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Recommended Citation
Susan Block-Lieb, *Accountability and the Bureau of Consumer Financial Protection*, 7 Brook. J. Corp. Fin. & Com. L. 25 (2012)
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ACCOUNTABILITY AND THE BUREAU OF CONSUMER FINANCIAL PROTECTION

By Susan Block-Lieb[*]

INTRODUCTION

Industry and political actors oppose the Bureau of Consumer Financial Protection (the Bureau or CFPB) on the grounds that its institutional design ensures its lack of accountability.[1] When complaining about the Bureau's lack of accountability, opponents point primarily to the CFPB's regulatory and financial independence, and to the fact that a single director heads the Bureau rather than a bipartisan panel of commissioners.[2] Based on these complaints, the House of Representatives passed a bill in 2011 to strengthen the authority of the Council on Financial Stability to set aside regulations issued by the Bureau.[3] Earlier, the Senate—well, really a cadre of Republican senators—vowed to filibuster the appointment of any director to the new CFPB.[4] By the time the Bureau "went live" on the date set by the Dodd-Frank Act, the Senate still had not consented to the President's nomination of Richard Cordray as Director for the CFPB.[5] Rather than allow this political hijacking to stymie the Bureau altogether, President Obama appointed Cordray under his recess appointments powers.[6] As might be imagined, Cordray's recess appointment has not endeared the CFPB or its efforts to regulate consumers' financial decision-making to the

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* Cooper Family Professor of Law, Fordham University School of Law. Many thanks to Ted Janger and all the participants at the conference held at Brooklyn Law School to consider the Consumer Financial Protection Bureau one year after its creation.

1. *See, e.g.*, David Hirschmann, *Consumer Financial Protection Bureau Needs More Accountability*, POLITICO (Dec. 7, 2011, 9:27 PM), http://www.politico.com/news/stories/1211/69992.html (President of U.S. Chamber of Commerce arguing that "in creating the CFPB last year, Congress exempted this new agency from virtually all the normal checks and balances" and proposing three reforms to restructure the design of the Bureau); Neil Weinberg, *Why Dodd-Frank is Regulatory Overkill*, AM. BANKER, Sept. 26, 2011, at 9-9, *available at* http://www.americanbanker.com/bankthink/dodd-frank-weinberg-1042465-1.html; Press Release, House Fin. Servs. Comm'n, Chair Bacchus Comments on Legal Challenge to Dodd-Frank Act (June 21, 2012), *available at* http://financialservices.house.gov/news/documentsingle.aspx?DocumentID=300403 ("As it is currently structured, the CFPB is one of the most powerful and least accountable agencies in all of Washington.").

2. Hirschmann, *supra* note 1.

3. H.R. 1315, 112th Cong. (2011); *see also* H.R. REP. NO. 112-89, at pt. I (May 25, 2011) (House Report accompanying passage of H.R. 1315).

4. *See* Ylan Q. Mui, *GOP's Mitch McConnell, Senate Minority Leader, Stands by Vow to Block CFPB Nominees*, WASH. POST, June 10, 2011, at A12.

5. Helene Cooper & Jennifer Steinhauer, *Bucking Senate, Obama Appoints Consumer Chief*, N.Y. TIMES, Jan. 4, 2012, at A1, http://www.nytimes.com/2012/01/05/us/politics/richard-cordray-named-consumer-chief-in-recess-appointment.html?pagewanted=all.

6. *Id.* The President's recess appointments powers are found in article II, section 2, clause 2, of the U.S. Constitution.

political right.[7] Cordray's recess appointment as Director arguably permitted the President to evade Senate review of his appointment, further reducing the Director's accountability to Congress.[8]

To what extent are these objections justified? Is the CFPB accountable to no one?

This essay argues that concerns about the CFPB's lack of accountability are partly right and mostly wrong. Congressional critics correctly note that the structure of the CFPB differs from other independent administrative agencies. A single director heads the Bureau, rather than a panel of commissioners appointed for fixed (and often staggered) terms as normally govern independent agencies.[9] In addition, the Bureau's annual budget is virtually guaranteed and nearly free from congressional revision, although most independent agencies have to seek funding from Congress and often face annual appropriations battles.[10]

But to focus on the Bureau's financial independence and single director is to miss the distinct political deal struck when Congress created the CFPB. Typically, an administrative agency is structured as an independent agency in order to insulate regulators from interest group influence.[11] Because capture often is accomplished through political channels, in the past,

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7. This summer, suit was brought claiming that Cordray's recess appointment is unconstitutional. *See* Suzy Khimm, *Obama's Consumer Watchdog Gets Sued*, WASH. POST (June 22, 2012), http://www.washingtonpost.com/blogs/ezra-klein/wp/2012/06/22/obamas-consumer-watchdog-gets-sued/.

8. The D.C. Circuit recently struck down adjudication by the National Labor Relations Board on the basis that President Obama appointed three members of the Board in contravention of the appointments and recess appointments clauses of the U.S. Constitution. *See* Canning v. NLRB, Nos. 12-1115, 12-1153, 2013 WL 276024 (D.C. Cir. Jan. 25, 2013) (construing Recess Appointments Clause of Constitution to allow such appointment only during intersessional recesses of the Senate and only then to vacancies that "happen" because it first "comes into being" during such a recess; because three members of the Board were appointed in violation of these requirements, the court held that the Board acted *ultra vires* without the requisite quorum). The D.C. Circuit's decision creates a circuit conflict on this issue. *See* Evans v. Stephens, 387 F.3d 1220, 1224 (11th Cir. 2004) (holding that "the Recess" includes intrasessional recesses and upholding judicial appointment under Recess Appointments Clause), *cert. denied*, 544 U.S. 942 (2005). How the D.C. Circuit's opinion might affect rulemaking and Directorial actions by the CFPB remains unclear. *Compare* Adam Levitin, *NLRB and CFPB: Recess Appointments*, CREDIT SLIPS (Jan. 25, 2013, 4:41 PM), http://www.creditslips.org/creditslips/2013/01/nlrb-and-cfpb-recess-appointments.html?utm_source=feedburner&utm_medium=email&utm_campaign=Feed %3A+creditslips%2Ffeed+%28Credit+Slips%29, *with* Deephak Gopta, *The CFPB and the Recess Appointment: DeFacto Officer Doctrine to the Rescue?*, PUBLIC CITIZEN (Jan. 25, 2013), http://pubcit.typepad.com/clpblog /2013/01/the-cfpb-and-the-recess-appointment-de-facto-officer-doctrine-to-the-rescue.html.

9. Marshall J. Breger & Gary J. Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies,* 52 ADMIN. L. REV. 1111, 1137–39 (2000).

10. Note, *Independence, Congressional Weakness, and the Importance of Appointment: The Impact of Combining Budgetary Autonomy with Removal Protection*, 125 HARV. L. REV. 1822, 1823 (2012).

11. Rachel Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 17 (2010) (noting that "the creation of an independent agency is often motivated by a concern with agency capture").

independent agencies also have been structured to be insulated from executive pressure.[12] Creating an independent commission with a bipartisan panel of commissioners holding staggered terms would insulate bureaucrats from this sort of influence.[13]

Industry influence was considered to be a contributing factor to the subprime mortgage crisis.[14] The Financial Crisis Inquiry Commission found that regulators were aware of the marketing and mass distribution of subprime mortgages and, due to industry pressure and ideological myopia, determined to do nothing.[15] Congress sought to prevent the possibility of further influence of this sort with the enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank).[16]

Uniquely, the CFPB is structured to insulate this independent agency not only from interest group influence and executive interference, but also from congressional reversal. That is, Congress intentionally designed the Bureau to insulate it somewhat from direct congressional control.

This feature of the CFPB's design, while unusual, is not anti-democratic; it is precisely what the democratically elected Congress that enacted the Dodd-Frank Act sought to accomplish. Like Ulysses tied to the mast, the institutional design of the Bureau works like a pre-commitment device. All pre-commitment devices involve accountability deficits—that is precisely the point.

Tying up Congress' ability to interfere with consumer financial protection regulation made particular sense in this context. Given its diffuse benefits and narrowly defined costs, consumer protection legislation has always been difficult to enact and even more difficult to enforce.[17] These "client politics" can and have given way,[18] especially in periods of crisis, to permit enactment.[19] In this case, the CFPB was created in reaction to the subprime mortgage crisis.[20] With the help of several political entrepre-

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12. *See id.* at 19–21.

13. *Recent Legislation*, 124 HARV. L. REV. 2123, 2128 (2011).

14. FINANCIAL CRISIS INQUIRY COMMISSION, THE FINANCIAL CRISIS INQUIRY REPORT, at xvii (2011) [hereinafter FCIC REPORT] (discussion of industry influence); Barkow, *supra* note 11, at 54.

15. FCIC REPORT, *supra* note 14, at xviii.

16. *See* Barkow, *supra* note 11, at 72–73, 74.

17. *See, e.g.*, Peter Letsou, *The Political Economy of Consumer Credit Regulation*, 44 EMORY L.J. 587, 623–57 (1995).

18. James Q. Wilson first coined the term "client politics," which refers to the politics of issues with diffuse benefits and concentrated costs. JAMES Q. WILSON, BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY 76 (1991). Wilson distinguished "client politics" from "entrepreneurial politics" involving diffuse costs and concentrated benefits. *Id*. at 77. Wilson's insights derive in large part from earlier economic work by Mancur Olson. *See* MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION (2d ed. 1971).

19. John C. Coffee, Jr., *The Political Economy of Dodd-Frank: Why Financial Reform Tends to be Frustrated and Systemic Risk Perpetuate*, 97 CORNELL L. REV. 1019, 1029 (2012).

20. *See* KATHLEEN C. ENGEL & PATRICIA A. MCCOY, THE SUBPRIME VIRUS: RECKLESS CREDIT, REGULATORY FAILURE, AND NEXT STEPS 227–28 (2011).

neurs,[21] congressional forces succeeded in countering opposition from the financial industry to enact the Dodd-Frank Act.[22] But once the fever from this crisis diminishes, the diffuse benefits and narrowly defined costs of regulation suggest that the Bureau's efforts to adopt and enforce consumer financial protection regulation will confront the same concentrated opposition that made creation of the Bureau seem unlikely.[23] The CFPB's independence is intended to make congressional interference more difficult.

Moreover, the Bureau's "accountability deficits" are not especially troubling. By statutory design, the CFPB shares its regulatory space with numerous political actors.[24] Because it is indirectly accountable to a wide range of both political and industry interests, the CFPB is less likely to promulgate overreaching regulations that protect consumer interests to the detriment of all else.

The remainder of this essay supports the argument sketched out above, and proceeds as follows. Part I is descriptive. It briefly recounts the Bureau's creation story to contrast the web of federal and state agencies previously vested with jurisdiction over consumer financial protection with the current regulatory space set out by Dodd-Frank.

Part II explains the importance of the Bureau's independence from Congress. This independence "mirrors" the consensus that existed upon Dodd-Frank's passage.[25] Congress designed the CFPB so that the Bureau

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21. The CFPB is well understood to be the brainchild of two law professors: Oren Bar-Gil and Elizabeth Warren. *See* Oren Bar-Gil & Elizabeth Warren, *Making Credit Safer*, 157 U. PA. L. REV. 1 (2008); *see also, e.g.*, Barkow, *supra* note 11, at 72; Susan Block-Lieb & Edward J. Janger, *Reforming Regulation in the Markets for Home Loans*, 38 FORD. URB. L.J. 681, 692 (2011).

22. President Obama signed the Dodd-Frank Act into law on July 21, 2010. Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified in scattered sections of the U.S.C.); Jesse Lee, *President Obama Signs Wall Street Reform: "No Easy Task,"* WHITE HOUSE BLOG (July 21, 2010, 2:22 PM), http://www.whitehouse.gov/blog/2010/07/21/president-obama-signs-wall-street-reform-no-easy-task.

23. John Coffee calls this toing-and-froing the "Regulatory Sine Curve." Coffee, *supra* note 19, at 1029–30. His intuition that financial regulation ebbs and flows between periods of crisis and amnesia regarding the last crisis event is widely shared, however. *See, e.g.*, Jonathan R. Macey, *Positive Political Theory and Federal Usurpation of the Regulation of Corporate Governance: The Coming Preemption of the Martin Act*, 80 NOTRE DAME L. REV. 951, 972–73 (2005) ("Crisis . . . created the 'policy window' through which political entrepreneurs could launch their initiatives. Moreover, the regulation that we observe at a particular juncture in time is not permanently in place. As political pressures change, as a result of exogenous events and technological change, so too will regulation.").

24. The term "shared regulatory space" belongs to Jody Freeman and Jim Rossi. *See, e.g.*, Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131 (2012).

25. Political scientists use the term "mirroring" to describe politicians' tendency to "create a decision-making environment in an agency in which the distribution of influence among constituencies reflects the political forces that gave rise to the agency's legislative mandate." McNollgast, *The Political Economy of Law: Decision-Making by Judicial, Legislative, Executive and Administrative Agencies*, at 1713, *in* HANDBOOK OF LAW AND ECONOMICS (A. Mitchell

would be insulated from congressional meddling but still answerable to other important political actors—in particular, other prudential regulators and the President. This design serves to counteract the "client politics" that are likely to be involved in any financial regulation, particularly consumer financial protection regulation, which only diffusely benefits the consumers it looks to protect.[26] The CFPB's independence has been controversial. This section also discusses industry and political complaints regarding the Bureau's institutional design and broad jurisdiction that have arisen since enactment of the Dodd-Frank Act, including various bills introduced in Congress to "reform" the newly constituted CFPB.

Whether the CFPB will succeed in withstanding industry pressure and political forces remains to be seen and depends, to a large extent, on whether the CFPB can, in practical effect, be held accountable to political and economic opponents while preserving this independence. Part III returns to Dodd-Frank, the legislation that created the CFPB, to tackle the issue of the Bureau's likely responsiveness to these concerns when promulgating and enforcing regulations. Combing through the statute, this section details the ex ante and ex post regulatory limits on the Bureau's authority. Through these political and procedural limits, this section finds that the CFPB is both independent *and* accountable. It finds that the CFPB is accountable to Congress and to the prudential regulators that possess overlapping jurisdiction. Industry actors and consumer advocates will have a say on the regulations the Bureau proposes. Its independence, thus, involves a carefully calibrated balancing of interests in tension.

I. EMERGENCE OF THE CFPB

The Dodd-Frank Act created the new Bureau of Consumer Financial Protection and granted it authority both to regulate consumer finance transactions and monitor and enforce these and other regulations.[27] Dodd-Frank shifted pre-existing regulatory authority that had been scattered among several federal regulators to one federal agency, the CFPB, with exclusive jurisdiction to promulgate regulations regarding the federal consumer financial protection laws and primary jurisdiction to monitor and enforce those laws.[28] With this shift, Dodd-Frank affected the source of

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Polinsky & Stephen Shavell eds., 2007); *see also, e.g.*, Matthew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Administrative Procedures as Instruments of Political Control,* 3 J. L. ECON. & ORG. 243, 262 (1987).

26. *See supra* note 18 and accompanying text (discussing the term "client politics").

27. *See* Block-Lieb & Janger, *supra* note 21, at 700–03.

28. ENGEL & MCCOY, *supra* note 20, at 227–28. The "federal consumer financial laws" is a defined term within Dodd-Frank, which includes the "enumerated consumer laws," another defined term, plus Dodd-Frank's provisions. Dodd-Frank Act, Pub. L. 111-203, § 1002(14), 1002(12), 124 Stat 1367, 1957 (2010) (codified at 12 U.S.C. § 5481 (2010)). While the Dodd-Frank Act grants the Bureau exclusive authority to promulgate regulations to protect consumers' financial transactions, *id*. § 1022(b)(4) (codified at 12 U.S.C. § 5512), it grants the Bureau only

rulemaking authority, as well as the location of monitoring and enforcement of these rules.

Few substantive changes were effected with this legislative enactment, however. Instead, Dodd-Frank left substantive changes to consumer financial protection regulation in the hands of this newly constituted Bureau. Congress' shift in jurisdiction over regulatory enforcement in this way is best explained in the context of recent history.

This history of consumer financial protection has seen its laws scattered across more than a dozen different federal and fifty states' laws. Congress first enacted consumer protection regulation with the Federal Trade Commission Act (FTC Act) in 1914.[29] Its 1938 Wheeler-Lea Amendments to the FTC Act broadly permitted the Federal Trade Commission (FTC) to regulate "unfair and deceptive" practices, without need to prove that the practices affected competition.[30] A number of state legislatures had enacted their own "Little FTC Acts" and other statutes regulating unfair and deceptive practices, which from time to time have been applied to unfair or deceptive practices in consumer lending.[31] In addition, starting in 1968 with the Truth in Lending Act,[32] Congress enacted roughly fourteen other federal consumer financial laws.[33]

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shared authority to enforce consumer financial protection regulation. *See id*. §§ 1024(c), 1025(c), 1026(d) (codified at 12 U.S.C. §§ 5514(c), 5515(c), 5516(d)). The Bureau shares its enforcement authority over nondepository consumer lenders with the Federal Trade Commission (the FTC). *See id*. § 1024(c). As to consumer lenders that are depository institutions, the Bureau enjoys exclusive federal enforcement authority over "too big to fail" banks, *see id.* § 1025(c), but has limited authority to enforce consumer financial protection regulations against other banks—as to these, the Office of the Comptroller of the Currency (the OCC) may enjoy exclusive federal enforcement authority. *See id*. § 1026(d). Moreover, Dodd-Frank reserves substantial authority for state attorneys general to enforce federal consumer financial protection regulations against depository and nondepository consumer lenders. *See id*. §§ 1041, 1042, 1044–1046 (codified at 12 U.S.C. §§ 5551, 5552, 5554–5556). For discussion of the differences in the enforcement relationships between the Bureau and banking regulators, on one hand, and the Bureau and the FTC, on the other, see *infra* text accompanying notes 162–187.

29. Federal Trade Commission Act (FTC Act), ch. 311, § 5, 38 Stat. 717, 719 (1914) (codified as amended at 15 U.S.C. § 45(a) (2011)).

30. Wheeler-Lea Amendment of 1938, ch. 601, § 3, 52 Stat. 111, 111–12 (codified as amended at 15 U.S.C. § 45) (amending FTC Act § 5(a)).

31. State law often also governs consumer financial protection. Often these state statutes prohibit "unfair and deceptive practices" (UDAP); some state laws list express practices that are prohibited, while others set an open-ended standard for prohibited practices and leave definition of the standard either to the FTC or to state courts, or both. For detailed discussion of these UDAP statutes, see, e.g., Anthony Paul Dunbar, Comment, *Consumer Protection: The Practical Effectiveness of State Deceptive Practices Statutes*, 59 TUL. L. REV. 427 (1984). Enforcement of this body of state law was complicated by preemption regulations issued by the OCC and the Office of Thrift Supervision (OTS) in the 1990s. For discussion of these regulations and Supreme Court case law considering the propriety of this preemption through regulation, see *infra* text accompanying notes 42–43.

32. Truth in Lending Act (TILA), Pub. L. No. 90-321, tit. I, §§ 101–145, 82 Stat. 146, 146–59 (1968) (codified as amended at 15 U.S.C. §§ 1601–1667 (2011)).

33. *See* Dodd-Frank Act § 1002(12), 124 Stat. at 1957 (codified at 12 U.S.C. § 5481) (listing and citing to these "enumerated consumer laws").

Rulemaking authority was also spread across multiple federal agencies.[34] Although the FTC is expressly precluded from regulating the practices of banks and other similar financial institutions,[35] it nonetheless has construed its jurisdiction to permit regulation of the unfair and deceptive financial practices of other sorts of consumer lenders.[36] The federal agencies charged with regulating these federally chartered depositary institutions similarly prohibit unfair and deceptive practices,[37] although these prudential regulators did not exercise their jurisdiction to regulate unfair or deceptive practices until after 2008.[38] In addition to this authority to regulate unfair and deceptive practices, Congress granted the Federal Reserve Board (the Fed or Board) jurisdiction to promulgate regulations to implement most of the federal consumer financial laws.[39]

Regulation is only effective if it is enforced. Before enactment of Dodd-Frank, enforcement of consumer financial protection laws had been shared by a number of federal and state regulators. Regulatory jurisdiction depended on the nature of the lender.[40] Federal enforcement authorities included the FTC (so long as the consumer lender was not a federally

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34. *See* DAVID H. CARPENTER, CONG. RESEARCH SERV., THE CONSUMER FINANCIAL PROTECTION BUREAU (CFPB): A LEGAL ANALYSIS 2 (2012) (noting that before Dodd-Frank created the CFPB, "the authority to write rules to implement the majority of the federal consumer financial protection laws, the power to enforce these laws, and the supervisory authority over the individuals and companies offering and selling consumer financial products and services were predominately shared by five different banking regulators, as well as the Federal Trade Commission (FTC) and the Department of Housing and Urban Development (HUD)").

35. *See* 15 U.S.C. § 45(a) (2006). Congress amended the FTC Act in 1975 to give the OCC, the Federal Deposit Insurance Corporation (FDIC), and the federal prudential regulators (together referred to as the Agencies) jurisdiction to enforce the FTC Act and its regulations as to banks, savings associations, and credit unions. *See* Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, Pub. L. No. 93-637, tit. II, sec. 202(a), § 108(f)(1), (f)(2), 88 Stat. 2183, 2196 (1975) (codified at 15 U.S.C. § 57a(f)(1)) [hereinafter 1975 Amendments] (adding § 18(f)(1) to FTC Act). These Agencies did not exercise their FTC Act rulemaking authority for more than twenty-five years. *See, e.g.*, James Huizinga, Michael McEneney, John van de Weert & Karl Kaufmann, *UDAP Regulations for Credit Card Issuers*, 64 BUS. LAW. 639, 640 (2009); Julie L. Williams & Michael S. Bylsma, *On the Same Page: Federal Banking Agency Enforcement of the FTC Act to Address Unfair and Deceptive Practices by Banks*, 58 BUS. LAW. 1243 (2003).

36. *See, e.g.*, FTC Regulation Concerning Preservation of Consumers' Claims and Defenses, 16 C.F.R. 433.1, 433.2, 40 Fed. Reg. No. 223, 53506 (Nov. 18, 1975) (FTC's holder in due course rule).

37. *See* CARPENTER, *supra* note 34, at 2.

38. *See* Huizinga, et al., *supra* note 35, at 640.

39. *See* CARPENTER, *supra* note 34, at 2; TILA, Pub. L. No. 90-321, § 105, 82 Stat. 146, 148 (1968) (codified at 15 U.S.C. § 1604), *amended by* Dodd-Frank Act, Pub. L. No 111-203, § 1100A, 124 Stat. 1376, 2107–09 (2010) (replacing the Board's authority to promulgate rules with that of the CFPB).

40. Moreover, a lender's "nature" could be changed by the simple expedient of a change in registration. State-chartered banks that found their regulators too nosy and intrusive might re-emerge as a federally chartered entity. *See* ENGEL & MCCOY, *supra* note 20, at 159–160; *see also, e.g.*, Barkow, *supra* note 11, at 44–45 (noting that "banks and thrifts have a great deal of flexibility in determining whom they wish to be chartered by, and it has little effect on their business plans").

chartered bank or some other federally regulated financial institution)[41] or the prudential regulator charged with authority over the consumer lender (if the lender was a regulated financial institution).[42] In theory, state banking regulators and state attorneys general also held jurisdiction to enforce state and possibly federal laws—unless the lender was a federally chartered bank or otherwise subject to federal banking regulation—but in 2004, this source of state enforcement largely evaporated. The Office of Thrift Supervision (OTS) and the Office of the Comptroller of the Currency (OCC) promulgated regulations preempting state enforcement actions.[43] These regulations were broad in reach, applying not only to federally chartered thrifts and banks, but also to state-chartered entities that were operating subsidiaries of federally chartered thrifts or banks.[44]

Consumers are themselves another source of enforcement authority, at least theoretically. While courts had early on held that the FTC Act did not create a private right of action,[45] most of the federal consumer financial laws expressly permitted suit.[46] Indeed, many of these statutes explicitly granted consumers the right to bring a class action;[47] where actual damages could not be established, statutory damages were instead expressly available.[48] Although these statutes imposed limits on the statutory damages that might have been recovered in the case of a class action, the limits were themselves generous.[49] No one argues that consumers provide anything more than a second-best means for enforcement of the federal consumer finance laws, however. Consumers are a diffuse and under-financed source of regulatory enforcement.[50] Although some of the federal consumer financial statutes sought to encourage consumers to bring watch-dog actions

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41. *See supra* note 35 and accompanying text.

42. *See supra* note 35 and accompanying text. Moreover, banks (but not other lenders) might have a range of federal charters to choose from based, in part, on the extent of the regulation and the breadth of regulatory authority that came along with the choice. *See supra* note 40 and accompanying text.

43. *See, e.g.*, 12 C.F.R. § 7.4000 (2011).

44. *Id*. In *Watters v. Wachovia, N.A.*, the Supreme Court upheld the OCC's preemption regulation as applied to the jurisdiction of state banking authorities over state-chartered operating subsidiaries of national banks. Watters v. Wachovia, N.A., 550 U.S. 1, 7 (2007).

45. *See, e.g.*, Holloway v. Bristol-Myers Corp., 485 F.2d 986, 987 (D.C. Cir. 1973) (holding that private litigants cannot sue for violations of the FTC Act).

46. *See, e.g.*, 15 U.S.C. § 1679g(a) (2012) (providing liability when a Credit Repair Organization fails to comply with 15 U.S.C. § 1693); 15 U.S.C. § 1681n (creating liability for willful noncompliance with credit reporting regulations in 15 U.S.C. § 1681); 15 U.S.C. § 1681o (creating liability for negligent noncompliance with credit reporting regulations in 15 U.S.C. § 1681); 15 U.S.C. § 1691e (providing liability for violations of 15 U.S.C. § 1693); 15 U.S.C. § 1692k(a) (providing liability for debt collectors who fail to comply with 15 U.S.C. § 1692).

47. *See, e.g.*, 15 U.S.C. §§ 1679g(a)(2)(B), 1691e(2), 1692k(a)(2)(B), 1693m(a)(2)(B).

48. *See, e.g.*, 15 U.S.C. § 1681n (providing statutory damages).

49. *See, e.g.*, 15 U.S.C. § 1691e(b) (capping class action claims at the "lesser of $500,000 or 1 per centum of the net worth of the debt collection"); 15 U.S.C. § 1693m(a)(2)(B) (capping class action claims at the "lesser of $500,000 or 1 per centum of the net worth of the defendant").

50. *See, e.g.*, Letsou, *supra* note 17, at 650.

by authorizing class actions and awarding statutory damages, courts cut back on these encouragements from time to time.[51]

The subprime mortgage crisis, thus, occurred despite the existence of a plethora of federal and state regulators with jurisdiction to enforce broad consumer financial protection regulation. While the sheer number of enforcers might have resulted in too much enforcement of existing consumer financial protection laws, in practice the result was too little enforcement (too little, at least, with the benefit of hindsight).[52] This under-enforcement of the federal consumer finance laws might have been predicted simply from the number of agencies with overlapping enforcement authority.[53] While several agencies might have proceeded against a lender's unfair or deceptive practice, none did, perhaps thinking that the other would.[54]

Negative common pool problems could plague any shared regulatory space, but these regulatory misincentives were exacerbated by the governance structure of at least some of the prudential regulators.[55] Neither the OCC nor the OTS received funding from Congress, instead paying for their bureaucratic budgets by means of fees paid by the entities they regulated.[56] This fee-paid regulatory system created a situation ripe for capture by members of the financial industry. If banks regulated by the OCC looked favorably at the regulatory terrain offered by the OTS, they simply re-chartered as thrifts to migrate from OCC to OTS jurisdiction. Re-chartering created incentives for the OCC to "compete" with the regulatory package offered to thrifts by the OTS so that it could retain its bank "clients" and perhaps even encourage some thrifts to re-charter as banks and come under the OCC's umbrella. While in most markets competition is a force that benefits consumers, competition between the OCC and OTS instead created incentives for a regulatory "race to the bottom"—a race to see who could regulate less.[57]

State regulators did not face the same misincentives. Indeed, states' attorneys general learned that political capital might be earned in the eyes of the electorate (particularly the electorate in "blue states" like New York and

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51. *See, e.g.*, Gene & Gene LLC v. Biopay LLC, 541 F.3d 318 (5th Cir. 2010) (denying class certification because the action did not satisfy the predominance requirement for class certification).

52. *See, e.g.*, ENGEL & MCCOY, *supra* note 20, at 162 (concluding that OCC and OTS preemption rules "turned the playing field into one 'with no rules'").

53. *See* William W. Buzbee, *Recognizing the Regulatory Commons: A Theory of Regulatory Gaps*, 89 IOWA L. REV. 1, 6 (2003).

54. *See id.* at 7, 22, 37 (positing that overregulation creates a "disincentive to address social ills" when "a social ill is juxtaposed against a fragmented or overlapping legal or political setting").

55. Barkow, *supra* note 11, at 44–45; ENGEL & MCCOY, *supra* note 20, at 159–162 (describing the process of "charter shopping" by financial industry actors).

56. Barkow, *supra* note 11, at 44.

57. *Id.* at 44–45, 45 n.164.

Illinois) if they succeeded in beating up on subprime lenders. They looked to bring suit against consumer lenders, but found they had more luck suing insurance companies than banks. OCC and OTS preemption regulations created high hurdles to states' action.[58] State regulators brought litigation that challenged the authority of the OCC and OTS to issue preemption regulations—suits that eventually found their way to the Supreme Court—but this litigation was extremely time consuming and initially unsuccessful. State banking authorities lost in *Watters*, the first such suit.[59] State attorneys general fared much better, prevailing in *Cuomo* on a slightly different issue, but did not achieve this victory until 2010—well too late to prevent the subprime mortgage crisis from spreading to create havoc in other financial markets.[60] In the interim, the crisis had burned unchecked by either federal regulators or their state counterparts. Attorneys general did not become a source of regulatory enforcement until after the Supreme Court's decision in *Cuomo* and after the enactment of Dodd-Frank.

Thus, while there were more than a half-dozen federal regulators with jurisdiction to enforce the federal consumer finance laws,[61] none did so until after the subprime mortgage crisis grew to become a prime mortgage crisis, and then a liquidity crisis that has, since at least late 2008, triggered a systemic financial crisis of truly global proportion. Given this distaste for enforcement of the federal consumer finance laws, bureaucrats' disinterest in promulgating stronger consumer financial protection regulation also became clear. As noted above, the FTC, Federal Reserve, FDIC, and prudential regulators might have issued regulations to clarify whether (or when) certain terms in subprime mortgages created unfair or deceptive lending practices.[62] Consumer advocates had long pressed for this sort of regulation,[63] but regulators did nothing until 2008, when high rates of default in subprime mortgages were on the cusp of creating a crisis in that and other markets. Moreover, when the Agencies did act, they first issued a

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58. *See, e.g.*, 12 C.F.R. § 7.4000 (2011).

59. Watters v. Wachovia Bank, N.A., 550 U.S. 1, 7 (2007).

60. Cuomo v. The Clearing House Ass'n, 129 S. Ct. 2710, 2721–22 (2009).

61. 12 C.F.R. app. I, § 226 (listing agencies responsible for enforcing the Truth in Lending Act); 12 C.F.R. § 227.1(c) (listing agencies responsible for enforcing the Unfair or Deceptive Acts or Practices Act); *see also* CARPENTER, *supra* note 34, at 2.

62. 15 U.S.C. § 57a (2011) (enabling FTC to promulgate rules, policy statements, and definitions regarding unfair or deceptive acts or practices in or affecting commerce); 12 U.S.C. § 1818(b)(1), (e)(1), (i) (Federal Reserve Board and FDIC authority); 12 C.F.R. pt. 535 (2011) (OTS authority); 12 C.F.R. pt. 30, app. C (OCC guidelines for establishing standards for residential mortgage lending).

63. *See, e.g.*, CAROLYN L. CARTER, NAT'L CONSUMER LAW CTR., CONSUMER PROTECTION IN THE STATES: A 50-STATE REPORT ON UNFAIR AND DECEPTIVE PRACTICES STATUTES (2009), *available at* http://www.nclc.org/images/pdf/udap/report_50_states.pdf. *See generally* Bar-Gil & Warren, *supra* note 21 (advocating for a new federal regulating agency to improve the safety of the consumer credit industry).

non-binding recommendation rather than binding regulations.[64] While the Fed also held exclusive jurisdiction to promulgate regulations under the Truth in Lending Act and might have amended Regulation Z to beef up disclosures associated with residential mortgage lending, especially high-priced residential mortgages, it did not issue proposed revisions to the Regulation Z mortgage rules until 2009, well too late to staunch the flames of the subprime mortgage crisis.[65]

II. THE CFPB'S INDEPENDENCE

Dodd-Frank instills in the CFPB independence both from industry actors and political forces looking to undermine the Bureau's mission of consumer protection.[66] Title X of the Dodd-Frank Act creates the Bureau as an "independent," "autonomous" Bureau within the Federal Reserve.[67] Its autonomy from the Fed's Board of Governors is assured by statute. Dodd-Frank expressly provides that the Board may not "intervene in any matter or proceeding before the Director."[68] Similarly, no rule or order of the Bureau is subject to approval or review of the Board of Governors; the Board also cannot delay or prevent the issuance of such a rule.[69] Nor can the Board intervene in the CFPB's examination or enforcement actions.[70]

Dodd-Frank designed the Bureau to be independent, not just from the Fed, but also from other financial regulators, at least up to a point. Independence is sought both structurally and financially.[71] The CFPB's financial independence substantially insulates it from political and industry forces, but assuring the Bureau a steady source of funding does not alone guarantee its independence. The CFPB is designed in a way that distinguishes between its rulemaking and its enforcement authority. Because Dodd-Frank grants exclusive rulemaking authority to the CFPB, the Bureau is most independent as relates to the writing of new regulations. Because the Act divides authority to enforce this regulation among federal

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64. *See* Patricia A. McCoy, Andrey D. Pavlov & Susan M. Wachter, *Systemic Risk Through Securitization: The Result of Deregulation & Regulatory Failure*, 41 CONN. L. REV. 493, 509–13 (2009).

65. Regulation Z, 74 Fed. Reg. 43232 (Aug. 26, 2009) proposed amendment to 12 C.F.R. pt. 226) (codified at 12 C.F.R. §§ 226.1, 226.4, 226.17, 226.18, 226.19, 226.20, 226.32, 226.36, 226.37, 226.38, (2010)).

66. *See* Barkow, *supra* note 11, at 72.

67. Dodd-Frank Act, Pub. L. No. 111-203, §§ 1011(a), 1012(c), 124 Stat. 1376, 1964–65 (2010) (codified at 12 U.S.C. §§ 5491(a), 5492(c) (2010)).

68. *Id.* § 1012(c)(2) (providing further that the Board may not "appoint, direct, or remove any officer or employee of the Bureau . . . or merge or consolidate the Bureau, or any of the functions or responsibilities of the Bureau, with any division or office of the Board of Governors or the Federal reserve banks").

69. *Id.* § 1012(c)(3).

70. *Id.* § 1012(c)(2)(A).

71. *See generally* Barkow, *supra* note 11 (providing the CFPB as an example of an agency that has achieved independence through both structural and financial design).

and state agents,[72] however, the CFPB will at times be required to rely on other regulators, thus importantly encroaching on the Bureau's independence.

In enacting Dodd-Frank and creating the CFPB, Congress accepted the claim that authority to promulgate consumer financial protection regulation should be granted to a single federal regulator with exclusive jurisdiction concerning all federal consumer finance laws and over all consumer lenders and other related "covered persons." Rather than continuing to divide this jurisdiction among the FTC and an assortment of federal and state prudential regulators, Dodd-Frank grants the Bureau "exclusive" authority to promulgate regulations on fourteen specified "federal consumer financial laws."[73] It also grants the Bureau additional authority to "prescribe rules and issue orders and guidance as may be necessary or appropriate to enable" it to "administer and carry out the purposes and objectives of the Federal consumer financial laws."[74] In addition, it permits the Bureau to issue regulations "identifying as unlawful, unfair, deceptive, or abusive" all "acts or practices in connection with any transaction" by a "covered person or service provider"[75] with a consumer for a "consumer financial product or service."[76] Jurisdiction to regulate "unfair" and "deceptive" practices had existed before Dodd-Frank, although this jurisdiction had been rarely used; jurisdiction to regulate "abusive" practices was relatively new, but not unprecedented in consumer protection regulation.[77]

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72. Dodd Frank Act § 1042(a), 124 Stat. at 2012 (codified at 12 U.S.C. § 5552) (authorizing state enforcement power); *id.* §§ 1025(c)(3), (e), 1026(d)(1), 124 Stat. at 1991, 1994 (codified at 12 U.S.C. §§ 5515(c)(3), (e), 5516(d)(1)) (authorizing federal agencies' enforcement power).

73. *Id.* § 1022(b)(1), 124 Stat. at 1980 (codified at 12 U.S.C. § 5512).

74. *Id*.

75. *Id.* § 1031(b), 124 Stat. at 2005 (codified at 12 U.S.C. § 5531). The Dodd-Frank Act defines a "covered person" as "any person that engages in offering or providing a consumer financial product or service," as well as "any affiliate of" or "service provider to" such person. *Id.* § 1002(6), 124 Stat. at 1956 (codified at 12 U.S.C. § 5481). This term includes those offering a "private education loan" or "consumer payday loan." *Id*. § 1024(a)(1), 124 Stat. at 1987 (codified at 12 U.S.C. § 5514). It also includes "a larger participant of a market for other consumer financial products or services." *Id*. § 1024(a)(1)(B), 124 Stat. at 1987. While the breadth of the term "larger participant" is left undefined by Dodd-Frank, the Act also authorizes the Bureau, after consultation with the FTC, to promulgate regulations defining this term. *Id*. § 1024(a)(2), 124 Stat. at 1987. On July 20, 2012, the CFPB issued its Final Rule on Defining Larger Participants. 12 C.F.R. pt. 1090, 77 Fed. Reg. 42874 (July 20, 2012). This rule became effective on September 30, 2012. *Id.* at 42874.

76. For definitions of "consumer financial product or service" and "financial product or service," see Dodd-Frank Act § 1002(5), (15), 124 Stat. at 1956, 1957–58 (codified at 12 U.S.C. § 5481).

77. For example, the Fair Debt Collection Practices Act prohibits specified "abusive" collection practices. *See* 15 U.S.C. § 1692d (2011). For a recent article on the breadth of the CFPB's jurisdiction of "abusive" practices, see Carey Alexander, *Abusive: Dodd-Frank Section 1031 and the Continuous Struggle to Protect Consumers*, ST. JOHN'S LEGAL STUD. RESEARCH PAPER SERIES, Mar. 2011 (paper no. 10-193), *available at* http://ssrn.com/abstract=1719600.

Congress also accepted, up to a point, the claim that enforcement authority should be housed in a single federal regulator. While the CFPB now enjoys exclusive enforcement jurisdiction over "too-big-to-fail" banks with "total assets in excess of $10 billion" and nondepository "covered persons,"[78] Dodd-Frank leaves all enforcement authority over banks, credit unions, and other financial institutions "with total assets of $10 billion or less" with their prudential regulators.[79] Thus, the CFPB holds primary enforcement authority because it has exclusive authority over too-big-to-fail banks; however, enforcement as to the greatest number of banks—those not too big to fail—falls on the prudential regulators. Should these regulators fail to enforce the federal consumer financial laws against depository lenders, Dodd-Frank grants the CFPB supplemental enforcement authority.[80] And as to nondepository consumer lenders, Dodd-Frank grants exclusive enforcement authority to the CFPB.[81] Moreover, Dodd-Frank governs other tertiary members of the financial services industry—mortgage servicers, for example, and debt collectors. The CFPB holds exclusive enforcement authority over these "covered persons," who, before enactment of Dodd-Frank, might have been subject to FTC or other jurisdiction.[82] The dividing line between persons remaining subject to FTC jurisdiction and those "covered" by the CFPB remains less than clear cut under Dodd-Frank; nonetheless, the Act directs the Bureau and the FTC to negotiate "an agreement for coordinating with respect to enforcement actions by each agency."[83]

The logic of aggregating regulatory authority and some enforcement authority in the Bureau is fairly simple: predatory subprime mortgages were left virtually unregulated by federal agencies, who viewed mortgage lenders as their "clients" rather than as the subjects of regulatory authority; lenders "chose" their registration in large part by choosing the regulator that presented the slimmest set of regulations or that sought to "deregulate" through preemption of state enforcement action.[84] Lenders would not have

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78. Dodd-Frank Act § 1025(a)(1), (c), 124 Stat. at 1990–91 (codified at 12 U.S.C. § 5515).

79. *Id.* § 1026, 124 Stat. at 1993 (codified at 12 U.S.C. § 5516).

80. *Id.* § 1026(d)(2), 124 Stat. at 1994 (requiring the prudential regulator to respond to written notices from the CFPB in situations where the CFPB believes there has been a material violation of a Federal consumer financial law). Dodd-Frank also narrows preemption in this context so that state regulators might find a toe-hold. *See* Jared Elosta, *Dynamic Federalism and Consumer Financial Protection: How the Dodd-Frank Act Changes the Preemption Debate*, 89 N.C. L. REV. 1273, 1299 (2011).

81. Dodd-Frank Act § 1024(c), 124 Stat. at 1989 (codified at 12 U.S.C. § 5514).

82. *Id.* § 1024(a)(1), 124 Stat. at 1987 (codified at 12 U.S.C. § 5514).

83. *Id.* § 1024(c)(3)(A), 124 Stat. at 1989. For discussion of the Memorandum of Understanding reached between the CFPB and FTC, see Press Release, FTC, Federal Trade Commission and Consumer Financial Protection Bureau Pledge to Work Together to Protect Consumers (Jan. 23, 2012), *available at* http://www.ftc.gov/opa/2012/01/ftccfpb.shtm.

84. *See, e.g.*, Barkow, *supra* note 11, at 44–45 (noting the "unhealthy" competition between the OCC and OTS in "attract[ing] regulated entities to charter with them to gain their operating fees" by "us[ing] their regulatory authority to preempt state consumer protection laws that would

been able to choose among regulators if a single regulator had been charged with consumer financial protection. Arguably, this regulatory competition facilitated agencies' "capture" by the industries they regulated.[85] Whether captured or simply suffering from denial, Congress placed some portion of blame for the subprime mortgage crisis on the backs of federal regulators by shifting authority to the new Bureau.

Moreover, Congress learned that capture might occur as much through inaction as action.[86] Granting the CFPB exclusive rulemaking authority does not guarantee that the Bureau will use this jurisdiction. Agency action depends both on the scope of an agency's jurisdiction as well as the will of its governing body to regulate. An agency governing by a bipartisan panel of commissioners might find itself internally deadlocked on whether and how to proceed on regulatory action. In order to ensure that the Bureau was not constrained by this sort of internal deadlock, Dodd-Frank structured the CFPB so that it would be headed by a single, independent Director appointed for a term of years.[87]

Commentators note that agency appointments for a term of years are intended to permit appointees both to develop expertise on technical subjects and to take "politically unpopular action."[88] Unlike other presidential appointments, which serve at the pleasure of the President and might be removed on the basis of interest group influence, the Director, as an appointee for a term of years, cannot be removed except "for inefficiency, neglect of duty, or malfeasance in office."[89] Once appointed by the President with the advice and consent of the Senate, the Director guides the CFPB for a five-year term.[90] This term of years, thus, helps to protect the Bureau from presidential interference after a Director has been appointed.[91] Politically unpopular actions might be taken by a Director appointed for a term of years because presidential influence occurs in the choice of the Director but is substantially less following appointment. In

otherwise govern the activities" of these regulated entities); *see also* ENGEL & MCCOY, *supra* note 20.

85. ENGEL & MCCOY, *supra* note 20, at 164; Barkow, *supra* note 11, at 44–45.

86. *Cf.* Barkow, *supra* note 11, at 37–41 (discussing the advantages and disadvantages of a multimember commission over that of a single agency head).

87. Dodd-Frank Act § 1011(b), 124 Stat. at 1964 (codified at 12 U.S.C. § 5491).

88. Barkow, *supra* note 11, at 29.

89. Dodd-Frank Act § 1011(c)(3), 124 Stat. at 1964–65 (codified at 12 U.S.C. § 5491).

90. A Director sits until the next Director is appointed by the President and approved by the Senate. *Id*. § 1011(c), 124 Stat. at 1964. Legislative history of the Dodd-Frank Act makes clear that Congress carefully considered alternate designs for the Bureau but decided that a single director would better serve its intent. See Block-Lieb & Janger, *supra* note 21, at 696.

91. *See* Barkow, *supra* note 11, at 29–30 (suggesting that the term of years "removal restriction undoubtedly gives an agency head greater confidence to challenge presidential pressure").

turn, longevity, expertise, and political independence also minimize the possibility of industry capture.[92]

While Dodd-Frank provides that the CFPB's Director cannot be removed once appointed, it does not completely insulate the Bureau from presidential influence. Presidential influence comes, ex ante, in the choice of the individual nominated to hold the position of Director. Indeed, that the Director sits for a five-year term means that most Presidents will influence policy-making on consumer financial protection for a period that extends beyond his own four-year term of office. As a result, this single-director design gives the President that appoints a Director far more influence than Congress. It should come as no surprise that the most controversial thing about the CFPB is that a single director heads the Bureau rather than a board of bipartisan commissioners with staggered terms.[93] While the Bureau is not the only independent administrative agency in Washington, D.C., it is the only independent agency headed by a single director.[94] When critics argue that the CFPB lacks accountability, they point to the fact that the Bureau is run by a single director rather than a board of commissioners.[95]

The Bureau is also made financially independent by statute; this financial independence, again, removes an aspect of congressional authority over the CFPB.[96] Once the Director determines the amount "reasonably necessary to carry out the authorities of the Bureau under federal consumer financial law,"[97] that amount is payable out of the coffers of the Federal Reserve. While Dodd-Frank sets a statutory cap on the portion of the Fed's budget available to the CFPB,[98] estimates place this amount at almost twice that of the FTC's annual budget and about half that of the Securities and Exchange Commission (SEC).[99] The CFPB, thus, need not go to Congress each year in search of an appropriation. The statute expressly provides that the Director's request for funding "shall not be subject to review by the Committees on Appropriations of the House of Representatives and the

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92. *See generally id*. at 28–30.

93. *See Recent Legislation*, *supra* note 13, at 2123, 2126.

94. *See* RICHARD PIERCE, SIDNEY A. SHAPIRO & PAUL VERKUIL, ADMINISTRATIVE LAW AND PROCESS 101 (5th ed. 2009).

95. *See* Richard Shelby, *The Danger of an Unaccountable "Consumer-Protection" Czar*, WALL ST. J., July 21, 2011, at A17, *available at* http://online.wsj.com/article/SB10001424053111903554904576457931310814462.html.

96. *See Recent Legislation*, *supra* note 13, at 2125–26.

97. Dodd-Frank Act, Pub. L. No. 111-203, § 1017(a)(1), 124 Stat. 1376, 1975 (2010) (codified at 12 U.S.C. § 5497 (2010)).

98. Dodd-Frank provides that the Bureau is entitled to receive not more than 10 to 12 percent of the Fed's annual budget. *Id*. § 1017(a)(2)(A), 124 Stat. at 1975.

99. National Consumer Law Center, *The Consumer Financial Protection Bureau: Bureau Structure, Independence and Funding*, 29 NCLC REPORTS 6 (July/August 2010) ("The CFPB's budget will be set by the CFPB's Director, up to a cap of about $485 million in 2013, adjusted for inflation thereafter. By comparison, the Federal Trade Commission's 2009 budget was $281 million and the Securities and Exchange Commission's was $961 million.").

Senate."[100] While the Bureau's budgets are subject to audit by the Office of Management and Budget and the Comptroller General of the United States,[101] these simply require the CFPB to account transparently for expenditures after the fact; it does not limit the amount or type of expenditures.

Almost from the day it was created with the enactment of Dodd-Frank, the CFPB's independence opened it to criticisms of unaccountability. The timing of this controversy bears emphasis, because immediate and vociferous opposition to the Bureau made it appear as though the CFPB was forced on Congress—as though Congress did not enact legislation to create the CFPB. But Dodd-Frank was enacted in mid-2010 just prior to midterm elections during the Obama Administration. By late 2010, disgruntled voters ensured that Democrats would no longer hold a majority in both houses of Congress.[102] The Tea Party emerged initially in reaction to the Obama Administration's handling of the bailout of large financial institutions, but also found much to complain about in the Dodd-Frank Act.

Although political power did not shift until after enactment of Dodd-Frank and after midterm elections, Congress was surely not unaware of these shifting political winds when it designed the CFPB as an independent agency. The Bureau was structured with the expectation that it would need to withstand immediate and fierce political resistance. It was designed to be independent from both industry and political influence—from both executive and congressional pressure.

Bills were introduced in the House almost immediately following midterm elections during the Obama Administration. Some, like that introduced by Rep. Michele Bachman, sought to repeal Dodd-Frank in toto.[103] Other bills introduced in the House tinkered around the edges, looking to effect changes in the governance structure of the CFPB or the burden of proof to be met before regulating.[104] There were similar bills

100. Dodd-Frank Act § 1017(a)(2)(C), 124 Stat. at 1976 (codified at 12 U.S.C. § 5497).

101. *Id.* § 1017(a)(4), 124 Stat. at 1976.

102. Jeff A. Boehner, *G.O.P. Captures House, but Not Senate*, N.Y. TIMES, Nov. 2, 2010, at A1, *available at* http://www.nytimes.com/2010/11/03/us/politics/03elect.html.

103. H.R. 87, 112th Cong. (2011) (introduced by Rep. Michele Bachman on January 5, 2011 to repeal Dodd-Frank Act); *see also* S. 712, 112st Cong. (2011) (Financial Takeover Repeal Act of 2011); S. 746, 112st Cong. (2011) (Dodd-Frank Repeal Act of 2011).

104. H.R. 557, 112th Cong. (2011) (transferring CFPB from Federal Reserve to Department of Treasury and prohibiting Director of Treasury from interfering with new Bureau's autonomy, but cut off Bureau from financial benefits of Fed relationship); H.R. 480, 110th Cong. (2007) (amending Truth in Lending Act to prohibit residential mortgage credit to consumers who lack social security numbers); H.R 1121, 112th Cong. (2011) (replacing single director of CFPB with five-member commission composed of Vice Chairman of Federal Reserve plus four additional presidential appointees); H.R. 1315, 112th Cong. (2011) (Consumer Financial Protection Safety and Soundness Improvement Act of 2011); H.R. 1355, 112th Cong. (2011) (Bureau of Consumer Financial Protection Accountability and Transparency Act of 2011); H.R. 1640, 112th Cong. (2011) (subjecting CFPB to appropriations process and repeal its access to Federal Reserve funds); H.R. 2612, 112th Cong. (2011) (repealing authority of CFPB to prohibit unfair, deceptive,

introduced in the Senate as well.[105] The Senate bills went nowhere, given the Democratic majority in that house of Congress, but the House of Representatives held hearings[106] and reported out several of its bills.[107] In July 21, 2011, just prior to the CFPB's start date, the House passed H.R. 1315.[108]

While the Senate did not move forward either on the bills introduced there or on the legislation previously enacted in the House, it held an important card in thwarting the President's ability to influence consumer protection policy. Because the Director of the CFPB required the Senate's consent, a minority of Senators threatened filibuster and succeeded in preventing appointment of a Director through normal means.[109] At first, President Obama engineered around this threatened filibuster by appointing Elizabeth Warren as a Consumer Czar,[110] a position that required no Senate approval;[111] but after the CFPB "went live" in July 2011, argument circulated that the Bureau could not accomplish much of anything without a Director.[112] Although by then President Obama had nominated Richard Cordray for the position of Director (rather than Elizabeth Warren),

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and abusive practices and promulgate regulations to prevent such practices); H.R. 4014, 112th Cong. (2011) (making CFPB a "covered agency"); H.R. 1667, 112th Cong. (2011) (altering "transfer date" under Dodd-Frank Act so that CFPB would not "go live" until confirmation of director by Senate); H.R. 3044, 112th Cong. (2011) (amending Dodd-Frank Act to repeal Office of Financial Research).

105. S. 2160, 112th Cong. (2012) (Financial Institutions Examination Fairness and Reform Act); S. 737, 112th Cong. (2011) (replacing the Director of the CFPB with a five-person commission and bringing the CFBP into the regular appropriations process); S. 3571, 112th Cong. (2012) (requiring CFPB to conduct a small business review panel on qualified mortgage rule); S. 1615, 112th Cong. (2011) (Financial Regulatory Responsibility Act of 2011).

106. *See, e.g.*, *Oversight of the Consumer Financial Protection Bureau: Hearing Before the Subcomm. on Fin. Institutions and Consumer Credit of the Comm. on Fin. Services*, 112th Cong. (2011), *available at* http://financialservices.house.gov/uploadedfiles/112-18.pdf.

107. CONSUMER FINANCIAL PROTECTION SAFETY AND SOUNDNESS ACT OF 2011, H.R. REP. NO. 89-112 (May 25, 2011) (reporting on H.R. 1315).

108. *Bill Summary & Status - 112th Congress (2011 – 2012) H.R.1315 - All Information*, THOMAS, http://www.govtrack.us/congress/votes/112-2011/h621? (last visited Oct. 20, 2012).

109. Whitehouse, *President Obama News Conference*, YOUTUBE (Sep. 10, 2010) at 22:15, http://www.youtube.com/watch?v=BvwB0guyuNk&cc=1#t=1339s.

110. Brady Dennis & Scott Wilson, *Warren Takes Post; Liberals Cheer*, WASH. POST, Sept. 18, 2010, at A8, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2010/09/17/AR2010091706828.html.

111. Presidential appointment of regulatory czars did not begin with Elizabeth Warren. Because czars report only to the President and often are appointed to get around Senate confirmation fights, their authority is contested, both politically and constitutionally. For debate on the legality and wisdom of regulatory czars, see Jacqueline M. Weyand, *Presidential Appointment of Czars: Executive Power Play or Administrative Renewal?*, 3 NW. INTERDISC. L. REV. 120 (2010); Aaron J. Saiger, *Obama's 'Czars' for Domestic Policy and the Law of the White House Staff*, 79 FORDHAM L. REV. 2577 (2011).

112. Although consumer advocates argued that this claim was based on a faulty reading of Dodd-Frank's provisions, *see* Lauren Saunders, *Hurdle for Challengers to CFPB Recess Appointment: Consumer Bureau Had Full Power With or Without a Director*, NAT'L CONSUMER LAW CTR. (February 2012), http://www.nclc.org/images/pdf/regulatory_reform/issue-brief-cfpb-interim-powers.pdf, few in the CFPB wanted to test the breadth of their regulatory authority given the ideological slant of this Supreme Court.

Republican members of the Senate announced that they would filibuster *any* nominee for the position.[113]

Between July 2011 and January 2012, the CFPB worked under this cloud of uncertainty. On January 4, 2012, Obama appointed Cordray to the position under his Recess Appointment powers, although the Senate technically had not recessed for its usual year-end break.[114]

Whether Cordray was properly appointed as Director of the CFPB is, thus, itself subject to question.[115] The constitutionality of his appointment, as well as the CFPB's regulatory and Directorial action since that appointment, are sharply contested. In June 2012, suit was brought seeking declaration that Cordray's appointment and, indeed, the whole of Dodd-Frank are unconstitutional.[116] The CFPB and other defendants moved to dismiss the suit in late 2012.[117] Although the court has yet to rule on the suit pending against the CFPB, it has ruled on a similar suit brought against the NLRB. In *Noel Canning v. NLRB*, the D.C. Circuit Court of Appeals recently struck down the NLRB's adjudication on the grounds that these appointments were neither approved by the Senate nor authorized by the Recess Appointments Clause.[118] While the facts of the case pending against the CFPB are distinguishable, commentators question whether Cordray's appointment as Director will withstand constitutional scrutiny.[119] President Obama recently nominated Cordray for a five-year term as Director.[120] While Senate approval of Cordray's "re-appointment" would resolve questions regarding the Director's status going forward, there remains the question of regulation and Directorial action previously taken by the CFPB. Commentators differ, except on the notion that litigation is likely.[121]

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113. *44 U.S. Sens. to Obama: No Accountability, No Confirmation*, SHELBY.SENATE.GOV (May 5, 2011), http://shelby.senate.gov/public/index.cfm/2011/5/44-u-s-sens-to-obama-no-accountability-no-confirmation.

114. Helene Cooper & Jennifer Steinhauer, *Bucking Senate, Obama Appoints Consumer Chief*, N.Y. TIMES, Jan. 5, 2012, at A1, http://www.nytimes.com/2012/01/05/us/politics/richard-cordray-named-consumer-chief-in-recess-appointment.html?pagewanted=all&_r=0.

115. *See* V. Gerard Comizio & Amanda M. Jabour, *Cordray's Recess Appointment: Future Legal Challenges*, ABA BANKING L. COMM. J., Mar. 2012, http://apps.americanbar.org/buslaw/committees/CL130000pub/newsletter/201203/comizio-jabour.pdf.

116. *See* Complaint for Declaratory and Injunctive Relief, State Nat'l Bank of Big Spring v. Geithner, No. 1:12_CV-01032, 2012 WL 2365284 (D.D.C. Jun. 21, 2012).

117. Alan S. Kaplinsky, *CFPB Moves to Dismiss Case Challenging Director Cordray's Recess Appointment*, CFPB MONITOR (Nov. 27, 2012), http://www.cfpbmonitor.com/2012/11/27/cfpb-moves-to-dismiss-case-challenging-director-cordrays-recess-appointment/.

118. Canning v. NLRB, No. 12-1115, 12-1153, 705 F.3d 490 (D.C. Cir. 2013).

119. *See* Levitin, *supra* note 8.

120. Ben Protess & Benjamin Weiser, *Obama's Picks for Regulators Send a Message to Wall Street*, N.Y. TIMES DEALBOOK BLOG (Jan. 24, 2013, 9:13 PM), http://dealbook.nytimes.com/2013/01/24/mary-jo-white-to-be-named-new-s-e-c-boss/?hp.

121. *See supra* note 8 and accompanying text.

III. THE CFPB'S ACCOUNTABILITY

The Dodd-Frank Act describes the CFPB as an "autonomous" bureau in the Federal Reserve System, "independent" from both the Fed and other administrative agencies.[122] This description of the CFPB is coupled with provisions in Dodd-Frank that free the Bureau from the congressional appropriations process; because the budget of the CFPB is payable from revenue of the Federal Reserve, Congress cannot control the Bureau by threatening to decrease or eliminate funding.[123]

Nonetheless, the CFPB sits in a regulatory space it shares with other regulators. While the CFPB is more independent than most administrative agencies, the Bureau holds institutional obligations to Congress, the FTC, and the prudential regulators, including the newly created Council on Financial Stability (the Council). While the FTC and prudential regulators do not hold veto power over the Bureau, both Congress and the Council can set aside CFPB regulation.[124] Reversal is not as simple as some would like. Nonetheless, the Bureau is, in important ways, accountable to these officials.

Table 1 summarizes this statutory division of labor. It categorizes the CFPB's accountability according to source (congressional, prudential regulators, FTC, and the Council) and subject (rulemaking, supervision and monitoring of depository institutions, enforcement, and oversight).

TABLE 1: CFPB OVERSIGHT AND OVERLAPPING REGULATORY OBLIGATIONS WITHIN DODD-FRANK

	Council	**Congress**	**Prudential and other regulators**	**FTC**
Rulemaking	Section 1023		Sections 1015, 1022	Section 1022
Supervision, Monitoring			Sections 1025, 1026	Sections 1024, 1027, 1029
Enforcement			Sections 1025, 1026	Sections 1024, 1027, 1029
Oversight		Sections 1016, 1013		

122. Dodd-Frank Act, Pub. L. No. 111-203, §§ 1011, 1012, 124 Stat. 1376, 1964–66 (2010) (codified at 12 U.S.C. §§ 5492, 5493 (2010)).

123. Nor can Congress indirectly control the budget of the CFPB by cutting the budget of the Fed. *Id.* § 1017(a)(1), 124 Stat. at 1975 (codified at 12 U.S.C. § 5497).

124. *Id.* § 1023(a), 124 Stat. at 1985 (codified at 12 U.S.C. § 5513).

Because references in the table are merely statutory provisions within the Dodd-Frank Act, the Table's complicated summary requires elaboration. These statutory provisions are described below.

A. RULEMAKING

Dodd-Frank provides that the Director has broad authority to "prescribe rules and issue orders and guidance."[125] Although this rulemaking authority is "exclusive,"[126] it is subject to specific burdens of proof set out in the Act.[127] The Bureau's rulemaking authority is also tempered by procedural requirements set in the Administrative Procedures Act (APA),[128] which govern all administrative agencies' rulemaking, including that by the CFPB. Because the APA requires notice of proposed rulemaking and opportunities for public comment by interested actors (whether industry or consumer advocates),[129] it provides a sort of intellectual roadmap of interest groups' influence in the process.[130]

The CFPB's exclusive rulemaking authority is also subject to oversight by other financial regulators. Dodd-Frank requires the CFPB to "consult with the appropriate prudential regulators or other Federal agencies prior to proposing a rule,"[131] and, where regulators object to its proposals during the comment phase of rulemaking, to publish these written objections.[132] While neither private actors nor prudential regulators can veto the Bureau's proposed regulation, it would be a mistake to conclude that the CFPB can simply ignore their regulatory commentary. Moreover, Dodd-Frank subjects the Bureau to the possibility that its financial regulations will be "stayed" or "set aside" by the Council.[133] These limits, as well as the regulatory burdens of proof, are each discussed in turn.

1. Burdens of Proof

Several regulatory burdens of proof built into Dodd-Frank are likely to inhibit CFPB regulation on a given topic. Like many agencies, the CFPB must assess the costs and benefits of any proposed regulation.[134] A cost-

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125. *Id.* § 1022(b)(1), 124 Stat. at 1980 (codified at 12 U.S.C. § 5512).

126. *Id.* § 1022(b)(4), 124 Stat. at 1981.

127. *See infra* notes 127–30 and accompanying text.

128. Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. §§ 551–559 (2011)).

129. 5 U.S.C. § 553(b), (c) (2011).

130. Political scientists view the APA as providing Congress with an important source of information about agency policy making. *See, e.g.*, McNollgast, *supra* note 25, at 94–97.

131. Dodd-Frank Act § 1022(b)(2)(B), 124 Stat. at 1981 (codified at 12 U.S.C. § 5512).

132. *Id.* § 1022(b)(2)(C), 124 Stat. at 1981.

133. *Id.* § 1023(b)(1), 124 Stat. at 1985 (codified at 12 U.S.C. § 5513).

134. *Id.* § 1022(b)(2)(A)(i), 124 Stat. at 1980 (codified at 12 U.S.C. § 5512) (requiring the Bureau to consider "the potential benefits and costs to consumers and covered persons, including the potential reduction of access by consumers to consumer financial products or services

benefit equation that compares concentrated costs to diffuse benefits is likely to overemphasize costs over benefits simply because diffuse benefits will be more difficult to quantify, and Dodd-Frank is not distinct in this regard.[135] Moreover, when regulating unfair, deceptive, or abusive practices, Dodd-Frank overlays a second cost-benefit analysis. It defines "unfair" to require the Bureau to conclude that the questionable practice "is likely to cause substantial injury to consumers" that is not "reasonably avoidable by consumers" and "is not outweighed by countervailing benefits."[136] Similarly, the Act defines "abusive" practices as limited to those "materially" interfering with "the ability of a consumer to understand a term or condition of a consumer financial product or service," or that take "unreasonable advantage" consumers.[137] Thus, high burdens of proof limit the Bureau's grant of regulatory authority.

Relying on these statutorily imposed burdens, political and industry interests can work to push back against an independent CFPB. For example, Dodd-Frank defines key terms such as "unfair" and "abusive" in ways that allow for arguments by industry that a practice may be problematic but not sufficiently problematic to justify regulation.[138] More importantly, section 1022(b)(2)(A)(i) of the Dodd-Frank Act requires the CFPB to consider "the potential benefits and costs to consumers and covered persons, including the potential reduction of access by consumers to consumer financial products of services resulting from such rule."[139] Because this cost-benefit analysis requires a balancing of concentrated costs and diffuse costs against diffuse benefits, it seems to favor a finding that costs exceed benefits. That conservative analysts criticize regulations recently proposed by the CFPB as failing to satisfy this standard supports a conclusion that this cost-benefit

resulting from such rule"); *id.* § 1022(b)(2)(A)(ii) (requiring consideration of "the impact on . . . covered persons" and "on consumers in rural areas").

135. *See* Charles F. Sabel & William H. Simon, *Minimalism and the Experimentalism in the Administrative State*, 100 GEO. L.J. 53, 65 (2011); *see also supra* notes 17–18 and accompanying text.

136. Dodd-Frank Act § 1031(c)(1), 124 Stat. at 2006 (codified at 12 U.S.C. § 5531).

137. *Id*. § 1031(d), 124 Stat. at 2006.

138. Dodd-Frank's definitions are far from bright-line rules. Dodd-Frank provides that an act or practice is unfair when it "causes or is likely to cause *substantial* injury to consumers which is not reasonably avoidable by consumers [and] such substantial injury is not outweighed by countervailing benefits to consumers or to competition." *Id.* § 1031(c)(1), 124 Stat. at 2006 (emphasis added). It similarly defines an abusive act or practice as one that "*materially* interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service [or] takes unreasonable advantage of" a consumer's lack of understanding, the inability of the consumer to protect his own interests, or the "*reasonable* reliance by the consumer on a covered person to act in the interests of the consumer." *Id.* § 1031(d)(1), 124 Stat. at 2006 (emphasis added).

139. *Id.* § 1022(b)(2)(A)(i), 124 Stat. at 1980 (codified at 12 U.S.C. § 5512).

analysis favors industry interests, and may suggest the possibility of future litigation on this basis.[140]

2. Regulatory "Consultation"

Dodd-Frank requires the Bureau to "consult" with the appropriate prudential regulators or other federal agencies prior to proposing a rule and during the comment process "regarding the consistency with prudential, market, or systemic objectives administered by such agencies."[141] This section further provides that a prudential regulator may submit a "written objection" to the proposed rule;[142] if it does so, the Bureau must include in its adopting release "a description of the objection and the basis for the Bureau's decision, if any, regarding this objection."[143]

While these provisions do not grant prudential regulators or other federal agencies a veto on the Bureau's proposed regulation, pragmatic consequences would likely follow the requirement that the CFPB record both the competing regulator's written objection and its response in the regulatory record. Depending on circumstances, the Bureau may look to avoid this public critique by anticipating and addressing such objections before dueling paperwork is submitted to the public record.

The precise contours and implications of this interagency consultation requirement are still somewhat opaque. Interagency regulatory consultation obligations are not unique to the CFPB. On one hand, a statute may include a purely discretionary statement that one agency "may consult" with another;[144] on the other hand, a statute might mandate that two agencies engage in joint rulemaking.[145] Between these two extremes lie statutes that "require consultation before an agency can take certain actions, even though how an agency should treat the substance of the interaction remains highly discretionary."[146]

Dodd-Frank fits in this grey zone. While it requires the CFPB to consult with the "appropriate" regulators before proposing new consumer financial

140. *See, e.g.*, Mark A. Calabria, *The CFPB: Problem of Solution?*, CATO INST., http://www.cato.org/publications/commentary/cfpb-problem-or-solution (last visited Nov. 20, 2012).

141. Dodd-Frank Act § 1022(b)(2)(B), 124 Stat. at 1981 (codified at 12 U.S.C. § 5512).

142. *Id*. § 1022(b)(2)(C), 124 Stat. at 1981.

143. *Id*. *But see id*. § 1022(b)(4)(B), 124 Stat. at 1981 (specifying "the deference that a court affords to the Bureau" should be "as if the Bureau were the only agency authorized to apply, enforce, interpret, or administer the provisions of such Federal consumer financial law").

144. *See* Freeman & Rossi, *supra* note 24, at 1157 (citing to section 3 of the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136a(f)(3) (2011), "which provides that when considering any application for pesticide registration, the EPA Administrator 'may consult' with any other federal agency").

145. *See* Freeman & Rossi, *supra* note 24, at 1165–73 (discussing joint rulemaking).

146. *Id.* at 1158 (describing section 7 of the Endangered Species Act, "which requires federal agencies to consult with the federal fish and wildlife agencies responsible for administering the Act to ensure that their proposed major actions are 'not likely to jeopardize' protected species").

protection regulations and "during the comment process";[147] it does not require the Bureau to defer to another regulator's determination that the proposed rule would be inconsistent with the "prudential, market, or systemic objectives administered by such agencies."[148] It merely requires that written objections be included in the regulatory record. Nonetheless, similar purely procedural requirements of consultation have been described as imposing "a powerful interagency lever"[149] on the grounds that, although the principal agency retains considerable discretion, in practice this sort of provision "can function as a veto because disregarding recommendations can expose an agency to civil and criminal penalties and because deviation may render a decision arbitrary and capricious on judicial review."[150] Whether Dodd-Frank will be construed in this way remains an open question, but the CFPB is likely to avoid litigation of the issue by trying to reach agreement before a written objection is lodged.

Interagency consultation can advance both congressional and presidential interests. Requirements that agencies consult each other before regulating can establish "a monitoring mechanism that can supplement congressional oversight."[151] It might, at the same time, "bolster the President's power by creating an avenue through which agencies might 'lobby' each other to advance the President's prerogatives."[152] Importantly, this sort of shared regulatory space can challenge industry influence because interest groups are required to assert influence in multiple locations simultaneously. In the case of financial regulation, where this influence can concentrate either on promoting favorable or resisting unfavorable regulation, containing capture could be more difficult than with other issue areas, even within a shared regulatory space, since benefits or costs are particularly concentrated and industry interests are particularly powerful and well financed.

3. Regulatory Stay and Set Aside

Dodd-Frank also creates a sort of "super prudential regulator"—the Financial Stability Oversight Council.[153] The Act grants the Council juris-

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147. The reference to "comment process" undoubtedly refers to the requirements of the APA, including 5 U.S.C. § 553(c). *See supra* notes 122–23 and accompanying text.

148. *See* Dodd-Frank Act § 1022(b)(2)(B), 124 Stat. at 1981 (codified at 12 U.S.C. § 5512).

149. Freeman & Rossi, *supra* note 24, at 1158; *see also* Eric Biber, *Too Many Things To Do: How to Deal with the Dysfunctions of Multiple-Goal Agencies*, 33 HARV. ENVTL. L. REV. 1, 52–57 (2009).

150. Freeman & Rossi, *supra* note 24, at 1158. The Supreme Court has agreed with Freeman and Rossi's pragmatic assessment. *See* Bennett v. Spear, 520 U.S. 154, 169 (1997) ("[W]hile the Service's Biological Opinion theoretically serves an 'advisory function,' . . . in reality it has a powerful coercive effect on the action agency . . . .").

151. Freeman & Rossi, *supra* note 24, at 1160.

152. *Id.* at 1160–61.

153. Dodd-Frank Act § 111, 124 Stat. at 1392–93 (codified at 12 U.S.C. § 5321). The members of the Council include the Secretary of the Treasury (who serves as Chairperson), the Chairman of

diction both to stay implementation of regulations promulgated by the Bureau and, ultimately, to "set aside" or veto its rules.[154] The standard for "set aside" is high. Dodd-Frank permits this extreme remedy only if the Council decides "that the regulation or provision [of a regulation] 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."[155] Moreover, a decision of the Council—a group of nine regulators and one presidential appointee—to set aside a regulation on this basis can be made "only with the affirmative vote" of "two thirds of the members of the Council."[156]

Unlike the consultation requirements discussed above, the Council does hold a veto power. Council interference with the regulatory authority of the CFPB can occur with the concurrence of seven members of the Council.[157] Although, the standard for a Council set aside is high, in all likelihood, the Council's determination would be subject to *Chevron* deference.[158] Would a court substitute its own judgment for that of the Council that the complained of regulation threatens the safety and soundness of the U.S. banking system or the financial stability of the U.S. financial system? If so, the pragmatic implications of this authority are probably far wider than the narrow parameters set forth in the statute and almost undoubtedly reach back to any written objection filed during the comment process if submitted by an agency with a seat on the Council.

This potential for regulatory veto provides enormous opportunity for executive influence on the CFPB's exercise of its rulemaking authority. Many of the Council seats are themselves presidential appointees and are, thus, unlikely to vote contrary to the President's wishes. The very public nature of the process through which the Council considers whether to set aside a regulation issued by the CFPB also provides each of the members of the Council with another opportunity to lobby the Bureau about its policies and proposed regulations. Given the likely crisis that a set aside is meant to

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the Board of Governors, the Comptroller of the Currency, the CFPB Director, the SEC Chairman, the FDIC Chairperson, the CFTC Chairperson, the Director of the Federal Housing Finance Agency, the Chairman of the National Credit Union Administration Board, and "an independent member appointed by the President, by and with the advice and consent of the Senate, having insurance expertise." *Id*.

154. *Id.* § 1023(a), 124 Stat. at 1985 (codified at 12 U.S.C. § 5513). The Chair of the Council can provisionally stay the effectiveness of a CFPB regulation on request of a single member of the Council. *Id*. § 1023(c)(1), 124 Stat. at 1985. This stay is effective for no more than a ninety-day period. *Id*. § 1023(c)(1). The request for a stay and ultimately a set aside of such a regulation is related to the consultation requirement specified in section 1023(b)(1)(A), 124 Stat. at 1985, in that a petition for a stay must allege a good faith attempt "to resolve concerns regarding the effect of the rule" on safety and soundness or financial stability. *Id*. § 1023(b)(1)(A), 124 Stat. at 1985.

155. *Id.* § 1023(a), 124 Stat. at 1985.

156. *Id*. § 1023(c)(3)(A), 124 Stat. at 1985–86.

157. *Id.*

158. Chevron U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837 (1984).

avert, behind-the-scenes presidential involvement in the process is also to be expected.

The public nature of this debate also presents Congress with both a source of information about the CFPB's rulemaking and an opportunity for involvement. In addition, Congress independently holds authority to reverse any regulation promulgated by the CFPB through additional legislation. Thus, if the Council fails to set aside a controversial regulation, Congress might itself step in and set aside the rule.[159]

H.R. 1315, the Consumer Financial Protection Safety and Soundness Improvement Act (the Improvement Act), would make it easier for the Council to veto CFPB regulation by softening the standard for set aside. Rather than require a showing that the regulation in question would put the safety and soundness of the banking system or the stability of the financial system "at risk," the Council could veto a regulation if it were found to be "inconsistent" with the safe and sound operations of this system.[160] Similarly, rather than require the Council to vote by a two-thirds majority, the Improvement Act would set aside a regulation on the basis of a simple majority.[161] But the difference between the 66 percent currently required for reversal and the 50 percent that H.R. 1315 would instead require would effect little in practice because each of the members of the Council are themselves presidential appointees. While dissent within the Council is politically unlikely, even the slimmest possibility of set aside is likely to chill CFPB regulatory action.

B. Enforcement, Examination, and Supervision

Whatever regulation the CFPB succeeds in issuing, it may need to rely on other regulators to enforce them. The CFPB may be the exclusive regulator of consumer financial protection, but it must share enforcement jurisdiction with a complex assortment of federal and state regulators. This section details this shared enforcement authority.

1. Coordination of Supervision and Enforcement

Before enactment of Dodd-Frank, regulators competed to determine who held exclusive enforcement authority. In notable instances, this was a race to the bottom to see who could regulate consumer lenders less.[162] Unlike rulemaking authority, which Dodd-Frank grants exclusively to the

159. Of course, legislation reversing a CFPB regulation would require approval by both the House of Representatives and the Senate and an absence of presidential veto. If the President were to veto such a bill, Congress could still enact such legislation, but with the approval of a veto-proof supermajority. U.S. CONST. art. I, § 7.

160. *Id.* § 3.

161. *Id.* § 2.

162. *See supra* text accompanying notes 54–56. *See generally* ENGEL & MCCOY, *supra* note 20, at pt. 3.

Bureau, enforcement and supervisory authority remains divided under the statute depending on the type of consumer lender at issue.

Most view the CFPB as the "primary" enforcement agency of consumer financial protection regulation.[163] But that assessment, while accurate on average, glosses over the numerous ways in which the CFPB shares enforcement authority.

a. Very Large Banks, Savings Associations, and Credit Unions

Dodd-Frank grants the Bureau exclusive supervisory authority over "very large banks, savings associations and credit unions," and "primary" authority to "enforce" the federal consumer finance laws against these very large banks.[164] Its supervisory powers grant the CFPB "exclusive authority" to examine very large banks to assess their compliance with the federal consumer financial laws and related risk to consumers and markets for consumer financial products and services.[165] Since this examination authority is limited in scope to the consumer financial laws, however, Dodd-Frank creates overlaps in supervisory jurisdiction, which it resolves by requiring the CFPB and the prudential regulator to coordinate supervision of the "very large banks."[166]

Express authority to enforce laws that have been violated bolsters this supervisory authority. Dodd-Frank grants the CFPB "primary authority to enforce" the federal consumer financial laws as against very large banks.[167] Because the Bureau's enforcement jurisdiction over very large banks is not exclusive, however, Dodd-Frank also specifies the "backup enforcement authority" of other federal agencies.[168] The Act provides that any federal agency other than the FTC can recommend, in writing, to the CFPB that they initiate an enforcement proceeding.[169] If the CFPB does not bring action within 120 days, the other agency can itself commence an enforcement proceeding.[170]

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163. Barkow, *supra* note 11, at 76 ("The CFPB has primary enforcement responsibility vis-à-vis other federal agencies that may be authorized to bring federal consumer finance actions.").

164. Dodd-Frank Act, Pub. L. No. 111-203, § 1025(b)(1), (c)(1), 124 Stat. 1376, 1990, 1991 (2010) (codified at 12 U.S.C. § 5515 (2010)). Very large banks, savings associations, and credit unions are defined as those respective entities with total assets exceeding $10 billion. *Id.* § 1025(a). For distinction between supervisory and enforcement powers, see Cuomo v. The Clearing House Ass'n, 129 S. Ct. 2710, 2721 (2009).

165. Dodd-Frank Act § 1025(b)(1)(A), (C), 124 Stat. at 1990 (codified at 12 U.S.C. § 5515).

166. *Id.* § 1025(e)(1), 124 Stat. at 1991; *see also* Memorandum of Understanding on Supervisory Coordination (May 16, 2012) *available at* http://www.federalreserve.gov/newsevents /press/bcreg/bcreg20120604a1.pdf (specifying coordination between CFPB and the Prudential Regulators regarding enforcement and supervisory actions involving very large banks).

167. Dodd-Frank Act § 1025(c)(1), 124 Stat. at 1991 (codified at 12 U.S.C. § 5515).

168. *Id.* § 1025(c)(3), 124 Stat. at 1991.

169. *Id.* § 1025(c)(2), 124 Stat. at 1991.

170. *Id.* § 1025(c)(3), 124 Stat. at 1991.

b. Other Banks, Savings Associations, and Credit Unions

Dodd-Frank grants to the CFPB examination and enforcement authority over banks, savings associations, and credit unions whose total assets are $10 billion or less,[171] but as to these banks the Bureau's role is as a backup enforcement authority. The Act permits the Director of the CFPB to require reports from these not-so-very-large financial institutions, although it directs the Bureau to use pre-existing reports or publicly available data "to the fullest extent possible."[172] The CFPB also can audit the primary prudential regulator's examination reports to "assess" the bank's "compliance with the Federal consumer finance laws."[173]

Despite these powers of examination, the CFPB holds no independent power of enforcement against these banks. If the CFPB has reason to believe "a material violation" of such laws has occurred, it can "notify the prudential regulators in writing and recommend appropriate action to respond."[174] But, in general, the prudential regulator for these financial institutions holds "exclusive authority (relative to the Bureau) to enforce" the federal consumer finance laws.[175]

While Dodd-Frank attempts to set clear regulatory boundaries between the CFPB and these prudential regulators, issues are bound to arise on the margins. In anticipation of the potential for dispute regarding these "other banks," the Act also specifies that the CFPB is required to coordinate with federal prudential regulators and state bank regulators "to minimize regulatory burden."[176] Although nothing in the statute expressly requires prudential regulators to maximize their protection of consumers' financial decision making, coordination should be interpreted to minimize the regulatory burden of duplicated efforts rather than minimization of regulatory effort altogether. It should also be interpreted to minimize the possibility that enforcement of the federal consumer financial laws is distinct depending on the agency with primary enforcement jurisdiction. Large banks with assets in excess of $10 billion should face the same enforcement energy as smaller banks with total assets of less than $10 billion. Dodd-Frank does not answer, however, whether enforcement interests of the CFPB or of the other regulators should prevail.

c. Other Consumer Lenders, Service Providers, and Related "Covered Persons"

In addition, the CFPB's enforcement authority extends to consumer lenders, service providers, and others that are "nondepository covered

171. *Id.* § 1026(a), 124 Stat. at 1993 (codified at 12 U.S.C. § 5516).
172. *Id.* § 1026(b), 124 Stat. at 1994–95.
173. *Id.* § 1026(c), 124 Stat. at 1994.
174. *Id.* § 1026(d)(2), 124 Stat. at 1994.
175. *Id.* § 1026(d)(1), 124 Stat. at 1994.
176. *Id.* § 1024(b)(3), 124 Stat. at 1988 (codified at 12 U.S.C. § 5514).

persons." While the CFPB does not share with any prudential regulator enforcement responsibility over these sorts of "covered persons," it also does not hold sole authority over them. As to these "nondepository covered persons," the CFPB shares enforcement authority with the FTC.[177]

The contours of this shared regulatory jurisdiction are complex. Dodd-Frank specifies that the CFPB hold supervisory and enforcement jurisdiction over any "covered person" who:

- "offers or provides origination, brokerage, or servicing" of loans secured by residential mortgages, "or loan modification or foreclosure relief services in connection with such loans."
- "offers or provides to a consumer a private education loan," or
- "offers or provides to a consumer a payday loan."[178]

It also specifies that the Bureau has jurisdiction over any "covered person" that "is a larger participant of a market for other consumer financial products or services,"[179] but left specification of this "larger participant" concept for later regulation in consultation with the FTC.[180] The final "larger participant" regulation became effective early this year.[181]

Dodd-Frank provides that the CFPB "shall" require reports and conduct periodic examinations of "nondepository covered persons,"[182] but also specifies that this examination function should be conducted to "minimize regulatory burden"[183] and must be coordinated with the federal and state prudential regulators exercising supervisory activities.[184] Again, examination is distinct from enforcement authority. Here, Dodd-Frank grants the CFPB "exclusive authority to enforce the Federal consumer financial law" relating to these nondepository covered persons.[185] Nonetheless, the Act permits "[a]ny federal agency authorized to enforce [the] Federal consumer financial law" to recommend initiation of an enforcement action.[186] It also specifically requires the CFPB and FTC to "negotiate an agreement for coordinating with respect to enforcement actions by each agency,"[187] a task the two agencies completed in 2012.[188]

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177. *Id.* § 1024(c)(3), 124 Stat. at 1989.

178. *Id*. §§ 1024, (a)(1)(A), (D), (E), 124 Stat. at 1987.

179. *Id*. § 1024(a)(1)(B), 124 Stat. at 1987.

180. *Id*. § 1024(a)(2), 124 Stat. at 1987.

181. *See* 12 C.F.R. pt. 1090, 77 Fed. Reg. 42874 (July 20, 2012) (providing that this final rule is to become effective Jan. 2, 2013).

182. Dodd-Frank Act § 1024(b)(1), 124 Stat. at 1987 (codified at 12 U.S.C. § 5514).

183. Presumably, this standard should be construed consistent with the same standard set in section 1024(b)(3). For discussion of this standard, see *supra* note 176 and accompanying text.

184. Dodd-Frank Act § 1024(b)(3), 124 Stat. at 1988 (codified at 12 U.S.C. § 5514).

185. *Id*. § 1024(c)(1), 124 Stat. at 1989.

186. *Id*. § 1024(c)(2), 124 Stat. at 1989 (providing that this recommendation be in writing).

187. *Id.* § 1024(c)(3)(A), 124 Stat. at 1989. Short of requiring this interagency agreement to be negotiated, the Act does not specify whether it would be enforceable or subject to judicial review. While Dodd-Frank did not otherwise set the terms of this interagency agreement, it suggests the

2. General Duty to Coordinate

In addition to the consultation and coordination otherwise specified in the Act, Dodd-Frank also requires the Bureau to "coordinate" with the SEC, the Commodity Futures Trading Commission (the CFTC), the FTC, and other federal agencies and state regulators "as appropriate to promote consistent regulatory treatment of consumer financial and investment products and services."[189] While it nowhere explicitly defines these duties of coordination, duties of coordination presumably differ from the consultation requirements otherwise specified in the Act. "Regulatory treatment" may refer to coordination of rulemaking authority to avoid inconsistent treatment of similar or related market actors, although the distinction between permitting consultation and requiring coordination on regulation is unclear. "Regulatory treatment" may instead refer to coordination of examination and enforcement actions, although Dodd-Frank elsewhere specifies similar obligations of coordination.[190] Finally, this provision may be construed to permit negotiation of a memorandum of understanding with the CFPB, although an express statutory authority to enter into an interagency agreement may be unnecessary.[191]

C. Oversight

1. Congressional Testimony and Reports

Although Congress does not control the Bureau's purse strings, Dodd-Frank nonetheless requires the Bureau to account to Congress annually. It requires the Director to provide semiannual testimony at hearings before the Senate Committee on Banking, Housing, and Urban Affairs, as well as the House Committees on Financial Services and on Energy and Commerce, where presumably members of Congress will submit their own questions to the Director.[192] The Director is also required to provide to these congressional committees and to the President "a report" on the Bureau's

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"rules of the road" to be followed when civil actions are brought either by the Bureau or the FTC. *Id.* § 1024(c)(3)(B), 124 Stat. at 1989. The Act also permits the two agencies to "modify or supersede" these recommendations by agreement. *Id.* § 1024(c)(3)(C), 124 Stat. at 1989. Memoranda of understanding (MOUs) have been negotiated between administrative agencies in the past, some voluntarily, some required by statute, but "there appears to be no generally applicable statutory or executive branch policy regarding the use of MOUs, leaving their content largely to the discretion of the agencies." Freeman & Rossi, *supra* note 24, at 1161.

188. Memorandum of Understanding between the Consumer Financial Protection Bureau and the Federal Trade Commission (May 16, 2012), http://ftc.gov/os/2012/01/120123ftc-cfpb-mou.pdf.

189. Dodd-Frank Act § 1015, 124 Stat. at 1974 (codified at 12 U.S.C. § 5495).

190. *See, e.g.*, *id.* § 619, 124 Stat. at 1620–31 (codified at 12 U.S.C. § 1851) (providing that the federal banking agencies, the SEC, and the CFTC shall consult and coordinate with each other in developing regulations with respect to the "Volcker Rule").

191. Freeman & Rossi, *supra* note 24, at 1161.

192. Dodd-Frank Act § 1016, 124 Stat. at 1974 (codified at 12 U.S.C. § 5496).

activities on nine statutorily specified topics[193] and on the consumer complaints received by the Bureau.[194]

The informational access that this oversight jurisdiction provides is considerable. While Congress undoubtedly possesses jurisdiction to investigate an agency based on specific complaints it receives, broader oversight jurisdiction granted to specific congressional committees means that Congress does not need to rely on complaints to trigger a review. Moreover, specifying monitoring functions can ensure that congressional committees keep a close watch on the Bureau's activities, while also preventing jurisdictional disputes as to which congressional committees the CFPB need report.

Congress may not be able to cut the CFPB's budget under Dodd-Frank, but it can count on multiple opportunities for public congressional testimony and related press conferences every year.[195] Reporting and testimonial obligations keep Congress informed on CFPB rulemaking and other regulatory activity; congressional committees can make the Director and other CFPB bureaucrats squirm at these public events.

Most importantly, congressional review provides a forum for threatening to use "the big club around the door"—repeal of disfavored regulation or even wholesale dismantling of the Bureau.[196] Oversight jurisdiction is an important step in publicly signaling congressional displeasure with a particular policy decision. These hearings permit members of Congress to gather information to assist in their own legislative agenda. They also permit Congress opportunities to invite industry actors and other administrative agencies to react to testimony.

Although the Bureau is designed to be insulated from congressional intervention, the CFPB ignores congressional criticism at its peril.

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193. *Id.* § 1016(c)(1)–(9), 124 Stat. at 1974–75 (requiring "a discussion of the significant problems faced by consumers in shopping for or obtaining consumer financial products or services," "a justification of the budget request of the previous year," a list of significant rules and other initiatives adopted or created by the Bureau in the preceding year, an analysis of consumer complaints received by the Bureau, a list of the "public supervisory and enforcement actions" that the Bureau participated in during the preceding year, the Bureau's actions taken against covered persons which are not credit unions or depository institutions, "an assessment of significant actions" by state attorneys general or regulators related to federal consumer financial law, "an analysis of the efforts of the Bureau to fulfill the fair lending mission of the Bureau," and "an analysis of the efforts of the Bureau to increase workforce and contracting diversity consistent with the procedures established by the Office of Minority and Women Inclusion"). The CFPB may also submit this report to the Senate Committee on Commerce, Science, and Transportation. *Id.* § 1016(b), 124 Stat. at 1974

194. *Id.* § 1013(b)(3)(C), 124 Stat. at 1969 (codified at 12 U.S.C. § 5493). Dodd-Frank also requires the CFPB to share this data on consumer complaints with the FTC and the prudential regulators. *Id*. § 1013(b)(3)(D), 124 Stat. at 1969.

195. *Id.* § 1016, 124 Stat. at 1974 (codified at 12 U.S.C. § 5496).

196. McNollgast, *supra* note 25, at 1651 (citing Barry R. Weingast, *The Congressional-Bureaucratic System: A Principle Agent Perspective (with Applications to the SEC)*, 44 PUB. CHOICE 147, 155 (1984)).

Oversight jurisdiction provides Congress with an opportunity to formalize these complaints; it also provides the CFPB with a clear forum for articulating its side of the debate.

CONCLUSION

The CFPB is designed so that the Bureau might rise above the client politics that normally surround financial regulation and protect the diffuse interests of consumers even after concerns about the subprime mortgage crisis abate.

Like many agencies, the CFPB is vested with jurisdiction of several different sorts. Because Congress granted the CFPB "exclusive" rulemaking authority, the Bureau's independence is greatest when it issues regulations. This ostensibly "exclusive" regulatory authority is, however, subject to oversight, consultation, and coordination.

The CFPB is less independent when viewed as an enforcement agent. Its enforcement authority is not exclusive. Given that regulation is only as effective as regulators are willing to enforce this law in the books this shared enforcement jurisdiction holds the key to the CFPB's accountability to political and industry forces. Dodd-Frank divides the Bureau's power to monitor and enforce the federal consumer financial laws in complex ways between federal and state authorities. While the CFPB holds greater enforcement authority over "large banks, savings associations, and credit unions," its ability to examine even these "large banks" is shared with prudential regulators. With banks and other financial institutions with assets of $10 billion or less, the CFPB must rely on the relevant prudential regulator to enforce consumer financial protection regulation. And as to "covered persons" that are not banks, Dodd-Frank was also clear to retain the FTC as a contiguous regulator.

The CFPB's rulemaking and enforcement authorities are importantly interconnected. Because the Bureau shares enforcement jurisdiction with the OCC, the NCUA, and other bank regulators, as a practical matter, it will have to take prudential regulators' concerns into account when promulgating regulations. Thus, while only the Financial Stability Council can veto a regulation promulgated by the Bureau, CFPB regulations might well be undermined by other regulators' inaction as enforcement agents.

Dodd-Frank crafts a complex regulatory space. This complex space means that descriptions of the CFPB's jurisdiction are best portrayed as Venn diagrams. A prudential regulator cannot alone veto a regulation issued by the CFPB, but it can comment on it in the public record, lobby for the Council to set it aside, and thwart enforcement efforts. Moreover, although the CFPB is financially independent and headed by a single director, Congress can exert influence on the Bureau through its influence on other administrative agencies. It can reverse CFPB regulation legislatively. It can repeal the legislation that created the Bureau.

Dodd-Frank grants the CFPB the power to promulgate consumer financial protection regulation that political actors disparage, but also creates incentives for crafting a consensus among regulators. Because the Bureau is designed so that it is accountable to a wide range of political actors, it just might accomplish the sort of effective consumer protection regulation that eluded earlier regulators.