# EXAMINATION AS A METHOD OF CONSUMER PROTECTION

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## I. INTRODUCTION

Lack of compliance with consumer protection law has been a crucial problem in the field for as long as such law has existed. In the aftermath of the consumer movement of the 1960s and 1970s, scholars struggled with the question of why the movement's new consumer protection statutes on the books did not result in more consumer protection in action.[1] The problem was sufficiently acute that some commentators argued that the real purpose of the legislation was to legitimize the current order by providing an illusion of consumer protection.[2] Fast-forward several decades to just before the recent financial crisis, and little had changed. At the federal level, an ideological aversion to consumer protection that went beyond disclosure[3] led to a paucity of regulatory development and enforcement,[4] despite a statutory regime that could have provided meaningful consumer protection.[5] States attempted to fill the gap, but

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1. Arthur Leff, *Unconscionability and the Crowd-Consumers and the Common Law Tradition*, 31 U. PITT. L. REV. 349 (1969); Stewart Macaulay, *Lawyers and Consumer Protection Laws*, 14 L. & SOC'Y REV. 115 (1979).

2. *See* William C. Whitford, *Structuring Consumer Protection Legislation to Maximize Effectiveness*, 1981 WIS. L. REV. 1018, 1018 n.2.

3. *See, e.g.*, Truth In Lending Act, 15 U.S.C. § 1601(a) (2012) (stating that Congress's goals of economic stabilization and increased competition in the credit card market could both be "strengthened by the informed use of credit," to be achieved by requiring a "meaningful disclosure of credit terms").

4. KATHLEEN C. ENGEL & PATRICIA A. MCCOY, THE SUBPRIME VIRUS: RECKLESS CREDIT, REGULATORY FAILURE, AND NEXT STEPS 20 (2011) (stating that, despite growing evidence of abusive mortgages, the "dominant ideology" of the Federal Reserve, Congress, and federal regulatory agencies was that the market's job was to offer consumer choice—no matter how irresponsibly consumers were making those choices—and should be left to self-adjust); E. ALLAN FARNSWORTH, CONTRACTS § 4.29 (2d ed. 1990) (stating "legislatures have favored . . . disclosure of terms, rather than control of terms . . . as more consistent with a market economy").

5. For example, the Federal Reserve Board did not regulate all mortgage lenders until 2008—a power vested in the Board since 1994. *Compare* Truth in Lending Act, 15 U.S.C. §§ 1601–1667f (originally passed in 1968), *and* Home Ownership and Equity Protection Act, 15 U.S.C. §1639 (2012) (collectively granting the Board the power to issue regulations binding upon all mortgage lenders),

were stopped by the aggressive preemption stances taken by some federal banking regulators.[6] There was so little consumer protection taking place, particularly regarding financial products, that an unsustainable level of consumer debt became a major contributor to the recent financial crisis.[7]

From out of the ashes of this crisis emerged the Consumer Financial Protection Bureau ("CFPB" or "the Bureau"), a new federal agency with a mandate to enforce consumer financial protection law.[8] One of the CFPB's most powerful tools is supervision, which enables the Bureau to examine financial institutions' compliance with consumer protection law on an ongoing basis.[9] Dedicated consumer protection examination is a new development in the law, one with potential to have a major impact on compliance. Although examination is time-consuming and commands devotion of resources both by the agency and regulated entities, it is still less resource-consuming than litigation. It thus provides a relatively cost-effective way for an agency to obtain both changes in company practices and compensation for victims. In other words, for the first time in U.S. history, a federal regulator with a commitment to consumer

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*with* Truth in Lending, 73 Fed. Reg. 1672, 1672-73 (Jan. 9, 2008) (codified at 12 C.F.R. pt. 226 (2015)) (regulating all lenders of mortgages secured by principal dwellings). *Accord* Shelley Smith, *Reforming the Law of Adhesion Contracts: A Judicial Response to the Subprime Mortgage Crisis*, 14 LEWIS & CLARK L. REV. 1035, 1071–72 (2010) (observing that when, in July 2008, Chairman of the Federal Reserve Ben Bernanke issued proposed regulations concerning subprime lending, "he relied on his authority under the 1994 [Home Ownership Equity Protection Act] statute, leaving no doubt that he understood that the Federal Reserve had this power all along"). This power was only exercised after criticism from Congress. *See* Daniel Carpenter, *Why Consumers Can't Trust the Fed*, N.Y. TIMES, Mar. 17, 2010, at A27 (stating that, in 2009, the Fed proposed new disclosure regulations for mortgages and credit cards, proposed a council of risk regulators, and increased its enforcement actions against banks and lenders "particularly after Congress took up the idea of an independent regulator"); Craig Torres, *Bernanke, Goaded by Congress, Steps Up Banking Regulation*, N.Y. TIMES (July 17, 2007), http://www.nytimes.com/2007/07/17/business/worldbusiness/17iht-fed.4.6700284.html?_r=0 (noting that Ben Bernanke began "mobilizing to placate Democrats in Congress," including Rep. Barney Frank, who had threatened to strip the Fed of some regulatory powers).

6. *See, e.g.*, ENGEL & MCCOY, *supra* note 4, at 16 (noting that, in the 1980s, Congress overrode state and local provisions that banned adjustable-rate mortgages, loans with balloon payments, and prepayment penalties, as well as those that imposed interest rate caps on mortgage loans); Oren Bar-Gill & Elizabeth Warren, *Making Credit Safer*, 157 U. PA. L. REV. 1, 92–93 (2008) (quoting *Credit Card Practices: Current Consumer and Regulatory Issues: Hearing Before the Subcomm. on Fin. Institutions and Consumer Credit of the H. Comm. on Fin. Servs*., 110th Cong. 77-79 (2007) (written testimony of Arthur E. Wilmarth, Jr., Professor of Law, George Washington University Law School) (stating that, between 1995 and 2007, the Office of the Comptroller of the Currency (OCC) had not issued a public enforcement order against any of the eight largest national banks and had only issued thirteen orders against national banks for violations of consumer lending laws; however, during 2003 alone, state officials "'initiated more than 20,000 investigations . . . [,] took more than 4,000 enforcement actions in response to consumer complaints about abusive lending practices,'" and ordered lenders to pay approximately $1 billion in penalties and restitution) (alterations in original).

7. *See generally* ENGEL & MCCOY, *supra* note 4 (discussing the political, regulatory, and market forces that lead to the financial crisis, including a general unwillingness to interfere with market forces, even for the sake of consumer protection).

8. See *infra* Part III.A.I for an overview of the CFPB's overarching statutory framework.

9. See *infra* Part III.A.2 for a discussion of the CFPB's supervision program.

protection has access to real-time company compliance information as well as the tools to remedy any deficits it finds.[10]

A consumer protection opportunity of this magnitude calls for study, and there is no better method than to apply the framework of one of the founding scholars of consumer protection law, Professor William C. Whitford. More than thirty years ago, Whitford addressed the key problem of company compliance and proposed a set of hypotheses for predicting whether a law will produce compliance with its commands.[11] Whitford's hypotheses are based on the premise that companies engage in cost-benefit analysis when deciding whether to comply with consumer protection rules.[12] In addition to the more traditional monetary considerations, the costs can include potential reputational damage and the cognitive dissonance that comes with engaging in clearly illegal behavior.[13]

Each of Whitford's proposed factors affects this cost-benefit calculation. First, he predicted that more specific statutes would produce greater compliance.[14] He argued that vague standards create unworkable precedent and allow companies to give themselves the benefit of the doubt regarding the legality of their practices, thereby minimizing the reputational and psychological costs of noncompliance. Next he addressed the monetary costs of compliance.[15] This is an obvious factor, but Whitford added a new layer to it by dividing costs into two categories: direct and indirect.[16] Direct costs are the implementation costs of legal compliance, such as drafting new disclosure forms or updating employee training. All parties benefit when these costs are low. Indirect costs pose a formidable obstacle to compliance. They represent the lost revenue that companies would otherwise have generated from practices that the law restricts. An example of an indirect cost is the additional interest a lender foregoes when complying with a usury statute.[17] Indirect costs create a zero-sum game between consumers and companies. What consumers gain, companies lose. Because indirect costs are thus unavoidable, it is essential to counteract them with remedies, which are Whitford's third factor.[18] Whitford argued that the penalties for violating consumer protection laws were not high enough to compensate for the fact that so few consumers sued. Consumers were subject to their own cost-benefit calculations, and their typically small claims made for cost-ineffective lawsuits, even when consumers had the option of affordable representation. Thus, public enforcement is crucial. Whitford proposed only one factor that might predict successful public enforcement: commitment of the regulatory

10. See *infra* Part III.B for an examination of CFPB supervision in action.
11. Whitford, *supra* note 2.
12. *Id.* at 1024–25.
13. See *supra* notes 234–35 and accompanying text.
14. See *infra* Part II.A.
15. See *infra* Part II.B.
16. See *infra* notes 70–74 and accompanying text.
17. See *infra* notes 75–76 and accompanying text.
18. See *infra* Part II.C.

agency.[19] He argued that an agency's commitment to consumer protection would be more important than the scope of its powers or any other element of its structure. Without commitment, consumer protection would not occur.[20]

The state of affairs Whitford described should sound familiar to today's reader. Companies still respond to a mixture of monetary and non-monetary incentives.[21] Consumer lawsuits are still not cost-effective due to the low dollar value of their claims and difficulty affording legal representation. And the private penalties for violating consumer protection laws remain low. Thus, Whitford's hypotheses are still very much relevant and applicable to the CFPB.

The early implementation of the CFPB's supervision program appears to bear out Whitford's predictions.[22] The CFPB's statutory structure enables a strong commitment to consumer protection, especially with respect to supervision. The CFPB relies heavily on this robust regulatory tool, and there is evidence the CFPB is using this power to the fullest. But supervision is necessarily a confidential process, which makes it susceptible to agency capture. The CFPB, however, is currently implementing two strategies that may mitigate this risk in the future.

The Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) structured the CFPB as a whole to maximize the agency's commitment to consumer protection.[23] The prudential regulators who previously had jurisdiction over consumer financial protection law were not committed to consumer protection and in some instances were hostile towards it. The CFPB's design reflects an understanding of why the prudential-regulator model of consumer protection failed and a goal of reversing course.[24] As a result, the Bureau has a broad statutory mandate to enforce consumer financial protection law and is the only federal regulator with this mission,[25] eliminating the problem of companies forum shopping for a weaker regulator. Conversely, consumer protection is the CFPB's only mission, freeing it from the perceived conflict of interests between consumer protection and bank financial health that has frequently resulted in the subordination of the former to the latter.[26] Congress also provided the CFPB with budgetary protection, enabling the Bureau to engage in assertive consumer protection without fear of jeopardizing its congressional appropriations.[27] Finally, the CFPB is led by a single director rather than a bipartisan board, making it likely to pursue consumer protection, at least during pro-consumer presidential administrations.

19. Whitford, *supra* note 2, at 1041–42.

20. See *infra* Section III for an application of Whitford's framework to the CFPB.

21. See *infra* Part III.B.5.b.

22. See *infra* Part III.B.

23. See *infra* Part III.A.1.

24. *See* Bar-Gill & Warren, *supra* note 6, at 86–95.

25. See *infra* Part III.A.1.

26. See *infra* notes 96–99 and accompanying text.

27. See *infra* notes 119–121 and accompanying text.

Similarly, the CFPB's supervision powers lay the groundwork for a strong commitment to consumer protection and an increase in company compliance.[28] The Dodd-Frank Act's first two stated purposes of examination are assessing compliance with federal consumer financial law and obtaining information about the activities and compliance systems of supervised entities.[29] At the same time, lest such broad statements of purpose be considered vague standards under Whitford's framework, the statute includes specific supervision rules and authorizes the CFPB to issues its own rules to cover any gaps.[30] Last, the Dodd-Frank Act contains specific provisions requiring the Bureau to minimize financial institutions' direct compliance costs, an approach that should increase compliance according to Whitford's predictions,[31] although of course even an efficient rigorous supervision program will entail significant direct costs for companies.[32]

The result so far is a supervision program with a strong commitment to consumer protection.[33] The CFPB appears to be making the most of its powers despite its resources, which are limited in light of the vast scope of its possible activities. The Bureau's supervision program makes smart use of its resources in four ways. First is the focus on the risk of noncompliance with consumer protection law.[34] The Bureau bases its supervision priorities on its assessment of the risks that a financial institution or product/service is violating consumer financial protection law. This strategy enables the CFPB to concentrate its resources where they are needed most. Second and probably most important, the Bureau takes the position that financial institutions must implement internal compliance management systems, under which they must monitor their own legal compliance, initiate correction of any legal violations they find, and constantly improve their compliance procedures.[35] As part of compliance management, the Bureau insists that the officers and directors of regulated entities go on record supporting compliance with consumer protection law, which has the potential to create compliance norms at some companies. Also, by placing itself in the role of monitoring companies' self-monitoring, the CFPB maximizes the compliance bang for its resource buck.[36]

28. See *infra* Part III.A.2.

29. Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) §§ 1024(b)(1)(A)–(B), 1025(b)(1)(A)–(B), 12 U.S.C. §§ 5514(b)(1)(A)–(B), 5515(b)(1)(A)–(B) (2012) (giving the CFPB authority to require reports and conduct examinations of, respectively, non-depository and depository entities, for the purposes of "assessing compliance with the requirements of Federal consumer financial law" and "obtaining information about the activities and compliance systems or procedures" of supervised entities).

30. See *infra* Part III.A.2.b.

31. See *infra* Part III.A.2.c.

32. See generally *infra* Part III.B.

33. See *infra* Part III.B.

34. See *infra* Part III.B.1.

35. See *infra* Part III.B.2.

36. On the negative side, the fact that a major goal of supervision is to change internal company practices limits our ability to study the results.

Next, the Bureau is investing heavily in supervision, defining its authority broadly, hiring hundreds of examiners, and establishing a commissioning program to train them.[37] Finally, the CFPB is using enforcement strategically,[38] establishing a spectrum of enforcement that enables it to tailor its remedies to the context of the legal violation. This approach has the benefit of essentially short-circuiting financial institutions' cost-benefit calculations, because the CFPB can return to an issue, with a range of potential penalties, until it achieves compliance.

If the CFPB maintains this level of commitment, its supervision program has the potential to radically reshape the market for consumer financial services.[39] Reading the Bureau's reports[40] on its supervision activities is like stepping into an alternate universe in which consumer protection is the normal state of affairs. Major problems that academics, advocacy groups, and the news media have been documenting for the past several years are now being written up as official government findings and followed with corrective action. On one hand, there is a sense of déjà vu. We already knew, for example, that mortgage servicers frequently do not have the documentation to support their foreclosure claims or that credit reporting agencies (CRAs) lack meaningful processes for resolving consumer disputes.[41] On the other hand, problems that were merely

37. See *infra* Parts III.B.3–4.

38. See *infra* Parts III.B.5.

39. See *infra* Section IV.

40. See *infra* note 52.

41. For example, in the area of mortgage servicing, mortgage servicers regularly do not comply with bankruptcy law: a majority of claims are missing required documentation, fees and charges on claims are poorly identified and often unreasonable, and the creditor's proof of claim frequently exceeds the debt amount listed on the debtor's schedule. Katherine Porter, *Misbehavior and Mistake in Bankruptcy Mortgage Claims*, 87 TEX. L. REV. 121 (2008); *accord* Gretchen Morgenson, *Dubious Fees Hit Borrowers in Foreclosures*, N.Y. TIMES (Nov. 6, 2007), http://www.nytimes.com/2007/11/06/business/06mortgage.html (discussing Porter's article and various consumer lawsuits, including a class action against the Mortgage Electronic Registration System—a home loan registration system owned by Fannie Mae—Countrywide Financial, and other large lenders, for charging borrowers three to four times more than what it actually pays for legal fees during a foreclosure); *see also* Press Release, National Consumer Law Center, Robo-Signing: Symptom of Mortgage Servicers' Lawless Attitude That Pushes Homeowners into Foreclosure (Nov. 16, 2010), *available at* http://www.washingtonpost.com/wp-srv/business/documents/robo-signing.pdf (citing multiple flaws in the mortgage servicing system, including robo-signing and "repeated failures to service loans, account for payments, limit fees to those that are reasonable and necessary, and provide loan modifications even when they could serve investors and allow homeowners to avoid foreclosures and evictions"). Another example is in credit reporting. *See, e.g.*, CHI CHI WU & ELIZABETH DE ARMOND, NAT'L CONSUMER LAW CTR., FAIR CREDIT REPORTING § 9.1 (7th ed. 2010) (stating credit bureaus generally fail to forward to the creditors any supporting documentation sent to them by the consumer, such as canceled checks; rather, a dispute is essentially reduced to a two-digit code that represents a category of complaint, and then it is forwarded to creditors); Angela Littwin, *Escaping Battered Credit: A Proposal for Repairing Credit Reports Damaged by Domestic Violence*, 161 U. PA. L. REV. 363, 379–89 (2013) (stating that credit reporting agencies routinely produce inaccurate credit reports and have grossly inadequate procedures for rectifying reporting mistakes). Prompted by an investigation that began in 2012, the New York State Office of the Attorney General recently reached a sweeping settlement with the credit reporting agencies, affecting consumers nationwide, wherein the

inferred from studies or litigation discovery are now confirmed by direct observation, and this time a federal agency is insisting that financial institutions fix them.[42] Moreover, the CFPB has been repairing major holes in financial consumer protection law. For example, professors who teach the Fair Debt Collection Practices Act (FDCPA) know that the statute's main "ah ha moment" is when students realize that it applies only to third-party debt collectors and not to original creditors,[43] who may represent a large segment of the debt-collection

agencies agreed to overhaul their approach to fixing errors on consumers' reports. Tara Siegel Bernard, *Top 3 Credit Bureaus Agree to Overhaul the Industry*, N.Y. TIMES, Mar. 10, 2015, at B3 (stating that "[t]he credit bureaus—Experian, Equifax and TransUnion—have long been criticized for the convoluted process that consumers must endure to get their credit reports fixed").

42. CONSUMER FINANCIAL PROTECTION BUREAU (CFPB), SUPERVISORY HIGHLIGHTS: SUMMER 2013, at 11–15 [hereinafter SUPERVISORY HIGHLIGHTS II] (released Aug. 21, 2013; reporting on supervision work completed between Nov. 2012 and June 2013, noting a mortgage servicer's lack of controls relating to the review and handling of key documents and another servicer improperly charging consumers for default-related fees); CONSUMER FINANCIAL PROTECTION BUREAU (CFPB), SUPERVISORY HIGHLIGHTS: WINTER 2013, at 5–10 [hereinafter SUPERVISORY HIGHLIGHTS III] (released Jan. 30, 2014; reporting on supervision work completed between July and Oct. 2013, finding a mortgage servicer had conducted collection efforts against multiple consumers, attempting to collect the contractual monthly payment amount, rather than the reduced amounts actually due per their loan modification agreements; another servicer charged loss mitigation costs to certain borrowers in error); *id.* at 8 (one servicer "engaged in a significant number of short sales" and erroneously reported them to the credit reporting agencies as foreclosures; another "misreported . . . trial loan modifications as being in the foreclosure process"); CONSUMER FINANCIAL PROTECTION BUREAU (CFPB), SUPERVISORY HIGHLIGHTS: SPRING 2014, at 9 [hereinafter SUPERVISORY HIGHLIGHTS IV] (released May 22, 2014; reporting on supervision work completed between Nov. 2013 and Feb. 2014, finding that "one or more of the CRAs lacked policies and procedures that adequately addressed the entity's dispute-handling obligations under Section 611 of the FCRA"); *id.* at 10 (finding that at least one CRA failed to forward to furnishers documents consumers submitted in support of their credit report disputes); *see also* CONSUMER FINANCIAL PROTECTION BUREAU (CFPB), SUPERVISORY HIGHLIGHTS: FALL 2014, VI at 6 [hereinafter SUPERVISORY HIGHLIGHTS VI] (released Oct. 28, 2014; reporting on supervisory work completed between Mar. and June 2014, finding that at least one specialty CRA was inadequately handling consumer complaints).

43. *See, e.g.*, ELIZABETH WARREN, JAY LAWRENCE WESTBROOK, KATHERINE PORTER & JOHN A. E. POTTOW, THE LAW OF DEBTORS AND CREDITORS: TEXTS, CASES, AND PROBLEMS (7th ed. 2014) ("The students are often quite eager to get to potential violations of the [FDCPA], but we call on students with a fairly abrupt question about 'the first problem you must solve' until someone sees that" the FDCPA may not even apply to the creditor in the textbook problem.). The FDCPA applies only to "debt collectors," which it defines to include third-party collectors and debt buyers but not creditors who originated the loans. *See* 15 U.S.C. § 1692 ("It is the purpose of this subchapter to eliminate abusive debt collection practices by *debt collectors* . . . .") (emphasis added); *id.* § 1692a(6) (defining "debt collector"). In its UDAAP Bulletin, the Bureau warned creditors that, "Although the FDCPA's definition of 'debt collector' does not include some persons who collect consumer debt, all covered persons and service providers must refrain from committing UDAAPs in violation of the Dodd-Frank Act." CONSUMER FIN. PROT. BUREAU, BULL. 2013-07, PROHIBITION OF UNFAIR, DECEPTIVE, OR ABUSIVE ACTS OR PRACTICES IN THE COLLECTION OF CONSUMER DEBTS 2 (2013), *available at* http://files.consumerfinance.gov/f/201307_cfpb_bulletin_unfair-deceptive-abusive-practices.pdf [hereinafter CFPB UDAAP BULLETIN]. The Bureau has implemented this approach in supervision. For example, a supervision report described payday lender practices that violate the FDCPA, such as workplace collection attempts and improper disclosure of debt information, both after consumers had requested they stop. 15 U.S.C. § 1692c(a)(3), 1692c(b). Payday lenders are

market.[44] The CFPB is filling this gap by characterizing original-creditor practices that would have violated the FDCPA as "unfair, deceptive, or abusive" practices,[45] which are prohibited under the Dodd-Frank Act.[46]

There is no guarantee, however, that the CFPB's strong commitment to consumer protection will remain intact. Industry capture[47] of regulators is an ever-present danger,[48] especially during a presidential administrations ideologically opposed to regulation.[49] Supervision programs are particularly

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original creditors and hence not covered by the FDCPA, so the Bureau characterized these practices as UDAAPs. SUPERVISORY HIGHLIGHTS IV, *supra* note 42, at 17–18.

44. "Information on the market share of various companies within the debt collection industry is unavailable." U.S. PIRG EDUCATION FUND, DEBT COLLECTORS, DEBT COMPLAINTS: THE CFPB'S CONSUMER COMPLAINT DATABASE GETS REAL RESULTS FOR CONSUMERS 17 (2014), *available at* http://www.uspirg.org/sites/pirg/files/reports/Debt%20Collectors,%20Debt%20Complaints.pdf.

45. See *infra* note 162. *See* FTC Policy Statement on Unfairness, Letter to Senators Ford & Danforth, Consumer Subcomm., Comm. on Commerce, Science & Transp. (Dec. 17, 1980), *reprinted in* Int'l Harvester, 104 F.T.C. 949, 1070 (1984) [hereinafter FTC Policy Statement on Unfairness].

46. Dodd-Frank Act § 1031, 12 U.S.C. § 5531 (2012) ("[p]rohibiting unfair, deceptive, or abusive acts or practices").

47. *See* Rachel E. Barkow, *Explaining and Curbing Capture*, 18 N.C. BANKING INST. 17, 17 (2013) (defining capture as when an agency becomes "more responsive to the desires of the entities it is supposed to be regulating than it is to the general public," i.e. disproportionate influence). See *infra* Part IV.A for a discussion of regulatory capture and related pressures facing the CFPB.

48. *See* Barkow, *supra* note 47, at 18–19 (noting that industry capture is more likely to develop where agencies regulate entities that are well-organized and well-funded (exemplified by those in the financial sector) and thus have the ability to monitor and challenge agency oversight). Another reason for agency capture is what is referred to as the revolving door, which can develop where agency employees might, when they leave, join the private sector in "the industries they regulated because that is their area of substantive expertise. . . . [A]gency employees might be thinking about how they are perceived by the very industry that they might ultimately join later." *Id.*

49. *E.g.*, Charles Tiefer, *Congressional Oversight of the Clinton Administration and Congressional Procedure*, 50 ADMIN. L. REV. 199, 203 n.24 (1998) (stating "[t]he Reagan administration came to office opposing what it considered excessive regulation, marked by the anti-regulation positions taken by Interior Secretary James Watt and Environmental Protection Agency (EPA) Administrator Anne Gorsuch"); *id.* (asserting that "President Reagan's approach to deregulation, particularly regarding environmental laws, was to render the federal agencies inactive and thus incapable of fulfilling their congressional mandate"; he accomplished this by, inter alia, "appoint[ing] agency chiefs who were hostile to the mission of their agency while simultaneously slashing the budgets of those agencies"); *accord* Richard Abel, *Civil Rights and Wrongs*, 38 LOY. L.A. L. REV. 1421, 1428 (2005) (stating that President Reagan and President George W. Bush appointees to the EPA and the National Labor Relations Board were "anti-environmental and anti-labor"); *see also* Jacob E. Gersen & Anne Joseph O'Connell, *Deadlines in Administrative Law*, 156 U. PA. L. REV. 923, 970 (2008) (noting that "[a]n anti-regulation President could consistently use [the Office of Management and Budget's Office of Information and Regulatory Affairs] review to impede or block entirely new agency regulations"). Reagan also recommended to Congress that it not reauthorize the Legal Services Corporation (LSC), instead suggesting that legal services be relegated to the control of local interests. Angela F. Turner, Comment, *President Reagan and the Legal Services Corporation*, 15 CREIGHTON L. REV. 711, 732 (1982) (predicting that, under this policy, "legal services would be severely restricted, if not entirely eliminated"). When that did not occur, Reagan instead replaced eleven members of LSC's board and recess appointed a chairman who reportedly advocated abolishing the agency. *See* Irvin Molotsky, *Reagan Chooses Lawyer as Chief of Aid Agency for the Poor*, N.Y. TIMES (Jan. 1, 1982), http://www.nytimes.com/1982/01/01/us/reagan-chooses-lawyer-as-

vulnerable to capture because examinations are necessarily conducted under conditions of confidentiality,[50] both to preserve competition and to promote voluntary compliance by removing the risk of damage to reputation.[51] It is thus difficult for outside observers to know what is being accomplished. The regulated stand ready to complain of over-aggressive regulation, but with confidential regulation, the public—and particularly consumer advocates—may not know when there is underregulation. Together, these risks mean that the agency could do very little with its examination power, and outsiders would be none the wiser. To combat this possibility, the CFPB has been creating strong norms of public reporting on its examination activities, issuing seven reports on supervisory highlights in its first four years.[52] And even if future presidential administrations sabotage the Bureau's effectiveness—so long as political forces do not eliminate the CFPB outright—we will at least have strong consumer protection during consumer-friendly administrations, which is significantly more than we had before.

The remainder of this Article proceeds as follows. Section II describes Whitford's analysis. Section III evaluates the early phase of implementation, concluding that examination shows remarkable promise to implement credit industry compliance with consumer protection legislation. Part IV discusses the challenges of operating an examination program that is confidential and avoids industry capture. It also covers two ways in which the CFPB currently is laying the groundwork for continued consumer protection under future Bureau

chief-of-legal-ai-d-agency-for-the-poor.html; Stuart Taylor, Jr., *Coast Lawyer Reported as Legal Aid Choice*, N.Y. TIMES (Nov. 8, 1981), http://www.nytimes.com/1981/11/08/us/coast-lawyer-reported-as-legal-aid-choice.html.

50. Supervision refers to all elements of an examination program, including deciding on priorities, gathering information from covered entities, conducting examinations, and reporting on findings and taking them into account in its other activities, including enforcement. Dodd-Frank Act §§ 1024(b)(1), 1025(b)(1), 12 U.S.C. §§ 5514(b)(1), 5515(b)(1). As the Office of Inspector General of the Federal Reserve System, the parent agency for CFPB put it, "The CFPB's supervision activities include (1) prioritizing and scheduling examinations, (2) planning and executing examinations, and (3) reporting findings in the form of reports of examination or supervisory letters." OFFICE OF INSPECTOR GEN., EVALUATION REPORT: THE CFPB CAN IMPROVE THE EFFICIENCY AND EFFECTIVENESS OF ITS SUPERVISORY ACTIVITIES 4–5 (2014) [hereinafter OIG EVALUATION REPORT]. Thus, we use the term "examination" to refer to the specific process of collecting supervisory data from companies, while "supervision" refers to examination policymaking and other activities related to establishing, conducting, and taking follow-up action regarding examinations.

51. See *infra* Part IV.B.

52. CONSUMER FINANCIAL PROTECTION BUREAU (CFPB), SUPERVISORY HIGHLIGHTS: FALL 2012 [hereinafter SUPERVISORY HIGHLIGHTS I]; SUPERVISORY HIGHLIGHTS II, *supra* note 42; SUPERVISORY HIGHLIGHTS III, *supra* note 42; SUPERVISORY HIGHLIGHTS IV, *supra* note 42; CONSUMER FIN. PROT. BUREAU (CFPB), SUPERVISORY HIGHLIGHTS: SUMMER 2014 [hereinafter SUPERVISORY HIGHLIGHTS V] (released Sept. 17, 2014; a special edition on the indirect automobile lending market); SUPERVISORY HIGHLIGHTS VI, *supra* note 42; CONSUMER FINANCIAL PROTECTION BUREAU (CFPB), SUPERVISORY HIGHLIGHTS: WINTER 2015 [hereinafter SUPERVISORY HIGHLIGHTS VII] (released Mar. 2015, and reporting on supervision work completed between July and December 2014). The Bureau has also been rotating examiners frequently to avoid examiners developing cozy relationships with the entities they examine. See *infra* notes 504–05 and accompanying text.

stewards who may not share the current agency's commitment to its mission. Section V concludes.

## II. WHITFORD'S FRAMEWORK

In 1981, Professor Whitford produced an elegant framework for considering the effectiveness of consumer protection legislation passed in the wake of the consumer movement of the 1960s and 1970s.[53] His analysis is particularly important now because the creation of the CFPB heralds a new wave of consumer protection rules. And when it comes to protecting consumers, having "law on the books" has never guaranteed the effectiveness of "law in action."[54] Whitford addressed the gap between written law and its impact on consumers by proposing hypotheses about the relationship between the structure of consumer protection law and the likelihood that companies will comply with it.[55] Because if companies do not comply—either willingly or under the threat of enforcement[56]—then the law becomes largely symbolic. Worse, by appearing to protect consumers, a symbolic law may, in fact, serve mainly to justify the status quo.[57] Thus, company compliance with consumer law is the major outcome in both Whitford's framework and the current analysis.

Whitford hypothesized that three major factors would influence company compliance: (1) the specificity of statutory commands, (2) the costs of compliance, and (3) remedies. The remainder of this Section outlines these factors and provides a few examples. We undertake an in-depth application of Whitford's framework to the CFPB's examination process in Section III.

### A. *Statutory Specificity*

Whitford predicted that specific rules would result in greater compliance than broad standards, but that standards can provide a valuable backdrop for rules by covering situations a law's drafters had not considered.[58] Whitford posited that specific statutory commands have a high impact on compliance because of companies' general belief in abiding by the law and fear of bad

53. Whitford, *supra* note 2.

54. *See* STEWART MACAULAY, JEAN BRAUCHER, JOHN A. KIDWELL & WILLIAM C. WHITFORD, CONTRACTS: LAW IN ACTION 2 (3d ed. 2010) (noting that gaps exist between stated policies and their impact, and that "business norms and imperatives are often more powerful 'law' than formal law on the books").

55. Whitford, *supra* note 2, at 1018.

56. Whitford defined voluntary compliance to mean company compliance in the absence of enforcement. *Id.* at 1022.

57. *Id.* at 1019. This is not precisely how Whitford discussed the problem of the potentially legitimizing effects of symbolic legislation. He considered the possibility that policymakers may enact ineffective consumer rules for the purpose of appearing to provide consumer protection and thus justifying the status quo. But because empirical observation of policymaker intent is difficult, if not impossible, he focused on likely effects of consumer laws, not the reasons for their passage. *Id.* at 1018–19. In keeping with Whitford's objective approach, we mention the existence of legitimizing legislation rather than the intent behind it.

58. *Id.* at 1023.

publicity.[59] In addition, enforcement litigation may be cheaper and more successful when a command is relatively clear and concrete.[60] In contrast, he reasoned that "vague, admonitory legislation" usually has little impact on compliance and that the idea of voluntary compliance is "almost meaningless" in such cases.[61] He used the example of UCC Article 2's unconscionability standard, a classic vague provision made even less workable by the statutory direction to consider the entire context of the transaction, which enables courts to distinguish any precedent based on a variation in circumstance.[62] When it comes to voluntary compliance, "merchants are likely to give themselves the benefit of the doubt"[63] that they are not doing anything unconscionable. Whitford acknowledged that in the rare cases in which consumers were represented,[64] the uncertainty surrounding unconscionability could induce companies to settle,[65] although settlements of course do not create precedent and thus do not help mitigate the vagueness problem for future consumers.[66]

But the potential for unforeseen circumstances makes standards crucial too. Legislators cannot think of every possible scenario they would want to regulate, and companies may develop new practices, some of which will be tailored to avoid violating the letter of specific rules.[67] Thus, Whitford argued for consumer protection legislation with a statement of purposes, followed by a number of specific applications.[68] Such a statute would cover both bases by providing concrete commands to engender compliance as well as standards that would allow for arguments that additional practices fell within the statute's scope. Perhaps the statutory best practice would be to vest an administrative agency with rulemaking power, enabling it to provide specific commands that address practices that were unknown or not yet existent at the time of legislative enactment.[69]

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59. *Id.* at 1022.

60. *Id.* at 1022 n.13.

61. *Id*. at 1020.

62. *Id.* (discussing Uniform Commercial Code section 2-302(1) and (2)). Whitford credited Arthur Leff's "typically erudite and convincing" argument along these lines in *Unconscionability and the Crowd—Consumers and the Common Law Tradition*, *supra* note 1.

63. Whitford, *supra* note 2, at 1022.

64. These cases would be rare because bringing consumer lawsuits is usually not cost-effective. See *infra* notes 78–80 and accompanying text. Whitford thought that they would usually not arise unless the consumer had access to free or low-cost legal services, which were scarce then as now. Whitford, *supra* note 2, at 1020–21.

65. Whitford, *supra* note 2, at 1020–21.

66. *Id.* at 1021.

67. Indeed, one of us made this very point about consumer financial companies in a 2010 opinion article arguing for the CFPB's creation. Angela Littwin, *Banks Move Faster Than Congress on Loopholes*, BLOOMBERG (May 9, 2010, 9:00 PM), http://www.bloomberg.com/apps/news?pid=20601039&sid=au2dkonlwlFY.

68. Whitford, *supra* note 2, at 1024.

69. *Id.*

### *B. Compliance Costs*

Whitford's next hypothesis is that, the lower the regulated entities' costs of compliance, the more likely they will comply.[70] He described this statement as "almost tautological," but he made a valuable contribution by differentiating between direct and indirect costs—and analyzing their compliance effects.[71] Direct costs are the costs of adjusting business practices to comply with the law.[72] In other words, they are the transaction costs of compliance. Reducing these costs should benefit both companies and consumers, at least to the extent that doing so is "consistent with the manifest purposes of the legislation."[73] This analysis implies that statutory minimization of direct compliance costs will normally result in more effective law because it mitigates one factor that reduces company compliance—without affecting consumer protection.[74]

The impact of indirect, or opportunity, costs is not so easily managed. Whitford used these terms to refer to the lost revenue compliant companies would have otherwise generated from potentially unlawful practices.[75] A simple example of an indirect cost is the revenue a hypothetical lender would lose by lowering the interest rate it charged in accordance with a usury law. To a large extent, indirect costs represent a zero-sum game between companies and consumers. Consumers benefit financially from a law in direct proportion to the revenue companies lose. For example, the fee restrictions Congress imposed in the Credit Card Accountability and Disclosure Act of 2009 (CARD Act) appear to have resulted in a $2.5 billion transfer from credit card issuers to consumers.[76] The money that consumers saved is money that issuers lost.

This analysis has two key implications. First, one reason compliance is so difficult to create is that company revenue loss is frequently an unavoidable—and sometimes intended—effect of a consumer compliance regime. So strong penalties or other enforcement are necessary to balance company incentives. Second, all else being equal, companies are most likely to comply with laws that provide consumers with the least benefit.[77] Thus, we must consider, not only legal compliance with any given law, but also the magnitude of its effect on consumers.

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70. *Id*.

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.* at 1024–25.

75. *Id.*

76. CONSUMER FINANCIAL PROTECTION BUREAU, CARD ACT REPORT 20–21 (2013), *available at* http://files.consumerfinance.gov/f/201309_cfpb_card-act-report.pdf; *see* Credit Card Accountability Responsibility and Disclosure Act of 2009, 123 Stat. 1734 (Pub. L. No. 111-24, 123 Stat. 1734 (codified as amended in scattered sections of 15 U.S.C.).

77. Whitford, *supra* note 2, at 1024–25 (discussing disclosure regulation under the Truth in Lending Act, 15 U.S.C. §§ 1601–1665, as an example of legislation with both minimal opportunity costs and consumer benefits).

### *C. Remedies and the Importance of Public Enforcement*

As profit-seeking enterprises, companies will normally not obey a law unless the costs of compliance are less than those of failing to comply. This partially explains why private consumer-protection remedies are usually ineffective.[78] Consumer lawsuits are extremely rare,[79] and damages are generally not high enough to overcome the low number of cases. For example, Whitford found that, even provision for modest punitive damages, typically $100 to $1,000, plus attorney's fees, "has not usually stimulated sufficient extra claims" to have much impact on compliance.[80] Fees of this type have not increased significantly in the three-and-a-half decades since the publication of his article.[81] As for stronger private remedies, such as injunctive relief and punitive damages without set limits,[82] Whitford found that they were rarely available.[83] This remains true today.[84] While Whitford argued that class actions were more successful in inducing compliance, problems with determination of a common basis of some issues, such as damages, often stood in the way.[85] Since Whitford wrote, companies have implemented standard-form predispute arbitration clauses and class action waivers to largely eliminate class relief in contracts cases.[86]

78. *Id.* at 1026.

79. This point is illustrated by analyzing cases involving Truth in Lending Act claims. From 1990 through 2005, there were never more than ten such cases brought per year. Verdict & Settlement Analyzer, LEXIS ADVANCE, https://advance.lexis.com/vsahome/ (search "Truth in Lending Act," then select the "Number of Cases per Year" chart). The most ever brought in one year was thirty-eight, but more recent years have seen a sharp decline, with only four suits brought in 2013 and two in 2014. *Id.* Once a case was brought, approximately 19% were dismissed by the court, a verdict for the defendant was reached in over 10%, and the parties reached a settlement in just over 50% of cases during that timeframe. *Id.* (selecting the "Percentage of Cases by Resolution" graph). Where the plaintiffs took their cases to the jury, the median award was $41,000, with one award as low as $128. *Id.* (selecting the "Award in US Dollars by Restitution" graph) (the $128 verdict was granted in *Charles J. Ferrari v. Lynn Howard*, 98 CVI 00268, 1999 Jury Verdicts LEXIS 51411 (Cleveland Mun. Ct. 1999)).

80. Whitford, *supra* note 2, at 1029–30.

81. Since 1981, the statutory damages section of the TILA, 15 U.S.C. § 1640, has been amended only twice. *See* Housing and Economic Recovery Act of 2008, 110 Pub. L. No. 289, § 2502(b)(1), 122 Stat. 2654, 2853 (2008) (increasing the penalty range in § 1640(a)(2)(A) relating to individual actions involving credit secured by real property from between $200 and $2,000 to between $400 and $4,000); Dodd-Frank Act, Pub. L. No. 111–203, § 1416, 124 Stat. 1376–2223 (2010) (codified at 15 U.S.C. § 1640 (2012)) (increasing the penalty for individual actions involving consumer leases from between $100 and $1,000 to between $200 and $2,000, and increasing the cap related to class actions in § 1640(a)(2)(B) from $500,000 to $1 million).

82. Whitford refers to these as "hybrid" remedies. Whitford, *supra* note 2, at 1034.

83. *Id.*

84. *See* 2 LINDA SCHLUETER, PUNITIVE DAMAGES § 20.1 (6th ed. 2010) (summarizing punitive damage statutory and case law by state, noting that a vast majority of states impose a cap on punitive damages in consumer protection suits, e.g., New York's cap on punitive damages for deceptive trade practices is the greater of three times the actual damages or $1,000).

85. Whitford, *supra* note 2, at 1036.

86. The Dodd-Frank Act directs the CFPB to study the impact of predispute contract provisions mandating use of arbitration and also gives it authority to regulate this practice. Dodd-Frank Act § 1028(a)–(b), 12 U.S.C. § 5518(a)–(b) (2012). The agency has released one study and is conducting further research on the question. CONSUMER FINANCIAL PROTECTION BUREAU, ARBITRATION

This analysis leaves public enforcement as the only viable alternative, and Whitford postulated that public remedies—those sought by administrative agencies—were the most likely to be effective. Public officials have a variety of enforcement tools that can raise significantly the costs of noncompliance.[87] These include injunctive relief, typically through an administrative cease and desist order, as well as criminal and civil penalties and public actions to require compensation for consumer injury.[88] But Whitford issued a major caveat: the effectiveness of public enforcement will depend in large part on the agency's commitment to legal compliance.[89] He declined to elaborate upon the factors likely to affect agency commitment, stating that they "must await other studies."[90] While this Article does not report on an empirical study, nearly thirty-five more years of experience and a recent financial crisis caused in large part by consumer-protection failures[91] provide enough information to begin identifying a few relevant factors and analyzing their implications for the CFPB's supervision program.

## III. APPLYING WHITFORD'S FRAMEWORK TO THE CFPB

Whitford's framework suggests at least two ways of analyzing the likely effectiveness of a public enforcement process. The first is to examine whether the CFPB's structure, as described in its enabling statute, is likely to produce an agency committed to consumer protection and company compliance with consumer law. We find that the Dodd-Frank Act positioned the CFPB well in these respects, both in general and in regard to supervision.[92] The Act grants the Bureau broad authority and contains several provisions designed to increase commitment. It also strikes an effective balance between rules and standards. The second approach is to analyze any available evidence of the strength of the agency's actual commitment and the potential of effect this commitment on company compliance with consumer protection law. The publicly available information about the CFPB's supervision program suggests a high level of commitment to consumer protection, a strategic approach to engendering

STUDY 10 (2015), *available at* http://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf (observing that "[n]early all of the arbitration clauses studied include provisions stating that arbitration may not proceed on a class basis" and some "also expressly waive the consumer's ability to participate in class actions in court"); *see also* Kevin McCoy, *CFPB May Let You Sue Your Bank Instead of Going to Arbitration,* USA TODAY (Oct. 7, 2015 11:07 AM), http://www.usatoday.com/story/money/2015/10/07/cfpb-considering-rules-banning-forced-arbitration/73455738/ (discussing the CFPB's recent "outline of proposals under consideration," a preliminary step to issuing a proposed rule on arbitration clauses).

87. See *infra* Part III.B.5.b.

88. Whitford, *supra* note 2, at 1041–42.

89. "The commitment of the agency to enforcement of the legislation is far more important in determining levels of compliance than the enforcement powers of an enforcing agency." *Id.* at 1042.

90. *Id.*

91. *See* ENGEL & MCCOY, *supra* note 4.

92. See *infra* Part III.A.

company compliance as well as some early, modest success in reaching this goal.[93] This Section addresses each analysis in turn.

### *A. An Agency Designed for Commitment to Consumer Protection*

#### 1. The CFPB's Overarching Statutory Framework

The Dodd-Frank Act gives the CFPB five structural features that increase the likelihood of the Bureau engaging in significant consumer protection. First, it has a broad statutory mandate to protect consumers from a plethora of financial-product risks, including unfair, abusive, deceptive, and discriminatory practices,[94] as well as regulatory authority over nineteen federal consumer-protection statutes.[95] Equally as important, this is the CFPB's sole mission. Thus, it does not face the perceived internal conflict of a dual mission that also includes prudential regulation of the safety and soundness of financial institutions.[96] Prudential regulators often consider consumer protection to conflict with bank safety and soundness, because protecting consumers from harmful yet profitable products could hurt banks' bottom lines.[97] This conflict may be overstated; one potential lesson from the recent financial crisis is that a lack of consumer financial protection may lead to underwriting practices that are not sustainable in the long run.[98] But regardless of the true extent of this conflict, the lack of a prudential mission means that there is no potential counterpoint to the Bureau's consumer protection goals. Moreover, an agency whose *raison d'être* is consumer protection is unlikely to abandon its consumer protection mission because doing so would leave it with no purpose, and it is a rare regulatory body that wants to eliminate the justification for its existence.[99]

Second, the CFPB is now the sole federal regulator for the consumer risks within its purview. The Dodd-Frank Act transferred to the CFPB nearly all of

93. See *infra* Part III.B.

94. *See* Dodd-Frank Act § 1021(b), 12 U.S.C. § 5511(b)(1)–(2) (2012) (stating the objectives of the Bureau include, inter alia, "ensuring that . . . consumers are protected from unfair, deceptive, or abusive acts and practices and from discrimination").

95. See *supra* note 156 and accompanying text. For some of these statutes, the CFPB has responsibility for enforcing the entire statute. For others, it received jurisdiction over only portions. DAVID H. CARPENTER, CONG. RESEARCH SERV., R42572, THE CONSUMER FINANCIAL PROTECTION BUREAU (CFPB): A LEGAL ANALYSIS 25 (2014).

96. Jean Braucher, *Form and Substance in Consumer Protection*, 7 BROOK. J. CORP. FIN. & COM. L. 107, 109 (discussing the goal of separating consumer protection from prudential regulation to avoid internal conflict in mission as a reason for creation of the CFPB).

97. Indeed, one aspect of the Bureau's structure, the Financial Stability Oversight Council (Council), appears designed to assuage these concerns. Dodd-Frank Act § 1023(a), 12 U.S.C. § 5513(a). See *infra* note 443 and accompanying text for a discussion of the Council's powers.

98. *See* ENGEL & MCCOY, *supra* note 4, at 225 (asserting that "[e]arly attention to basic consumer protections would have halted disastrous subprime loans in their tracks").

99. Sarah Babb & Ariel Buira, *Mission Creep, Mission Push and Discretion: The Case of IMF Conditionality*, *in* THE IMF AND THE WORLD BANK AT SIXTY 59, 60 (Ariel Budra ed., 2005) (discussing the phenomenon of "mission creep" and noting that entities such as "public service organizations . . . tend to become . . . preoccupied with their own survival").

the consumer financial powers of four pre-crisis federal prudential regulators[100] that previously held major portions of this authority as well as certain consumer financial powers of the Department of Housing and Urban Development (HUD) and the Federal Trade Commission (FTC).[101] From each of the prudential regulators, the Bureau received "all powers and duties that were vested in [the agency], relating to consumer financial protection functions."[102] The statute transferred HUD authority for three real estate laws[103] and certain FTC authority over several consumer financial protection statutes.[104]

In significant contrast, before the Dodd-Frank Act, financial consumer protection was spread across a bewildering array of regulators, including the Federal Reserve Board, the Federal Deposit Insurance Corporation, the former Office of Thrift Supervision (OTS), and state banking agencies.[105] Financial institutions could essentially choose their regulator by changing their charters.[106] Not surprisingly, the result was significant forum shopping. One particularly striking example occurred when the now-notorious Countrywide Financial[107]

100. These are "the Federal Deposit Insurance Corporation, . . . the National Credit Union Administration, the Office of the Comptroller of the Currency, [and] the Office of Thrift Supervision . . . and the heads of those agencies." Dodd-Frank Act § 1061(a)(2)(A), 12 U.S.C. § 5581(a)(2)(A) (2012). We describe these four regulators as "pre-crisis" because the Dodd-Frank Act eliminated the Office of Thrift Supervision. Dodd-Frank Act § 312(b), 12 U.S.C. § 5412(b) (moving OTS authority over state savings associations to the Federal Deposit Insurance Corporation and its authority over federal savings associations to the OCC).

101. Dodd Frank Act § 1061(a)(2)(A), 12 U.S.C. § 5581.

102. *Id.* § 1061(b)(1)–(4), (6), 12 U.S.C. § 5581(b)(1)–(4), (6).

103. *Id.* § 1061(b)(7), 12 U.S.C. § 5581(b)(7) (transferring to the CFPB the functions related to "the Real Estate Settlement Procedures Act of 1974 (12 U.S.C. 2601 et seq.), the Secure and Fair Enforcement for Mortgage Licensing Act of 2008 (12 U.S.C. 5102 et seq.), and the Interstate Land Sales Full Disclosure Act (15 U.S.C. 1701 et seq.)").

104. *Id.* § 1061(b)(5), 12 U.S.C § 5581(b)(5) (retaining the FTC's primary rulemaking authority under the FTC Act, 15 U.S.C. §§ 41–58, but transferring to the CFPB the FTC's authority under other "enumerated consumer laws" (defined by section 1002(12)) to proscribe rules, issue guidelines, or conduct a study or issue a report). The Dodd-Frank Act requires the two agencies to coordinate their authority in some instances, e.g., the CFPB must consult with the FTC before issuing a rule that would expand the definition of "covered persons." *Id.* § 1024(a)(2), 12 U.S.C. § 5514(a)(2).

105. Elizabeth F. Brown, *E Pluribus Unum-Out of Many One: Why the United States Needs a Single Financial Services Agency*, 14 U. MIAMI BUS. L. REV 1, 4–5 (2005) (noting that there were, at the time, over 115 different state and federal agencies that regulated banking, securities, and insurance firms and their products and services); *see also* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-05-61, FINANCIAL REGULATION: INDUSTRY CHANGES PROMPT NEED TO RECONSIDER U.S. REGULATORY STRUCTURE 111 (2004) (acknowledging that the existing complaint system made it difficult for consumers to determine the relevant regulator).

106. Dee Pridgen, *Sea Changes in Consumer Financial Protection: Stronger Agency and Stronger Laws*, 13 WYO. L. REV. 405, 408–409 (2013) (discussing critique that charter shopping set up race to the bottom in consumer protection regulation).

107. *See* Dan Fitzpatrick, *BofA's Blunder: $40 Billion-Plus*, WALL ST. J. (July 1, 2012, 3:52 PM), http://on.wsj.com/1P4VHip (describing Countrywide Bank as "a pioneer of subprime and adjustable-rate mortgages that were some of the worst made during the housing boom"). By 2012, Bank of America, which purchased Countrywide in 2008, had paid "more than $40 billion in real-estate losses, legal expenses and settlements with state and federal agencies" and anticipated an additional $5 billion in possible losses and "scores of lawsuits" related to Countrywide's activities. *Id.*

reorganized as a thrift and moved from the Office of Comptroller of the Currency (OCC), which did not by any means have a strong consumer-protection record,[108] to the OTS,[109] which promised an even friendlier regulatory environment.[110]

Congress addressed this problem by concentrating consumer financial protection in one federal agency whose jurisdiction is defined by financial product rather than financial institution legal structure.[111] As part of this consolidation, the CFPB also has authority over non-depository institutions,[112] so that restructuring as such an entity does not allow a company to remove itself from the CFPB's jurisdiction. Consolidation of authority in one agency also enables the Bureau to regulate assertively without worrying that it is disadvantaging the companies under its jurisdiction compared to other companies in the market. Indeed, this is one of the Dodd-Frank Act's explicit objectives in creating the CFPB: "Federal consumer financial law is enforced consistently, without regard to the status of a person as a depository institution, in order to promote fair competition . . . ."[113]

108. In one case, the OCC refused to help hundreds of consumers who complained after Fleet Bank raised the interest rates on their credit cards despite promises of a "fixed" rate. Jess Bravin & Paul Beckett, *Dependent on Lenders' Fees, the OCC Takes Banks' Side Against Local Laws*, WALL ST. J., Jan. 28, 2002, at A1 (quoting the OCC's response letter to the complaining consumers that "'we can only suggest that you contact private legal counsel regarding any additional remedies'"). When an aggrieved customer filed a federal class action alleging deceptive practices by Fleet, the OCC responded by submitting amicus briefs on behalf of Fleet in both the district court and the Third Circuit Court of Appeals. *See* Roberts v. Fleet Bank, 2001 U.S. Dist. LEXIS 19117 (E.D. Pa. Nov. 20, 2001), at *5 (referring to "the amicus brief filed by the [OCC]"), *aff'd in part, rev'd in part*, 342 F.3d 260, 262 (3d Cir. 2003) (noting counsel for the OCC as amicus curiae). The Third Circuit found that the plaintiff presented a genuine issue of fact based on her claim that Fleet's disclosures were misleading and violated the Truth in Lending Act, calling into question whether the OCC acted properly in telling consumers that federal law granted no reasonable grounds for them to proceed against Fleet. *Fleet Bank*, 342 F.3d at 269. The OCC has also intervened on behalf of the banks in cases challenging ATM fees (where the OCC said the "'public interest' favored allowing banks to charge noncustomers more for using their ATMs") and check-cashing fees (the OCC arguing that the National Bank Act permits national banks to charge whatever fees they deem appropriate). Bravin & Beckett, *supra; see also* Bar-Gill & Warren, *supra* note 6, at 91–93 (discussing the OCC's interventions that effectively disabled states' ability to redress consumer protection violations by national banks).

109. One way to characterize this situation is as regulatory capture, which is an important way that agency commitment to its mission can be weakened. Because Whitford did not use the term capture, we frame the bulk of our analysis in terms of commitment, saving the capture discussion for our counter-arguments in Section IV.

110. Binyamin Appelbaum & Ellen Nakashima, *Banking Regulator Played Advocate over Enforcer*, WASH. POST (Nov. 23, 2008), http://www.washingtonpost.com/wp-dyn/content/article/2008/11/22/AR2008112202213_pf.html (noting that the OTS "promised more flexible oversight of issues related to [Countrywide's] mortgage lending"). The OTS was generally known for its "aggressively deregulatory stance toward the mortgage lenders it regulated."

111. *See* Dodd-Frank Act § 1011(a), 12 U.S.C § 5491(a) (2012) (granting the Bureau the power to "regulate the offering and provision of consumer financial products or services under the Federal consumer financial laws").

112. *Id.* § 1024, 12 U.S.C. § 5514.

113. Dodd-Frank Act § 1041(b)(4), 12 U.S.C. § 5551(b)(4); *see also* Danielle Douglas, *Q & A: Richard Cordray on What's Next for the Consumer Protect Bureau*, WASH. POST (Sept. 11, 2013),

Congress addressed a related problem that had exacerbated the pre-crisis charter shopping. The Bureau's budget does not depend on the number and size of the financial institutions it regulates. Before the Dodd-Frank Act, the OCC and OTS budgets were comprised primarily of financial assessments on the financial institutions they regulated.[114] This established a classic framework for a race to the bottom[115] by incentivizing agencies to attract financial institutions to their regulatory purview—or at least to avoid alienating regulated companies.[116] A laissez-faire approach to consumer protection is an obvious attractive regulatory feature, and one agency went so far as to promote its ability to preempt state and local consumer protection as an advantage of a federal charter.[117] The Bureau has no such conflict of interest. To the extent that companies contribute financially to the CFPB, it is through penalties generated by enforcement activities,[118] which, if anything, gives the CFPB a pro-compliance incentive. And the Dodd-Frank Act did not stop there. It took one more step to insulate the CFPB from risks to its financial health that rigorous consumer protection might otherwise entail. Congress limited its own influence—or more precisely, the influence of future Congresses—over the CFPB by giving the agency a minimum budget entitlement,[119] which may not fall

http://www.washingtonpost.com/business/economy/qanda-richard-cordray-on-whats-next-for-the-consumer-protection-bureau/2013/09/10/e0efde82-1a42-11e3-82ef-a059e54c49d0_story.html (quoting Cordray as emphasizing the need for regulation of both chartered and nonchartered creditors to have a level playing field in the market"). See *infra* Part III.B.4 for a discussion of the Bureau's commitment to consistency.

114. Bar-Gill & Warren, *supra* note 6, at 93 ("Assessments comprise 95% of the OCC's budget, with the twenty largest national banks covering nearly three-fifths of these assessments."); Appelbaum & Nakashima, *supra* note 110 (the OTS "is funded by assessments on the roughly 750 banks it regulates, with the largest firms paying much of the freight").

115. *See* CARPENTER, *supra* note 95, at 5–8 (2014) (discussing the "race-to-the-bottom" that existed in the pre–Dodd-Frank Act regulatory system).

116. *See, e.g.*, Bar-Gill & Warren, *supra* note 6, at 93–94 (noting that, because assessments comprise 95% of the budget for the OCC, its "ability to attract large banks to the national banking system results in a significant financial gain," making the OCC reluctant to impose substantial restraints on such banks).

117. *See* Bravin & Beckett, *supra* note 108 (quoting John D. Hawke Jr., chief of the OCC, as stating that the OCC's power to override state and local consumer protection laws "provides an incentive for banks to sign up with the OCC . . . . 'It is one of the advantages of a national charter, and I'm not the least bit ashamed to promote it.'").

118. The CFPB can and does sue for civil penalties, which go into the Civil Penalty Fund. Between July 2011 and September 2012, for example, Capital One paid $25 million to the CFPB's Civil Penalty Fund, Discover Bank paid $7 million, and AmEx paid $14.1 million. (These were all in addition to penalties the companies had to pay to other agencies.) SUPERVISORY HIGHLIGHTS I, *supra* note 52, at 8–11. The Fund is used to pay victims who are not fully compensated by damage awards and, if funds remain that cannot be distributed to victims, for funding consumer education and financial literacy programs. Consumer Financial Civil Penalty Fund, 78 Fed. Reg. 26489, 26490 (May 7, 2013) (codified at 12 C.F.R. § 1075 (2015)). The Civil Penalty Fund Rules require the Fund only be used for these three purposes—it cannot be used to pay, for example, examiner salaries. *Id.*

119. Dodd-Frank Act § 1017(a)(1), 12 U.S.C. § 5497(a)(1) (2012) (requiring the Board of Governors to transfer earnings from the Federal Reserve to the CFPB in an amount "determined by

below of twelve percent of the Federal Reserve's expenses.[120] Congress cannot increase its oversight influence with threats to cut the budget without also cutting the Federal Reserve's budget, a politically less feasible course of action.[121] Of course, changes in the governing law—although harder to achieve—continue to give it some sway over the agency, as is only appropriate in a democracy. But the CFPB has significant budgetary protection, which removes a major potential impediment to rigorous consumer protection.

A final structural element that may lead to a strong commitment to consumer protection is that CFPB's leader is a single director rather than a body of commissioners balanced by party.[122] During the debates over Dodd-Frank's passage, CFPB proponents argued that this was essential to the agency's independence.[123] And opponents of the agency's creation strongly objected to a unitary director. It was one principal reason that Senate Republicans filibustered President Obama's director nominee for approximately six months.[124]

Indeed, an agency headed by a single director does seem more likely to engage in more rigorous consumer protection than one headed by a bipartisan board, in the right circumstances. But this strategy also contains risks. During the six months of the Senate Republication filibuster, it was unclear that the Bureau would ever assume its full powers because of the statutory decision to invest so

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the [CFPB] Director to be reasonably necessary to carry out the authorities of the Bureau," subject to a percentage cap).

120. *Id.* § 1017(a)(2)(A)(iii), (B), 12 U.S.C. § 5497(a)(2)(A)(iii) (setting the CFPB budgetary cap for 2013 and beyond at twelve percent of the Federal Reserve's expenses, though the percentage limit will be increased annually in proportion to "the employment cost index for total compensation for State and local government workers").

121. *See* Binyamin Appelbaum, *In Republican Attacks on the Fed, Experts See a Shift*, N.Y. TIMES (Apr. 7, 2015), http://www.nytimes.com/2015/04/08/business/economy/in-republican-attacks-on-the-fed-experts-see-a-shift.html?hp&action=click&pgtype=Homepage&module=first-column-region&region=top-news&WT.nav=top-news (citing recent Republican legislative attacks on the Federal Reserve's decision not to raise interest rates, but ultimately concluding that the Federal Reserve's structure is unlikely to change).

122. Dodd-Frank Act, § 1011(b), 12 U.S.C. § 5491(b). Rachel Barkow discusses two additional structural elements that should insulate the CFPB from capture and therefore increase its commitment to consumer protection. These are the ability to speak publicly without needing approval first and legal powers to bring suits on its own behalf rather than relying on the Department of Justice. Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15 (2010).

123. *See, e.g.*, Shahien Nasiripour, *Fight for the CFPA Is 'A Dispute Between Families and Banks,' Says Elizabeth Warren*, HUFFINGTON POST (May 25, 2011, 3:40 PM), http://www.huffingtonpost.com/2010/03/03/fight-for-the-cfpa-is-a-d_n_483707.html (noting that Elizabeth Warren and Senator Christopher Dodd both cite a single, presidentially appointed director as necessary for functional independence, and quoting Warren as stating, "'My first choice is a strong consumer agency . . . . My second choice is no agency at all and plenty of blood and teeth left on the floor.'").

124. Todd Zywicki, *The Consumer Financial Protection Bureau: Savior or Menace?*, 81 GEO. WASH. L. REV. 856, 863 (2013). At first, they appeared to object only to the appointment of Elizabeth Warren, but when Obama nominated Richard Cordray in July 2011 as director instead, the objections did not abate, and a filibuster ensued. *Id.* at 862–63.

much of its authority in the director.[125] Even though the Senate eventually confirmed the appointment of Director Cordray,[126] a unitary director makes the Bureau more susceptible to policy swings during a presidential administration opposed to consumer financial protection.[127]

### 2. Supervision Designed for Consumer Protection

The Dodd-Frank Act also lays the groundwork for a supervision process committed to consumer protection and likely to increase company compliance with consumer law. It does so by (1) granting a comprehensive statutory mandate, (2) providing rule-like clarity within the broad standards it establishes, and (3) requiring the CFPB to minimize the direct compliance costs companies incur.

#### *a. Statutory Mandate*

The Bureau has a broad supervision mandate, which enables it to design a rigorous supervision program without fear of overstepping its authority.[128] The Dodd-Frank Act gives the CFPB the "primary function" of "supervising covered persons for compliance" with federal consumer financial law.[129] More specifically, the statute contains two comprehensive supervision sections, one covering non-depository institutions, and a second for insured depository institutions and credit unions with more than $10 billion in assets.[130] A third,

125. Zywicki, *supra* note 124, at 863 (stating that 12 U.S.C. § 5586(a) "makes the transfer of certain new powers granted to the CFPB under Dodd-Frank—namely, the power to regulate nonbank lenders such as payday lenders, as well as credit reporting agencies—subject to the presence of a confirmed director").

126. Jonathan Weisman & Jennifer Steinhauer, *Senate Strikes Filibuster Deal, Ending Logjam on Nominees*, N.Y. TIMES, July 17, 2013, at A1 (reporting that Senate Democrats agreed to abandon proposed filibuster changes in exchange for confirmation votes on several of President Obama's stalled nominees, including Richard Cordray). Although President Obama had appointed Cordray as a "recess appointment," the legitimacy of the appointment was in doubt. Andrew Rosenthal, *Republicans Versus Consumers*, N.Y. TIMES: TAKING NOTE – THE EDITORIAL PAGE EDITOR'S BLOG (Feb. 4, 2013, 6:16 PM), http://takingnote.blogs.nytimes.com/2013/02/04/republicans-versus-consumers/ (noting that, at the time of Cordray's appointment, Congress "was holding pro-forma sessions lasting a few minutes each day, a non-recess recess organized specifically to prevent Mr. Obama from making appointments"). The Senate confirmation vote came just weeks after the Supreme Court agreed to hear a case regarding the legality of Mr. Obama's recess appointments to the NLRB, made on the same day and in the same way as Mr. Cordray's appointment. Binyamin Appelbaum, *Senate Backs a Director for Financial Watchdog*, N.Y. TIMES, July 17, 2013, at B1 (stating that the confirmation vote meant that any adverse Supreme Court ruling regarding the NLRB appointments would have "limited consequences" for Cordray).

127. See *infra* notes 435–37 and accompanying text.

128. Angela Littwin, *Why Process Complaints? Then and Now*, 87 TEMP. L. REV. 895, 897–99 (2015).

129. Dodd-Frank Act § 1021(c)(4), 12 U.S.C. § 5511(c)(4) (2012).

130. The statute divides consumer financial companies into three groups for supervisory purposes: non-depository institutions (covered by section 1024); insured depository institutions and credit unions with assets of more than $10 billion as well as their affiliates (section 1025) (hereinafter "larger depository institutions and credit unions" or "larger financial institutions"); and insured

narrower section provides some analogous powers[131] with respect to smaller depository institutions and credit unions.[132] These provisions grant the CFPB supervisory authority over a broad swath of the consumer financial marketplace. The CFPB's jurisdiction over large depository institutions alone gives it supervision authority over institutions that "account for $10 trillion in assets or nearly 80 percent of the nation's banking market."[133] It also has supervisory authority over nonbank entities that "number in the thousands."[134] And just as the Bureau's general authority over nearly all[135] of the consumer financial

depository institutions and credit unions with assets of $10 billion or less (section 1026) (hereinafter "smaller depository institutions and credit unions" or "smaller financial institutions"). The CFPB's supervisory authority is broadest with respect to non-depository companies and narrowest with respect to smaller financial institutions. See *infra* notes 153–54 and accompanying text. Its authority over larger financial institutions generally mirrors the broader non-depository authority, but does not include two particularly intrusive powers and requires substantive coordination with federal prudential regulators. See *infra* notes 199–204 and accompanying text.

131. The CFPB's related authority over smaller depository institutions and credit unions may not even properly be called "supervisory." Unlike sections 1024 and 1025, section 1026 does not include the word "supervision" in its title or anywhere in its text, although the statute does reference all three sections in the provision designating supervision as one of the Bureau's six "primary functions." Dodd-Frank Act § 1021(c)(4), 12 U.S.C. § 5511(c)(4). Rather than granting the Bureau direct supervisory powers, section 1026 establishes some information-gathering authority and provides for the inclusion of Bureau examiners in a "sampling" of prudential-agency examinations (at the Bureau's discretion). *Id.* § 1026(c)(1), 12 U.S.C. § 5516(c)(1). Although the CFPB's role in these examinations is to "assess compliance with the requirements of Federal consumer financial law," its enforcement authority is limited to notifying the prudential regulator and recommending action. *Id.* § 1026(d)(2)(A), 12 U.S.C. § 5516(d)(2)(A). The prudential regulator must "consider" the Bureau's input about the examination process (section 1026(c)(2)(C)) and respond in writing to the Bureau's notifications within sixty days (section 1026(d)(2)(B)). The statute makes clear that the prudential regulator is the agency with exclusive authority to enforce federal consumer financial law. *Id.* § 1026(d)(1), 12 U.S.C. § 5516(d)(1). However, there is an exception in section 1026(e) for service providers to a substantial number of smaller financial institutions, which gives the CFPB section 1025 supervisory authority over them. Most of the statutory provisions cited in this Part apply to non-depository institutions and larger depository institutions and credit unions but not to smaller depository institutions and credit unions. Thus, for the sake of readability, we do not specify it in the text when a provision covers only the first two groups. The coverage, or lack thereof, of smaller financial institutions will be clear in the citations.

132. The CFPB's limited supervisory power over these smaller institutions is the result of a deliberate decision by now-Senator Elizabeth Warren, who during her campaign to establish the Bureau, courted them via their trade association, the Independent Community Bankers of America (ICBA). Barney Frank and the ICBA's leader eventually brokered this comprise, which resulted in the ICBA not opposing the CFPB's creation, a decision that Frank credited with "secur[ing] the support of many wavering centrist Democrats and help[ing] insure the bill's passage." Ryan Lizza, *The Virtual Candidate*, NEW YORKER, May 4, 2015, at 39–40.

133. OIG EVALUATION REPORT, *supra* note 50, at 36 (Appendix B, Management's Response, March 24, 2014, letter from Steven L. Antonakes, deputy director and associate director of the CFPB Division of Supervision, Enforcement, and Fair Lending).

134. *Id.*

135. Dodd-Frank Act § 1027, 12 U.S.C. § 5517 (excluding from CFPB coverage small businesses that extend credit for the sale of nonfinancial goods or services, real estate brokers and agents, manufactured and modular home retailers, accountants and tax preparers, activities engaged in by attorneys as part of the practice of law, insurance, activities related to "specified plan[s] or

marketplace promotes general company compliance with consumer financial protection law, the Bureau's broad supervisory authority promotes company compliance through supervision in the same two ways. First, it constrains companies' ability to modify their practices in order to avoid falling within the CFPB's supervisory jurisdiction.[136] Second, it limits the risk that assertive CFPB action will disadvantage supervised companies against their competitors.[137]

In addition, the Dodd-Frank Act gives the CFPB explicit supervision-related enforcement authority,[138] which enables the Bureau to deploy whatever regulatory tools it needs to engender compliance via supervision. This power is exclusive and overrides previous federal statutory grants of authority to other agencies.[139]

The three statutory "purposes" of supervision provide further support for a wide-reaching, consumer-driven process. Two of these purposes are "assessing compliance with the requirements of Federal consumer financial law" and "detecting and assessing risks to consumers and to markets for consumer financial products and services."[140] These are both broadly framed tasks that privilege consumer protection. This is a major change. Before the CFPB's creation, the federal prudential agencies had regulatory authority over consumer protection statutes,[141] but their examinations focused on prudential concerns, almost to the exclusion of consumer protection.[142] As Richard Cordray, the first director of the CFPB, explained, "We have to institute our supervision program for financial institutions that are used to being regulated, but not necessarily used to being regulated with a focus on consumer protection. It's an adjustment for them."[143]

The remaining statutory "purpose" requires the CFPB to obtain information about companies' activities and internal systems for complying with consumer financial law.[144] This purpose gives the Bureau broad information-

arrangement[s]" or charitable contributions under the Internal Revenue Code, and persons regulated by a state securities commission, commodity futures trading commission, or farm credit administration); *id.* § 1029, 12 U.S.C. § 5519 (excluding transactions primarily dealing with the sale or servicing of automobiles).

136. See *supra* notes 105–10 and accompanying text.

137. See *supra* note 113 and accompanying text.

138. Dodd-Frank Act §§ 1024(c)(1), 1025(c)(1), 12 U.S.C. § 5514(c)(1), 5515(c)(1).

139. *Id.* §§ 1024(c)(1), 1025(c)(1), 12 U.S.C. § 5514(c)(1), 5515(c)(1).

140. *Id.* § 1024, 12 U.S.C. 5514 (covering non-depository institutions); *id.* § 1025(b)(1)(C), 12 U.S.C. § 5515(b)(1)(C) (covering insured depository institutions and credit unions with assets over $10 billion).

141. Enforcement responsibilities for the Truth in Lending Act, for example, were allocated between nine different agencies. *See* Truth in Lending Act, 15 U.S.C. § 1607(a), (c) (2012).

142. See *infra* Part IV.B.2 for a discussion of the lack of compliance management systems at some financial institutions when the CFPB began its work.

143. Douglas, *supra* note 113.

144. Dodd-Frank Act § 1024, 12 U.S.C. § 5514(b)(1)(B) (covering non-depository institutions); *id.* § 1025(b)(1)(B), 12 U.S.C. § 5515(b)(1)(B) (covering insured depository institutions and credit unions with assets over $10 billion).

gathering capabilities and enables it to monitor companies' "voluntary" legal compliance.[145]

Other provisions similarly increase the likelihood that companies will take CFPB supervision seriously. The Dodd-Frank Act mandates that the Bureau report potential violations of federal criminal law to the Department of Justice.[146] The Bureau is required to report any tax noncompliance it finds to the IRS.[147] And it can use surprisingly intrusive measures, such as background checks of company principals, to assess the "legitima[cy]" of non-depository institutions as well as their ability to fulfill obligations to consumers.[148] If it finds the latter wanting, it can require bonding or other financial consumer protections.[149]

Finally, the statute's language leaves little room for regulated entities to resist CFPB supervision by closing three important potential loopholes. First, it enables the Bureau to collect all relevant information under companies' control, even information stored with other entities.[150] This prevents companies from withholding information by outsourcing its management. Second, the CFPB has supervisory authority over companies' service providers,[151] thereby preventing companies from offloading the legally riskier aspects of their operations onto third parties.[152] Third, the affiliates of large depository institutions and credit

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145. We use the term "voluntary" here as Whitford does in his article: company compliance with consumer law that is not a result of legal enforcement. See *supra* note 56. We perhaps stretch the word's meaning further than he does because sections 1024(b)(1)(B) and 1025(b)(1)(B) put companies on notice that their compliance management systems would receive scrutiny, although companies do not appear to have taken advantage of this notice, at least not before their initial examinations. See *infra* Part III.B.5.c.

146. *Id.* § 1056, 12 U.S.C. § 5566. The CFPB has interpreted this authority to cover practices such as false loan documentation and inflated appraisals, which contributed to the subprime lending bubble that preceded the recent financial crisis. CONSUMER PROTECTION FINANCIAL BOARD, CFPB SUPERVISION AND EXAMINATION MANUAL, Overview 8 (2012) [hereinafter CFPB EXAMINATION MANUAL]; ENGEL & MCCOY, *supra* note 4, at 28, 30–31.

147. Dodd-Frank Act §§ 1024(b)(7), 1025(b)(5), 1026(b)(3), 12 U.S.C. §§ 5514(b)(7), 5515(b)(5), 5516(b)(3).

148. *Id.* § 1024(b)(7)(C), 12 U.S.C. § 5514(b)(7).

149. *Id.*

150. Dodd-Frank Act §§ 1024(b)(5), 1025(b)(4), 1026(b)(1)–(2), 12 U.S.C. §§ 5514(b)(5), 5515(b)(4), 5516(b)(1)–(2). These provisions technically give this authority to the Bureau's "Director," but we do not mention it in the text because it is not relevant to this point.

151. *Id.* §§ 1024(e), 1025(d), 12 U.S.C. §§ 5514(e), 5515(e). The equivalent section 1026 power allows the CFPB to supervise service providers that work with a "substantial" number of smaller financial institutions. *Id.* § 1026(e), 12 U.S.C. § 5516(e).

152. This also has the pro-compliance effect of holding large, reputable financial institutions accountable for the actions of their smaller, less savory business partners. For example, consumer first-party lenders can no longer disclaim responsibility for the practices of third-party debtor collectors, even when those debt collectors have purchased a lender's debts. *See, e.g.*, Debt Collection (Regulation F), 78 Fed. Reg. 67848, 67855 (Nov. 12, 2013) (codified at 12 C.F.R. § 1006 (2015)) (seeking comment on the level of "monitoring or oversight of debt buyers" that creditors should "undertake after debt sales are completed or after debts are placed with third parties for collection"); Benjamin G. Diehl, *Regulatory Scrutiny Increases on Lenders Collection Practices with Respect to Third Parties and Data Integrity*, BANKING L.J., Feb. 2014, at 143, 146–47 (advising creditors to

unions are covered under the same statutory section as large financial institutions,[153] which eliminates these companies' ability to segment themselves into groups of smaller affiliates—with each affiliate covered by the significantly less demanding statutory section for smaller financial institutions.[154]

#### *b. The Right Combination of Rules and Standards*

Almost by definition, statutory mandates are standards, not rules. Thus, at first glance, it appears that much of the supervision structure just described presents the risks Whitford identified with vague, admonitory statutes. But on closer examination, the Dodd-Frank Act actually creates a supervision program that implements the structure that Whitford hypothesized was most likely to produce compliance.[155] Its broad statements of purpose are supported by a wealth of specific statutory commands.

The statute transferred to the CFPB some or all authority for nineteen specific federal laws that regulate consumer financial products and services.[156] These statutes are incredibly diverse—ranging from the Equal Credit Opportunity Act[157] to the Electronic Funds Transfer Act[158] to the S.A.F.E. Mortgage Licensing Act of 2008[159]—and include statutes, like the Truth and Lending Act,[160] that contain a wide array of specific statutory commands.[161]

As if this were not enough, the Dodd-Frank Act grants the CFPB three more points of authority: the power to regulate unfair, deceptive, and abusive practices (UDAAP) by the entities it regulates.[162] These concepts are themselves broad standards that nevertheless contain enough substantive content to be

"evaluate their best practices regarding their handling of debt sales while also examining the policies and procedures with respect to collection activities handled by third party service providers" in order to avoid CFPB scrutiny); *Shining a Light on the Consumer Debt Industry: Provided to the Subcomm. on Fin. Inst. & Consumer Protection of the Senate Comm. on Banking, Housing, & Urban Affairs* 113th Cong. 12 (July 17, 2013) (statement of the Comptroller of the Currency), *available at* http://www.occ.gov/news-issuances/congressional-testimony/2013/pub-test-2013-116-oral.pdf (recommending, in the OCC's statement of best practices in debt sales, that national banks monitor debt buyers after sales are completed "to help control and limit legal and reputation risk").

153. Dodd-Frank Act § 1025(a)(1)–(2), 12 U.S.C. § 5515(a)(1)–(2).

154. *Id.* § 1026(a)(1)–(2), 12 U.S.C. § 5516(a)(1)–(2).

155. See *supra* Section II for an overview of Whitford's analytical framework for evaluating consumer protection legislation.

156. CARPENTER, *supra* note 95, at 25, 25 n.150.

157. 15 U.S.C. § 1691–1691f (2012).

158. Pub. L. No. 95-630, 92 Stat. 3641 (1978) (codified in scattered sections of 12 and 15 U.S.C.).

159. 12 U.S.C. §§ 5101– 5116 (2012).

160. 15 U.S.C. §§ 1601–1667f (2012).

161. *E.g.*, *id.* § 1637(a)(4) (requiring that creditors disclose interest rates to consumers in terms of annual percentage rate); *id.* § 1637(k) (requiring consumers opt-in for over-the-limit transactions if fees are imposed); *id.* § 1643(a)(1)(B) (limiting consumer liability for unauthorized credit card use to a maximum of $50).

162. Dodd-Frank Act § 1031(a), 12 U.S.C. § 5531(a) (2012); *see also id.* § 1036(a)(1)(B), 12 U.S.C. § 5536(a)(1)(B) (making it unlawful for covered persons and service providers "to engage in any unfair, deceptive, or abusive act or practice").

useful. Because they are standards, the CFPB can use them to regulate new practices for which there is no specific authority or statutory command. But while they may sound vague to the untrained ear, the UDAAP standards are not nearly as imprecise as the unconscionability standard. Two of them (unfair and deceptive) have had well-settled definitions since the 1980s,[163] and two of them (unfair and abusive) are defined in the Dodd-Frank Act.[164] The deception and unfairness concepts are from the Federal Trade Commission Act (FTC Act) and have been the subject of policy statements and case law.[165] There is some overlap among the three terms,[166] but they do have distinct meanings.

Deception liberalizes the common law of misrepresentation, for example to cover acts or practices likely to mislead average consumers in the target audience even if there has not been any actual misleading and no deceptive intent.[167] It also enables preventive regulation. The CFPB is making use of this history by following an FTC policy statement on the meaning of deception.[168]

Unfairness focuses on likely substantial consumer injury that is not reasonably avoidable or outweighed by countervailing benefits; the FTC Act and the Dodd-Frank Act use essentially the same definition.[169] And while this statutory definition is itself vague, both agencies have supplied concrete interpretations. The FTC has been refining its approach in dialogue with the courts and Congress for more than eight decades,[170] while the CFPB appears to be making up for lost time. In a 1980 policy letter to Congress, the FTC offered a consolidated interpretation that later became the basis for the statutory definition of unfairness.[171] The CFPB has built on the FTC's approach and added a few features of its own. The FTC defined substantial harm generally as

163. *See* FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 244–45 n.5 (1972) (quoting the factors the FTC considers when applying the prohibition against consumer unfairness); FTC Policy Statement on Deception, Letter to John D. Dingell, Chairman, Subcomm. on Oversight & Investigations, Comm. on Energy & Commerce (Oct. 14, 1983), *reprinted in In re* Cliffdale Assoc., 103 F.T.C. 110, 170–71 (1984) [hereinafter FTC Policy Statement on Deception] (summarizing the elements of deception); FTC Policy Statement on Unfairness, *supra* note 45 (stating the FTC's policy on "unfairness").

164. *See* Dodd-Frank Act § 1031(c), 12 U.S.C. § 5531(c) (defining "unfairness"); *id.* § 1031(d), 12 U.S.C. § 5531(d) (defining "abusive").

165. 15 U.S.C. §§ 41–58 (2012).

166. *See* CFPB EXAMINATION MANUAL, *supra* note 146, at UDAAP 9 (stating that, "[a]lthough abusive acts also may be unfair or deceptive, . . . the legal standards for abusive, unfair, and deceptive each are separate").

167. 2 DEE PRIDGEN & RICHARD M. ALDERMAN, CONSUMER PROTECTION AND THE LAW, 104–15 (2013) (discussing FTC case law development of the concept of deception).

168. *See* FTC Policy Statement on Deception, *supra* note 163; *see also* CFPB EXAMINATION MANUAL, *supra* note 146, at UDAAP 5 (quoting the tests of the FTC Deception Policy Statement); *id.* at UDAAP 5 n.10 (stating that "Examiners should be informed by the FTC's standard for deception").

169. Dodd-Frank Act § 1031(c), 12 U.S.C. § 45(a)(4).

170. *See* FTC Policy Statement on Unfairness, *supra* note 45, at 305 (citing a 1931 Supreme Court opinion discussing unfairness).

171. A definition of unfair was added to the FTC Act in 1994. 15 U.S.C. § 45(a)(4). It was taken from the FTC Policy Statement on Unfairness, *supra* note 45. The Dodd-Frank Act adopts the same definition of unfair as the FTC Act. Dodd-Frank Act § 1031, 12 U.S.C. § 5531.

monetary (or health and safety), rather than emotional, injury.[172] The CFPB adopts a similar course, although it states that emotional harm could be enough in the right circumstances and emphasizes that the risk of substantial harm satisfies the test; actual injury is not required.[173] The FTC restricted unavoidable injuries to those that undermined "the free exercise of consumer decisionmaking."[174] Similarly, the CFPB considers injury not reasonably avoidable when a practice "interferes with or hinders a consumer's ability to make informed decisions or take action to avoid that injury."[175] The Bureau also adds that injuries are not reasonably avoidable when consumers can only avoid them by spending significant monetary or other resources.[176] When balancing potential benefits, the FTC considered a practice's potential cost savings to consumers as well as the potential costs of regulation to companies and society as a whole.[177] The CFPB also includes potential consumer cost savings and the cost of regulation in its cost-benefit analysis.[178] The Bureau additionally mentions "a wider availability of products and services resulting from competition" as a possible offsetting benefit.[179]

In contrast with unfairness and deception, the abusiveness concept is new. But not only does the Dodd-Frank Act define abusiveness, the Act defines it to prohibit a specific type of consumer lending practice that has become increasingly prevalent in recent years.[180] Abusiveness addresses harms stemming from the consumer's cognitive biases identified by behavioral economics.[181] The statutory definition has multiple alternatives, the most important of which is that an act or practice must not take unreasonable advantage of "a lack of understanding on the part of the consumer of the material risks, costs, or conditions of the product or service."[182] Deception appears to already cover this behavior, but abuse's emphasis on consumer understanding clarifies that even accurate disclosure is not enough if consumers misunderstand how a product will

172. FTC Policy Statement on Unfairness, *supra* note 45.

173. CFPB UDAAP BULLETIN, *supra* note 43; CFPB EXAMINATION MANUAL, *supra* note 146, at UDAAP 2.

174. FTC Policy Statement on Unfairness, *supra* note 45.

175. CFPB UDAAP BULLETIN, *supra* note 43, at 3.

176. *Id.*

177. FTC Policy Statement on Unfairness, *supra* note 45.

178. CFPB EXAMINATION MANUAL, *supra* note 146, at UDAAP 3.

179. *Id.*

180. Dodd-Frank Act § 1031(a), (d); 12 U.S.C. § 5531(a), (d) (2012).

181. *Id.* For analysis of the implementation of the CFPB's UDAAP authority and the behavioral economics analysis underlying the abusiveness concept, see Braucher, *supra* note 96, at 125–29. For the history of unfairness and deception regulation by the FTC, as well as how abusiveness expands on that regulation, see Jean Braucher & Barak Orbach, *Scamming: The Misunderstood Confidence Man,* 26 YALE J.L. & HUMAN. (forthcoming 2015) (manuscript at Part III), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2314071.

182. Dodd-Frank Act § 1031(d), 12 U.S.C. § 5531(d).

work.[183] In other words, abusive practices are those that depend on companies understanding consumers better than consumers understand themselves and using that knowledge to profit from consumers' blind spots about their own cognition and behavior.[184]

The CFPB has provided additional clarity by providing examples of evidence that a practice may be abusive: (1) if profitability depends on back-end penalty fees, or more generally, if a pricing structure makes it difficult for consumers to understand total costs; and (2) when credit is extended without the expectation that consumers will be able to pay.[185] Obscuring the total price has featured prominently in the revolving credit card business model, while lending without regard to ability to pay characterizes subprime mortgage loans during the pre-crisis bubble, much revolving credit card debt, and subprime automobile loans today.[186]

183. The theoretical underpinnings of the CFPB's abusiveness authority are set forth in Bar-Gill & Warren, *supra* note 6 (collecting vast evidence from empirical studies by many researchers of consumer lack of understanding of credit terms, centrally due to use of complexity and cost deferral).

184. *Id.* at 23–25 (noting that the complexity of credit products makes them particularly subject to customer misestimation of her own use patterns, while lenders have a "superior ability to develop fairly accurate estimates of the consumer's future use"). This feature also characterizes consumer retail pricing practices. Rory Van Loo, *Helping Buyers Beware: The Need for Supervision of Big Retail*, 163 U. PA. L. REV. 1311 (2015).

185. CFPB EXAMINATION MANUAL, *supra* note 146, at Risk Assessment Template 3–4. Regulated entities, however—or at least their lawyers—do not believe that abuse is as clear as our discussion indicates. The CFPB has declined to issue a rule defining abuse. But synthesizing CFPB enforcement actions, one law firm is able to provide "some warnings and takeaways" that resemble our analysis but that do not connect abuse to behavioral economics. Nicholas A.J. Vlietstra & Brent Ylvisaker, *"Abusive" Development – Recent Applications of the Prohibition Against Abusive Acts and Practices*, DORSEY (June 10, 2015), https://www.dorsey.com/newsresources/publications/client-alerts/2015/06/abusive-development--recent-applications-of-the-__. Another law firm instead argues that abuse may be unconstitutionally vague or violate the non- delegation doctrine. MAYER BROWN, THE US CONSUMER FINANCIAL PROTECTION BUREAU'S "ABUSIVE" STANDARD – EARLY LESSONS (Feb. 12, 2015), *available at* https://www.mayerbrown.com/files/Publication/91f64a79-96f6-4d4b-b3d7-bb22473c6c8b/Presentation/PublicationAttachment/7a898bf4-1091-4d7c-ae3a-489ebb677c82/150212-CHI-UPDATE-BFL-ComLit.pdf.

186. In his seminal article *Seduction by Plastic*, Oren Bar-Gill used behavioral economics to identify the price-related abusive practices as features of credit card lending. 98 NW. U. L. REV. 1373 (2004). In an equally important article, Ronald Mann identified the credit card business model of profiting from consumers who incur debt beyond their ability to pay (and who thus generate revenue over long periods of time). *Bankruptcy Reform and the "Sweat Box" of Credit Card Debt*, 2007 U. ILL. L. REV. 375. "Asset-based lending," that is, lending based only on the value of the collateral rather than the consumer's ability to pay, was a major feature of the subprime mortgage bubble that preceded the recent financial crisis. Kathleen C. Engel & Patricia A. McCoy, *A Tale of Three Markets: The Law and Economics of Predatory Lending*, 80 TEX. L. REV. 1255, 1262, 1261–62 & n.11 (2002). Lenders in the current wave of subprime car loans also appear to be ignoring consumer ability to pay. Jessica Silver-Greenberg & Michael Corkery, *Easy Credit, Hard to Repay*, N.Y. TIMES (N.Y. ed.), July 20, 2014, at A1. This practice may well continue because car dealer lenders are specifically excluded from the CFPB's jurisdiction. *See* Dodd-Frank Act § 1029, 12 U.S.C. § 5519. The CFPB is taking action against indirect auto lenders, however, which may have the effect of constraining dealers' legal violations. See *infra* notes 287 and 406–07 and accompanying text.

Another example of the Dodd-Frank Act's use of a powerful mix of rules and standards is its delineation of CFPB supervisory authority over non-depository institutions.[187] All companies that provide consumer financial services are "covered persons," the Act's term for entities regulated by the CFPB,[188] but the Bureau has supervisory authority over only certain types of non-depository institutions, those that meet the criteria for one of three specific rules or two broad standards.[189] The three rules target products whose non-depository purveyors Congress deemed in definite need of supervision: mortgages (defined comprehensively to include services ranging from origination to foreclosure relief),[190] private student loans,[191] and payday loans.[192] But as Whitford predicted, if these rules were not accompanied by standards, consumers would still be vulnerable to practices that Congress did not consider or that did not exist at the time of legislation.[193]

The standards enable the CFPB to supervise new practices or products as they develop and come to the Bureau's attention. They cover two factors that capture differently the potential for consumer harm: size and risk. The first standard enables the CFPB to supervise the larger participants in any consumer financial market.[194] Size is a risk factor for consumer harm, because large companies have the potential to harm large numbers of consumers, even when the individual level of harm is small. The CFPB has been active in using this power,[195] which suggests that size is a standard specific enough to enable the issuance of rules under it.

The second standard directly addresses the risk of legal violations that cause harm. It allows the Bureau to supervise regulated entities whose consumer financial products or services pose risks to consumers. This risk-based approach further increases the likelihood of supervisory success by directing the CFPB to use its resources in a targeted manner. And perhaps recognizing that risk to consumers is itself a standard, Congress also provided a nonexclusive list of factors for the Bureau to consider: (A) "the likely risks and costs to consumers";

187. Dodd-Frank Act § 1024(a)(1), 12 U.S.C. § 5514(a)(1) (2012).

188. *Id.* § 1002(6), 12 U.S.C. § 5481(6). The CFPB has the authority to investigate and bring enforcement actions against covered persons who are not subject to the Bureau's supervisory authority. *See, e.g.*, Jonice G. Tucker, *The CFPB's "UDAAPification" of Consumer Protection Law*, LAW360 (Sep. 16, 2014 6:08 PM), http://www.law360.com/articles/577426/the-cfpb-s-udaapification-of-consumer-protection-law ("The bureau regulates many entities through direct supervisory authority and holds the power to indirectly 'regulate' many others through its ability to enforce a veritable alphabet soup of consumer protection laws. . . . Using its expansive enforcement authority, the CFPB can . . . take action against institutions that it may not supervise directly. Such entities have included debt-relief service providers and mortgage insurers, for example.").

189. Dodd-Frank Act § 1024(a)(1)(B)–(C), 12 U.S.C. § 5514(a)(1).

190. *Id.* § 1024(a)(1)(A), 12 U.S.C. § 5514(a)(1)(A).

191. *Id.* § 1024(a)(1)(D), 12 U.S.C. § 5514(a)(1)(D).

192. *Id.* § 1024(a)(1)(E), 12 U.S.C. § 5513(a)(1)(E).

193. Whitford, *supra* note 2, at 1022.

194. Dodd-Frank Act § 1024(a)(1)(B), 12 U.S.C. § 5514(a)(1)(B).

195. See *infra* notes 286–89 and accompanying text.

(B) consumers' understanding of such risks; (C) the legal protections applicable; (D) rates of growth in the relevant market; (E) "the extent, if any, to which the risks may disproportionately affect traditionally underserved consumers"; and (F) the types, number, and other pertinent characteristics of companies that offer or provide the consumer financial product or service.[196] Thus, these provisions perfectly embody Whitford's best practice of standards backed up by a nonexclusive list of rules.[197]

#### *c. Minimizing Direct Compliance Costs*

While this factor is not likely to enhance the CFPB's commitment to consumer protection, according to Whitford's hypothesis, it should directly increase company compliance.[198] The Dodd-Frank Act minimizes companies' direct costs regarding CFPB supervision for companies in two ways. First, during an examination, the CFPB must "to the fullest extent possible" gather information from other regulatory agencies and public sources.[199] This decreases the information-provision burden on companies. Second, the Act requires the CFPB to coordinate its supervisory activities—substantively as well as procedurally—with state and federal regulators. For non-depository institutions, the statute requires the Bureau to coordinate schedules and company data-reporting requirements with the companies' other regulators in order to "minimize regulatory burden."[200] The Bureau also must coordinate with the FTC[201] when categorizing a "covered person" as a "larger participant of a market" who thus will be subject to CFPB supervision.[202] More generally, the CFPB and the FTC are required to coordinate their rulemaking in order "[t]o avoid duplication of or conflict between rules."[203] With respect to larger depository institutions and credit unions, the Bureau must coordinate its supervision schedule with a given company's relevant state and federal prudential regulators as well as conduct supervision jointly with them (unless the company requests otherwise).[204] The Bureau, prudential regulators, and state agencies must share their preliminary examination reports, must permit the other agencies at least thirty days to review and comment, and must take into

196. Dodd-Frank Act § 1022(c)(2), 12 U.S.C. § 5512(c)(2).

197. See *supra* Part II.A.

198. Whitford, *supra* note 2, at 1024 ("[W]here costs of compliance to the regulated merchant decrease, compliance tends to increase.").

199. Dodd-Frank Act §§ 1024(b)(4), 1025(b)(3), 1026(b)(1), 12 U.S.C. §§ 5514(b)(4), 5515(b)(3), 5516(b)(3). The Bureau has incorporated this requirement into its pre-examination planning. CFPB EXAMINATION MANUAL, *supra* note 146, at Examinations 1.

200. Dodd-Frank Act § 1024(b)(3), 12 U.S.C. § 5514(b)(3). The Bureau also must coordinate with state agencies regarding record-keeping requirements. *Id.* § 1024(b)(7)(D), 12 U.S.C. § 5514(b)(7)(D).

201. *Id.* § 1024(a)(2), 12 U.S.C. § 5514(a)(12) ("The Bureau shall consult with the Federal Trade Commission prior to issuing a rule . . . to define covered persons . . . .").

202. *Id.* § 1024(a)(1)(B), 12 U.S.C. § 5514(a)(1)(B).

203. *Id.* § 1061(b)(5)(D), 12 U.S.C. § 5581(b)(5)(D).

204. *Id.* § 1025(b)(2), (e)(1)(A)–(B), 12 U.S.C. § 5515(b)(2), (e)(1)(A)–(B).

consideration any concerns raised by the other agencies before issuing a final report.[205] A company may request that the agencies issue a joint statement or coordinated supervisory action,[206] and if the agencies cannot reach a consensus, the covered person may make an appeal to a governing panel.[207]

### B. *CFPB Supervision in Action: Evidence of a Commitment to Consumer Protection*

The CFPB's implementation of its supervision process provides evidence in favor of Whitford's hypothesis that agency commitment to consumer protection is essential to company compliance. The Bureau has developed practices that both demonstrate its commitment to consumer protection and increase the likelihood of company compliance. From a practical perspective, the Bureau's largest constraint in reaching its compliance goals is resources. It has such a broad mandate that it cannot possibly supervise all the companies under its authority on a regular basis, even with several hundred examiners,[208] and more still to be hired.[209] Indeed, the CFPB has been able to cover only between 120 and 160 institution product lines each year.[210] The Bureau supervision program appears designed to mitigate this limitation in five ways: (1) prioritizing supervision by legal risk; (2) requiring companies to implement their own compliance management systems; (3) investing heavily in supervision; (4) supervising consistently across products and financial institutions; and (5) bringing enforcement actions strategically. By doing so, the CFPB has demonstrated that it takes this form of consumer protection seriously and increased the likelihood of company compliance.

#### 1. Prioritizing by Risk of Legal Noncompliance

An obvious first point is that the overarching goal of CFPB supervision is to engender company compliance with financial consumer protection law. The CFPB Supervision and Examination Manual ("Examination Manual" or "Manual"),[211] the Bureau's detailed template for conducting examinations, begins by quoting in bold type the Dodd-Frank Act's statement of "purpose"[212]

205. *Id.* § 1025(e)(1)(C)–(D), 12 U.S.C. § 5515(e)(1)(C)–(D).

206. *Id.* § 1025(e)(3), 12 U.S.C. § 5515(e)(3).

207. *Id.* § 1025(e)(4), 12 U.S.C. § 5515(e)(4). The panel is comprised of uninvolved representatives from each agency as well as a representative from the Federal Reserve, FDIC, National Credit Union Administration, or OCC to the extent that the latter agencies were not involved in the dispute. *Id.* § 1025(e)(4)(B), 12 U.S.C. § 5515(e)(4)(B).

208. SUPERVISORY HIGHLIGHTS VII, *supra* note 52, at 16 (noting that, as of February 6, 2015, the CFPB had approximately four hundred examiners).

209. CONSUMER FIN. PROT. BUREAU, STRATEGIC PLAN, BUDGET AND PERFORMANCE PLAN AND REPORT 12 (2014), *available at* http://files.consumerfinance.gov/f/strategic-plan-budget-and-performance-plan-and-report-FY2013-15.pdf (stating that the Bureau's 2015 budget estimate was 2.4% higher than its 2014 budget to support, inter alia, additional examiner staff).

210. OIG EVALUATION REPORT, *supra* note 50, at 5.

211. CFPB EXAMINATION MANUAL, *supra* note 146.

212. Dodd-Frank Act § 1021(a), 12 U.S.C. § 5511(a) (2012).

for the CFPB: "The Bureau shall seek to implement and, where applicable, enforce Federal consumer financial law . . . ."[213] The first of three Manual sections is entitled, "*Compliance* Supervision and Examination,"[214] suggesting that the Bureau views compliance as the central function of supervision. The Manual also contains ten pages of material on preventing, identifying, and correcting UDAAP violations[215] and another 647 pages on enforcing twelve of the statutes transferred from other agencies.[216]

A focus on compliance with consumer law flows directly from the Dodd-Frank Act.[217] The CFPB's contribution is risk prioritization, which entails basing all major examination decisions on an analysis of which products and services pose the greatest risks of legal harm to consumers.[218] This approach enables the Bureau to direct its supervisory resources to the areas where they are likely to have the largest compliance effect. Because risk prioritization drives decisions about which companies or product lines to examine,[219] it has the added benefit of incentivizing companies to avoid legally risky practices in order to minimize the amount of supervision they receive.

The CFPB frames risk prioritization as "continuous cycle,"[220] which ensures that the Bureau never takes its eye off the compliance ball. CFPB supervision proceeds in a feedback loop of four steps: pre-examination risk assessment, examination, communication of findings and required corrective action, and monitoring.[221] Each step provides a foundation for the next, and crucially, the last two steps also lead back to pre-examination, with analysis generated during previous examinations and intermittent monitoring informing the next pre-examination.[222]

Risk-based prioritization begins with pre-examination planning, during which examiners gather information from sources external to a supervised entity, analyze this information, and use the resulting analysis as the basis for requesting information from the company.[223] This section of the Examination Manual begins by stating, "The goal of a risk-focused examination is to direct resources

213. CFPB EXAMINATION MANUAL, *supra* note 146, at Overview 1 (quoting Dodd-Frank Act § 1021(a)).

214. *Id.* (emphasis added).

215. *Id.* at UDAAP 1–10.

216. *Id.* at ECOA 1–GLBA Privacy Checklist 1.

217. Dodd-Frank Act §§ 1024(b)(1)(A), 1024(b)(1)(C), 1025(b)(1)(A), 1025(b)(1)(C), 12 U.SC. §§ 5554(b)(1)(A), 5554(b)(1)(C), 5554(b)(1)(C) (2012).

218. *See generally* CFPB EXAMINATION MANUAL, *supra* note 146.

219. *See Id.* at Overview 5 ("Non-depository consumer financial services companies will be identified for examination on the basis of risks to consumers. . . . Regular examination schedules for large depository institutions and affiliates will depend on two considerations: (1) an assessment of risks to consumers and (2) ensuring consistency with statutory requirements that CFPB and prudential regulators coordinate the scheduling of examinations. . . .").

220. *Id.* at Overview 10.

221. *Id.*

222. *Id.*

223. CFPB EXAMINATION MANUAL, *supra* note 146, at Examinations 1–2.

toward areas with higher degrees of risk. . . . of harm to consumers, including the risk a supervised entity will not comply with Federal consumer financial law."[224] A central pre-examination activity is updating a company's "Risk Assessment," which the CFPB uses to set priorities for the examination.[225]

One additional feature has the potential to enhance the compliance effectiveness of Bureau pre-examination planning. The process is extremely thorough but still minimizes company direct compliance costs by obtaining as much outside information as possible before contacting the company.[226] Examiners gather information from an impressive variety of sources: (1) CFPB work products such as the most recent Risk Assessment, prior examination reports, and information on enforcement; (2) complaint information from the CFPB, the FTC Consumer Sentinel, the Better Business Bureau, as well other federal and state agencies; and (3) public information, including that from securities filings, newspaper articles, websites, blog postings, as well as industry publications with information on credit ratings, product performance, and areas of profitability.[227] Only after conducting this exhaustive external review do examiners ask the supervised entity for information.[228]

The actual examinations are the next step in the Bureau's risk-prioritization cycle. The updated Risk Assessment "[g]uide[s]" the examinations. Pursuant to it, examiners are instructed to assess legal risks, by reviewing for potential UDAAPs, regulatory noncompliance, and discrimination.[229] Full-scope examinations culminate with the determination of a "compliance rating," a numerical evaluation of a company's current compliance with federal financial consumer law and systems for ensuring compliance in the future.[230] These ratings provide another way the Bureau maximizes the compliance effect of its supervision resources. Examiners apply uniform criteria, regardless of industry, in order to effectuate the purpose of the rating system: "[T]o help identify those institutions whose compliance with Federal consumer financial law displays weaknesses requiring special supervisory attention."[231]

The examination reports in which the CFPB communicates its findings to supervised companies likely further increase company compliance in two ways. First, a company's compliance rating provides the organizing principle for the examination report the Bureau uses to communicate its findings. Companies presenting little risk of noncompliance receive brief reports, while companies presenting increasing degrees of risk receive increasingly longer reports.[232] The

224. CFPB EXAMINATION MANUAL, *supra* note 146, at Examinations 1.

225. *Id.* at Examinations 3.

226. The Dodd-Frank Act mandates this step. *See* Dodd-Frank Act §§ 1024(b)(4), 1025(a)(3), 12 U.S.C. §§ 5514(b)(4), 5515(a)(3) (2012).

227. CFPB EXAMINATION MANUAL, *supra* note 146, at Examinations 1–2.

228. *Id.* at Examinations 2.

229. *Id.* at Examinations 7.

230. *Id.* at Examinations 8.

231. *Id.* at Examinations 8.

232. *Id.* at Examinations 11.

tone of a report's conclusion about a company should also match the compliance rating.[233] Second, the Manual instructs examiners to "clearly cite statutory or regulatory violations," and to state "specific expectations," including a timeframe, when company attention or corrective action is required.[234] This legal specificity nicely extends Whitford's statutory specificity point. The more precise the feedback on regulatory violations, the less able companies are to give themselves the benefit of the doubt and the more pressure it places on company actors' self-image as law-abiding citizens.[235]

In addition to reports, examiners communicate findings to company principals through meetings structured to incentivize compliance. These meetings always include a supervised entity's management,[236] but board of director attendance is required only when an examination yields findings that raise concern. If a company receives a high-risk rating of 3, 4, or 5 (on a scale of 1 to 5), the board is expected at the meeting.[237] Examiners also include the board when there are specific findings that require corrective action.[238] These policies demonstrate to companies that the CFPB takes its examination process seriously. The threat of board involvement also provides an incentive for management to avoid practices that might result in negative examination findings.

Finally, even once an examination is complete, supervised entities are still subject to ongoing monitoring, which closes the risk-prioritization feedback loop. For nonbanks, the Bureau conducts product and market analyses to inform its ongoing risk assessment, which in turn informs the next round of examination scheduling.[239] For large banks, the goal is to "maintain reasonably current information" about their risk profiles[240] through periodic checks that may include meetings and telephone calls.[241] The CFPB monitors banks at least once

233. *Id.*

234. *Id.*

235. See *supra* Part II.A.

236. CFPB EXAMINATION MANUAL, *supra* note 146, at Examinations 7 (stating that, once an examination is complete, the Examiner in Charge and, depending on the severity of the findings, other CFPB representatives "should meet with the supervised entity's management to discuss the preliminary examination findings, expected corrective actions, recommended rating, and next steps, if any").

237. *Id.* at Examinations 12.

238. *Id.* at Examinations 11.

239. *Id.* at Overview 10. To support the examination program, the Nonbank Supervision Risk Analytics and Monitoring team "will acquire and analyze qualitative and quantitative information and data . . . to determine what industries and institutions pose the greatest risk to consumers. . . . and provide a risk ranking of entities to program teams for use in scheduling examinations." *Id.*

240. "The purpose of depository institution monitoring is to maintain reasonably current information about the institution's activities in order to determine whether changes in risks to consumers or markets warrant a change in the CFPB Supervision Plan. . . . The frequency and depth of monitoring will vary depending on the organization's risk profile." *Id.* at Overview 11.

241. *Id.* at Overview 10. The "[b]asic monitoring activities" include: reviewing supervisory and public information about the entity, contacting the appropriate officer of the institution and the prudential regulator, and consulting internally. *Id.* at Overview 12.

per quarter[242] and places some of them under continuous supervision with CFPB examiners present on a fulltime basis.[243]

2. Compliance Management Systems

The second way in which CFPB supervision is likely to increase compliance is that the Bureau requires companies to have internal compliance management systems (CMS). The statute mandates that the CFPB monitor company compliance,[244] but the Bureau takes this one step further by insisting that companies monitor their own legal compliance. The CFPB holds companies accountable for initiating self-correction and redesigning policies that are lacking. This approach also stretches CFPB resources because self-compliant companies will require less supervision. In the best case scenario, companies will "avoid compliance problems before they start."[245]

The CFPB expects companies to take seriously their duty to establish internal CMS. The Examination Manual sets forth an expectation that every regulated entity have "an effective compliance management system,"[246] and every Bureau examination reviews and tests components of the supervised entity's compliance management system.[247] The Bureau expects compliance to be part of day-to-day responsibilities of management and employees. The CFPB places particular emphasis on companies self-identifying issues and self-initiating correction.[248] For example, the Bureau directs regulated entities to use the Manual "to self-assess the effectiveness of [their] CMS"[249] and advises entities to use the Manual's fair-lending module as a template for developing their fair-lending compliance programs.[250] The Bureau further maximizes its supervision resources, and likely increases total marketplace compliance, by requiring that companies monitor service providers to ensure that they too have effective CMS.[251]

At the same time, the Bureau is proceeding in dialogue with companies and recognizes the need for flexibility. In report outlining the CFPB's CMS expectations, the Bureau stated that it was "committed to an open dialogue with

242. *Id.* at Overview 11.

243. OIG EVALUATION REPORT, *supra* note 50, at 3; *see also* CFPB EXAMINATION MANUAL, *supra* note 146, at Examinations 6.

244. The Dodd-Frank Act lists first among the purposes of examination "assessing compliance with the requirements of Federal consumer financial law." Dodd-Frank Act §§ 1024(b)(1)(A), 1025(b)(1)(A), 12 U.S.C. §§ 5514(b)(1)(A), 5515(b)(1)(A) (2012).

245. SUPERVISORY HIGHLIGHTS I, *supra* note 52, at 2.

246. CFPB EXAMINATION MANUAL, *supra* note 146, at CMR 1.

247. *Id.*; SUPERVISORY HIGHLIGHTS II, *supra* note 42, at 6 (stating instead that "[n]early every" CFPB examination or targeted review assesses all or part of an entity's CMS); SUPERVISORY HIGHLIGHTS IV, *supra* note 42, at 5 (explaining that "every CFPB examination contains some level of CMS review").

248. CFPB EXAMINATION MANUAL, *supra* note 146, at CMR 1.

249. SUPERVISORY HIGHLIGHTS II, *supra* note 42, at 5.

250. *Id.* at 18–19.

251. *Id.*

its supervised entities about their compliance management systems."[252] A high-level CFPB official once described examination as a process in which companies and the Bureau attempt to persuade each other of their positions.[253] The CFPB encourages regulated entities to push back when they believe the CFPB is in error and yet to avoid defensiveness.[254] The Bureau is also flexible about implementation, stating that it "does not require entities to structure their CMS in any particular manner."[255] Indeed, it expects companies to implement CMS adapted to their business strategy and operations.[256] Holding high expectations while being flexible and committed to dialogue seems like a best practices approach to engendering compliance.

The CFPB has established four "interdependent control components"[257] of effective CMS, each of which is likely to have a positive effect on company compliance: board and management oversight, the compliance program itself, response to consumer complaints, and independent auditing of compliance.[258] All four functions are subject to detailed examination.

Board and management oversight is likely to increase compliance because accountability at the highest level of an organization is often essential to creating internal change.[259] High-level authorization is probably also necessary for the large company resource commitment inherent in the Bureau's expansive vision of CMS.[260] All but the smallest and simplest organizations are required to have sufficient compliance staff, typically led by a chief compliance officer.[261] The board is expected to adopt clear policy statements concerning compliance, provide sufficient resources to the compliance function, address compliance

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252. SUPERVISORY HIGHLIGHTS II, *supra* note 42, at 6; *see also id.* at 19 ("As always, the CFPB welcomes feedback and comments regarding this compliance tool and others . . . .").

253. An ALI webinar about CFPB examinations underscored that the on-site process presents opportunities for each side to persuade the other during the many interactions that occur. Entities can attempt to persuade examiners that their practices are appropriate and legal, including by supplying a legal opinion. On the agency side, a high-level CFPB official described the job of an examiner as including persuading the entity that risk to consumers warrants a change that is requested. Jonice Gray Tucker, Elizabeth E. McGinn, Calvin R. Hagins, Marguerite Sagatelian & Clint Walker, *CFPB Examinations & Beyond: Are You Ready?,* AM. L. INST. CONTINUING LEGAL EDUC. (Nov. 14, 2013), http://www.ali-cle.org/index.cfm?fuseaction=courses.course&course_code=TSVQ04.

254. *Id.*

255. SUPERVISORY HIGHLIGHTS II, *supra* note 42, at 5.

256. CFPB EXAMINATION Manual, *supra* note 146, at CMR 1; SUPERVISORY HIGHLIGHTS II, *supra* note 42, at 5.

257. CFPB EXAMINATION MANUAL, *supra* note 146, at CMR 2.

258. *Id.* at CMR 2.

259. *See, e.g.*, SUPERVISORY HIGHLIGHTS IV, *supra* note 42, at 6 (stating that where an entity's CMS has, inter alia, board of director and management oversight, "a supervised entity is likely to be more successful at managing its compliance responsibilities and risks.").

260. *See, e.g.*, SUPERVISORY HIGHLIGHTS II, *supra* note 42, at 8 (requiring a supervised entity's board to establish a compliance function, ensure the function is "appropriately staffed with a qualified chief compliance officer[] and other additional compliance managers," and that the board "allocat[e] sufficient resources to that function, commensurate with the entity's size, organizational complexity, and risk profile").

261. CFPB EXAMINATION MANUAL, *supra* note 146, at CMR 3.

issues including establishing a thorough process for handling of consumer complaints, require and review reports of compliance audits, and appoint qualified personnel.[262] The board is also charged with reviewing compliance participation in new product development and implementation.[263] Management too must engage directly with CMS issues.[264] The Examination Manual instructs examiners to discuss with management the review of a company's internal controls for assessing whether new products, changes in products, and marketing materials raise potential UDAAP concerns.[265]

The compliance program itself is expected to be rigorous. The CFPB specifies that it should be formal and written, comply with board policies, involve adequate training of the board, management and staff, and provide for monitoring and prompt corrective action.[266] Examiners evaluate the program to determine whether it is designed to prevent violations of federal consumer financial laws throughout product lifecycles.[267] They also test "to confirm that actual practices are consistent" with policies.[268] Finally, CMS involves frequent monitoring, leading to timely corrective action and reporting to management and the board if appropriate.[269] This ongoing monitoring is in addition to the independent auditing that is the fourth primary feature of CMS.

The central role of company response to consumer complaints in CMS also probably increases its compliance effect. By insisting that companies proactively address complaints about their practices, the CFPB is ensuring that companies must engage with and respond to the "on the ground" impact of their products and services. This may drive prospective adjustments of business practices as well as action to correct harmful effects that have already occurred.[270] Consumer complaints probably provide a worst-case-scenario view of company compliance, because they likely identify many of a company's regulatory violations, but also almost certainly describe some conduct that is not illegal.[271] The CFPB appears to account for the latter possibility,[272] which makes complaints a useful barometer of potentially harmful company practices. CFPB expectations for company complaint response are high. Examiners review complaints to the

262. *Id.* at CMR 2–3.

263. *Id.* at CMR 4.

264. *Id.* at CMR 1 (stating that "[u]ltimately, compliance should be part of the day-to-day responsibilities of management").

265. *Id.* at Procedures 3.

266. *Id.* at CMR 5–10.

267. *Id.* at CMR 5.

268. *Id.* at CMR 7.

269. *Id.* at CMR 9.

270. *Id.* at CMR 10.

271. Telephone Interview by Angela K. Littwin with Scott Pluta, Assistant Director for Consumer Response, and Darian Dorsey, Chief of Staff for Consumer Response (Oct. 6, 2014) (quoting Ms. Dorsey's statement that Consumer Response reviews consumer complaints to determine "if there's a regulatory reason to take a closer look," thereby implying that not every complaint describes potentially illegal company behavior). *See* Littwin, *supra* note 128, at 902.

272. *Id.*

CFPB, other public and private agencies, and internal complaints to the entity,[273] evaluating both the volume and nature of these complaints.[274] They also determine whether the entity is handling complaints in a timely fashion and reporting on them internally to the board and senior management and using the information to modify policies, procedures, training, and monitoring.[275]

The CFPB's final CMS element is independent compliance auditing. Independent auditing means that companies are responsible for evaluating their own compliance systems. This makes it difficult for high-level company principals to disclaim knowledge of subpar practices. If the CFPB can convince companies to establish effective independent auditing, it could also save CFPB resources because companies conducting their own reviews are likely to need less supervision.

The Bureau's compliance audit objectives are tailored to increase compliance. The Examination Manual charges examiners with assessing the independence and thoroughness of company audits as well as whether the audits result in corrective action.[276] While on-going compliance monitoring can be incorporated into business units to facilitate quick response,[277] the Bureau expects compliance auditing to be fully independent, even of a supervised entity's compliance management division.[278] Auditors should report directly to a company's board (or a board committee), providing it with information about whether its policies are being implemented and whether they contain any gaps.[279] Thus, compliance auditing closes the loop, making entities' boards directly accountable for any lapses in compliance.

3. Investment in Supervision

Another way that the supervision program demonstrates the CFPB's commitment to consumer protection is that the Bureau has invested heavily in supervision, expending significant resources, defining its authority expansively, and developing an intensive examination process that appears to leave no stone unturned.

CFPB supervision hit the ground running. The Bureau began its operations in July 2011 and immediately initiated its supervision program for larger depository institutions and credit unions as well as their affiliates.[280] At that time, there were 111 qualifying institutions with more than $10 billion in total

273. CFPB EXAMINATION MANUAL, *supra* note 146, at CMR 11.
274. *Id.* at Examinations 3.
275. *Id.* at CMR 11.
276. *Id.* at CMR 12.
277. *Id.* at CMR 8.
278. *Id.* at CMR 11.
279. *Id.*
280. *See* OIG EVALUATION REPORT, *supra* note 50, at 2.

assets.[281] The CFPB's supervisory authority over non-depository institutions was effective only upon appointment of its director,[282] which occurred during a congressional recess on January 4, 2012.[283] The CFPB non-depository supervision program began the next day.[284] On a smaller scale, the CFPB "established a nationwide team of examiners to focus on consumer reporting agencies (CRAs)" shortly after its rule subjecting CRAs to its supervision authority went into effect.[285]

The Bureau has defined its supervision mandate broadly. It has been actively issuing rules that enable it to bring large market players under its supervisory authority, exercising this power over consumer reporting agencies, debt collectors, student loan servicers, and international payment remitters.[286] The CFPB has plans to do so for indirect auto lenders as well.[287] Regarding the

281. CFPB Newsroom Press Release, *Consumer Financial Protection Bureau Outlines Bank Supervision Approach*, CONSUMER FIN. PROT. BUREAU (July 12, 2011), http://www.consumerfinance.gov/newsroom/consumer-financial-protection-bureau-outlines-bank-supervision-approach/.

282. See *supra* note 125; *see also* David N. Anthony, John C. Lynch, Alan D. Wingfield & Timothy "Tim" J. St. George, Noel Canning v. NLRB, *Implications for the CFPB and Richard Cordray's Pending Nomination to Lead the CFPB: Recent Developments*, TROUTMANSANDERS (June 27, 2013), http://www.troutmansanders.com/noel-canning-v-nlrb-implications-for-the-cfpb-and-richard-cordrays-pending-nomination-to-lead-the-cfpb-recent-developments-06-27-2013/ (noting that, without a director, the CFPB's powers were limited to interpreting the federal consumer protection laws, supervising large banking institutions, and enforcing a limited subset of the consumer protection laws).

283. See *supra* note 126 for an overview of the "recess" appointment of Cordray. *See also* Helene Cooper & Jennifer Steinhauer, *Bucking Senate, Obama Appoints Consumer Chief*, N.Y. TIMES, Jan. 5, 2012, at A1.

284. CFPB Newsroom Press Release, *CFPB Launches Nonbank Supervision Program*, CONSUMER FIN. PROT. BUREAU (Jan. 5, 2012), http://www.consumerfinance.gov/newsroom/consumer-financial-protection-bureau-launches-nonbank-supervision-program/ (noting that CFPB announced the launch of its supervision program for non-depository institutions on January 5, 2012). The CFPB's rapid launch of this program was partly driven by statutory deadline. The Bureau would have lost its power to define larger participants in a market if it had failed to issue its first rule on this point by July 2012. *See* Dodd-Frank Act § 1024(a)(2), 12 U.S.C. § 5514(a)(2) (2012) (requiring the Bureau to issue its initial rule defining non-depository covered persons no later than one year after the "designated transfer date").

285. SUPERVISORY HIGHLIGHTS IV, *supra* note 42, at 8.

286. *See, e.g.*, Defining Larger Participants of the Consumer Reporting Market, 77 Fed. Reg. 42874 (July 20, 2012) (codified at 12 C.F.R. § 1090.104 (2015)) (qualifying a nonbank covered person with more than $7 million in annual receipts resulting from relevant consumer reporting activities as a larger participant); Defining Larger Participants of the Consumer Debt Collection Market, 77 Fed. Reg. 65775 (Oct. 31, 2012) (codified at 12 C.F.R. § 1090.105 (2015)) (qualifying a nonbank covered person with more than $10 million in annual receipts resulting from consumer debt collection as a larger participant); Defining Larger Participants of the Student Loan Servicing Market, 78 Fed. Reg. 73383 (Dec. 6, 2013) (codified at 12 C.F.R. § 1090.106 (2015)) (qualifying a covered person as a larger participant if the number of accounts for which the entity was considered to perform student loan servicing as of December 31 of the prior calendar year exceeds one million); Defining Larger Participants of the International Money Transfer Market, 79 Fed. Reg. 56631 (Sep. 23, 2014) (codified at 12 C.F.R. § 1090.107 (2015)) (defining a covered person as a larger participant if it has at least one million aggregate annual international money transfers).

287. Defining Larger Participants of the Automobile Financing Market and Defining Certain Automobile Leasing Activity as a Financial Product or Service, 79 Fed. Reg. 60762 (Oct. 8, 2014) (a

CFPB's power to supervise non-depository institutions whose practices pose risks to consumers,[288] the Bureau has issued a final procedural rule for making this determination, but we were unable to find any instances of the Bureau exercising its powers under it.[289]

Not surprisingly given the program's breadth, the CFPB has invested significant resources in supervision. The examination staff grew quickly, to 319 examiners as of December 12, 2013,[290] and reached approximately 400 by February 6, 2015,[291] with further expansion planned.[292] In addition, the CFPB Office of Supervision, Enforcement, and Fair Lending has comprised the largest portion (45%–47%) of the CFPB budget for the past three fiscal years, and much of that funding has supported the growing regional supervision and examination workforce.[293]

This dedication of resources is crucial because the examination process itself is exhaustive. The Examination Manual directs examiners to review a tremendous variety of documents when looking for regulatory violations. In addition to the external sources[294] and consumer complaints[295] discussed earlier, the nonexclusive list includes training materials, descriptions of products and services that include their fee structures, disclosures, notices, agreements, periodic and account statements, written procedures and policies, minutes of board meetings and management committees concerning compliance, materials concerning monitoring and auditing, and compensation arrangements including incentive programs for employees and third parties.[296] Further, examiners are to

proposed rule with request for public comment). The indirect auto lender activities addressed in *Supervisory Highlights V*, included only lenders with more than $10 billion in assets that were under CFPB authority per section 1025 of the Dodd-Frank Act. In that report, the Bureau states, "To provide more complete oversight of the auto financing market, the Bureau has proposed a rule to define larger participants in this market," and cites the proposed rule. *See* SUPERVISORY HIGHLIGHTS V, *supra* note 52, at 7.

288. Dodd-Frank Act § 1024(a)(1)(C), 12 U.S.C. § 5514(a)(1)(C).

289. The CFPB issued a final "Procedural Rule to Establish Supervisory Authority over Certain Nonbank Covered Persons Based on Risk Determination" on July 3, 2013. 78 Fed. Reg. 40352 (to be codified at 12 C.F.R. § 1091).

290. OIG EVALUATION REPORT, *supra* note 50, at 3.

291. SUPERVISORY HIGHLIGHTS VII, *supra* note 52, at 16.

292. OIG EVALUATION REPORT, *supra* note 50, at 2–3. The entire division of Supervision, Enforcement, and Fair Lending reached 633 full-time staff out of 1,379 total in 2014 and is projected to grow to 691 of 1,537 in 2015, and to 747 out of 1,690 in 2016. *See* CONSUMER FIN. PROT. BUREAU, THE CFPB STRATEGIC PLAN, BUDGET AND PERFORMANCE PLAN AND REPORT 15 tbl.3 (2015), *available at* http://files.consumerfinance.gov/f/201502_cfpb_report_strategic-plan-budget-and-performance-plan_FY2014-2016.pdf.

293. "Activities related to regulation, supervision, and enforcement activities . . . represent the largest portion of the FY 2016 budget at 47% and primarily support the continued growth of the regional supervision and examination workforce as the CFPB moves towards steady-state operation." *Id.* at 12. Those activities also represent the largest portions of the 2014 and 2015 budgets, at 45% and 46%, respectively. *Id.* at 13.

294. See *supra* note 223 and accompanying text.

295. See *supra* note 228 and accompanying text.

296. CFPB EXAMINATION MANUAL, *supra* note 146, at Procedures 1–2.

review documentation related to new product development, marketing and media, scripts and recorded calls, and consumer complaints.[297] These directions make clear that the Bureau is concerned about regulatory violations when new products are designed and marketed as well as throughout the lifecycle of products.

Despite the thoroughness of this review, the CFPB is still strategic in deploying its examination resources. The Bureau uses misrepresentation and consumer misunderstanding as a way to understand the perspective of a reasonable consumer, and complaints alleging that consumers did not understand the terms of a product "may be a red flag indicating that examiners should conduct a detailed review of the relevant practice."[298] Numerous complaints raise particular concern, but the Manual states that "even a single substantive complaint may raise serious concerns that would warrant further review."[299] And when potential legal violations are identified, examiners can pursue a particularly intrusive form of information gathering: interviews with consumers.[300]

The Bureau has also been investing in the work products that result from its examinations. By July 31, 2013, the CFPB had issued 82 products from completed examination, 35 reports of examination and 47 supervisory letters, with 63 of the 82 work products pertaining to depository institutions and 19 to non-depository institutions.[301] An OIG report criticized the CFPB for delay in issuing work product on examinations, a point with which the Bureau's management agreed. As a result, the Bureau streamlined its processes and revised its self-imposed deadlines.[302] The CFPB reported that it conducted more than 100 supervision activities in 2013, "such as full scope reviews and subsequent follow-up examinations," and planned to conduct about 150 in 2014.[303]

#### 4. Consistency

Another way in which the CFPB examination process is likely to increase company compliance is consistency across different types of institutions. As discussed earlier,[304] one reason for the Bureau's creation was the forum shopping and other difficulties that arose when the same products were

297. *Id.* at Procedures 2.

298. *Id.* at UDAAP 9.

299. *Id.* at UDAAP 10.

300. *Id.* at Procedures 7. Examiners must consult with regional CFPB management when deciding whether to take this step. *Id.*

301. OIG EVALUATION REPORT, *supra* note 50, at 7.

302. *Id.* at 9–12. After the OIG concluded its field study, the CFPB hired a consulting firm to improve timeliness and has also piloted new approaches to "streamline the reporting process." SUPERVISORY HIGHLIGHTS IV, *supra* note 42, at 12.

303. SUPERVISORY HIGHLIGHTS IV, *supra* note 42, at 5. We were unable to locate a total number of examinations actually completed in 2014.

304. See *supra* Part III.A.

regulated by different agencies. And even within one agency, consistency is crucial, both for legitimacy[305] and to avoid disadvantaging some companies' version of the same product,[306] which could hurt competition.[307]

Consistency is a CFPB statutory mandate,[308] and the Bureau's supervision program demonstrates that it takes this obligation seriously. Consistency is one of three "main principles" that guide CFPB supervision.[309] A high-level CFPB official confirmed the central role of consistency in supervision by stating that one of its objectives is consistency of regulation across depository and non-depository institutions.[310] The Bureau's policy of conducting some examinations on a product-line basis, rather than always examining an entire entity,[311] also supports consistency by enabling it to examine simultaneously, for example, all mortgage-servicing product lines, whether mortgage servicing is the company's entire business or a small portion of it.

The CFPB implements consistency through the very structure of its supervision division. Originally, there were two supervision offices within that division, divided into depository and non-depository responsibilities. But in December 2012, the two offices were consolidated into one Office of Supervision Examination.[312] In a blog post discussing the consolidation, a CFPB official stated that the previous departments were split between Nonbank Supervision and Large Bank Supervision because, when the CFPB started, it had two distinct supervisory mandates.[313] The large bank office handled the supervisory authority transferred from other agencies, while the nonbank office developed a new program, since these entities were not previously subject to federal supervision.[314] Once the CFPB was up and running, the two groups were realigned into one cohesive supervisory program for all covered entities,

305. *See* Harold J. Krent, *Reviewing Agency Action for Inconsistency with Prior Rules and Regulations*, 72 CHI.-KENT L. REV. 1187, 1212, 1233–34 (1997) (stressing the link between consistency in agency decision making and agency legitimacy).

306. See *supra* notes 315–16 and accompanying text.

307. In addition to protecting consumers directly, the CFPB has a mandate to protect consumers indirectly by promoting fair competition. *See, e.g.*, Dodd-Frank Act § 1021(b)(4), 12 U.S.C. § 5551(b)(4) (2012) (stating that one objective of the CFPB is to ensure that "Federal consumer financial law is enforced consistently . . . in order to promote fair competition").

308. The first clause of the statutory provision defining the CFPB's "purpose" reads, "The Bureau shall seek to implement and, where applicable, enforce Federal consumer financial law consistently . . . ." Dodd-Frank Act § 1021(a), 12 U.S.C. § 5511(a).

309. CFPB EXAMINATION MANUAL, *supra* note 146, at Overview 4.

310. Tucker et al., *supra* note 253.

311. SUPERVISORY HIGHLIGHTS II, *supra* note 42, at 23.

312. *Id.* at 21–22.

313. Steve Antonakes, *Realigning Our Supervision Work*, CONSUMER FIN. PROT. BUREAU BLOG (Dec. 17, 2012), http://www.consumerfinance.gov/blog/realigning-our-supervision-work/.

314. SUPERVISORY HIGHLIGHTS II, *supra* note 42, at 21–22.

regardless of the provider's charter.[315] The Bureau even uses almost identical procedures for supervising both types of institution.[316]

5. Enforcement

The CFPB's enforcement of consumer law through supervision provides suggestive support for Whitford's hypothesis that agency commitment is the key to meaningful consumer protection. The most striking feature of CFPB supervisory enforcement is the sheer volume of activity. The Bureau has uncovered violations of twelve distinct consumer financial protection statutes to date[317] and has discussed sixteen public enforcement actions[318] in its Supervisory Highlights (Highlights), the documents in which the Bureau reports on its supervision and examination activities.[319] Public enforcement actions have resulted in more than $2 billion in remediation on behalf of at least 13,230,000 consumers and over $223 million in penalties.[320] Nonpublic actions have assessed approximately $148 million in remediation as a result of harm to more than one million consumers.[321]

As with other aspects of its supervision program, the CFPB is strategic in its enforcement choices. There are three main ways the CFPB's supervisory enforcement program demonstrates commitment and likely increases

315. Antonakes, *supra* note 313. The division is now split into two groups, one for supervision policy and one for actual examinations. *Id.*

316. CFPB EXAMINATION MANUAL, *supra* note 146, at Overview 4. The CFPB is simultaneously flexible enough to recognize that the means different types and sizes of institutions employ to achieve legal compliance will likely vary. *Id.*

317. *See* SUPERVISORY HIGHLIGHTS I, *supra* note 52, at 4, 10, 13 (discussing violations of Dodd-Frank, the Equal Credit Opportunity Act, Truth in Lending Act (TILA), Fair Credit Reporting Act, Real Estate Settlement Procedures Act, and Home Mortgage Disclosure Act); SUPERVISORY HIGHLIGHTS II, *supra* note 42, at 13, 17 (discussing violations of the Homeowners Protection Act and the Military Installment Loans and Education Services program); SUPERVISORY HIGHLIGHTS III, *supra* note 42, at 10–11 (discussing violations of the Fair Debt Collection Practices Act and the Military Lending Act); SUPERVISORY HIGHLIGHTS VI, *supra* note 42, at 9–11, 19 (discussing violations of the Electronic Funds Transfer Act and the Truth in Savings Act).

318. SUPERVISORY HIGHLIGHTS I, *supra* note 52, at 7–12 (three public actions); SUPERVISORY HIGHLIGHTS II, *supra* note 42, at 17 (one public action); SUPERVISORY HIGHLIGHTS III, *supra* note 42, at 10–13 (five public actions); SUPERVISORY HIGHLIGHTS IV, *supra* note 42, at 23 (one public action); SUPERVISORY HIGHLIGHTS V, *supra* note 52, at 17–18 (one public action); SUPERVISORY HIGHLIGHTS VI, *supra* note 42, at 19–22 (five public actions). The total number of nonpublic actions is not available because the Supervisory Highlights passages discussing them tend to begin with phrases such as "In one or more examinations, . . . examiners identified. . . ." or "[R]esolutions reached in the areas of payday lending, mortgage servicing, and mortgage origination have resulted in . . . ." SUPERVISORY HIGHLIGHTS VII, *supra* note 52, at 6, 15.

319. See *supra* note 52.

320. Calculations on file with author Angela Littwin. We say "at least 13,230,000 consumers" and "over $223 million" because the Bureau does not always provide precise numbers. For example, *Supervisory Highlights VI* lists a total of 1,225,000 consumers who were harmed but does not provide consumer numbers for two of the five public enforcement actions discussed. SUPERVISORY HIGHLIGHTS VI, *supra* note 42, at 19–22.

321. Calculations on file with author Angela Littwin.

compliance. First, the Bureau continues to emphasize company CMS, thereby transferring much of the compliance work onto the financial institutions themselves. The CFPB also uses a wide variety of enforcement tools, enabling it to tailor remedies to maximize compliance with consumer protection law. Finally, the Bureau publicizes its enforcement activities in ways that incentivize company compliance. Thus far, the CFPB appears to be making progress. The later Highlights note improvements in company compliance,[322] and companies are beginning to find and correct their own violations.[323] Another indication that financial institutions are moving towards compliance is that, even when public enforcement actions are brought, frequently the result is a consent decree rather than a contested lawsuit.[324]

#### *a. Focus on CMS*

The CFPB's first strategic approach to supervisory enforcement is maintaining its focus on company CMS. Sections on CMS are the first sections after the introduction in *Supervisory Highlights I, II,* and *IV*.[325] In *Supervisory Highlights VI*, the first non-introduction section begins with a paragraph reiterating the Bureau's commitment to CMS and providing an update on regulated entities' progress in this respect.[326] The Highlights contain analyses of companies' CMS throughout.[327] Indeed, the first five reports mention "CMS" or "compliance management system(s)" a total of 101 times.[328]

The CFPB further increases the impact of its commitment to CMS by extending companies' compliance responsibilities to cover their third-party service providers.[329] When regulated entities fail to supervise service providers,

322. *See, e.g.*, SUPERVISORY HIGHLIGHTS IV, *supra* note 42, at 4 ("Recent examinations have seen, especially in the nonbank sector, increased efforts by supervised entities to develop more robust compliance management systems.").

323. See *infra* notes 354–61 and accompanying text.

324. *See, e.g.*, *In re* Discover Bank, et al., No. 2015-CFPB-0016 (CFP July 22, 2015), (student loans); *In re* Regions Bank, No. 2015-CFPB-0009 (CFPB Apr. 28, 2015), http://files.consumerfinance.gov/f/201504_cfpb_consent-order_regions-bank.pdf (debit card overdraft); Consumer Fin. Prot. Bureau v. Global Holdings, LLC, et al., No. 2:14-cv-06643-DDP-JPR (Aug. 17, 2014), http://files.consumerfinance.gov/f/201408_cfpb_consent-order_global-client-solutions.pdf (debt relief).

325. SUPERVISORY HIGHLIGHTS I, *supra* note 52, at 4–7; SUPERVISORY HIGHLIGHTS II, *supra* note 42, at 5–11; SUPERVISORY HIGHLIGHTS IV, *supra* note 42, at 5–8.

326. SUPERVISORY HIGHLIGHTS VI, *supra* note 52, at 5. We discuss the extent of this progress later in this Part.

327. *See, e.g.*, SUPERVISORY HIGHLIGHTS II, *supra* note 42, at 8 (explaining that effective CMS often include the following components: board and managerial oversight, a compliance program, a complaint management program, and an independent compliance audit); SUPERVISORY HIGHLIGHTS V, *supra* note 52, at 19–21 (analyzing the fair-lending compliance systems of indirect auto lenders); SUPERVISORY HIGHLIGHTS VI, *supra* note 42, at 18 (stating that, after examining dozens of mortgage lenders, "examiners have found inadequate compliance management systems and severely compromised mortgage lending data").

328. See *supra* note 52 for the Supervisory Highlights.

329. SUPERVISORY HIGHLIGHTS I, *supra* note 52, at 4–5.

the Bureau's remedy is often an instruction to develop a monitoring program with elements of CMS.[330] For example, in two public enforcement actions against Chase and American Express regarding credit card add-on products, the companies agreed to improve their oversight of third-party vendors.[331] A nonpublic enforcement action faulted a creditor for not monitoring the legal compliance of its network of debt buyers.[332] This creditor was "ostensibly" monitoring its debt buyers, but it lacked policies to guide the monitoring and frequently failed to retain the results.[333] In other words, it did not have an adequate CMS for its debt buyers. In yet another example, the CFPB cited payday lenders for failing to properly oversee their third-party service providers. The key examiner finding was that the contracts governing these relationships rarely contained adequate compliance policies.[334] And in the case of indirect auto lenders and their car-dealer third parties, the CFPB went so far as to require certain lenders to "discipline" dealers with fair-lending violations.[335] (This was an element of one remedy among those from which lenders could choose.)[336]

According to CFPB reports on the quality of companies' CMS, the general trend appears to be one of gradual improvement over time. Initially, the Bureau found that nonbanks were more likely than banks to lack robust CMS.[337] The situation was so dire that the Bureau found that nonbanks' CMS deficiencies were "generally related to the supervised entity's lacking a CMS structure altogether."[338] In addition, examiners found nonbanks with no formal policies and procedures or no independent compliance audits.[339] Importantly, this lack of CMS "resulted" in legal violations of consumer protection law.[340] In contrast, examiners found that the majority of banks had "adequate" CMS processes,[341] although these institutions were not entirely problem free. The most prevalent weakness appeared to be that ongoing monitoring was not frequent or that banks were relying entirely on the independent audit for monitoring. Both practices meant that problems could go undetected for long periods of time.[342]

330. *Id.*

331. SUPERVISORY HIGHLIGHTS III, *supra* note 42, at 10 (Chase); *id.* at 12–13 (American Express).

332. SUPERVISORY HIGHLIGHTS IV, *supra* note 42, at 12.

333. *Id.*

334. *Id.* at 15.

335. SUPERVISORY HIGHLIGHTS V, *supra* note 52, at 5 (discussing the compliance responsibilities of lenders who chose not to eliminate or limit certain problematic pricing practices as including "dealer-specific monitoring and discipline").

336. *Id.* at 19–23 (explaining that "discipline" is a required outcome in the introductory summary of the Highlight, while later presenting discipline as part of one of three choices).

337. SUPERVISORY HIGHLIGHTS II, *supra* note 42, at 6.

338. *Id.*

339. *Id.*

340. *Id.*

341. *Id.* at 7.

342. *Id.* at 7–8.

More generally, throughout the first five Supervisory Highlights, which cover the time period through early 2014,[343] the CFPB regularly noted companies' CMS deficiencies and sought corrections.[344]

By March, 2014, matters had improved significantly. The CFPB reported seeing "increased efforts" at developing robust CMS, especially among nonbanks.[345] And the Bureau commended banks and nonbanks alike for dedicating more resources to compliance and improving reporting structures so that CMS accountability reached the organizations' highest levels.[346] In the sixth and seventh edition of the Supervisory Highlights, which together cover the final ten months of 2014,[347] the CFPB's use of the terms "compliance management system(s)" or "CMS" dropped precipitously.[348]

Around this same time, the Bureau also began noting specific mixed improvements resulting from prior CFPB action. For example, after the CFPB's new mortgage servicing rules went into effect,[349] the Bureau found that several servicers had implemented procedures "reasonably designed to meet the specific objectives laid out in the rule," although examiners also found several rule violations.[350] Towards the end of 2014, the CFPB noted that the credit reporting agencies—which previously had grossly inadequate dispute processing systems[351]—had made marked improvement "in response to CFPB directives."[352] However, examiners still found that some CRAs were still not consistently forwarding supporting material consumers submitted with their disputes and had deficiencies in their processes for updating public records information.[353]

Another way in which the CFPB's emphasis on CMS is having a positive effect is that regulated entities are finding and correcting their own consumer protection violations. In 2014, the CFPB noted increasing numbers of "instances

343. See *supra* note 52 for the Supervisory Highlights.

344. *See, e.g.*, SUPERVISORY HIGHLIGHTS I, *supra* note 52, at 4–5 (explaining that the CFPB directed a financial institution to "adopt appropriate policies and procedures, and establish an effective CMS" because it "failed to adopt and follow comprehensive internal policies and procedures, resulting in a significant breakdown in compliance"); SUPERVISORY HIGHLIGHTS III, *supra* note 42, at 11 ("Several HMDA reviews at financial institutions found error rates over the resubmission thresholds and Supervision directed the financial institutions to resubmit their HMDA data and improve their HMDA compliance systems."); SUPERVISORY HIGHLIGHTS VI, *supra* note 42, at 11–12 (observing "significant weaknesses in the CMS of several debt collectors").

345. SUPERVISORY HIGHLIGHTS VI, *supra* note 42, at 5.

346. *Id.*

347. See *supra* note 52.

348. The terms appear four times in *Supervisory Highlights VI* and six times in *Supervisory Highlights VII*. SUPERVISORY HIGHLIGHTS VI, *supra* note 42, at 5, 18; SUPERVISORY HIGHLIGHTS VII, *supra* note 52, at 12–13.

349. 12 C.F.R. § 1024.38(a), (b) (2015).

350. SUPERVISORY HIGHLIGHTS VI, *supra* note 42, at 12.

351. See *supra* note 40.

352. SUPERVISORY HIGHLIGHTS VII, *supra* note 52, at 5.

353. *Id.* at 5–6.

of self-identified issues resulting in remediation to consumers,"[354] but examples of self-correction have been present all along. As early as mid-2013, when describing a series of nonpublic enforcement actions that yielded restitution to approximately ten thousand consumers, the CFPB stated that some of this remediation was the result of regulated entities self-identifying and correcting violations without direct CFPB involvement.[355] Also in mid-2013, a mortgage servicer that had been inaccurately reporting short sales as foreclosures to credit reporting agencies "self-identified the issue through internal audits," reported it to the CFPB, and self-initiated corrective action.[356] Another mortgage servicer's internal audits revealed similar inaccurate credit reporting regarding trial loan modifications, which the servicer self-corrected by implementing new procedures, although the CFPB directed the servicer to make further improvements.[357] In the same Highlight covering the middle of 2013, the nonpublic supervisory actions that generated at least $2.6 million in consumer remediation resulted from a combination of examiner findings and company self-reports of violations during an exam.[358] In yet another example, examiners found that a creditor had sold one cancelled debt. The creditor subsequently reviewed its records and found "dozens" of cancelled-debt sales, which were the result of "a flaw in its record retention policy."[359] The creditor agreed to modify the policy, and the CFPB further directed it to document the effectiveness of its policy revision as well as to compensate consumers for any harm.[360] Lastly, one payday lender's audit program revealed a violation, which the lender self-corrected by providing consumer refunds.[361]

*b. A Spectrum of Enforcement*

The CFPB also maximizes the effectiveness of supervisory enforcement using a wide range of tools in ways that are strategic, proactive, and context driven. Examination enforcement consists of nonpublic and public supervisory actions.[362] For the former, remedies range from the Bureau making recommendations to labeling a problem as a "matter requiring attention," which sets a time for resolution and requires a response to the CFPB.[363] Some nonpublic actions include monetary remedies but many do not.[364] Public

354. SUPERVISORY HIGHLIGHTS VI, *supra* note 42, at 5.

355. SUPERVISORY HIGHLIGHTS II, *supra* note 42, at 17.

356. SUPERVISORY HIGHLIGHTS III, *supra* note 42, at 8.

357. *Id.*

358. *Id.* at 13.

359. SUPERVISORY HIGHLIGHTS IV, *supra* note 42, at 12.

360. *Id.*

361. *Id.* at 16.

362. OIG EVALUATION REPORT, *supra* note 50, at 4.

363. *Id.*

364. *See, e.g.*, SUPERVISORY HIGHLIGHTS II, *supra* note 42, at 17 (discussing nonpublic enforcement actions resulting in monetary remediation to approximately 10,000 consumers); SUPERVISORY HIGHLIGHTS I, *supra* note 42, at 12 (directing financial institutions to remedy their credit reporting practices but not requiring a monetary remedy).

enforcement actions carry a range of stiffer penalties that almost always includes monetary restitution or fines.[365] This enforcement spectrum enables the CFPB to circumvent companies' cost-benefit analyses by increasing the severity of the remedies it imposes to the point at which a given company complies with consumer protection law. If the Bureau imposes a remedy that turns out not to produce compliance, it can try another approach later.[366] The range of remedies enables the CFPB to tailor enforcement to the seriousness of a legal violation and degree of consumer harm. Tailored remedies convey the message that the Bureau is not targeting financial institutions for minor infractions while incentivizing companies to avoid egregious violations. In the worst case scenario, sabotaging the examination process is likely to result in public enforcement and additional penalties.[367]

The CFPB further enhances likely compliance by deploying more than one remedy per enforcement action. In a typical remedy package, the Bureau directs the financial institution to correct the specific legal violations, reimburse with interest or otherwise make whole any consumers who were harmed, and revise its procedures so that these violations do not reoccur. Addressing the specific issues and revising company procedures are equivalent to injunctive relief. Making consumers whole is the equivalent of damages when reimbursement is the relief or specific performance when the relief is nonmonetary. For example, in a set of early public enforcement actions regarding credit card add-on products, the CFPB required the issuers to cease their illegal practices, pay restitution and civil penalties, and submit to independent auditing regarding their compliance with their Bureau consent orders.[368] Even nonpublic enforcement actions result in comprehensive remedies. When the CFPB found that some credit card issuers were not conducting certain six-month interest rate reviews required by the CARD Act,[369] it ordered them to conduct the rate revaluations, reimburse with interest any consumers who were harmed, and establish appropriate procedures.[370]

More specifically, the CFPB employs a wide range of remedies that require companies to be proactive in addressing their compliance issues. The CFPB has

365. See *infra* notes 371–80 for examples of a stiffer non-monetary penalty imposed on banks when the Bureau's findings indicate particularly troubling violations. For examples of monetary penalties, see SUPERVISORY HIGHLIGHTS III, *supra* note 42, at 10–13 (outlining the Bureau's recent public enforcement actions); *see, e.g.*, *id.* at 10 ("In addition to providing refunds, Chase has agreed to end the unfair billing practices, submit to an independent audit, improve its oversight of third-party service providers, and pay $20 million to the CFPB's Civil Penalty Fund."); *id.* at 12 ("In addition to providing consumer remuneration, Ally [Bank] has agreed to establish an enhanced compliance framework.").

366. See *supra* notes 355–62 and accompanying text for examples.

367. *See, e.g.*, SUPERVISORY HIGHLIGHTS III, *supra* note 42, at 11 (fining Cash America $5 million for destroying records in advance of a CFPB examination in addition to ordering $14 million in refunds for substantive violations).

368. *See, e.g.*, SUPERVISORY HIGHLIGHTS I, *supra* note 52, at 8–11.

369. 12 CFR 1026.51(b)(2) (2015); SUPERVISORY HIGHLIGHTS I, *supra* note 52, at 11.

370. SUPERVISORY HIGHLIGHTS I, *supra* note 52, at 11.

directed companies to review for additional consumer harm beyond that which examiners found,[371] implement training programs,[372] draft new policies,[373] develop procedures for reviewing and updating their newly implemented programs and policies,[374] expand fair-lending regression analyses,[375] and report to the CFPB on progress regarding corrective action.[376] When examination findings are of particular concern, the Bureau has taken these remedies one step further. For example, a consent order with Ally Bank, an indirect auto lender found accountable for its dealers' fair-lending violations, required the bank to hire a settlement administrator to distribute restitution funds to harmed consumers.[377] Or when the CFPB found that at least one mortgage originator was denying loans to applicants with public-benefits income—and describing this prohibition in marketing materials—the Bureau ordered the originators to identify and compensate not only applicants who were wrongly denied but also consumers who may have been discouraged from applying in the first place.[378] In two instances in which legal violations were pervasive, the CFPB prohibited a mortgage servicer from "acquiring servicing rights for default loan portfolios until it demonstrates it has the ability to comply" with consumer protection laws[379] and banned Bank of America from marketing credit card add-on products until it provided the Bureau with a compliance plan demonstrating that it could do so without deception.[380]

A comprehensive discussion of one example can serve as a mini case study showing the CFPB strategically deploying a spectrum of enforcement and contextualized remedies to harness company incentives. It concerns indirect auto lending, the term the CFPB uses to describe vehicle loans consumers obtain from

371. SUPERVISORY HIGHLIGHTS II, *supra* note 42, at 13 (Homeowners Protection Act violations by mortgage servicers); SUPERVISORY HIGHLIGHTS III, *supra* note 42, at 10 (deceptive practices regarding short sales); *see also* SUPERVISORY HIGHLIGHTS VI, *supra* note 42, at 7 (debt collectors in a nonpublic action to identify and reimburse consumers harmed by "convenience fees" not allowed by the FDCPA or not verified to be in the contract).

372. SUPERVISORY HIGHLIGHTS II, *supra* note 42, at 15–16 (fair-lending violations); SUPERVISORY HIGHLIGHTS V, *supra* note 52, at 16–17 (debt collectors whose faulty training had resulted in improper disclosures to third parties to conduct remedial training, update training programs, and self-monitor the effectiveness of the new programs).

373. SUPERVISORY HIGHLIGHTS III, *supra* note 42, at 6 (mortgage servicer Real Estate Settlement Procedures Act violations); SUPERVISORY HIGHLIGHTS IV, *supra* note 42, at 9 (CRAs' lack of adequate dispute resolution procedures).

374. SUPERVISORY HIGHLIGHTS IV, *supra* note 42, at 9 (ordering CRAs to develop processes for reviewing and updating the dispute-resolution procedures the CFPB had just ordered drafted).

375. SUPERVISORY HIGHLIGHTS I, *supra* note 52, at 6–7.

376. SUPERVISORY HIGHLIGHTS II, *supra* note 42, at 14 (describing mortgage servicer loss-mitigation issues); *id.* at 17 (considering deceptive practices in auto lending to military servicemembers).

377. SUPERVISORY HIGHLIGHTS V, *supra* note 52, at 17.

378. SUPERVISORY HIGHLIGHTS VII, *supra* note 52, at 14–15.

379. SUPERVISORY HIGHLIGHTS VI, *supra* note 42, at 20.

380. SUPERVISORY HIGHLIGHTS IV, *supra* note 42, at 23.

car dealers that arrange financing through third-party lenders.[381] The Bureau was concerned about the fair-lending risks inherent in financial institution policies that compensate car dealers by granting them discretionary authority to increase consumers' interest rates beyond a financial institution's risk-based price for a loan.[382] CFPB examinations uncovered multiple instances of these policies resulting in discrimination against racial and ethnic minorities,[383] presumably because dealers were more likely to offer higher interest rates to members of those groups.[384] Through a combination of private agreement, nonpublic supervisory action, and public enforcement, CFPB supervision resulted in lenders committing to pay approximately $272 million in consumer redress.[385]

The interesting part is what happened next. The Bureau gave lenders a choice of methods for preventing future fair-lending violations.[386] The CFPB's recommended option was that lenders develop alternate means of compensating auto dealers.[387] The Bureau reported on lenders that have implemented pilot programs and the dealer-compensation methods they developed,[388] enabling other financial institutions to learn from these ideas.[389] The CFPB also used

381. SUPERVISORY HIGHLIGHTS V, *supra* note 52, at 3 n.2. The CFPB's work in this area has been controversial and resulted the U.S. House of Representatives proposing two bills to limit the Bureau's authority over indirect auto lenders. *See* Reforming CFPB Indirect Auto Financing Guidance Act, H.R. 1737, 114th Cong. (2015); Reforming CFPB Indirect Auto Financing Guidance Act, H.R. 5403, 113th Cong. (2014).

382. *Id.* at 5–6. The CFPB was concerned enough that it dedicated an entire "special edition" of Supervisory Highlights to indirect auto lending. *Id.* at 3.

383. *Id.* at 4.

384. Michael Corkery & Jessica Silver-Greenberg, *Prosecutors Scrutinize Minorities' Auto Loans*, N.Y. TIMES, Mar. 31, 2015, at B1 (reporting that minority borrowers, "once starved for credit through redlining—banks' refusal to provide mortgages in their communities"—are now being singled out by the auto industry and offered car loans with disproportionately high dealer mark-ups, a practice dubbed "reverse-redlining"). This is not the only instance in which third-party lenders compensating intermediaries through discretionary mark-ups has resulted in racial and ethnic discrimination. During the mortgage bubble, African Americans and Hispanics were more than twice as likely as comparable white borrowers to receive high-cost, subprime loans. Jacob W. Faber, *Racial Dynamics of Subprime Mortgage Lending at the Peak*, 23 HOUSING POL'Y DEBATE 328 (2013) (finding that 2006 HMDA data suggested that applications from African American and Hispanic borrowers were 2.4 times more likely to result in a subprime loan than those from whites, even after controlling for gender and income).

385. SUPERVISORY HIGHLIGHTS V, *supra* note 52, at 16–17 (describing payments for the following categories and amounts, lender agreements: ~$136 million; nonpublic supervisory actions: ~$56 million; public enforcement action: ~$80).

386. SUPERVISORY HIGHLIGHTS V, *supra* note 52, at 5–6, 16–18.

387. *Id.* at 4–5. We infer that this is the CFPB's preferred option because of the Bureau's statement that, even with compliance monitoring, it "remains concerned about indirect lending programs built around discretion and financial incentives that create fair lending risks." *Id.* at 22.

388. *Id.* at 22–23.

389. See *infra* Part III.B.5.c for a discussion of the CFPB's commitment to informing companies of its expectations.

positive reinforcement by commending BMO Harris Bank for publicly announcing its switch to a nondiscretionary dealer-compensation system.[390]

In contrast, when lenders chose to retain discretionary pricing, the Bureau required them to establish labor-intensive programs to monitor dealers, which included ten specific steps such as conducting sophisticated statistical analysis, regularly establishing and communicating fair-lending expectations to dealers, and disciplining dealers who violate the law.[391] This high level of compliance management is likely necessary to eliminate lending discrimination in a compensation system that incentivizes it,[392] but the CFPB also seems to recognize that its expensive monitoring requirements provide incentives too.

This is apparent from the way the CFPB's offered the hybrid alternative of limiting the level of discretionary pricing. There are good reasons for this approach. Thus far, the Bureau has found "no actionable disparities" when lenders limited mark-up discretion to well under the typical 200 to 250 basis points, for example, to 100 basis points.[393] But this option also enabled the CFPB to offer a carrot by explaining that a lender selecting this approach "may find that it can significantly reduce certain compliance management activities . . . to which the institution would otherwise need to devote significant attention and resources."[394] In other words, lenders that mitigate risk this way can lower their monitoring costs, which otherwise promise to be high.

*c. Putting Companies on Notice*

In addition to direct enforcement, the CFPB has been active in publicizing detailed accounts of its supervisory expectations and enforcement activities. Indeed, the CFPB has stated that a major reason for issuing the Supervisory Highlights is to provide regulated entities with specific information about the Bureau's expectations.[395] This type of publicity has three related potential compliance-enhancing effects on companies not facing an immediate examination. First, it gives financial institutions knowledge of how the Bureau uses its spectrum of enforcement tools, providing companies with both the incentive and the ability to modify their practices to avoid the more severe remedies. Similarly, the Bureau's documentation of its public-enforcement actions to date should make companies aware that they will not necessarily

390. SUPERVISORY HIGHLIGHTS V, *supra* note 52, at 23 ("As CFPB Director Richard Cordray stated at the time, BMO Harris's new policy represents 'a proactive step to protect consumers from discrimination.'").

391. *Id.* at 19–21.

392. See *supra* note 384.

393. SUPERVISORY HIGHLIGHTS V, *supra* note 52, at 21.

394. *Id.* at 5.

395. SUPERVISORY HIGHLIGHTS I, *supra* note 52, at 2 (The Bureau publishes its supervisory reports to provide financial institutions with "clear guidance about the standards of conduct expected of them").

receive a warning[396] before public enforcement when legal violations are serious.[397] Finally, putting entire markets on notice of CFPB expectations provides legitimacy when the Bureau decides to use high-cost remedies to resolve first-time, albeit major violations. Thus, publicity is likely to extend the Bureau's limited supervision and enforcement resources.

The CFPB takes a proactive approach to ensuring that companies understand its expectations. As the Bureau states, "The CFPB is committed to providing guidance on its supervisory priorities to industry and members of the public."[398] Indeed, CFPB's commitment is so strong that it is almost as if the Bureau has read Whitford's discussion of specificity.[399] When the CFPB updates its examination procedures, it not only updates the Examination Manual,[400] but also summarizes the changes in its next edition of Supervisory Highlights.[401] Further, the Bureau frequently publishes bulletins addressed to specific markets or on specific issues. For example, the CFPB's first public enforcement action was accompanied by a "compliance bulletin" putting other regulated entities on notice that they would be subject to enforcement actions for similar violations.[402] Another bulletin provided Fair Debt Collection Practices Act guidance,[403] including examples of statements by collection agents[404] that the Bureau considered "deceptive" under the Dodd-Frank Act.[405] In another instance, the

396. CFPB EXAMINATION MANUAL, *supra* note 146, at Overview 6 ("Self-correction will be encouraged, but some circumstances may nevertheless be sufficiently serious to warrant a public enforcement action.").

397. SUPERVISORY HIGHLIGHTS III, *supra* note 42, at 10–13 (discussing early public enforcement actions undertaken by the Bureau).

398. *Id.* at 17.

399. See *supra* Part II.A.

400. SUPERVISORY HIGHLIGHTS III, *supra* note 42, at 15 ("All of the Bureau's examination procedures can be found at: http://www.consumerfinance.gov/guidance/supervision/manual/, and are updated as regulatory changes warrant.").

401. *See, e.g.*, *id.* at 15–17; SUPERVISORY HIGHLIGHTS IV, *supra* note 52, at 25–26; SUPERVISORY HIGHLIGHTS VII, *supra* note 52, at 16–17.

402. CFPB Newsroom Press Release, *CFPB Probe into Capital One Credit Card Marketing Results in $140 Million Consumer Refund*, CONSUMER FIN. PROT. BUREAU (July 8, 2012), http://www.consumerfinance.gov/newsroom/cfpb-capital-one-probe/; *see also* SUPERVISORY HIGHLIGHTS VI, *supra* note 42, at 24 (summarizing the CFPB compliance bulletin about mortgage servicing transfers); CONSUMER FIN. PROT. BUREAU, BULL. 2014-01, COMPLIANCE BULLETIN AND POLICY GUIDANCE: MORTGAGE SERVICING TRANSFERS (2014), *available at* http://files.consumerfinance.gov/f/201408_cfpb_bulletin_mortgage-servicing-transfer.pdf.

403. CONSUMER FIN. PROT. BUREAU, BULL. 2013-08, REPRESENTATIONS REGARDING EFFECT OF DEBT PAYMENTS ON CREDIT REPORTS AND SCORES (2013), *available at* http://files.consumerfinance.gov/f/201307_cfpb_bulletin_collections-consumer-credit.pdf; *see also* CONSUMER FIN. PROT. BUREAU, BULL. 2013-10, PAYROLL CARD ACCOUNTS (REGULATION E) (2013), *available at* http://files.consumerfinance.gov/f/201309_cfpb_payroll-card-bulletin.pdf.

404. CONSUMER FIN. PROT. BUREAU, BULL. 2013-08, *supra* note 403, at 2–3 (explaining "creditors and debt buyers (collectively 'debt owners') and third-party debt collectors often make material representations intended to persuade consumers to pay debts in collection" and providing generalized examples).

405. Dodd-Frank Act § 1031, 12 U.S.C. § 5531 (2012).

CFPB gave indirect auto lenders specific recommendations for avoiding car dealer fair-lending violations in a compliance bulletin.[406] The Bureau followed up with examinations of these companies and then a dedicated edition of Supervisory Highlights, which reported on the examination findings and provided additional guidance for lenders.[407] The CFPB collects its guidance documents on a dedicated website,[408] thus enabling financial institutions to review them at any point. Similarly, the Bureau also maintains a "Regulatory Implementation" website[409] that provides downloadable "plain-language guides" and "quick reference charts" about recent CFPB rules.[410] And the CFPB provides one more layer of notice by referencing all of these documents and Internet compilations in its Highlights.[411]

The CFPB also uses publicity to maximize its compliance leverage by harnessing companies' fears of negative press, a factor Whitford identified as motivating compliance.[412] The key dividing line in the CFPB spectrum of remedies is whether an enforcement action is public or nonpublic, and the difference between them is great. As the name suggests, public enforcement actions are public events. The Supervisory Highlights disclose company names and specify their legal violations. Further, the CFPB publicizes its public enforcement actions, issuing press releases[413] and publishing the appropriate

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406. CONSUMER FIN. PROT. BUREAU, BULL. 2013-02, INDIRECT AUTO LENDING AND COMPLIANCE WITH THE EQUAL CREDIT OPPORTUNITY ACT (2013), *available at* http://files.consumerfinance.gov/f/201303_cfpb_march_-Auto-Finance-Bulletin.pdf (reviewing indirect auto lenders' obligations under the ECOA).

407. SUPERVISORY HIGHLIGHTS V, *supra* note 52.

408. *Guidance Documents,* CONSUMER FIN. PROT. BUREAU, http://www.consumerfinance.gov/guidance/ (last visited Sept. 15, 2015).

409. *Regulatory Implementation,* CONSUMER FIN. PROT. BUREAU, http://www.consumerfinance.gov/regulatory-implementation/ (last visited Sept. 15, 2015).

410. *See, e.g.*, *Title XIV Rule Implementation,* CONSUMER FIN. PROT. BUREAU, http://www.consumerfinance.gov/regulatory-implementation/title-xiv/.

411. *See, e.g.*, SUPERVISORY HIGHLIGHTS V, *supra* note 52, at 3 n.1 (citing CONSUMER FIN. PROT. BUREAU, BULL. 2013-02, *supra* note 406 and providing corresponding link to the bulletin in the first paragraph of the report).

412. See *supra* note 59 and accompanying text.

413. *See, e.g.*, CFPB Newsroom Press Release, *CFPB Takes Action Against PayPal for Illegally Signing Up Consumers for Unwanted Online Credit*, CONSUMER FIN. PROT. BUREAU (May 19, 2015), http://www.consumerfinance.gov/newsroom/cfpb-takes-action-against-paypal-for-illegally-signing-up-consumers-for-unwanted-online-credit/ (publicizing a complaint and proposed consent order filed by the Bureau against PayPal, Inc., wherein the Bureau would require PayPal to refund $15 million to consumers and pay a $10 million fine); CFPB Newsroom Press Release, *CFPB Takes Action to Obtain $120 Million in Redress from Sprint and Verizon for Illegal Mobile Cramming*, CONSUMER FIN. PROTECTION BUREAU (May 12, 2015), http://www.consumerfinance.gov/newsroom/cfpb-takes-action-to-obtain-120-million-in-redress-from-sprint-and-verizon-for-illegal-mobile-cramming/ (reporting that the CFPB had filed proposed consent orders against Sprint and Verizon); CFPB Newsroom Press Release, *CFPB Files Suit Against Nationwide Biweekly for Luring Consumers with False Promises of Mortgage Savings*, CONSUMER FIN. PROT. BUREAU (May 11, 2015), http://www.consumerfinance.gov/newsroom/cfpb-files-suit-against-nationwide-biweekly-for-luring-consumers-with-false-promises-of-mortgage-savings/ (announcing that the Bureau had filed a lawsuit against Nationwide Biweekly Administration, Inc. and affiliates for misleading customers).

legal supporting material, such as the Bureau's complaint in a lawsuit or a consent order with the company.[414] These documents provide significantly more detail about legal violations and necessary corrective action than do the Supervisory Highlights.

In contrast, Bureau discussions of nonpublic enforcement actions not only avoid using company names, but also actively obscure company identities. For example, in Supervisory Highlights passages detailing the regulatory violations that resulted in nonpublic enforcement, the CFPB refers to "one or more instances" of insufficient employee training by credit reporting agencies,[415] "one or more of the CRAs" lacking adequate dispute-resolution procedures,[416] and "one or more situations in which requirements of the CARD Act have not been followed."[417] In markets with few major players, such as credit reporting,[418] or massive consolidation, such as credit card issuing,[419] this vagueness is a logical precaution. In those markets, reporting the number of companies who were violating the law could compromise confidentiality. But even in markets with broader competition,[420] this effort probably reassures companies that private enforcement actions will not result in reputational costs. These stark differences in publicity incentivize companies to at least avoid gross noncompliance.

The early efforts by the Bureau to define its supervisory authority establish a dynamic of the type Whitford described for specific statutory commands—that specificity results in compliance from "such motives as a general belief in law abidingness and a fear of bad publicity."[421] The Dodd-Frank Act authorizes examination to determine whether covered entities are complying with the law, and the Bureau has spelled out in great detail what compliance systems must do. In this context, it is simply not acceptable for institutions to respond to the CFPB

414. *E.g.*, Joint Consent Order, Order For Restitution, and Order To Pay Civil Money Penalty, *In re* Discover Bank, Nos. FDIC-ll-548b, FDIC-ll-55lk, 2012-CFPB-0005 (FDIC/CFPB Sept. 24, 2012), http://files.consumerfinance.gov/f/201209_cfpb_consent_order_0005.pdf.

415. SUPERVISORY HIGHLIGHTS I, *supra* note 52, at 12.

416. SUPERVISORY HIGHLIGHTS IV, *supra* note 42, at 9; *see also* SUPERVISORY HIGHLIGHTS VI, *supra* note 42, at 6 (referring to "at least one specialty CRA" with weak complaints management "program(s)"—parenthetical "(s)" in the original to maintain confidentiality regarding the number of inadequate programs).

417. SUPERVISORY HIGHLIGHTS I, *supra* note 52, at 11. *But see* SUPERVISORY HIGHLIGHTS III, *supra* note 42, at 5–6 (referring to "two [mortgage] servicers" and "a servicer"); SUPERVISORY HIGHLIGHTS IV, *supra* note 42, at 12 (discussing examiner findings during "one debt collector examination"); SUPERVISORY HIGHLIGHTS IV, *supra* note 42, at 12 (referring to "a creditor" that failed to monitor its debt buyers' compliance with consumer law).

418. *See* Littwin, *supra* note 42, at 385 (noting that the "big three" CRAs are Equifax, Experian, and TransUnion).

419. Bar-Gill, *supra* note 186, at 1387 (outlining the make up of the credit card industry and explaining that within the industry exists "two intertwined levels of competition")

420. *See, e.g.*, SUPERVISORY HIGHLIGHTS II, *supra* note 42, at 6 (identifying "one or more instances of nonbanks that lack formal policies and procedures"); SUPERVISORY HIGHLIGHTS VI, *supra* note 42, at 9 (referring to "one or more" financial institutions violating the Electronic Funds Transfer Act and its implementing regulation).

421. Whitford, *supra* note 2, at 1022. See *supra* note 59 and accompanying text.

that they do not care about compliance and are not interested in effective compliance systems.

## IV. POTENTIAL PITFALLS AND THEIR PREVENTION

Two types of pitfalls could, in the future, cloud the relatively sunny picture painted in Section III. First are the factors that could weaken the CFPB's commitment to consumer protection, such as regulatory capture by industry and related political pressures. Second is the fact that supervision is, by necessity, a confidential process, which means that, were CFPB supervision to decline in rigor at a later date, the public might be none the wiser. However, two current CFPB practices could mitigate these pitfalls' effects: (1) the creation of an informal, yet public precedent to constrain future Bureau directors; and (2) the attempt to establish compliance norms at financial institutions.

### *A. Capture and Related Pressures*

Regulatory capture refers to situations in which a regulated industry has disproportionate influence over its regulator.[422] Some degree of industry influence is probably inevitable, because industry tends to have more resources and to be better organized than the constituencies, such as consumers or the general public, that are the intended beneficiaries of many agencies' missions.[423] Industry has a superior ability to monitor the agency, protest agency actions the industry disfavors, and bring lawsuits. Thus, a "rational, well-meaning agency" needs to accommodate industry to some extent, or it risks tying up its resources in battles and jeopardizing its ability to accomplish any of its goals.[424] One way

422. Barkow, *supra* note 47, at 17, 20, 25. Professor Barkow is a leading authority on regulatory capture, having written approximately twenty articles on industry design and capture. She also testified about the institutional design of the then-proposed CFPB before the House Subcommittee on Commerce, Trade, and Consumer Protection. *Id*.

423. *See, e.g.*, 47 U.S.C. § 151 (2012) (stating that a purpose of the FCC is "regulating interstate and foreign commerce in communication by wire and radio so as to make available . . . to all the people of the United States . . . [n]ation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges"); Spencer Weber Waller, Jillian G. Brady, R.J. Acosta & Jennifer Fair, *Consumer Protection in the United States: An Overview*, 2011 EUR. J. CONSUMER L., 1, 2–3, 8–13, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1000226; *About FDA—What We Do,* U.S. Food and Drug Administration, http://www.fda.gov/AboutFDA/WhatWeDo/ (last updated Aug. 5, 2014) ("FDA is responsible for protecting the public health by assuring the safety, efficacy and security of human and veterinary drugs . . . . FDA is also responsible for advancing the public health by helping to speed innovations that make medicines more effective, safer, and more affordable."); *EPA Takes Action to Protect Consumers from Harmful Chemicals that Can Cause Reproductive and Developmental Harm* (DEC. 29, 2014), NAT'L L. REV., http://www.natlawreview.com /article/epa-takes-action-to-protect-consumers-harmful-chemicals-can-cause-reproductive-and-d.

424. Barkow, *supra* note 47, at 18; Nathan Cortez, *Adverse Publicity by Administrative Agencies in the Internet Era*, 2011 BYU L. REV. 1371, 1392 (2011) ("Agencies frequently try to cooperate with and accommodate industry interests, which triggers criticisms that agencies are too industry friendly."); Arthur E. Wilmarth Jr., *Turning a Blind Eye: Why Washington Keeps Giving in to Wall Street*, 81 U. CIN. L. REV. 1283, 1294 (2013) (observing that the "'revolving door' between government

to counteract the potential for capture is with the agency's design, and as discussed in Section III.A, the CFPB has key structural features that insulate it from some of the pressures just described. On the other hand, the Bureau has five sources of potential industry pressure: industry itself, Congress, a new presidential administration, prudential regulators, and the Bureau's own employees.

The CFPB's first vulnerability *vis à vis* industry is that the newness of consumer-protection supervision could make companies less tolerant of it than they otherwise would have been. Some of the companies the Bureau is charged with examining (larger depository institutions) are used to supervision focused almost exclusively on prudential concerns,[425] while others (non-depository institutions) have not experienced supervision at all.[426] Second, the CFPB's mission is to protect consumers, a group that is diffuse and whose members each have a small stake in the agency's success.[427] These factors make it difficult for them to mobilize and push back against industry influence. Furthermore, the Bureau's mandate is specifically to protect consumers from financial harm, meaning that many of its constituents will be in debt, a stigmatized state that makes these consumers even less likely to organize than most.[428] Third, the industry the CFPB regulates is particularly powerful and willing to invest significant resources in monitoring the CFPB.[429]

The second vulnerability is that industry can complain to the agency's congressional overseers, who may be receptive due to campaign contributions or political inclinations.[430] The consumer finance industry invests heavily in congressional lobbying and campaigns.[431] And while the CFPB was created

service and financial-sector jobs encourages regulators to accommodate industry demands for deregulation and supervisory 'flexibility'").

425. See *supra* notes 101–10 and accompanying text for a discussion of the pre-crisis prudential regulators' lack of interest in consumer protection.

426. See *supra* note 113 and accompanying text.

427. See *supra* notes 78–81 and accompanying text.

428. *See, e.g.*, Angela Littwin, *The Affordability Paradox: How Consumer Bankruptcy's Greatest Weakness May Account for Its Surprising Success*, 52 WM. & MARY L. REV. 1933, 1933 (2011) (stating that consumer bankruptcy filers are "a textbook case of an interest that cannot organize effectively" due to diffusion and stigma).

429. *See, e.g.*, Prepaid Accounts Under the Electronic Fund Transfer Act (Regulation E) and the Truth in Lending Act (Regulation Z), 79 Fed. Reg. 77102 (Dec. 23, 2014) (a proposed rule with request for public comment); *Prepaid Accounts Under the Electronic Fund Transfer Act (Regulation E) and the Truth in Lending Act (Regulation Z)*, REGULATIONS.GOV (Mar. 23, 2015, 11:59 PM), http://www.regulations.gov/#!documentDetail;D=CFPB-2014-0031-0001 (providing access to the 6,413 comments received on the CFPB's proposed rule to bring prepaid financial products within the CFPB's ambit). Industry has even established a website that collects and disseminates information about Bureau activities. Consumer Fin. Servs. Group at Ballard Spahr, CFPB MONITOR, http://www.cfpbmonitor.com/ (last visited Sept. 15, 2015).

430. Barkow, *supra* note 47, at 18.

431. Americans for Financial Reform reported that financial interest groups spent $1.4 billion on campaign contributions and lobbying during the 2013-14 election cycle—the equivalent of $1.9 million per day over the two-year period. AMERICANS FOR FIN. REFORM, WALL STREET MONEY IN WASHINGTON: UPDATE ON 2013-2014 CAMPAIGN AND LOBBY SPENDING BY THE FINANCIAL SECTOR

despite industry's objections,[432] this industry has a history of successful lobbying at the federal level.[433] Further, the Congress that created the CFPB had Democratic majorities in both houses, while the current Congress is led by Republicans, who have thus far been sympathetic to industry complaints about the CFPB.[434]

Just as Congresses change, so do presidents, and the CFPB's very existence may be threatened during times in which the Republican Party controls both political branches of the federal government.[435] But even a Republican President without Congress on his or her side could increase industry's influence by appointing a director hostile to the Bureau's consumer mission. Past presidents have used such appointments to weaken from the inside agencies whose missions they opposed.[436] The CFPB has a unitary director rather than a body of

(2015), *available at* http://ourfinancialsecurity.org/blogs/wp-content/ourfinancialsecurity.org/uploads/2014/12/Wall-Street-Money-Final-March-2015.pdf. Credit card companies alone spent $39.8 million on lobbying in 2009. Center for Responsible Politics, *Finance / Credit Companies: Lobbying, 2014*, OPENSECRETS.ORG), http://www.opensecrets.org/industries/lobbying.php?cycle=2014&ind=F06 (last visited Sept. 15, 2015).

432. *See generally* Arthur E. Wilmarth, Jr., *The Financial Services Industry's Misguided Quest to Undermine the Consumer Financial Protection Bureau*, 31 REV. BANKING & FIN. L. 881 (2012) (noting that opponents argued the CFPB would reduce the availability of credit to consumers, the safety and soundness of financial institutions would be undermined, and, because the Bureau did not have meaningful checks and balances, it would likely become an all-powerful bureaucracy that would stifle innovation and flexibility in the consumer financial services market).

433. *See generally* Robert M. Lawless, Angela K. Littwin, Katherine M. Porter, John A.E. Pottow, Deborah Thorne & Elizabeth Warren, *Did Bankruptcy Reform Fail? An Empirical Study of Consumer Debtors,* 82 AM. BANKR. L.J. 349 (2008) (discussing the role of industry, especially credit card companies, in passing the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005).

434. Jordan Fabian, *Obama Looks to Defend CFPB from Republican Attacks*, THE HILL (Mar. 26, 2015, 2:29 PM), http://thehill.com/homenews/administration/237099-obama-looks-to-defend-cfpb-from-republican-attacks ("Democrats are accusing Republicans of attempting to gut the CFPB through the budget process. The Senate GOP's budget proposal contains language that would fund the bureau through congressional appropriations."); Michael Hiltzik, *Consumer Protection: Why Do Republicans Hate the CFPB So Much?,* L.A. TIMES (July 23, 2015, 12:46 PM), http://www.latimes.com/business/hiltzik/la-fi-mh-cfpb-republicans-20150723-column.html; Jim Puzzanghera, *Republicans Criticize Spending by New Consumer Bureau*, L.A. TIMES (Feb. 15, 2012), http://articles.latimes.com/2012/feb/15/business/la-fi-cordray-consumers-spending-20120215.

435. *See* Erika Eichelberger, *A GOP Senate's First Target: Elizabeth Warren's Consumer Protection Agency*, MOTHERJONES (Sept. 26, 2014, 6:15 AM), http://www.motherjones.com//2014/09/republican-senate-would-gut-elizabeth-warren-consumer-protection-bureau (noting that Republicans have been particularly hostile towards the CFPB and would seize the opportunity to roll back the Bureau, demonstrated by the Republican-controlled House passing bills to replace the CFPB Director with a five-member panel and to subject Bureau funding to congressional appropriations, as well as proposing bills to allow financial regulators to overturn CFPB rules, to eliminate the CFPB's Civil Money Penalty Fund, and to restrict the Bureau's data-collection abilities); *accord* Press Release, Congresswoman Carolyn B. Maloney, Maloney Fights to Protect CFPB Funding During Contentious Committee Markup (Feb. 13, 2015), http://maloney.house.gov/media-center/press-releases/maloney-fights-to-protect-cfpb-funding-during-contentious-committee (observing that, "[i]n the 113th Congress, Republicans tried to eliminate the CFPB's independent funding four separate times" and that "[n]early 40 percent of bills marked up by the Financial Services Committee in the previous Congress were designed to weaken the CFPB").

436. See *supra* note 49 and accompanying text for examples.

commissioners, an intentional choice that provides independence during an administration committed to consumer protection.[437] But this structure also makes the Bureau vulnerable to mission dilution with a change of presidential administration.

The next potential pressure that could weaken the CFPB's commitment to consumer protection comes from its relationships with the federal prudential regulators, which have a history of devaluing consumer protection.[438] First, the CFPB is not a separate agency, but is rather housed within the Board of Governors of the Federal Reserve (Board).[439] Although the Dodd-Frank Act provided for a large degree of Bureau independence within the Board,[440] there could still be subtle Board influence over the CFPB. For example, the Board and the Bureau now share an Office of Inspector General (OIG),[441] and an early OIG report seemed attuned to CFPB startup flaws that burden industry and nowhere commented on the importance of consumer protection.[442] Second, the Dodd-Frank Act directly curbs the Bureau's independence by granting the Financial Stability Oversight Council—which is composed of the heads of the mostly prudential federal banking agencies—the authority to block CFPB rules it deems a threat to safety and soundness.[443] In addition, if an individual prudential regulating agency issues safety-and-soundness concerns about a potential CFPB rule, the Bureau must respond to these concerns in writing when promulgating the rule.[444]

The third source of prudential regulators' potential influence is their role in CFPB examinations of large depository institutions.[445] The Dodd-Frank Act requires the CFPB to coordinate examination schedules with prudential regulators for depository institutions in order to minimize regulatory burden.[446] This may mean that the CFPB and prudential regulators are present at the same

437. See *supra* note 122–27 and accompanying text.

438. See *supra* note 5 and accompanying text for the Federal Reserve's lack of use of its consumer protection regulatory authority until 2008. See *supra* Part III.A for a discussion of the anti–consumer protection stance of pre-crisis prudential regulators.

439. Dodd-Frank Act § 1012(c), 12 U.S.C. § 5492(c) (2012) (describing the coordination of the CFPB with the Board of Governors of the Federal Reserve, as well as the CFPB's relative autonomy).

440. *Id.* § 1011(a), 12 U.S.C. § 5491(a) (2012) (stating that the CFPB is "an independent bureau" and "considered an [e]xecutive agency"); *id.* § 1011(b)(2), 12 U.S.C. § 5491(b)(2).

441. *Introduction to the OIG*, OFFICE OF THE INSPECTOR GEN., http://oig.federalreserve.gov/introduction.htm (last visited Sept. 15, 2015) ("The OIG's mission is to provide independent oversight by conducting audits, investigations, and other reviews of the programs and operations of the Board and the CFPB.").

442. OIG EVALUATION REPORT, *supra* note 50.

443. Dodd-Frank Act § 1023(a), 12 U.S.C. § 5513(a) (giving the Council the power to set aside any final regulation prescribed by the Bureau that the Council decides "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").

444. *Id.* § 1022(b)(2)(C), 12 U.S.C. § 5512(b)(2)(C).

445. *Id.* § 1025(b)(2), 12 U.S.C. § 5515(b)(2).

446. *Id.*; OIG EVALUATION REPORT, *supra* note 50, at 3.

time at a supervised entity, although not necessarily.[447] Another type of coordination occurs at the end of the examination process. When the CFPB prepares to issue a supervisory report, it must give the relevant prudential regulator an opportunity to comment on a draft before it makes the report final.[448] CFPB supervisory letters are not currently shared with prudential regulators,[449] although the OIG report recommended changing this practice,[450] and the Bureau has agreed with the OIG's suggestion.[451] Interactions between CFPB and prudential agencies concerning examinations have the potential to reintroduce some element of conflict of interest in mission.[452] For example, a high-level CFPB official has said that working with an agency focused on safety and soundness can give a more complete perspective to consumer protection examination.[453]

The CFPB, however, appears attuned to the difference between its mission and that of prudential regulators. This sensitivity is reflected in its pronouncements about the need for training focused on a consumer protection mission.[454] A sign that the Bureau has thoughtfully considered the perceived conflict between prudential regulation and consumer protection is CFPB Director Cordray's statement harmonizing the two missions: "It's not a long-term business model to take advantage of your consumers in ways that are not sustainable."[455] The quotation demonstrates that CFPB—at the highest level—actively rejects the idea that safety and soundness should trump consumer protection.

The final potential source of capture is in the staffing of the organization, which in turn influences its culture.[456] An agency's employees must come from somewhere and go somewhere when they leave. For reasons of interest and expertise, people may work in the same field when seeking new employment.[457] And because of its superior resources, industry tends to have better-paying jobs

447. Dodd-Frank Act § 1025(e)(1)(B), 12 U.S.C. § 5515(e)(1)(B). One reason for separate scheduling is that the supervised entity can request it. *Id.* Another is that a "simultaneous" examination can be only partially overlapping in time and conducted at different locations. *See* CONSUMER FIN. PROT. BUREAU, MEMORANDUM OF UNDERSTANDING ON SUPERVISORY COORDINATION (May 2012), *available at* http://files.consumerfinance.gov/f/201206_CFPB_MOU_Supervisory_Coordination.pdf (agreement entered into between the CFPB and Prudential Regulators).

448. Dodd-Frank Act § 1025(e)(1)(C), 12 U.S.C. § 5515(e)(1)(C).

449. OIG EVALUATION REPORT, *supra* note 50, at 3. This lack of sharing of drafts of supervisory letters was agreed to in the Memorandum of Understanding on Supervisory Coordination, *supra* note 447.

450. OIG EVALUATION REPORT, *supra* note 50, at 31–32.

451. *Id.* at 36–39.

452. See *supra* notes 96–99 and accompanying text for a discussion of perceived conflict between safety and soundness and consumer protection.

453. Tucker et al., *supra* note 253.

454. SUPERVISORY HIGHLIGHTS II, *supra* note 42, at 22–23.

455. Douglas, *supra* note 113.

456. Barkow, *supra* note 47, at 23.

457. *Id.* at 18–19.

and more of them than the nonprofit sector.[458] This can lead to the "revolving door" in which agency employees who come from industry bring that perspective and employees contemplating working in the industry afterwards might—even unconsciously—consider their job prospects when regulating their future potential employers.[459]

The CFPB has some vulnerabilities in this area as well. As a new agency, it needed all new employees, and two of the major places to find employees with relevant financial or examination-related expertise are industry and the prudential regulators, which do not have a history of consumer protection.[460] Staff coming from either location may not have a strong commitment to consumer protection, although self-selection could mitigate this concern. Other potential talent pools can be found in nonprofits and consumer-focused agencies, such as the FTC or state attorney general offices.[461] Employees from those organizations would be more likely to have a consumer focus.

The CFPB's early supervision staff was drawn from the ranks of federal and state government regulators and related-industry positions.[462] It also included entry-level staff, such as recent law school graduates.[463] But most of the early supervision managers and examiners came from prudential agencies at the federal or state level,[464] for reasons that may have been beyond the CFPB's control. Initially, prudential regulators were the only ones with prior examination experience,[465] a key credential for an agency that began its

458. *See* Ben Protess, *Slowing the Revolving Door Between Public and Private Jobs*, N.Y. TIMES, Nov. 12, 2013, at F18 (stating that some watchdog groups estimate that a $100,000 government salary would need to be raised to $400,000 or more to be on par with equivalent job opportunities in the private sector); *see also* Bureau of Labor Statistics, U.S. Dep't of Labor, *Nonprofits Account for 11.4 Million Jobs, 10.3 Percent of all Private Sector Employment*, TED: THE ECONOMICS DAILY (Oct. 21, 2014), http://www.bls.gov/opub/ted/2014/ted_20141021.htm (reporting on 2012 data).

459. *See* Barkow, *supra* note 47, at 18–19.

460. Severin Borenstein, Meghan R. Busse & Ryan Kellogg, *Career Concerns, Inaction and Market Inefficiency: Evidence from Utility Regulation*, 60 J. INDUSTRIAL ECON. 220 (2012). See *supra* notes 100–04 and accompanying text for a discussion of the pre-crisis prudential regulators.

461. Indeed, Director Richard Cordray was the Ohio Attorney General before joining the CFPB. *About Richard Cordray,* CONSUMER FIN. PROT. BUREAU, http://www.consumerfinance.gov/the-bureau/about-rich-cordray/ (last visited Sept. 15, 2015).

462. Tucker et al., *supra* note 253 (discussion by Calvin R. Hagins, program manager, Office of Supervision Policy within the CFPB Division of Supervision, Enforcement and Fair Lending, previously an examiner for many years at the Office of Comptroller of the Currency and then part of OCC management in several roles).

463. *Id.*

464. Ronald Rubin, *The Identity Crisis at the Consumer Financial Protection Bureau,* BLOOMBERG BNA (JAN. 15, 2013), http://www.bna.com/the-identity-crisis-at-the-consumer-financial-protection-bureau/ (articulating the challenges of the CFPB as witnessed firsthand by the author while serving as an enforcement attorney at the CFPB, where he played a critical role in the development the Office of Enforcement, including rulemaking and training). In contrast, most of the first managers in Enforcement and many of its earliest Enforcement attorneys either came from the FTC's Bureau of Consumer Protection or had FTC experience. *Id.*

465. The FDIC and OCC, for example, both have published examination manuals. FED. DEPOSIT INS. CORP., COMPLIANCE EXAMINATION MANUAL (2015), *available at*

supervision program immediately upon opening.[466] And the Dodd-Frank Act itself provided for the transfer of employees from federal prudential regulators,[467] but not from the FTC.[468]

The Bureau has made efforts to shape the composition of its supervision staff. It has repeatedly stressed the importance of recruiting effective supervisory employees, stating that it views recruiting "talented and highly motivated" examiners as a "central priority."[469] The CFPB's commitment to hiring new staff was so strong that in the early phases of the examination program, the lack of experience of some team members slowed down the process.[470] It also reported developing its own commissioning program similar to that of prudential regulators but "focused on the CFPB's unique mission."[471] As of October 2013, the CFPB had 108 commissioned examiners, 88 of whom were commissioned by another regulatory agency and 20 of whom were commissioned by the CFPB's interim commissioning program.[472] These numbers, however, are dwarfed by the

https://www.fdic.gov/regulations/compliance/manual/index.html; OFFICE OF THRIFT SUPERVISION, SECTION 1354 EXAMINATION HANDBOOK (2010), *available at* http://occ.gov/static/news-issuances/ots/exam-handbook/ots-exam-handbook-1354.pdf. While the FTC conducts "investigations," i.e. requesting copies of documents, requiring reports, issuing subpoenas, and taking witness statements, these activities are more formal and adversarial than examination. 15 U.S.C. §§ 46, 49, 57b-1 (2012). The SEC conducts examinations with the goal of investor protection, a form of consumer protection, but it regulates a different set of entities, and the CFPB hired few senior-level employees with SEC backgrounds. Rubin, *supra* note 464.

466. See *supra* notes 290–93 and accompanying text.

467. Dodd-Frank Act § 1064(a)(1)–(6), 12 U.S.C. § 5584(a)(1)–(6) (outlining the process by which certain Federal Reserve employees would be transferred as "necessary to perform or support the consumer financial protection function of the Board of Governors that are transferred to the Bureau"). The CFPB also received employees from the Department of Housing and Urban Development, perhaps to ensure that its staff would have expertise in the mortgage market, which is a particularly complex area of consumer finance. *Id.* § 1064(a)(6), 12 U.S.C. § 5584(a)(6).

468. Dodd-Frank Act § 1061(b)(5)(A), 12 U.S.C. § 5581(b)(5)(A) (mandating the transfer of FTC functions, while explicitly noting that "[n]othing . . . shall be construed to require a mandatory transfer of any employee of the [FTC]"); *id.* §1064(a)(7), 12 U.S.C. § 5584(a)(7) (exempting the FTC from the "transferor agencies" from which employees shall be transferred to the Bureau).

469. SUPERVISORY HIGHLIGHTS II, *supra* note 42, at 22 (noting recruiting as a "central priority"); SUPERVISORY HIGHLIGHTS IV, *supra* note 42, at 25 (stating that, "[t]he Bureau continues to recruit talented and highly motivated staff" for its supervision program; s*ee also* OIG EVALUATION REPORT, *supra* note 50, at 29 (stating in management response to OIG recommendations concerning examiner training, that "[w]e share the OIG's appreciation of the critical role training plays in enhancing the overall effectiveness of CFPB's supervisory operations" and that "[o]ur examiners possess deep and varied experience. Our goal remains to recruit high quality talent and develop future generations of examiners.").

470. OIG EVALUATION REPORT, *supra* note 50, at 29 (noting that, according to a senior CFPB official, other federal regulatory agencies generally have inexperienced examiners making up one-third of examination staff, while at CFPB as of June 11, 2013, fifty-five percent of CFPB examiners were below the minimum grade level for commissioning, and that a regional CFPB director explained that having a large proportion of noncommissioned examiners meant training during examinations, which "requires more staff resources and lengthens examination time").

471. SUPERVISORY HIGHLIGHTS II, *supra* note 42, at 22–23.

472. OIG EVALUATION REPORT, *supra* note 50, at 28.

number of examiners federal and state prudential regulators employ.[473] The CFPB commissioning program, including both classes and on-the-job training, was finalized at the end of 2014.[474]

At the other end of the timeline, the destinations of CFPB employees who leave can also affect the balance of industry influence at the agency. A "revolving door" between an agency and industry increases the risk of capture because regulators who plan (or hope) to work in the industry might be more inclined to adopt the industry's perspective.[475] Unfortunately, the revolving door appears to be turning rapidly at the CFPB. The most prominent example is the departure of Deputy Director Steve Antonakes, who became a senior vice president and chief compliance officer at Eastern Bank.[476] A previous CFPB's Deputy Director (and one-time Acting Director), Rajeev Date, left to start his own bank consulting firm.[477] Other examples include nine senior CFPB officials who left for the private sector in the first half of 2013.[478] In spring 2014, two top mortgage officials left the Bureau for senior positions at Wells Fargo,[479] and a former assistant director of the CFPB's Office of Regulations left for a law firm where he advises financial institutions on consumer financial law.[480]

### B. *Examination-Specific Capture Risks*

Examinations are confidential and for good reason. Public examinations would hurt consumers by hurting competition and would frustrate the CFPB's goal of encouraging company candor—not to mention undermining the Bureau's threat of negative publicity.[481] But this lack of transparency increases the risk of capture by preventing consumer and other public-interest-minded groups from monitoring CFPB supervision. Furthermore, because of the close contact

473. Alan Zibel & Dan Fitzpatrick, *Banks Seek a Détente with New Consumer Bureau*, WALL ST. J. (July 1, 2013, 8:46 PM), http://www.wsj.com/articles/SB1000142412788732425150457857961252870 6162.

474. SUPERVISORY HIGHLIGHTS VII, *supra* note 52, at 19.

475. *See* Barkow, *supra* note 47, at 19.

476. Phil Hall, *Ex-CFPB Deputy Antonakes Joins the Private Sector*, NAT'L MORTGAGE PROFESSIONAL MAG. (Aug. 11, 2015 1:09 PM), http://nationalmortgageprofessional.com/news/55306/ex-cfpb-deputy-antonakes-joins-private-sector.

477. Richard Pollock, *House Panels Demand Info on CFPB's Revolving Door*, WASH. EXAMINER (Aug. 1, 2013, 12:00 AM), http://www.washingtonexaminer.com/article/2533787.

478. Megan R. Wilson, *Revolving Door in Full Swing at New Consumer Bureau,* THE HILL (June 14, 2013), http://thehill.com/business-a-lobbying/305691-revolving-door-in-full-swing-at-new-consumer-bureau.

479. Timothy P. Carney, *Revolving Door at Regulator CFPB Enables Former Bureaucrats to Cash in at Taxpayers' Expense*, WASH. EXAMINER (Aug. 19, 2014, 6:41 PM), http://www.washington examiner.com/revolving-door-at-regulator-cfpb-enables-former-bureaucrats-to-cash-in-at-taxpayers-expense/article/2552211 (describing these moves as "completely unremarkable for the agency").

480. *Id.*

481. See *supra* notes 415–21 and accompanying text.

between examiners and regulated entities, examinations present an inherent risk of regulators adopting industry perspectives.[482]

Examination must be confidential in order to protect company competitive information. Otherwise, the process would frustrate one of the CFPB's statutory purposes: ensuring competition in markets for consumer financial products and services.[483] Examiners gather so much internal data[484] that the revelation of competitive information about business plans would be inevitable if the details of the process were made public. For example, in the course of examining how an entity builds compliance oversight into the process of developing new products and services,[485] the CFPB views information that would be of great interest to competitors. Sometimes it obtains this information before products are even launched,[486] which helps the agency's preventive project.[487] Other times, it will learn of planned changed to address potential violations of law revealed by complaints.

Furthermore, the CFPB's goal of promoting compliance through examination would be impaired if it publicly disclosed flaws in the behavior of supervised entities. To instill an ethos of constant self-initiated correction,[488] the CFPB must tolerate some lapses by the institutions it examines. Indeed, its two highest consumer compliance ratings both recognize the possibility of deficiencies in practices leading to legal violations.[489] Perfection is not expected but constant improvement and documentation of improvement are.[490] The Bureau wants supervised entities to communicate internally about legal violations discovered, to fix them promptly, and to revise their procedures for

482. Lawrence G. Baxter, *"Capture" in Financial Regulation: Can We Channel It Toward the Common Good?*, 21 CORNELL J.L. & PUB. POL'Y 175, 187 (2011) (observing that "the highly discretionary and continuous nature of bank regulation is dependent on and nurtures an environment in which the regulators and the regulated are engaged in such close, daily relationships as to nurture intense mutual empathy—perhaps even a kind of "transference"—between the two sides. This codependence might seem inevitably to lead to a mutual identification of interests. . . .").

483. *See* Dodd-Frank Act § 1021, 12 U.S.C. § 5511(a) (2012).

484. CFPB EXAMINATION MANUAL, *supra* note 146, at Overview 5–6.

485. SUPERVISORY HIGHLIGHTS IV, *supra* note 42, at 7 (observing that compliance "training programs should be responsive to new or changing regulatory requirements, new products and services, and product changes").

486. *See* CFPB EXAMINATION MANUAL, *supra* note 146, at CMR 1 ("To maintain legal compliance, a supervised entity must develop and maintain a sound compliance management system that is integrated into the overall framework for product design, delivery, and administration—that is, the entire product and service lifecycle.").

487. See *supra* notes 167–68 and accompanying text.

488. See *supra* Part III.B.2.

489. CFPB EXAMINATION MANUAL, *supra* note 146, at Examinations 9. A number one, or top, consumer compliance rating includes this possibility, "If any violations are noted, they relate to relatively minor deficiencies in forms or practices that are easily corrected," and there is no evidence of repeat violations because "[v]iolations and deficiencies are promptly corrected by management." Its number two rating includes that violations have occurred but can be eliminated by "[m]odification in the institution's compliance program and/or the establishment of additional review/audit procedures." This rating also is based on a lack of repeat violations. *Id.*

490. See *supra* notes 349–53 and accompanying text.

preventative purposes.[491] To create an atmosphere that encourages this high level of candor, confidentiality is essential. The one exception, of course, is when legal violations rise to the level of public enforcement,[492] but as discussed earlier, the background norm of examination confidentiality increases companies' incentives to avoid the publicity of these enforcement actions.[493]

Thus, the CFPB demonstrates a strong commitment to confidentiality: "**The CFPB considers all supervisory information, including examination reports and ratings, highly confidential.**"[494] The Bureau applies this warning not only to CFPB employees but also to supervised institutions.

Of course, one person's confidentiality is another's lack of transparency. Nontransparency exacerbates capture dynamics,[495] because financial institutions are the only entities with enough information to monitor the CFPB's examination activities and react to any perceived Bureau overreaching. Conversely, a lack of such information prevents other observers, such as consumer advocates, journalists, and scholars, from serving as counterweights to balance the industry perspective. Industry has more information than others about the CFPB's examination practices for the obvious reason that companies undergo examinations and learn what the CFPB is expecting of them. Regulated entities also share information with each other,[496] although they may not share confidential supervisory information[497] without the Bureau's prior written approval.[498] Outsiders must rely on the CFPB's public pronouncements and to a lesser extent on industry communications that are not kept private.[499] One way that consumer advocates, including lawyers, can affect the examination process is by aiding consumers to make complaints to the CFPB,[500] although they will not

491. See *supra* notes 354–61 and accompanying text.

492. See *supra* notes 412–14 and accompanying text.

493. See *supra* note 421 and accompanying text.

494. CFPB EXAMINATION MANUAL, *supra* note 146, at Overview 6 (emphasis in original). See *supra* Part III.B.5.c for a discussion of CFPB efforts to preserve confidentiality by framing discussions of violations in vague terms to avoid identifying specific companies.

495. See *supra* Part IV.A.

496. An example is the UDAAP Council, which is an industry forum that holds regular web conferences to provide information to the regulated about activities of the CFPB and also provides intelligence on a secure platform. *UDAAP Council*, FOLEY & LARDNER LLP, http://www.foley.com/udaap/ (last visited Sept. 15, 2015).

497. This term is defined broadly: "Any documents, including reports of examination, prepared by, or on behalf of, or for the use of the CFPB or any other Federal, State, or foreign government agency in the exercise of supervisory authority over a financial institution, and any information derived from such documents." 12 C.F.R. § 1070.2(ii) (2015).

498. *Id.* § 1070.42(b).

499. *See* CONSUMER FIN. PROT. BUREAU, CFPB COMPANY PORTAL MANUAL, VERSION 2.9 (Mar. 7, 2013), *available at* http://www.insidearm.com/wp-content/uploads/CFPB-Company-Portal-Manual-v2-9.pdf?8b505b; Littwin, *supra* note 128, at 900 n.44.

500. The CFPB's "submit a complaint" form on its website includes a place for attorneys to indicate that they are submitting the complaint for a client. See *Consumer Complaint Database*, CONSUMER FIN. PROT. BUREAU, http://www.consumerfinance.gov/complaint/ (last visited Sept. 15, 2015). Consumer complaints are an important source of examination information. *See generally* Littwin, *supra* note 128.

learn whether a given complaint affected a company's examination unless the complained-of practice becomes part of a CFPB action. Members of Congress have oversight powers, although the Dodd-Frank Act intentionally weakened Congress's role in order to protect CFPB independence.[501]

Examinations present an additional capture risk because they entail a close working relationship between examiners and regulated entities. Either set of parties could influence the other, but the only capture risk is when examiners begin to view regulation through the eyes of the companies with which they work.[502] Embedding examiners presents a particularly acute risk because the relationships between examiners and financial institutions could grow in closeness over time. The CFPB does embed examiners,[503] but also appears attuned to the risks that practice presents. Although there is no formal rotation schedule like that in place at the OCC,[504] the CFPB does rotate examiners informally in order to avoid "too-close relationships."[505]

### C. *Preventative Measures*

There are two main ways that current CFPB practices could protect its supervision program from potential later dilution of the Bureau's commitment to consumer protection. First, the CFPB is publicizing its supervision and examination activities to the extent that it can do so without violating confidentiality. As Part III.B of this Article demonstrates, the CFPB is publishing a tremendous wealth of detail about this process. One benefit of so much transparency is that it puts pressure on future stewards of the CFPB to continue these practices and thus constrains their ability to weaken supervision in secret. Second, the Bureau's focus on company CMS has the potential to establish legal compliance as a normal state of affairs at financial institutions or at least to create some internal company pressure in that direction.[506] Even partial success here could preserve a degree of legal compliance that would not have otherwise existed.

In its startup phase, the CFPB has been attuned to the need for creating transparency. The Bureau posted online its 924-page Examination Manual, which documents the form and substance of CFPB examinations in comprehensive—or some might say, excruciating—detail.[507] But no matter how

501. See *supra* notes 119–21 and accompanying text.

502. See *supra* note 475 and accompanying text.

503. "The CFPB may place certain institutions under a continuous supervision program whereby institutions have CFPB examiners present on a full-time basis." OIG EVALUATION REPORT, *supra* note 50, at 3.

504. Jesse Hamilton, *OCC to Rotate On-Site Examiners at Biggest U.S. Banks*, BLOOMBERGBUSINESS (May 28, 2014, 3:50 PM), http://www.bloomberg.com/news/articles/2014-05-28/occ-to-rotate-on-site-examiners-at-biggest-u-s-banks.

505. Zibel & Fitzpatrick, *supra* note 473 (noting that the CFPB "rotat[es] lead bank examiners to prevent too-close relationships from forming").

506. See *supra* Part III.B.2.

507. CFPB EXAMINATION MANUAL, *supra* note 146.

rigorous of a program it outlines, a manual cannot provide constraining transparency because a future CFPB less committed to consumer protection could simply ignore it. Without the Supervisory Highlights and public enforcement actions, we would not know if the Bureau was following the Manual even now.[508]

The Supervisory Highlights and public enforcement actions present more formidable obstacles. On the first page of its first such report, the CFPB explicitly stated that publishing the Supervisory Highlights was part of its "commitment" to informing "the public of its supervisory goals, work, and accomplishments," while still preserving examination confidentiality.[509] As the earlier discussion of the Bureau's enforcement activities demonstrates,[510] the Supervisory Highlights do in fact evidence a strong commitment to transparency. The Highlights provide a wealth of detail about even private supervisory actions: the product or service, the specific practice, how the practice violated the law, an approximate number of consumers harmed, how consumers were harmed, and the package of remedies requested or ordered by the CFPB.[511] It is difficult to see how the Bureau could provide more information about its actions without violating confidentiality. In addition, although the Supervisory Highlights do not follow an explicit schedule, for the past year or so, the CFPB has been publishing approximately one per quarter, albeit with some variation.[512] Thus, if the CFPB under a future administration began providing less information or providing it less frequently, outsiders, such as consumer advocates, would have notice that the Bureau's commitment to rigorous supervision might be changing. A drop in public enforcement actions would be even more noticeable.

But because the CFPB controls the information flow in its Supervisory Highlights, these reports are not likely to mention steps it could have taken but decided not to pursue. For example, they do not report on violations of law that the Bureau found but did not treat as serious. Put more simply, outsiders, other than the regulated, cannot know what the CFPB did not do. And even if the future stewards of the CFPB under a later administration continue the Highlights, it might be easy to report on a few activities to give the impression that rigorous supervision was still occurring. In short, if the agency cuts back on

508. This is less of a risk, however, because the CFPB is still operating under the same presidential administration and director as it was when it wrote and chose to publish the Manual.

509. SUPERVISORY HIGHLIGHTS I, *supra* note 52, at 1.

510. See *supra* Part III.B.5.

511. See *supra* Part III.B.5 for a discussion of the Bureau's supervisory activities, as seen through its Supervisory Highlights.

512. See *supra* note 52. The named dates of the recent reports, such as "Fall, 2014," follow a quarterly schedule, but their dates of publication and coverage are less consistent. *Supervisory Highlights I* covered fourteen months; *Highlights II* covered seven months; *Highlights III, IV*, and *VI* all covered three months; and *Highlights VII* covered five months. *Supervisory Highlights V* was a special edition about the auto industry and thus didn't cover a particular time frame of examination findings. The time between report issue dates is similarly uneven: nine months, then five, three, five, and four, excluding the special edition.

its regulatory vigilance, it is not likely to say so. The agency could choose to be less active and at the same time choose to be less forthcoming.

The CFPB's current emphasis on companies establishing their own CMS[513] could also provide a compliance buffer in the case of future Bureau leadership with a weaker commitment to consumer protection. If the CFPB does, in fact, persuade financial institutions to adopt effective CMS, compliance may become part of companies' cultures.[514] At the very least, they may not dismantle their compliance systems immediately upon changes at the CFPB. In particular, the Bureau's insistence that entities hire or train compliance management personnel[515]—for large entities, an entire department led by a chief compliance officer[516]—may lead to this effect. A compliance management unit or employee will in some instances become an internal voice for the consumer protection mission, embracing and promoting the norm of obeying consumer protection law.[517] These officers and personnel probably draw their power within their organizations from their success in avoiding regulatory consequences, which could lower their risk tolerance regarding legal noncompliance. And were the likelihood of negative CFPB actions to decline, compliance personnel may lack the incentive to point out this fact for fear of losing their organizational role—and perhaps their jobs. Although, of course, over time, a lack of rigorous enforcement would weaken the compliance norms the current CFPB is seeking to establish.

## V. CONCLUSION

Administrative agencies take on different characteristics under different presidential administrations. Past presidents who opposed an agency's mission have appointed directors who have weakened regulators' commitment to their missions. For example, Presidents Ronald Reagan and George W. Bush appointed heads of the EPA and NLRB who were, respectively, anti-environment and anti-labor.[518] And the Dodd-Frank Act, which created the CFPB, is already under attack from Congress.[519] The statute regulates a particularly powerful industry that has been "methodical" in its "continuing assault" on the law.[520] Thus, the current CFPB appears to be engaging in

513. See *supra* Part III.B.2.

514. The UDAAP Forum that financial institutions created provides some evidence that companies are accepting the need to avoid those practices, although this acceptance could, of course, change were the CFPB to change.

515. See *supra* notes 276–79 and accompanying text.

516. SUPERVISORY HIGHLIGHTS II, *supra* note 42, at 8.

517. The likelihood of this possibility is buttressed by Whitford's proposition that companies generally believe in obeying the law. See *supra* note 59 and accompanying text.

518. Republican presidents are more likely to take this approach because the recent GOP has been anti-regulation, which makes its presidents more likely to oppose the missions of regulatory agencies. See *supra* note 49.

519. Jonathan Weisman & Eric Lipton, *Wall Street Chips Away at Dodd-Frank Rules,* N.Y. TIMES, Jan. 13, 2015, at A1.

520. *Id.*

rigorous supervision while it can and in the process demonstrating a strong commitment to consumer protection. To that end, the Bureau has essentially adopted Whitford's insights for how to design a compliance-inducing supervision system, albeit almost certainly unintentionally. And while a central tenant of Whitford's framework is agency commitment, the question is whether the foundation laid down by the drafting Congress and the CFPB's early administration is strong enough to make the oversight they envisioned into a continuous reality.