Dodd-Frank's systemic risk monitoring and mitigation framework").

188 12 U.S.C. § 5321.

189 *Id*. § 5513(c)(3)(A).

190 *Id*. § 5513(a).

The two-thirds majority vote requirement for a veto applies to the FSOC members currently serving, meaning seven of ten members if the FSOC is fully manned.[191] Given that the CFPB Director is unlikely to vote against CFPB regulations, the required vote for a veto is really seven of the nine remaining FSOC members. The FSOC must publish its reasons for the veto, and the FSOC's actions—including its systemic risk determination (which must also be made separately by each voting member prior to voting)—are subject to judicial review under the Administrative Procedure Act.[192]

As with OIRA/SBA review under SBREFA, the FSOC veto raises separation of powers concerns, as it subjects an independent agency to a veto by a body including some executive and some independent agencies.[193] The FSOC veto structure is unique in federal legislation.[194] The Supreme Court, however, held another interagency veto arrangement—that of the SEC over the Public Company Accounting Oversight Board (PCAOB)—unconstitutional.[195] In that case, the Supreme Court held that it was an unconstitutional violation of the separation of powers to restrict the President in his ability to "remove a [principal] officer of the United States, who is in turn restricted in his ability to remove an inferior officer, even though that inferior officer determines the policy and enforces the laws of the United States."[196] This ruling raises the question of whether by giving the FSOC veto power over CFPB rulemaking, Congress has impermissibly restricted the power of the President to "take Care that the Laws be faithfully executed" through his appointee as Director of the Bureau of Consumer Financial

[191] *Id.* § 5513(c)(3)(A) ("The decision to issue a stay of, or set aside, any regulation under this section shall be made only with the affirmative vote in accordance with subparagraph (B) of two-thirds of the members of the Council then serving.").
[192] *Id.* § 5513(c)(8).
[193] *Id.* § 5321.
[194] *Who's Watching the Watchmen? Oversight of the Consumer Financial Protection Bureau: Hearing Before the H. Comm. On Oversight & Gov't Reform, Subcomm. on TARP, Fin. Serv., and Bailouts of Pub. and Private Programs*, 112th Cong. 86 (2011) (statement of Adam J. Levitin) ("CFPB rulemaking is subject to a veto by the Financial Stability Oversight Council. This is unique for federal bank regulators.").
[195] Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3151 (2010).
[196] *Id.* at 3147.

Protection.[197] It also raises the concern that the CFPB is not truly an independent agency as it would be subject to a veto exercised in part by cabinet agencies.

7. What the CFPB Cannot Do

Beyond the various procedural checks on its actions, it is worthwhile emphasizing in substantive terms what the CFPB *cannot* do. The CFPB cannot:

- force financial institutions to extend credit;
- mandate the offering of any financial product, including requiring financial institutions to offer "standard" or "plain vanilla" products if they offer "alternative" products;
- require consumers to purchase financial products; or
- create private rights of action.[198]

At most, then, the CFPB can use rulemaking to curtail the offering of certain financial products.[199] This is a critical point: it means that it is virtually impossible for CFPB actions to create systemic risk because the agency cannot force financial institutions to make loans that they do not wish to make.[200]

B. CFPB Supervision Authority

The CFPB has supervisory authority over certain entities. This means that the CFPB has the authority to send in teams of examiners to look at the entity's books and records and inquire about its operations.[201] What the CFPB learns during its examinations is confidential; the information can be used by the CFPB, but it cannot be shared with private parties.[202] The examination process is a critical way for the CFPB to gather intelligence about market

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[197] *See* U.S. CONST. art. II, § 3.
[198] *Enhanced Consumer Fin. Prot. Hearing*, *supra* note 89, at 110 (statement of Adam J. Levitin).
[199] *Id.*
[200] *Id.*
[201] 12 U.S.C. § 5515(b)(1) (Supp. V 2011).
[202] 12 C.F.R. §§ 1070.40–.48 (2012) (effective Mar. 18, 2013).

practices, to learn where regulatory problems lie, and to informally communicate concerns to regulated entities.[203]

The CFPB has supervisory authority only over certain "covered persons," namely:

- parties offering or providing residential mortgage loan origination, brokerage, or servicing;[204]
- parties offering loan modification or foreclosure relief services;[205]
- payday lenders;[206]
- private student lenders;[207]
- "larger participants" in a market for other consumer financial products or service;[208] and
- any party the CFPB has reasonable cause to determine is engaged in conduct that poses risks to consumers with regard to the offering or provision of consumer financial products or services.[209]

For debt collection, the CFPB defines "larger participant" as any entity with affiliates collecting more than $10 million annually in receipts,[210] while for consumer reporting, the threshold for being a larger participant is $7 million in annual receipts.[211]

The CFPB also has supervisory authority over large depositary covered persons.[212] These are defined as banks with more than $10 billion in net assets.[213] The threshold is not inflation adjusted, so the scope of CFPB authority will expand over time. As

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[203] Relatedly, the CFPB has established complaint registries, which provide another source of intelligence about market practices. *Cf.* Disclosure of Certain Credit Card Complaint Data, 77 Fed. Reg. 37,558 (June 22, 2012).
[204] 12 U.S.C. § 5514(a)(1).
[205] *Id.*
[206] *Id.* § 5514(a)(1)(E).
[207] *Id.* § 5514(a)(1)(D).
[208] *Id.* § 5514(a)(1)(B). Note that under 12 U.S.C. § 5514(a)(2) the CFPB must consult with the FTC prior to issuing a rule covering larger market participants under 12 U.S.C. § 5514(a)(1)(B).
[209] *Id.* § 5514(a)(1).
[210] 12 C.F.R. § 1090.105(b) (2012).
[211] *Id.* § 1090.104(b).
[212] 12 U.S.C. § 5515.
[213] *Id.*

of September 30, 2012, only 111 depositaries out of over 16,000 nationwide fell within the scope of CFPB supervisory authority.[214] The CFPB lacks supervisory authority over smaller depositary institutions.[215]

C. CFPB Enforcement Authority

The CFPB's enforcement authority is limited to bringing civil suit for violation of "Federal consumer financial law."[216] "Federal consumer financial law" covers both violations of the Consumer Financial Protection Act and rulemakings thereunder—UDAAP, disclosures, registration, and limitations of pre-dispute arbitration—and the enumerated consumer laws and rulemakings thereunder.[217] Therefore, unless an entity is either a "covered person" or covered by an enumerated consumer law, the CFPB lacks enforcement authority of any sort in regard to that person.[218]

The CFPB is prohibited, however, from bringing enforcement actions against smaller depositaries (those with less than $10 billion in consolidated net assets).[219] Instead, enforcement in such cases is the province of the appropriate prudential regulator.[220] For large banks, the CFPB has primary, but non-exclusive enforcement authority along with prudential regulators,[221] while for non-depositaries, the CFPB shares enforcement authority with the FTC according to a memorandum of understanding.[222] State attorneys general retain broad enforcement authority under both state and federal law, albeit with certain limitations—most notably that against national banks and federal savings associations the states can enforce CFPB rulemakings, but not the Consumer Financial Protection Act itself,[223] thereby limiting the states' ability to apply

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[214] This consists of 108 banks and thrifts and three credit unions. *See Guidance Documents: Depository Institutions under CFPB Jurisdiction*, CONSUMER FIN. PROTECTION BUREAU, http://www.consumerfinance.gov/guidance/ (last visited Apr. 1, 2013).
[215] 12 U.S.C. § 5516.
[216] *Id.* § 5564(a).
[217] *Id.* § 5481(14).
[218] *See id*.
[219] *Id.* § 5516(d).
[220] *Id*.
[221] *Id.* § 5515(c).
[222] *Id.* § 5514(c)(3)(A).
[223] *Id.* § 5552(a)(2).

the CFPB's Unfair, Deceptive, and Abusive Acts and Practices (UDAAP) provision themselves.[224]

If the CFPB believes that a party is violating federal consumer financial law, the agency may proceed in one of two ways: it may commence litigation in a federal district court,[225] or it may conduct an administrative adjudication before an administrative law judge under the Administrative Procedure Act.[226] Any orders from an administrative hearing must be taken to a federal district court for enforcement.[227]

The relief that the CFPB can obtain in an enforcement action is wide-ranging. It includes rescission or reformation of contracts; refunds or returns of money or real property; restitution; disgorgement or compensation for unjust enrichment; payment of damages; civil monetary penalties; and injunctive relief.[228] Civil monetary penalties are limited by statute,[229] and complement any relief available under the enumerated consumer laws. A simple violation has civil monetary penalties of a maximum of $5,000 per day, but if the violation is reckless, then penalties increase to a maximum of $25,000 per day, and for knowing violations, the penalties rise to $1,000,000 per day.[230] The penalties are not inflation adjusted.

D. General Exclusions from CFPB Authority

Certain entities are entirely excluded from CFPB authority-rulemaking, supervision, and enforcement. The exclusions, however, are not absolute, and the section of the Consumer Financial Protection Act detailing them is among the Act's most complicated.

1. Nonfinancial Goods or Service Providers

The major exclusion is for "merchants, retailers, and other sellers of nonfinancial goods or services."[231] The CFPB is prohibited

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[224] *See id.*
[225] *Id.* §§ 5564(a), (f).
[226] *Id.* § 5563 (applying 5 U.S.C. § 554 (2006)).
[227] *Id.* § 5563(d) (Supp. V 2011).
[228] *Id.* § 5565(a)(2).
[229] *Id.* § 5565(c).
[230] *Id.*
[231] *Id.* § 5517(a).

from regulating anyone selling or brokering nonfinancial goods or services, **“**except to the extent that such person is engaged in offering or providing any consumer financial product or service, or is otherwise subject to any enumerated consumer law.”[232] This prohibition is essentially a restatement of the positive limitations on the CFPB’s authority. The CFPB’s rulemaking authority is limited to “covered persons,”[233] namely those who offer or provide “consumer financial products or services,”[234] and rulemaking authority under the enumerated consumer laws.[235] The CFPB’s supervision authority is limited to “covered persons,”[236] while the CFPB’s enforcement authority is limited to prosecuting violations of “Federal consumer financial law,”[237] which is comprised of the enumerated consumer laws and the organic powers in the Consumer Financial Protection Act, which are in turn limited to “covered persons.”

2. Purchase Money Financing

So far, then, nothing new here, just a comforting restatement that the CFPB cannot regulate retailers and merchants for their sales activities. The exclusion further provides, however, that the CFPB may not exercise any authority regarding “a merchant, retailer, or seller of nonfinancial goods or services,” to the extent that such person extends purchase money credit directly to consumers, collects the debt created by the extension of credit directly or through a debt collector, or sells delinquent debt.[238] In other words, while the CFPB may generally regulate merchants when they extend credit or collect debts—as doing so is offering or providing a “consumer financial product” and also subject to certain of the enumerated consumer laws—the CFPB may not do so if the credit is purchase money and the merchant is merely trying to collect the purchase money debt or sell it when it is delinquent.

The purchase money exclusion only applies, however, if the value of the purchase money credit does not “significantly exceed the

[232] *Id.* § 5517(a)(1).
[233] *Id.* § 5512.
[234] *Id.*
[235] *Id*. § 5517(b)(2).
[236] *Id.* § 5481(6).
[237] *Id.* § 5564(a).
[238] *Id.* § 5517(a)(2).

market value of the nonfinancial good or service provided,"[239] or if the "merchant, retailer, or seller of nonfinancial goods or services regularly extends credit and the credit is subject to a finance charge" and the seller "is not engaged significantly in offering or providing consumer financial products or services."[240] The merchant is still subject to the enumerated consumer laws.[241]

3. Special Interest Carveouts and the Service Provider Clawback

Excluded from the scope of CFPB authority are realtors, retailers of manufactured homes and modular homes (also known as mobile homes), tax preparers and accountants, or attorneys, except to the extent that they are engaged in offering or providing consumer financial products or services, particularly the extension of credit, or would be already covered by an enumerated consumer law.[242] The CFPB is further prohibited from regulating entities regulated by the SEC, CFTC, IRS (as charities), Farm Credit Administration, state securities regulators, state insurance regulators, as well as employee benefit and compensation plans, except to the extent that these entities offer or provide consumer financial products or servicers or are otherwise subject to the enumerated consumer laws.[243]

Significantly, despite the carveouts from CFPB authority for these various groups, there is a statutory clawback of authority. The Consumer Financial Protection Act provides that, notwithstanding the carveouts, the entities excluded from CFPB authority:

> (1) may be a service provider; and
> (2) may be subject to requests from, or requirements imposed by, the Bureau regarding information in order to carry out the responsibilities and functions of the Bureau.[244]

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[239] *Id.* § 5517(a)(2)(B)(ii).
[240] *Id.* §§ 5517(a)(2)(B)(iii), (C).
[241] *Id*. § 5517(a)(2)(C)(ii)(II).
[242] *Id.* §§ 5517(b)–(e). While all of these groups are exempt from supervision and enforcement authority, attorneys are not exempt from CFPB rulemaking authority. *Id.* § 5517(e).
[243] *Id.* §§ 5517(f)–(*l*).
[244] *Id.* § 5517(n).

It is not clear whether this clawback provision means that the CFPB is permitted to regulate these otherwise carved out groups as "service providers" or whether it merely permits the CFPB to subject carved-out persons to information requests if they are servicer providers.

If the provision is read to enable otherwise carved-out persons to be regulated as service providers, then they are subject to CFPB UDAAP rulemaking[245] and UDAAP enforcement (by the CFPB, FTC, or attorneys general),[246] both of which specifically apply to "service providers" in addition to "covered persons." Moreover, if the clawback does make the carved-out persons potentially service providers, they may also then be "covered persons," if they are service providers and affiliated with another covered person, meaning under the control of that other covered person.[247] Control is not defined in the statute; it may not be restricted to ownership and might also include agency relationships. If so, then a law firm or accounting firm that "participates in designing, operating, or maintaining the consumer financial product or service"[248] at the direction of a covered person might be treated as an affiliate of that covered person and thus subject to regulation as a covered person, meaning the full panoply of rulemaking, supervision, and enforcement powers, notwithstanding the existence of a carveout.[249]

It is also worth noting that, after intense lobbying efforts during the passage of the Dodd-Frank Act, auto and boat dealers won their own special exemption from all CFPB authority.[250] The CFPB is generally prohibited from rulemaking, supervision, or enforcement of auto and boat dealers, both under its organic powers and under the enumerated consumer laws. The FTC retains all authority over auto and boat dealers,[251] which is basically the FTC's own UDAP (not UDAAP) authority and enforcement of the Truth in Lending Act.

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[245] *Id.* § 5531, 5536.
[246] *Id.* § 5536.
[247] *Id.* §§ 5481(1), (6).
[248] *Id.* § 5481(26)(A)(i).
[249] While the statutory structure of carveout, clawback, and definitions may seem unnecessarily complex and opaque, the drafting might well have been a deliberate attempt to obfuscate the true extent of CFPB jurisdiction in order to facilitate passage of the Consumer Financial Protection Act.
[250] 12 U.S.C. § 5519.
[251] *Id.* § 5519(d).

The CFPB, however, does have authority over auto and boat dealers to the extent that they offer financing (including leases) directly to consumers and do not routinely assign the loan or lease to an unaffiliated third party (in other words, the CFPB cannot regulate auto and boat dealers when they are merely loan/lease origination conduits); provide services related to real property transactions; or offer any other consumer financial product or service not related to the sale or servicing of vehicles.[252] The CFPB does, of course, have regulatory authority over non-dealer financing of motor vehicles. The service provider clawback does not apply to auto and boat dealers; their exclusion from CFPB regulatory authority is more complete.

4. Exemption Authority

The CFPB is authorized to exempt classes of covered persons, service providers, consumer financial products, and consumer financial services from any rule.[253]

V. Ongoing Politics of the CFPB

Many observers expected President Obama to appoint Elizabeth Warren as CFPB Director shortly after the Dodd-Frank Act was passed.[254] At the time, Democrats and associated Independents held sixty seats in the Senate and were, in theory, capable of confirming a nominee even in the face of a filibuster. The President did not proceed with a nomination, however. A factor that may have played a role was the opposition of some Democratic senators—including Senate Banking Committee Chairman Christopher Dodd—and some Administration officials to the nomination of Warren.[255]

Thus, instead of appointing Warren as CFPB Director, in September 2010 President Obama appointed Warren as Assistant to the President and Special Advisor to the Treasury Secretary on the

[252] *Id.* § 5519(b).
[253] *Id.* § 5512(b)(3).
[254] *See, e.g.*, Gary L. Goldberg, *Dodd-Frank Act at One Year: An Overview*, 65 CONSUMER FIN. L.Q. REP. 229, 234 (2011).
[255] *See, e.g.*, Alison Vekshin & James Rowley, *Dodd: Warren Nomination to Consumer Bureau Could Stir Fight*, BLOOMBERG (Aug 6, 2010, 6:00 AM), http://www.bloomberg.com/news/2010-08-06/dodd-warns-of-senate-fight-if-obama-picks-warren-to-head-consumer-agency.html.

CFPB and tasked her with setting up the agency.[256] In the November 2010 midterm election, the Democrats lost several Senate seats, making Warren's confirmation as Director impossible in light of the threat of a filibuster.[257]

Warren, however, continued to serve as a *de facto* Director until late July 2011.[258] In this role she spearheaded critical internal organizational and hiring decisions for the CFPB.[259] Her presence at the agency shaped its esprit de corps, which exuded the same excitement and energy that animated the SEC during the 1930s and established it as a magnet for some of the best and brightest legal minds.[260]

Without a *de jure* director, however, the CFPB was unable to exercise its full powers.[261] While the CFPB was officially open for business on July 20, 2011, with Treasury Secretary Timothy Geithner serving as acting Director, the agency was limited by statute to only undertake rulemaking and enforcement of the enumerated consumer laws—those pre-Dodd-Frank Act consumer laws that had been transferred to the CFPB from other agencies.[262] The CFPB was not, however, able to exercise its new organic powers absent a Director.[263]

While serving as *de facto* CFPB Director, Warren was a lightning rod for continued attacks by congressional Republicans on the CFPB. House Republicans introduced several bills that would have reduced the CFPB's independence, and repeatedly grilled

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[256] *See* Sewell Chan, *Interim Plan for Warren Raises Even Supporters' Eyebrows*, N.Y. TIMES, Sept. 17, 2010, at B2.
[257] *See* Gary L. Goldberg, *Dodd-Frank Act at One Year: An Overview*, 65 CONSUMER FIN. L.Q. REP. 229, 234 (2011).
[258] *See* Joe Nocera, *The Travails of Ms. Warren*, N.Y. TIMES, July 23, 2011, at A19.
[259] *See id*.
[260] *See id*.
[261] *See* Edward Wyatt, *An Agency Builder, But Not Yet Its Leader*, N.Y. TIMES, July 5, 2011, at B1 ("Without a director, the agency cannot regulate nonbank financial companies, including payday lenders, mortgage companies and consumer credit agencies.").
[262] Memorandum from Inspectors Gen. of the Treasury Dep't and the Fed. Reserve, to Spencer Bachus, the Republican Chairman of the House Fin. Serv. Comm. (Jan. 10, 2011), *available at* http://www.federalreserve.gov/oig/files/Treasury_OIG_Posted_PDF_-_Response_CFPB.pdf (describing the limits of the acting Director's authority).
[263] *See id*.

Warren at hearings,[264] particularly after it emerged that the CFPB had been involved in negotiations preceding the landmark $25 billion federal-state mortgage servicing settlement that was announced in February 2012.[265]

On July 18, 2011, President Obama nominated Richard Cordray, a former Ohio Attorney General serving as the CFPB's head of enforcement, as the agency's first Director.[266] Cordray's nomination was held up by a Republican filibuster in the Senate in December 2011.[267] In January 2012, President Obama used his recess appointment power to appoint Cordray.[268] The legality of the Cordray recess appointment—and hence rulemakings taken thereunder—was promptly challenged.[269] The litigation is currently pending.[270]

The CFPB has completed several rulemakings in its first year with a Director. Most important is its rulemaking to define "qualified mortgages," which benefit from a safe harbor from the Dodd-Frank Act's requirement that lenders verify a borrower's ability to repay a mortgage, the failure to do so being a defense against foreclosure.[271] The CFPB has also undertaken a number of enforcement actions, although none of its rulemakings or enforcement actions has yet invoked the "abusive" prong of the

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[264] Jia Lynn Yang, *Warren Faces More Grilling Over Consumer Bureau*, WASH. POST (July 15, 2011), http://www.washingtonpost.com/business/economy/warren-faces-more-grilling-over-consumer-bureau/2011/07/14/gIQAjMUIFI_story.html.

[265] Edward Wyatt, *Elizabeth Warren Tells Chamber of Commerce They Share Some Ideals*, N.Y. TIMES, Mar. 31, 2011, at B5.

[266] Binyamin Appelbaum, *Former Ohio Attorney General to Head New Consumer Agency*, N.Y. TIMES, July 18, 2011, at B1.

[267] John M. Cushman, Jr., *Senate Stops Consumer Nominee*, N.Y. TIMES, Dec. 9, 2011, at B1.

[268] Helene Cooper & Jennifer Steinhauser, *Bucking Senate, Obama Appoints Consumer Chief*, N.Y. TIMES, Jan. 5, 2012, at A1.

[269] State National Bank of Big Spring v. Geithner, No. 1:12cv1032 (D.D.C. filed June 21, 2012), *available at* http://digitalcommons.law.scu.edu/doddfrank/1/.

[270] *But see* text accompanying notes 280–283 (describing related challenges to recess appointments).

[271] Dodd-Frank Act § 1411, 15 U.S.C. §§ 1640, 1693c(a), (b) (Supp. V 2011); 78 Fed. Reg. 6856 (Jan. 11, 2013) (to be codified at 12 C.F.R. pt. 1026).

UDAAP power.[272] Instead, only the "deceptive" prong has been invoked, and that has been aimed at marketing practices for credit card add-ons, rather than product features themselves.[273]

An uncertain political future overshadows the CFPB's activities. The fate of the agency was very much uncertain prior to the 2012 election; had Republicans taken the White House and Senate, there was a high likelihood that parts or all of the Dodd-Frank Act would be repealed and that the CFPB would either have its independence and powers curtailed or be abolished.[274] President Obama's reelection in 2012 and the election of Elizabeth Warren to represent the Commonwealth of Massachusetts in the Senate should provide the CFPB with several years of breathing room to establish itself, but the agency recognizes that it is still swimming in dangerous political waters.[275] It remains deeply unpopular with Republicans and faces skepticism from some Democrats.[276] Even after the 2012 election, conservative columnist George Will devoted a column to attacking the CFPB as an unaccountable agency.[277]

On January 24, 2013, President Obama re-nominated Richard Cordray for the CFPB Directorship.[278] Whether sufficient votes exist in the Senate for confirmation (or more precisely for

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[272] Martin J. Bishop & Rebecca R. Hanson, *Notwithstanding Little Guidance from the CFPB, Except more UDAAP Enforcement Actions Now that the Presidential Election is Over*, THOMPSON REUTERS NEWS & INSIGHT (Nov. 19, 2012), http://newsandinsight.thomsonreuters.com/Securities/Insight/2012/11_-_November/Notwithstanding_little_guidance_from_the_CFPB,_expect_more_UDAAP_enforcement_actions_now_that_the_presidential_election_is_ over/.

[273] *See id*.

[274] Edward Wyatt, *Dodd-Frank Act a Favorite Target for Republicans Laying Blame*, N.Y. TIMES, Sept. 21, 2011, at B1.

[275] *See* Karen Weise, *The Consumer Watchdog Comes Under New Fire From Congress*, BLOOMBERG BUSINESSWEEK, (Feb. 4, 2013), http://www.businessweek.com/articles/2013-02-04/the-consumer-watchdog-comes-under-new-fire-from-congress.

[276] *See id*.

[277] George F. Will, *Answerable to No One*, WASH. POST, Nov. 16, 2012, at A27, *available at* http://articles.washingtonpost.com/2012-11-16/opinions/35505301_1_cfpb-richard-cordray-community-bank.

[278] Robert Barnes & Steven Mufson, *Obama Recess Picks Invalid*, WASH. POST, Jan. 26, 2013, at A1.

getting to a confirmation vote) remains uncertain.[279] On January 25, 2013, however, the CFPB's political situation became more complicated. The D.C. Circuit Court of Appeals invalidated the appointments of three National Labor Relations Board Commissioners on the grounds that they were appointed pursuant to the President's recess appointments power at a time when the Senate was not in fact in recess[280] and because the vacancies were ineligible to be filled by recess appointments because they arose before the alleged Senate recess, rather than during it.[281]

The NLRB decision has serious implications for the CFPB. Director Cordray was also appointed as CFPB Director pursuant to the President's recess appointments power on the same day as the three NLRB Commissioners.[282] The timing of the vacancy of the CFPB Directorship is less clear because of the Secretary of the Treasury's interim authority over the CFPB until the confirmation of the initial CFPB Director by the Senate.[283] The Supreme Court is widely expected to grant certiorari to review the D.C. Circuit's opinion, both because of the importance of the decision and because a circuit split now exists about the interpretation of the recess appointments power.[284] The Supreme Court's consideration may also include the CFPB Director's appointment, depending on intervention and joinder.[285]

If the Supreme Court grants certiorari, it is possible that the D.C. Circuit will be reversed entirely.[286] It is also possible that the Supreme Court upholds Director Cordray's appointment even if the NLRB Commissioners are found not to have been validly appointed on the basis of the vacancies for their positions not having arisen

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[279] *See id*. Cordray's nomination was approved by the Senate Banking Committee on a 12-10 vote on partisan lines. Danielle Douglas, *Panel approves consumer watchdog nominee, but confirmation fight wages on*, WASH. POST. Mar. 19, 2013.
[280] Canning v. NLRB, 705 F.3d 490, 512 (D.C. Cir. 2013).
[281] *Id.*
[282] *See* Barnes & Mufson, *supra* note 278, at A1.
[283] *See* 12 U.S.C. § 5586 (Supp. V 2011).
[284] *Cf.* Canning, 705 F.3d at 512 (invalidating recess appointment). *But cf.* Evans v. Stephens, 387 F.3d 1220 (11th Cir. 2004) (upholding recess appointment).
[285] *See* Jann Swanson, *NLRB Ruling Leaves a "Dark Cloud" Hanging over CFPB*, MORTGAGE NEWS DAILY (Feb. 8, 2013, 9:49 AM), http://www.mortgagenewsdaily.com/02082013_cfpb_cordray.asp.
[286] *See id*.

during the Senate's recess.[287] However, it is also possible that Director Cordray's appointment will be found to be invalid.[288] If so, there would be subsequent issues about the validity of CFPB enforcement actions, rulemakings, and personnel and administrative decisions.[289] Some of these actions might be shielded by the *de facto* officer doctrine, but the application of that doctrine is uncertain.[290]

Regardless of the outcome of the litigation, the D.C. Circuit's opinion creates additional political complications for the CFPB and has reinvigorated calls for subjecting the CFPB to Congressional appropriations, transforming it into a five-member commission, or both.[291] The former change would significantly affect the CFPB's independence. Being subject to appropriations may increase agency accountability in certain ways, but appropriations are not handled by the Congressional committees that actually deal with

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[287] *See id*.

[288] *See id*.

[289] *See, e.g.*, Charlie Savage & Steven Greenhouse, *Court Rejects Obama Move To Fill Posts*, N.Y. TIMES, Jan. 26, 2013, at A1.

[290] *See* Ryder v. United States, 515 U.S. 177, 180 (1995) (reasoning that actions performed by officials "acting under the color of official title" may be validated despite later findings that the officer's appointment is deficient).

[291] *See* Letter from Senate Republicans to U.S. President Barack Obama (Feb. 1, 2013) [hereinafter *Senate Republicans Letter*], *available at* http://www.cfpbmonitor.com/files/2013/02/Senate-Republican-Leader-McConnell-42-Senators-Demand-Accountability-and-Transparency-at-the-Consumer-Financial-Protection-Bureau-Full-Text-of-February-2013-and-May-2011-Letters-to-President-Obama.pdf. Already, the Chairman of the House Financial Services Committee has refused to accept from Director Cordray statutorily mandated Directorial testimony regarding the CFPB's semi-annual report on the grounds that Cordray is not properly appointed as Director. Danielle Douglas, *House Financial Services Committee Refuses to Allow Consumer Bureau Chief to Testify*, WASH. POST (Apr. 22, 2013), http://articles.washingtonpost.com/2013-04-22/business/38732974_1_senate-republicans-senate-democrats-richard-cordray. The House Financial Services Committee appears to be engaged in political posturing, rather than truly concerned about legal compliance. Until Cordray's appointment is adjudicated, he is presumptively the properly appointed CFPB Director, and, to the extent that there are questions, the prudent course of action would be to accept testimony and reports from him provisionally, rather than to refuse them, lest the House Financial Services Committee itself frustrate the law.

the substantive oversight of agencies.[292] There is a concern, then, that rather than increasing accountability, the appropriations process instead subjects agencies to the risks of Congressional hostage-taking, brinksmanship, and horse-trading, none of which have anything to do with substantive accountability.[293] Indeed, the CFPB's independent funding was intended to avoid precisely these problems.[294]

Similarly, the five-member commission structure would likely change the political direction of the CFPB, as the choice of commissioners would be the result of Congressional bargaining and would includes two commissioners from the minority party regardless of election outcomes.[295] Even if one party ended up with only a fifth of the seats in the Senate, it would still control two-fifths of the votes on a commission. A commission structure would effectively shift the power of appointment for the CFPB from the Presidency to the Senate, which, given staggered elections and incumbent entrenchment because of lack of term limits, is arguably the less democratically responsive branch of government.

Perhaps more importantly, in the case of consumer finance, policy differences frequently do not correspond with partisan lines.[296] Frequently, conservative Democrats will align with Republicans in regulatory skepticism.[297] Thus, a five-member commission is likely to produce a majority that is consistently skeptical about regulation, whereas a single Directorship is more likely to produce a Director with a policy agenda more closely aligned with the President's,

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[292] *See* Arthur E. Wilmarth, Jr., *The Financial Services Industry's Misguided Quest to Undermine the Consumer Financial Protection Bureau*, 31 REV. BANKING & FIN. L. 881, 941 (2012) (arguing that the CFPB's financial independence insulates the Bureau from agency capture).
[293] *See id*.
[294] *See id*.
[295] *Enhanced Consumer Fin. Prot. Hearing*, *supra* note 89, at 69 (statement of Adam J. Levitin) (arguing that a five-person commission will be divided along partisan lines and result in gridlock).
[296] *See* Wilmarth, Jr., *supra* note 292, at 937.
[297] *See id*.; *see also* Ben Protess, *Regulators Overhaul Derivatives Market, but with a Caveat*, N.Y. TIMES DEALBOOK (May 16, 2013, 2:42 PM), http://dealbook.nytimes.com/2013/05/16/regulators-overhaul-derivatives-market-but-with-a-caveat/ (noting that one of the three Democratic CFTC has frequently sided with Republicans on rules disfavored by the regulated entities).

whatever that may be.[298] Certainly it is hard to imagine a Progressive majority on a five-member commission, even if a Progressive Presidential candidate won a landslide victory. A five-member commission structure would have the effect of precluding a particular political alignment at the CFPB, irrespective of the overall national political alignment.

Arguably, then, a single Director structure makes the CFPB more electorally responsive than a commission structure. The questions about Director Cordray's appointment may encourage attempts to change the structure and powers of the CFPB as some members of Congress seek to aggrandize their own power and limit the potential for a Progressive agenda at the CPFB.[299]

Even without political pressure, the CFPB faces a constant challenge in terms of measuring and then balancing the consumer protection benefits from regulation with the costs of regulation and the potential impact of those costs on the availability and pricing of consumer financial products and services. What remains to be seen, however, is whether the CFPB will back away from more controversial rulemaking and enforcement activity because of the political threat it faces or whether the agency will pursue the policies it believes to be substantively right irrespective of the political situation. In other words, will the agency's own interests affect and guide its behavior? Furthermore, are those interests best served by compromising and living to fight another day or by taking a principled stand and hoping to rally political support on that basis? The CFPB is a powerful new agency, but it is also one very much aware of its vulnerability and likely to proceed carefully and soberly in the face of its political situation.

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[298] *See* Wilmarth, Jr., *supra* note 292, at 937.
[299] *See Senate Republicans Letter*, *supra* note 291.