Article

Inside Job: The Assault on the Structure of the Consumer Financial Protection Bureau

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INTRODUCTION

With the 2016 election of President Trump, the fate of the fledgling Consumer Financial Protection Bureau (CFPB or the Bureau) hung in the balance. Would the Bureau be dismantled? Would it be reduced to an empty shell?

These concerns were far from hypothetical. From the day it opened its doors, the Bureau was a lightning rod, sparking partisan and industry opposition.[1] The opposition mounted while the Bureau amassed an impressive track record in its first six-

1. *See, e.g.*, Adam J. Levitin, *The Consumer Financial Protection Bureau: An Introduction*, 32 REV. BANKING & FIN. L. 321, 336–38 (2013).

plus years.[2] Under the CFPB's first Director, Richard Cordray, the Bureau rolled out major rulemakings, built an examination force from scratch, unveiled the most effective consumer complaint function in federal bank regulation history, and secured almost $12 billion dollars in financial relief for consumers.[3] Partisan and industry resentment smoldered as the Bureau racked up success after success. By the time that Mr. Cordray stepped down as Director in November 2017 to run for governor of Ohio, a backlash was in full force.

Once the Trump Administration took power, the new leadership and industry declared outright war on the Bureau. The assault came from all sides: from the Republican-controlled Congress, from the new Administration, and from the courts.[4] Interestingly, the target was not so much the substance of federal consumer financial laws as the structure of the CFPB itself. The attack on structure was based on the premise that the CFPB's effectiveness was largely a product of its structure and that undermining that structure was essential to neutering the Bureau.

The CFPB's architecture was not an accident. In 2010, when Congress originally created the CFPB in the Dodd-Frank Wall Street Reform and Consumer Protection Act[5] (the Dodd-Frank Act or Dodd-Frank), it gave careful thought to the structure of consumer financial protection regulation. Congress focused on structure both to strengthen consumer financial protection and to shield federal oversight of consumer finance from interference for short-term political gain.[6]

In view of that design, it was no wonder that seven years later, round one of the war against the CFPB aimed to bring down the structure of the Bureau in Congress and the courts. The congressional and judicial attacks focused on hot-button

2. *Id.* at 332 (discussing how prior to the creation of the Bureau the agencies responsible for consumer financial protection lacked important information to do the job well).

3. *See* Richard Cordray, Dir., CFPB, Prepared Remarks at National Community Reinvestment Coalition Conference (Mar. 29, 2017), https://www.consumerfinance.gov/about-us/newsroom/prepared-remarks-cfpb-director-richard-cordray-national-community-reinvestment-coalition-conference.

4. *See infra* Parts II and III.

5. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

6. *See* Leonard Kennedy, Patricia A. McCoy & Ethan Bernstein, *The Consumer Financial Protection Bureau: Financial Regulation for the 21st Century*, 98 CORNELL L. REV. 1141, 1146–49 (2012) (describing the powers Congress bestowed on the CFPB).

structural issues such the CFPB's single-Director model, the Director's protection from at-will firing, and the independent funding of the Bureau. Congress failed to enact legislation eliminating these structural protections, however, and internal divisions beset the judicial challenges' litigation strategy. Frustrated in Congress and bogged down in the courts, the Republican leadership turned to the White House to disable the CFPB from within.[7]

Once President Trump appointed Mick Mulvaney, the Director of the Office of Management and Budget (OMB), as Acting Director of the CFPB in November 2017, the attack on the Bureau's structure entered a new and insidious phase. In round two, the guns were trained on the operational pillars of the Bureau: rulemaking, supervision, enforcement, and some of their more controversial moving parts. This second, ongoing phase was waged principally by the CFPB's new leadership and had all the marks of an inside job.

Part I describes the numerous ways Congress consciously structured the operating divisions of the CFPB to strengthen consumer protection and avoid agency capture. These design choices were an intentional attempt to address the failures of federal regulation of consumer finance leading up to 2008.[8] Part II turns to how the Trump Administration and other CFPB opponents sought to paralyze the Bureau by compromising its structure through congressional and judicial action. After those efforts failed to gain traction, the CFPB's opponents looked to the White House to dismantle the CFPB from inside.[9] Part III proceeds to analyze Mr. Mulvaney's efforts, as Acting CFPB Director, to immobilize the Bureau through administrative action.

The events to date raise the ultimate question, will the assault on the CFPB's structure succeed? Or will the foundations of the Bureau emerge intact? Part IV takes up this question, evaluating the likely success of the Administration's efforts to cripple the Bureau. In the short term, I conclude supervision and enforcement will slow down substantially and will be suspended for specific consumer laws and industry sectors. Reversing Cordray-era rules will be harder and take longer, but that process has begun.

7. *See infra* Part II.C.

8. *See* Kennedy, McCoy & Bernstein, *supra* note 6, at 1146–49 (explaining that the CFPB was created in response to the 2008 financial crisis and how it was designed to address the regulatory failures that culminated in that crisis).

9. *See infra* Part II.C.

As a result, the CFPB's rollback of compliance oversight will inflict substantial harm on consumers in the immediate and near term. Some of that short-term harm will be mitigated through concurrent state legislation and through oversight and enforcement by other state and federal regulators. Meanwhile, in the longer term, there are reasons to believe that the CFPB and its structure will ultimately survive. Because the current leadership's actions are executive in nature, they are reversible (some requiring more effort than others) once a Director who genuinely cares for the welfare of consumers takes office. Any statutory repeals would have been harder to reverse, but the Republican leadership was not able to enact legislation to abolish the Bureau or overhaul its structure even when it controlled both houses of Congress and the White House. As a result of congressional gridlock, the Bureau's governance and funding structure remain intact, the Bureau retains all of its core powers, and the federal consumer financial laws remain on the books.[10] Thus, the Bureau will likely withstand the assault on its structure and survive until more favorable political winds prevail.

This analysis depends on three assumptions, any of which if wrong could deal a lasting blow to consumer welfare. First, it assumes that none of the constitutional challenges to the CFPB's structure now pending in federal court will succeed and abridge the Bureau's independence. Second, it assumes that CFPB mortgage oversight will remain sufficiently robust to avoid another financial crisis. Lastly, as Part V describes, it assumes that citizens and courts will rebuff attempts by the current CFPB leadership to undermine the Bureau's structure through disregard of law. A number of disturbing recent actions by leadership at the Bureau have flouted the spirit or letter of the law. If the laws creating the CFPB's structure are treated with contempt, then all bets are off and the Bureau's structure will be in serious peril.

I. THE ARCHITECTURE OF CFPB EFFECTIVENESS

When Congress created the CFPB, the drafters of the Dodd-Frank Act paid close attention to the architecture of consumer financial protection.[11] That structure reflects a conscious decision to correct the regulatory failings of the past and to buffer CFPB decision-making against industry pressure and partisan meddling for campaign contributions and short-term advantage.

10. *See infra* Part IV.

11. *See* Kennedy, McCoy & Bernstein, *supra* note 6, at 1145–49 (discussing Congress's design of the CFPB).

Some of the ensuing design features are innovative, while others seem unremarkable. In the latter vein, for instance, Congress deliberately clothed the CFPB with the traditional mainstays of agency independence that all other federal banking regulators enjoy. These include statutory designation as an independent agency,[12] funding outside the congressional appropriations process,[13] protection of the agency head from at-will firing,[14] a more competitive pay scale,[15] and exemption from OMB cost-benefit review.[16] Another, more novel, move was Congress's decision to embrace a new regulatory paradigm that divides financial regulation according to risk and houses market conduct regulation in its own dedicated agency.

A. A NEW REGULATORY MODEL

Congress's choice to assign consumer financial protection to a brand-new agency was a bold departure from the prior division of federal authority pre-crisis. Before 2008, chief rulemaking authority for most federal consumer financial laws had resided in the Board of Governors of the Federal Reserve System. Federal jurisdiction over depository institutions and their nonbank lending affiliates for consumer compliance examinations and enforcement had been assigned to the relevant federal prudential banking regulator.[17] The Federal Trade Commission (FTC) had regulated independent nonbank lenders, but it lacked significant examination powers[18] and its rulemaking powers were paltry

12. 12 U.S.C. § 5491(a) (2012).

13. *Id.* § 5497(a)(2)(C). Specifically, the Bureau's budget is primarily funded by transfers from the Federal Reserve, capped at twelve percent of the Fed's 2009 annual operating expenses, adjusted for inflation. *Id.* § 5497(a)(1)–(a)(2).

14. The President may only "remove the Director for inefficiency, neglect of duty, or malfeasance in office." *Id.* § 5491(c)(1)–(c)(3).

15. *Id.* §§ 5493(a)(2), 5941(b)(4).

16. *Id.* § 5512(b)(2)(A).

17. For a description of the division of regulatory authority before 2011, see Patricia A. McCoy & Elizabeth Renuart, *The Legal Infrastructure of Subprime and Nontraditional Home Mortgages*, *in* BORROWING TO LIVE: CONSUMER AND MORTGAGE CREDIT REVISITED 110, 127–28 tbl.4-1 (Nicolas P. Retsinas & Eric S. Belsky eds., 2008). These regulators were the OCC for national banks and their operating subsidiaries, the Federal Reserve for state member banks and nonbank lending subsidiaries of bank holding companies, the Federal Deposit Insurance Corporation (FDIC) for state non-member banks and their operating subsidiaries, and the former OTS for savings associations and their operating subsidiaries. *Id.*

18. *See, e.g.*, DAVID H. CARPENTER, CONG. RESEARCH SERV., R42572, THE CONSUMER FINANCIAL PROTECTION BUREAU (CFPB): A LEGAL ANALYSIS 3

compared to those of the Federal Reserve and the other federal prudential banking regulators.[19]

Pre-crisis, a mortgage lender's charter and sometimes the location of its operations dictated which consumer laws applied to the company. State-chartered depository institutions and independent nonbank lenders were subject to state anti-predatory lending laws in the states where they operated.[20] Broad Office of the Comptroller of the Currency (OCC) and Office of Thrift Supervision (OTS) preemption rulings, meanwhile, freed national banks, federal savings associations, and their mortgage lending subsidiaries from compliance with those state mortgage lending laws. That left a void in consumer protection at federally chartered institutions, because the OCC and OTS did not replace the state strictures with tough anti-predatory lending provisions of their own.[21]

This dual regulatory system allowed mortgage lenders to switch their charters in order to shop for the easiest regulator. Mortgage lenders could elect to organize as depository institutions or nonbanks.[22] Meanwhile, depository institutions could choose between state and federal charters and between thrift charters and commercial bank charters. To bypass a strict state law, a lender could convert to a federal bank or thrift charter or move its operations to a less regulated state. To shed a strong regulator, a lender could convert its charter and move to a more sympathetic agency. As their regulated entities threatened to bolt, regulators—both state and federal—came under mounting pressure to relax their mortgage lending standards and enforcement. The result was a disastrous race to the bottom in mortgage lending.

Congress could have tinkered at the margins by leaving regulators' jurisdictional boundaries alone. In the mortgage lending area, however, the regulatory lapses had been so egregious that Congress devised a whole new model of regulation in the Dodd-

(2014).

19. *See* Jeffrey S. Lubbers, Essay, *It's Time to Remove the "Mossified" Procedures for FTC Rulemaking*, 83 GEO. WASH. L. REV. 1979 (2015); McCoy & Renuart, *supra* note 17, at 123 n.47.

20. For full treatment of the regulatory race to the bottom in mortgage lending standards, see KATHLEEN C. ENGEL & PATRICIA A. MCCOY, THE SUBPRIME VIRUS: RECKLESS CREDIT, REGULATORY FAILURE, AND NEXT STEPS 151–223 (2011).

21. *See id.* at 157–62.

22. *See* McCoy & Renuart, *supra* note 17, at 128–30.

Frank Act.[23] Under this structure, which had attributes of the "twin peaks" model,[24] Congress lodged lead responsibility for two distinct risks—solvency risk and market conduct risk—in separate agencies. It continued to vest authority for the solvency risk of banks and thrifts in the Federal Reserve, the FDIC, and the OCC. But it stripped the Federal Reserve of primary authority for overseeing market conduct risk in consumer finance and transferred that jurisdiction to the new CFPB. Further, Congress made consumer financial protection the new Bureau's sole mission, to ensure that the agency's top priority was safeguarding the financial health of consumers.[25] Creating the Bureau also allowed Congress to write on a clean slate, with an agency that had not been captured.

To be sure, the federal prudential banking regulators retain limited authority over consumer financial protection under Dodd-Frank. The Federal Reserve, the OCC, the FDIC, and the National Credit Union Administration (NCUA) conduct consumer compliance examinations and enforcement for smaller depository institutions and credit unions (with total assets of $10 billion or less).[26] Still, the breadth of the CFPB's jurisdiction and its resulting expertise make it the predominant regulator in the field. The CFPB takes lead supervision and enforcement responsibility for nonbanks,[27] plus for the largest banks, thrifts, and

23. *See* Kennedy, McCoy & Bernstein, *supra* note 6, at 1144, 1147–49 (describing how, in response to the mortgage crisis, Congress enacted the Dodd-Frank Act's provisions on the CFPB to protect consumers in the financial marketplace).

24. *See, e.g.*, MICHAEL W. TAYLOR, CTR. FOR THE STUDY OF FIN. INNOVATION, TWIN PEAKS: A REGULATORY STRUCTURE FOR THE NEW CENTURY (1995); *see also* Heidi Mandanis Schooner, *Regulating Risk Not Function*, 66 U. CIN. L. REV. 441, 460–61, 484–85 (1998) (describing regulation by risk). Technically, Congress adopted elements of a "triple peaks" model, because it housed responsibility for a third financial risk—systemic risk—in the newly formed Financial Stability Oversight Council and the Office of Financial Research. Dodd-Frank Act, Pub. L. No. 111-203, §§ 111–156, 124 Stat. 1376, 1392–1420 (2010); MICHAEL BARR ET AL., FINANCIAL REGULATION: LAW AND POLICY 79 (2d ed. 2018).

25. This decision was a reaction to the fact that the Federal Reserve suffered from a serious mission conflict and a hostile mindset to market conduct regulation during the years leading up to the 2008 financial crisis. Not only was monetary policy its top priority, it viewed consumer financial protection as antithetical to the short-term profitability of banks. *See, e.g.*, Levitin, *supra* note 1, at 330–31. *See generally* ENGEL & MCCOY, *supra* note 20, at 189–204. To compound matters, the Federal Reserve under then-Chairman Alan Greenspan was the most articulate proponent of the deregulatory agenda that prevailed during the 1990s and 2000s. *See id.* at 189–93.

26. 12 U.S.C. §§ 5515–5516 (2012).

27. The CFPB has supervisory and enforcement powers over all nonbanks

credit unions (with more than $10 billion in total assets) and their affiliates.[28] Most importantly, the Bureau has sole rule-making authority for the federal consumer financial laws.[29] Those rules apply to depository institutions and nonbank providers alike.

This structure allocating regulatory responsibilities according to risk offers several benefits. It entrusts the Bureau with market conduct oversight and aligns the agency's authority with its mission. It consolidates research and regulatory expertise for consumer finance in one agency. It enables the CFPB to better respond to new market conduct risks as financial products evolve. Finally, it blocks some of the most important previous avenues for regulatory arbitrage.

B. Reduced Regulatory Arbitrage

Several features of the CFPB's architecture work to reduce regulatory arbitrage by industry participants. These elements include the new division of federal supervisory and enforcement authority for consumer finance, stricter, uniform federal substantive laws, agency disincentives to vie for more regulated entities, and increased flexibility to keep abreast of financial innovations. As a result, now it is harder for consumer financial

that are either covered persons or services providers or that are governed by an enumerated consumer law. *Id.* §§ 5481(14), 5514(c)(3)(A). After it opened for business, the Bureau entered into a cooperation agreement with the FTC to share enforcement duties with respect to nonbanks. *Id.* § 5514(c)(3)(A); Memorandum of Understanding Between the Consumer Financial Protection Bureau and the Federal Trade Commission (Jan. 20, 2012) [hereinafter CFPB-FTC Memorandum of Understanding], https://www.ftc.gov/system/files/120123ftc-cfpb-mou.pdf.

The CFPB's supervisory powers over nonbanks are somewhat narrower than its enforcement powers and depend on the industry. The CFPB examines all nonbank consumer financial services providers that: (1) offer or provide residential mortgage loan origination, brokerage, or servicing; (2) offer loan modification or foreclosure relief services; (3) are payday lenders; or (4) are private student lenders. 12 U.S.C. § 5514(a)(1). Nonbanks that provide other consumer financial products or services undergo CFPB supervision only if they are larger participants in their markets. *Id.* § 5514(a)(1)(B). For any given market, the CFPB defines "larger participant[s]" by rule after consultation with the FTC. *Id.* To date, the Bureau has defined that term for the debt collection and consumer reporting industries, but has not yet defined it for the prepaid account, installment loan, vehicle title lending, or financial data aggregator markets. 12 C.F.R. §§ 1090.104(b), 1090.105(b) (2018); *see* AM. FOR FIN. REFORM ET AL., No. 2018-BCFP-004, COMMENTS & REQUEST FOR INFORMATION ("RFI") REGARDING THE BUREAU'S SUPERVISION PROGRAM 1 (2018).

28. 12 U.S.C. § 5515.

29. *Id.* § 5512(b)(4)(A).

services providers to evade consumer regulation through new product lines or divide-and-conquer tactics.

1. The Extension of the Supervisory Perimeter to Nonbanks

In the Dodd-Frank Act, Congress reallocated federal authority for supervision and enforcement to make it harder for nonbank consumer finance companies to escape federal oversight. At the time of Dodd-Frank's passage, insured depository institutions and credit unions already underwent regular consumer compliance examinations. Consequently, Dodd-Frank's biggest single change to the old supervisory regime was to extend federal supervision to independent nonbank providers and to assign that responsibility to the CFPB.[30]

As a result, nonbanks under CFPB supervision[31] no longer have the ability to flee federal oversight. If they retain their nonbank charters, they remain under CFPB supervision and enforcement.[32] If they convert to bank or thrift charters, they may escape CFPB supervision (depending on their size) but then will be overseen by one of the federal prudential banking regulators.[33] Further, the charter switch scenario is mostly hypothetical for now, in part because bank regulators have granted extremely few charters post-crisis and applicants must raise substantial capital to win approval.[34] Accordingly, nonbanks under CFPB supervision cannot escape federal examination and have few easy alternatives for switching federal regulators.[35]

30. *Id.* §§ 5481(14), 5514(c)(3)(A).

31. Some nonbank financial providers remain exempt from CFPB supervision. *See supra* note 27 and accompanying text.

32. 12 U.S.C. § 5514.

33. *Id.* §§ 5515–5516.

34. James M. Kane et al., *Phoenix Rising: De Novo Bank Formation?*, VEDDER PRICE (Mar. 22, 2018), https://www.vedderbanking.com/2018/03/update-de-novo-bank-formation-2015-2018. However, in 2018, the OCC announced it would start accepting applications for a new national fintech charter. Press Release, OCC, OCC Begins Accepting National Bank Charter Applications From Financial Technology Companies (July 31, 2018), https://www.occ.gov/news-issuances/news-releases/2018/nr-occ-2018-74.html.

A separate reason why some nonbanks might not contemplate converting into bank charters is that the depository institution business model does not easily fit certain classes of nonbank providers, such as payday lenders, credit reporting agencies, and debt collectors.

35. In addition, Dodd-Frank's provision transferring examination and enforcement authority over insured depository institutions and credit unions with total assets exceeding $10 billion and their affiliates to the CFPB, 12 U.S.C. § 5515, curbed regulatory arbitrage in another way. Today, the only way for

2. Uniform Federal Standards

Another way Dodd-Frank curbed regulatory arbitrage was by circumscribing firms' ability to shop for the weakest consumer protection laws.[36] Some history is needed to set the stage. Before the 2008 crisis, financial innovations had outpaced regulation, rendering the federal consumer financial laws obsolete. With rare exceptions,[37] the federal laws on point had been confined to disclosure requirements. The old federal disclosures, however, brushed over the greatest financial risks that new financial products posed to consumers.[38] Further, millions of consumers were unable to grasp those disclosures or use them properly due to lack of financial literacy, cognitive impairments, behavioral biases, or victimization through fraud.[39]

At the state level, by 2007, twenty-nine states and the District of Columbia[40] had adopted new, stricter mortgage lending laws that went well beyond disclosures by actually outlawing or restricting certain mortgage terms and practices.[41] Federal law at that time offered no equivalent protections, except for the restrictions on high-cost mortgages in the Home Ownership and Equity Protection Act (HOEPA),[42] which were limited to the costliest one percent of mortgage refinance loans.[43] Worse, the legal void created by the OCC and OTS preemption rulings encouraged mortgage lenders to flock to the lax federal charters in droves.

large depository institutions to shed the Bureau as their supervisor is to downsize below the $10 billion threshold. Only a few institutions on the cusp of the $10 billion cutoff can do this as a practical manner.

36. *See also supra* Part I.B.1.

37. Examples include the old restrictions on high-cost loans, 15 U.S.C.A. § 1602(aa) (West 2018), contained in the Home Ownership and Equity Protection Act amendments to Truth in Lending Act, as codified in 15 U.S.C.A. § 1639(c)–(m) (West 2018), and the anti-kickback provisions in the Real Estate Settlement Procedures Act, 12 U.S.C. § 2607 (2012).

38. *See* Patricia A. McCoy, *Rethinking Disclosure in a World of Risk-Based Pricing*, 44 HARV. J. LEGIS. 123 (2007).

39. *See, e.g.*, McCoy & Renuart, *supra* note 17, at 125–27 (discussing complexities in grasping adjustable-rate mortgages).

40. *Id.* at 119–20.

41. Raphael Bostic, Kathleen C. Engel, Patricia A. McCoy, Anthony Pennington-Cross & Susan Wachter, *State and Local Anti-Predatory Lending Laws: The Effect of Legal Enforcement Mechanisms*, 60 J. ECON. & BUS. 47, 52–54 (2008); McCoy & Renuart, *supra* note 17, at 119.

42. Riegle Community Development and Regulatory Improvement Act of 1994, Pub. L. No. 103-325, §§ 151–158, 108 Stat. 2160 (codified as amended in in 15 U.S.C. §§ 1601–1602, 1639–1641).

43. McCoy & Renuart, *supra* note 17, at 119, 123 n.47.

The Dodd-Frank Act plugged that hole in four ways. First, Congress took a leaf from the state anti-predatory lending laws and strengthened the federal consumer financial laws considerably by outlawing or regulating a long list of hazardous mortgage lending terms and practices.[44] Second, Congress gave the CFPB sole rulemaking authority for these (and other) federal consumer financial laws.[45] Third, virtually all consumer financial services providers across the country must observe those stricter federal laws, regardless of charter or location. As a result, companies can no longer duck those laws by changing regulators or locales. Fourth, the stricter federal consumer financial laws blunt OCC preemption for federally chartered depository institutions under the National Bank Act[46] and the Home Owners' Loan Act[47] by substituting comparable federal rules for many of the preempted state laws.[48] Unlike with state regulatory regimes, national banks and federal thrifts cannot effectively opt out of these demanding federal laws. In the meantime, all other consumer financial services providers, regardless of their charter or location, are subject to those same, stronger federal laws.

3. Other Disincentives to Charter Competition

During the lead-up to 2008, financial regulators had their own perverse incentives to vie for charters, meaning that the regulatory race to the bottom during those years was a two-way street. Financial services providers switched to lighter regulators, while agencies loosened regulation to woo firms to their fold. To prevent a recurrence, Congress instituted reforms to discourage the CFPB from courting new regulated entities by relaxing oversight.

One way Congress achieved this was by drawing bright-line borders around the CFPB's jurisdiction that the agency cannot easily enlarge. Thus, banks, thrifts, and credit unions with more

44. *See* 12 U.S.C. § 5532(f) (2012) (integrated mortgage disclosures); 15 U.S.C. § 1639 (2012), *amended by* Economic Growth, Regulatory Relief, and Consumer Protection Act, Pub. L. No. 115-174, 132 Stat. 1296, 1305 (2018) (high-cost mortgages); 15 U.S.C. §§ 1639b(c)(3) (anti-steering provisions), 1639c(b)(3) (ability-to-repay and qualified mortgage rule), 1639d (escrow requirements).

45. 12 U.S.C. §§ 5481(14), 5512(a), 5512(b)(4)(A).

46. National Bank Act, ch. 78, 13 Stat. 99 (1864) (codified as amended in scattered sections of 12 U.S.C).

47. 12 U.S.C. §§ 1461–1470.

48. In addition, OCC preemption no longer applies to nonbank operating subsidiaries of national banks or federal savings associations. 12 U.S.C. §§ 25B(e), 1465(a).

than $10 billion in total assets and their affiliates are subject to CFPB supervision and enforcement, while smaller depository institutions are not.[49] All nonbank mortgage lenders, mortgage servicers, mortgage brokers, foreclosure relief firms, payday lenders, and private student lenders are similarly subject to CFPB oversight.[50] Other nonbank providers only face CFPB supervision if they are "larger participants," but the Bureau will face industry resistance if it seeks to define that term for additional industry sectors such as installment lenders.[51] Accordingly, the CFPB cannot easily expand its turf by loosening regulation.

Furthermore, the CFPB lacks a financial incentive to vie for regulated entities. Unlike the OCC and the former OTS, the Bureau does not depend on assessments on its regulated companies to fund its operations. Instead, the CFPB is housed within,[52] and derives almost all of its funding from,[53] the Federal Reserve. This independent funding model, combined with the bright-line nature of the Bureau's jurisdiction over entities, eliminates a chief reason for the destructive charter competition that precipitated the 2008 crisis.

4. Greater Ability to Reach Harmful Conduct

So far, this discussion has focused on regulatory arbitrage through charter shopping. Other forms of regulatory arbitrage, however, involve harmful conduct that is calibrated to evade regulation. For example, a provider might engage in misconduct harming consumers that has not yet been condemned as illegal. Or a provider might devise a risky new product that has not yet been regulated. In the Dodd-Frank Act, Congress carefully considered how to reduce both types of arbitrage when it designed the powers it conferred on the CFPB.

a. Conduct That Evades Bright-Line Rules

In 2010, if Congress had merely used rules to define specific conduct as consumer abuses and banned them *ex ante*, fraudsters would have had rein to devise new forms of fraud or other

49. *Id.* §§ 5515–5516

50. *Id.* § 5514.

51. *See supra* note 27.

52. 12 U.S.C. § 5491(a); *see* Levitin, *supra* note 1, at 339–40.

53. 12 U.S.C. § 5497(a)(1)–(2). For a description of that funding, see *supra* note 13.

misconduct that had not yet been declared illegal.[54] To avoid this type of arbitrage, Congress took care not to confine CFPB regulation to narrowly defined types of market misconduct in the Dodd-Frank Act.[55] Instead, Congress also conferred a standard[56] giving the CFPB the power to prohibit unfair, deceptive or abusive acts or practices (UDAAPs) in connection with the offering of, or transactions with consumers in, consumer financial products or services.[57] This power builds on the FTC's traditional statutory power to punish unfair or deceptive acts or practices (UDAPs),[58] but expands that power by adding the term "abusive."

In Dodd-Frank, Congress empowered the CFPB to address UDAAPs in two ways. The Bureau may promulgate rules outlawing specific conduct as UDAAPs.[59] And in addition, it can

54. Oren Bar-Gill & Elizabeth Warren, *Making Credit Safer*, 157 U. PA. L. REV. 1, 84–85 (2008).

55. As this implies, Congress in Dodd-Frank did outlaw an extensive set of specific market abuses in the federal consumer financial laws. *See, e.g.*, 12 U.S.C. § 5536(a)(1)(A) (prohibiting covered persons or service providers from offering or providing "to a consumer any financial product or service not in conformity with Federal consumer financial law, or otherwise commit any act or omission in violation of a Federal consumer financial law"). In that connection, the Bureau has the power to prescribe rules "to administer and carry out the purposes and objectives of the Federal consumer financial laws, and to prevent evasions thereof." *Id.* § 5512(b)(1).

56. See Louis Kaplow, *Rules Versus Standards: An Economic Analysis,* 42 DUKE L.J. 557, 560 (1992), for discussion of the difference between rules and standards. *Cf.* Prentiss Cox et al., *Strategies of Public UDAP Enforcement*, 55 HARV. J. LEGIS. 37, 44–45 (2018) (explaining how analogous laws against unfair and deceptive acts and practices operate as standards).

57. 12 U.S.C. § 5531; *see also id.* § 5536(a)(1)(B) (making it unlawful for covered persons or service providers to engage in UDAAPs). The Dodd-Frank Act defines the terms "unfair" and "abusive," but not the term "deceptive" (which has been well developed through longstanding FTC case law). *Id.* § 5531(c)–(d).

Less well-known, but similarly broad, is the Bureau's power to define other practices, by regulation, as consumer financial products or services where those services are "permissible for a bank or for a financial holding company to offer or to provide under any provision of a Federal law or regulation applicable to a bank or a financial holding company, and has, or likely will have a material impact on consumers." *Id.* § 5481(15)(A)(xi)(II). This power, however, is confined to financial products or services offered or provided by banks or financial holding companies and does not extend to services offered or provided by independent nonbank providers.

58. 15 U.S.C. § 45(a)(1) (2012).

59. 12 U.S.C. § 5531(b); *see also id.* § 5538(a)(1) (authorizing the Bureau to prescribe rules on UDAPs in mortgage loans, including loan modification and foreclosure rescue services). The agency is required to consult the federal banking agencies, or other agencies, as appropriate, concerning the consistency of

take enforcement action to prevent UDAAPs by covered persons or service providers.[60] This latter power allows the Bureau to seek redress against new types of consumer harms, even if the agency had not defined those harms as UDAAPs by regulation before.[61] This enforcement power against UDAAPs has proven crucial in combatting regulatory arbitrage, with illegal deceptive acts or practices accounting for approximately 60 percent of the Bureau's enforcement orders through year-end 2015.[62]

b. Product Innovation to Evade Regulation

Product innovations are another time-tested technique for evading regulation.[63] Several aspects of Dodd-Frank's consumer financial protection scheme seek to blunt this type of arbitrage by enhancing the Bureau's ability to keep up with financial innovations that are marketed to consumers. Among these aspects, the most important is the shift to regulation by risk, which allows the CFPB to regulate market conduct risks in all consumer finance products or services, new or old.[64]

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any such proposed rule with prudential, market, or systemic objectives administered by such agencies. *Id.* § 5531(e).

60. *Id.* § 5531(a); *see also id.* § 5538(a) (authorizing the Bureau and the FTC to enforce any specialized UDAP rules applying to mortgages). Dodd-Frank defines a "covered person" as "any person that engages in offering or providing a consumer financial product or service." *Id.* § 5481(6). In addition, the term "covered person" extends to any affiliate of a covered person that acts as a service provider to that person. *Id.* § 5481(6)(B). Subject to certain exceptions, the term "service provider" means "any person that provides a material service to a covered person in connection with the offering or provision by such covered person of a consumer financial product or service . . ." *Id.* § 5481(26)(A). This includes persons who participate in "designing, operating, or maintaining," or who process transactions relating to, the product or service. *Id.*

61. This uncertainty drew the ire of the Chamber of Commerce. *See* CTR. FOR CAPITAL MKTS., U.S. CHAMBER OF COMMERCE, CONSUMER FINANCIAL PROTECTION BUREAU: WORKING TOWARDS FUNDAMENTAL REFORM 4–5, 11, 14–15 (2018) [hereinafter CHAMBER OF COMMERCE], https://www.centerforcapitalmarkets.com/resource/working-towards-fundamental-reform.

62. *See* Christopher L. Peterson, Comments of Financial Regulation and Consumer Protection Scholars and Former Regulators on Docket No. CFPB-2018-0003, at 7 (May 14, 2018) [hereinafter May 14, 2018 Comments], https://lawdigitalcommons.bc.edu/cfpb-comments/3.

63. For an example of how payday lenders evaded a New Mexico payday regulation law by reinventing their product, see Nathalie Martin, *1,000% Interest—Good While Supplies Last: A Study of Payday Loan Practices and Solutions*, 52 ARIZ. L. REV. 563, 585–96 (2010).

64. This is encompassed by Dodd-Frank's broad command to the Bureau to "implement and . . . enforce Federal consumer financial law consistently for the purpose of ensuring that all consumers have access to markets for consumer

The Bureau also has improved ability to oversee product innovations based on its mandate to "regulate the offering and provision of consumer financial products or services under the Federal consumer financial laws."[65] Dodd-Frank defined the operative term—"consumer financial products or services"—to include a long list of financial services to consumers made for personal, family or household purposes.[66] This list includes the functional equivalents of numerous traditional services.[67] In addition, Congress added a catch-all definition of that term that includes other financial products or services that are specifically conducted for purposes of regulatory arbitrage:[68]

> (xi) such other financial product or service as may be defined by the Bureau, by regulation, for purposes of this title, if the Bureau finds that such financial product or service is—
>
> (I) Entered into or conducted as a subterfuge or with a purpose to evade any Federal consumer financial law; . . .

This clause, combined with the functional equivalent clause, allows the CFPB to oversee all sorts of novel consumer financial services.

Finally, as I discuss in greater detail below, Congress preserved the states' ability to adopt state laws and rules on consumer financial protection that are stronger than their federal counterparts, so long as the state laws and rules are consistent with federal law.[69] States are more attuned to local conditions and are often better positioned to detect and respond to new, emerging types of consumer harms than the CFPB located in Washington, D.C. This expansion of the states' ability to redress market misconduct is another Dodd-Frank response to the potential risks posed by financial innovations.

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financial products and services and that markets for consumer financial products and services are fair, transparent, and competitive." 12 U.S.C. § 5511(a).

65. *Id.* § 5491(a).

66. *Id.* § 5481(5).

67. Specifically, consumer financial products or services include extensions of credit and leases that are functional equivalents of purchase finance, real estate settlement services, deposit-taking, money transmission or exchange, stored value and payment instruments, check cashing and other checking services, payments services, credit counseling, debt settlement, and certain other financial advisory services, consumer reporting, and debt collection. *Id.* § 5481(5), (15)(A). The term "financial product or service" excludes the business of insurance and electronic conduit services, however. *Id.* § 5481(15)(C).

68. *Id.* § 5481(15)(A)(xi)(I); *see also id.* § 5512(b)(1).

69. *Id.* § 5551(a) (2012). For further discussion, see *infra* notes 102–04 and accompanying text.

Together, these design attributes in the Dodd-Frank Act made significant inroads on opportunities for regulatory arbitrage by regulated entities. Now it is difficult for consumer financial services firms to escape federal market conduct oversight. Similarly, all financial providers operate under the same federal consumer financial protection laws nationwide. For its part, the CFPB lacks the financial incentives that tempted the OCC and the former OTS to let down their guard before 2008. Finally, the switch to regulation by risk, the introduction of UDAAP powers, and the renewed empowerment of state regulation in Dodd-Frank substantially increases regulators' ability to track and regulate any consumer harms from financial innovations as they materialize.

C. Commitment to Evidence-Based Decision-Making

Another core CFPB principle is its commitment to data-driven regulation. From the day the CFPB had opened its doors, the agency prided itself on evidence-based decision-making.[70] This devotion to empirically-based policymaking is hard-wired into the structure of the Bureau and flows from Dodd-Frank's command to "collect[], research[], monitor[], and publish[] information relevant to the functioning of" consumer financial markets in order to "identify risks to consumers and the proper functioning of such markets[.]"[71]

In furtherance of that objective, Dodd-Frank expressly instructed the Director to establish a research function, which Congress charged with "researching, analyzing, and reporting" on consumer financial markets, market developments and their effects, and consumer behavior when using financial products.[72] The Bureau houses its research operations in its Regulations, Markets, and Research Division (RMR) within two types of teams. The research team, which is staffed with respected Ph.D. economists, behavioral scientists, and data analysts, conducts impartial, quantitative and qualitative research on topics in consumer finance, including firm behavior, household decision-making, and welfare-enhancing regulation, often using large, state-of-the-art data sets.[73] Meanwhile, the markets teams in

70. *See* Kennedy, McCoy & Bernstein, *supra* note 6, at 1155–58 (discussing the Bureau's commitment to data-driven analysis).

71. 12 U.S.C. § 5511(c)(3); *see also id.* § 5512(c) (mandating CFPB monitoring for rulemaking purposes and otherwise).

72. *Id.* § 5493(b)(1).

73. *See* Kennedy, McCoy & Bernstein, *supra* note 6, at 1155.

RMR monitor consumer financial markets and conduct evidence-based policy analysis on markets including mortgages, credit cards, small dollar lending, student loans, deposits, debt collection, and credit reporting.[74]

These teams work closely together and with other CFPB regulators in rulemaking, supervision and enforcement. Before virtually all major proposed rulemakings, for example, the Bureau traditionally has conducted careful empirical analysis of consumer financial markets and their benefits and any harm to consumers.[75] Importantly, where the Bureau's rulemaking authority is discretionary, the agency has not pre-judged the need for a rule. Instead, RMR conducted economic studies of the market in question, following consultation with industry, academia, think tanks, consumer groups and others, to evaluate whether a rule should even be considered in light of the competing benefits and costs. If a discretionary rulemaking moved forward, the Bureau ran more empirical analyses to pinpoint how the market failed and to evaluate competing approaches for how to fix it.[76]

The Bureau does not limit its empirical analysis to rulemaking activities. Supervision conducts voluminous empirical analysis to detect and understand trends in the field. Enforcement analyzes data to evaluate whether action should be taken and, if so, what type.

As this suggests, data are the lifeblood of the Bureau's markets analytics, research, and supervision activities. The Bureau draws on a broad range of quantitative and qualitative data to

74. *See id.* at 1156. Separately, the Bureau's Academic Research Council, comprised of leading economists and other experts, advises RMR on research methodologies, data collection, and analytic design. CFPB, SEMI-ANNUAL REPORT OF THE CONSUMER FINANCIAL PROTECTION BUREAU 56 (2017) [hereinafter March 2017 Semi-Annual Report], https://www.consumerfinance.gov/data-research/research-reports/semi-annual-report-spring-2017; *see also Academic Research Council*, CFPB, https://www.consumerfinance.gov/about-us/advisory-committees/academic-research-council (last visited Apr. 12, 2019) (for examples of the Council's recommendations).

75. *See* Patricia A. McCoy, Fin. Regulation & Consumer Prot. Scholars & Former Regulators, Response Regarding Bureau Rulemaking Processes (Docket No. CFPB-2018-0009), at 11–13 (June 7, 2018) [hereinafter June 7 Comment], https://lawdigitalcommons.bc.edu/cfpb-comments/6. The ability-to-repay rule was a special case. Because the Bureau inherited that rulemaking from the Board of Governors of the Federal Reserve System, which had issued the proposed rule, this initial research occurred both at the Bureau and at the Federal Reserve.

76. These analyses build on an existing foundation of the ongoing monitoring of consumer financial markets for developments and any risks to consumers required by Section 1022(c) of the Dodd-Frank Act, 12 U.S.C. § 5512(c).

tackle analytical questions. The research economists and markets experts in RMR analyze large data sets,[77] some assembled by the federal government[78] and others purchased from private vendors. Their work is supplemented with qualitative analysis and field insights from CFPB examinations, consumer complaints, public comments, and other sources,[79] which are used, among other things, to spot emerging issues for further research. The breadth and depth of these data sources ensure that CFPB policymaking is evidence-based, and not ideologically driven.

D. RULEMAKING POWERS

As the discussion so far has hinted, the CFPB, like the federal prudential banking regulators, has broad rulemaking powers delegated to it by Congress.[80] On its face, the power to prescribe rules might seem unremarkable. In reality, Congress consciously designed the Bureau's rulemaking powers to strengthen federal consumer protection oversight.

As one important example, the CFPB's rulemaking powers have the same safeguards against partisan interference as rulemaking by other federal banking regulators. Importantly, all federal banking regulators, including the Bureau, are free from the normal requirement that agencies submit their rules to OMB's Office of Information and Regulatory Affairs (OIRA) for review and cost-benefit analysis.[81] This results from the express exemption in Executive Order 12,866 for agencies designated as "independent regulatory agencies" under the Paperwork Reduction Act.[82] The Paperwork Reduction Act's list of independent

77. *See* CFPB, SOURCES AND USES OF DATA AT THE BUREAU OF CONSUMER FINANCIAL PROTECTION 21–28 (2018), https://www.consumerfinance.gov/documents/6850/bcfp_sources-uses-of-data.pdf (describing data sources used by the CFPB).

78. Examples include the Home Mortgage Disclosure Act dataset and the National Mortgage Database. *See HMDA & PMIC Data Products*, FED. FIN. INSTITUTIONS EXAMINATION COUNCIL (Sept 6, 2018), https://www.ffiec.gov/hmda/hmdaproducts.htm; *National Mortgage Database Program*, FED. HOUSING FIN. AGENCY, https://www.fhfa.gov/PolicyProgramsResearch/Programs/Pages/National-Mortgage-Database.aspx (last visited Apr. 12, 2019).

79. *See, e.g.*, March 2017 Semi-Annual Report, *supra* note 74, at 64; *How We Use Complaint Data*, CFPB, https://www.consumerfinance.gov/complaint/data-use (last visited Apr. 12, 2019).

80. *See, e.g.*, 12 U.S.C. § 5512(b)(1) (general rulemaking authority); *id.* § 5518(b) (mandatory arbitration clauses); *id.* § 5531(b) (defining unfair, deceptive or abusive acts or practices); *id.* §§ 5532(a), 5533(a).

81. Exec. Order No. 12,866, 58 Fed. Reg. 51,735, 51,753 (Oct. 4, 1993).

82. *Id.*

regulatory agencies includes the CFPB and all other federal banking regulators.[83]

This exemption is significant because of OMB's situs in the White House.[84] Effectively, Executive Order 12,866 shields the CFPB from White House review of its rules. The purpose of this carve-out is to ensure the expert neutrality of CFPB rules and to insulate those rules from political manipulation by OMB and the White House. Instead, Congress, not the White House, retains ultimate control over CFPB rules.

Congress also strengthened rulemaking for consumer financial protection by applying the Administrative Procedures Act (APA),[85] including its notice and comment provisions and rights of judicial review, to all CFPB rulemakings. Insofar as the federal prudential banking regulators also conduct rulemakings under the APA, this might sound mundane. However, when Congress crafted the CFPB's rulemaking powers, it did so cognizant of the substantially weaker rulemaking powers accorded to the FTC.[86] In the 1975 Magnuson-Moss Warranty Act,[87] Congress had hobbled the FTC's ability to promulgate binding rules by imposing rigid rulemaking procedures on top of those already mandated by the APA.[88] Thus, in all FTC rulemakings, the Commission must give "interested persons an opportunity for oral presentations of data, views, and arguments."[89] FTC rules are also subject to a much harsher standard of judicial review than standard APA rulemakings.[90] These added procedures proved so

83. 44 U.S.C. § 3502(5) (2012).

84. 31 U.S.C. § 501 (2012) (establishing OMB as "an office in the Executive Office of the President"). Because OMB resides within the White House, its website is nested within the White House website. *See* OFFICE MGMT. & BUDGET, WHITE HOUSE, https://www.whitehouse.gov/omb (last visited Apr. 12, 2019).

85. Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.); *see, e.g.*, 12 U.S.C. § 5538(a)(1) (requiring CFPB rules on unfair or deceptive acts or practices in mortgage loans to be adopted "in accordance with section 553 of title 5"); *id.* § 5551(c)(5) ("No provision of this subsection shall be construed as exempting the Bureau from complying with" the rulemaking requirements of the APA).

86. The FTC was the primary federal market conduct regulator for nonbank financial providers before the CFPB's creation. Today, it shares enforcement responsibilities for nonbanks with the Bureau. *See* CFPB-FTC Memorandum of Understanding, *supra* note 27.

87. Pub. L. No. 93-637, 88 Stat. 2183 (1975) (codified as amended in scattered sections of 15 U.S.C.).

88. 15 U.S.C. § 2309 (2012).

89. *Id.* § 2309(a).

90. *See id.* § 57a(e) (providing that "any interested person" may "file a petition" with the D.C. Circuit "for judicial review" of a rule within sixty days of the

cumbersome that after the enactment of Magnuson-Moss, the FTC adopted no significant rules governing nonbank providers[91] and relied strictly on enforcement actions.

Congress took pains to avoid repeating that mistake in Dodd-Frank by conferring standard, more flexible APA rulemaking powers on the CFPB and applying those rules to banks and nonbanks alike. The Bureau's rulemaking authority is more workable than the FTC's, allowing the CFPB to police the marketplace without relying on enforcement actions alone. This inures to the benefit of both industry and consumers because rules, unlike enforcement, give regulated companies notice of the Bureau's expectations and ample opportunities for input through the public comment process. In addition, rules do not entail the moral approbation of enforcement actions.

Another strong feature of CFPB rulemaking involves the regulatory toolbox at the agency's disposal. In the Dodd-Frank Act, Congress significantly expanded and strengthened the types of regulatory techniques that the CFPB can draw on when engaging in rulemaking. As mentioned earlier, previously, with few exceptions,[92] federal consumer financial protection rules had been limited to mandatory disclosures. In the Dodd-Frank Act, Congress revisited the federal government's near-total reliance on consumer disclosures and found it wanting. Consequently, in addition to reforming the existing federal disclosure scheme, Congress gave the Bureau authority to mandate prohibitions or restrictions on some types of credit terms and practices[93] and to offer legal incentives for other terms and practices that it wished to encourage.[94]

In sum, Congress designed the rulemaking powers of the Bureau with an eye to their effectiveness. It removed CFPB rules from OIRA review, it rejected the rigid strictures that crippled FTC rulemakings, and it expanded the regulatory toolkit that the Bureau can draw on in rulemakings. These attributes had beneficial ripple effects not just for CFPB rulemaking, but also for supervision and enforcement by the Bureau, as I now discuss.

rule being promulgated); *id.* § 2309(a).

91. *See* Lubbers, *supra* note 19.

92. *See, e.g.*, Real Estate Settlement Procedures Act, 12 U.S.C. § 2607 (2012); Home Ownership and Equity Protection Act, Pub. L. 103-325, 108 Stat. 2190 (1994) (codified as amended in 15 U.S.C. §§ 1601–1602, 1639–41).

93. *See, e.g.*, 15 U.S.C. § 1639c(a).

94. *See, e.g.*, *id.* § 1639c(b).

E. The Crucial Symbiosis of Rulemaking, Supervision, and Enforcement

In many ways, Congress's decision to confer the triad of rulemaking, supervision, and enforcement powers on the Bureau seems unremarkable. The other federal banking regulators have exercised those powers for years. From another perspective, however, the juxtaposition of all three powers within the Bureau considerably strengthened its capabilities compared to the FTC. On top of its ineffective rulemaking powers, the FTC's ability to prevent market conduct abuses was (and is) hampered by its lack of power to examine nonbanks. Effectively, two of the three most powerful regulatory functions—APA rulemaking and supervision—are missing from the FTC's arsenal.

This difference in the FTC and CFPB regulatory models highlights the crucial symbiosis among rulemaking, supervision, and enforcement. The first advantage of this symbiosis arises from the interaction between rulemaking and enforcement. Rules that lack enforcement are not worth the paper on which they are written. Similarly, enforcement benefits from the *ex ante* promulgation of rules. Rules are instrumental in defining prohibited conduct and in providing legal grounds for enforcement as markets and consumer harms evolve. Further, the research and markets analysis that underpins CFPB rules[95] provides an important avenue for detecting potential enforcement problems and gauging their importance.

Supervision and enforcement enjoy a similarly beneficial interaction. The on-site examinations and off-site monitoring that CFPB supervision provides are invaluable in detecting violations.[96] It also allows the Bureau to spot new efforts at regulatory arbitrage and to update its rules to prevent any new abuses that result. In contrast, the FTC cannot open an enforcement investigation as a practical matter until it receives outside notice of prohibited market conduct, either through a consumer complaint, the press, a whistle-blower, a competitor, or some other external channel. The CFPB is in a better position than the FTC to actively root out problems because it has the independent authority to go into companies and examine their practices directly.

95. *See supra* notes 72–76 and accompanying text.

96. *Cf.* Jeremy C. Kress, Patricia A. McCoy & Daniel Schwarcz, *Regulating Entities and Activities: Complementary Approaches to Nonbank Systemic Risk,* 92 S. CAL. L. REV. (forthcoming 2019) ("Continuous monitoring—a hallmark of entity-based systemic risk oversight—allows FSOC members and Federal Reserve officials to observe the impact of different activities across time.").

The importance of the symbiosis between supervision and enforcement is particularly evident when it comes to fair lending violations and student loans. Consumers who have been injured by lending discrimination are in a poor position to successfully obtain relief because they often lack the evidence to detect discrimination, let alone plead a *prima facie* case. And, even if they did, the cost of private litigation too often is prohibitively expensive.[97] Similarly, the recent surge in total student loan indebtedness (today, that sector accounts for the second largest amount of aggregate consumer debt, behind home mortgages)[98] and the shockingly high default rate on those loans[99] make vigorous supervision and enforcement essential.

The CFPB located both of these functions inside its Division of Supervision, Enforcement, and Fair Lending (SEFL) to maximize their effectiveness. In Dodd-Frank, Congress directed the Bureau to create an Office of Fair Lending and Equal Opportunity (OFLEO),[100] and further created the position of the Private Education Loan Ombudsman.[101] By situating both offices right within SEFL, the CFPB leveraged the combined strengths of supervision and enforcement to detect and redress credit discrimination and misconduct by private student lenders and their servicers.

In sum, the decision to endow the CFPB with the three pillars of rulemaking, supervision and enforcement vastly enriched its ability to define violations, to detect violations when they occur, and to initiate enforcement when consumers have suffered harm. This design substantially improves the Bureau's ability to safeguard consumers compared to that of the FTC.

F. DUAL FEDERAL-STATE PROTECTIONS AFFORD MULTIPLE CENTERS OF OVERSIGHT

As a final structural element, when it drafted Dodd-Frank, Congress added prophylactic measures in case the CFPB succumbed to industry capture or had a Director who was hostile to consumer interests. These safeguards employ the diversity of

97. *See, e.g.*, Winnie Taylor, *Proving Racial Discrimination and Monitoring Fair Lending Compliance: The Missing Data Problem in Nonmortgage Credit*, 31 REV. BANKING & FIN. L. 199, 241–42 (2011).

98. *See, e.g.*, FED. RESERVE BANK OF N.Y., QUARTERLY REPORT ON HOUSEHOLD DEBT AND CREDIT 3 (Aug. 2018), https://www.newyorkfed.org/medialibrary/interactives/householdcredit/data/pdf/HHDC_2018Q2.pdf.

99. *See, e.g.*, *id.* at 1.

100. 12 U.S.C. § 5493(c) (2012).

101. *Id.* § 5535.

governmental organs and officials at the state and federal levels—each with different constituencies and incentives—as a springboard to protect consumers in the event the CFPB retreats.

The first of these safeguards consists of the concurrent applicability of state and federal consumer financial laws. Under Dodd-Frank, state laws operate in tandem with the federal consumer financial laws and accompanying CFPB rules. Specifically, Dodd-Frank provides that no federal consumer financial law or rule shall supplant state laws, unless a state law "is inconsistent with the provisions of [Title X of Dodd-Frank], and then only to the extent of the inconsistency."[102] Further, state laws that afford greater protection to consumers than Title X of Dodd-Frank are not "inconsistent" *per se.*[103] By virtue of this latter provision, federal law operates as a floor, not a ceiling. As a result, states can protect their citizens by adopting consumer financial laws that exceed federal protections, so long as those state laws are consistent with federal law.[104]

The second safeguard gives concurrent authority to the states to enforce federal consumer financial laws and CFPB regulations. In an unusual provision, Dodd-Frank authorized state attorneys general to sue to enforce the provisions of Title X of Dodd-Frank and CFPB rules issued under that title.[105] The only exception is where the defendant is a federally chartered bank or savings association, in which case state attorneys general may only sue to enforce those CFPB rules.[106] State regulators may also "bring a civil action or other appropriate proceeding" to en-

102. *Id.* § 5551(a)(1).

103. *Id.* § 5551(a)(2).

104. *See id.* §§ 5551(a), 5552(d). However, federal preemption continues to operate in other, important respects in consumer finance. *See* BARR ET AL., *supra* note 24, at 128–36, 618–24.

105. 12 U.S.C. § 5552(a)(1). Another provision of Dodd-Frank allows states, upon specified fact-findings by the state's attorney general, to file suit in *parens patrie* to enforce any CFPB rules that define UDAPs "regarding mortgage loans." *Id.* § 5538(a)(1), (b)(1).

106. *Id.* § 5552(a)(2). State attorneys general may also enforce specified provisions of the Truth in Lending Act. 15 U.S.C. § 1640(e) (2012); 12 U.S.C. § 5552(a)(3). Separately, the Dodd-Frank Act clarified the visitorial standards for national banks and federal savings associations to allow any state attorney general "to bring an action against a national bank [or federal savings association] in a court of appropriate jurisdiction to enforce an applicable law and to seek relief as authorized by such law." 12 U.S.C. § 25B(i).

force the same federal laws and rules against state-chartered entities.[107]

Together, these Dodd-Frank provisions preserving state laws and conferring added state enforcement powers add an important element of redundancy to federal consumer financial protection. States can experiment with stronger consumer laws if they conclude that Congress or the CFPB have set the bar too low. And if CFPB enforcement falters, the states can step in and enforce certain federal consumer financial protection laws, plus their own laws (subject, of course, to the limitations of OCC preemption). Any enforcement action by the states, moreover, has the potential to shame the CFPB into more vigilant enforcement action of its own.

To conclude, Congress designed the CFPB's structure and its interaction with strong consumer protection in mind. The structure tasks the Bureau with one mission, while the agency's independent status is meant to shield it from political interference. Similarly, numerous design features work to block or reduce arbitrage by the CFPB's regulated entities. Finally, Congress endowed the Bureau with a more effective set of regulatory powers—consisting of flexible rulemaking authority plus supervision and enforcement—than those accorded the FTC. So it is no wonder that when the backlash against the CFPB eventually materialized, it was aimed at the architecture of the Bureau.

II. THE CFPB'S STRUCTURE UNDER SIEGE

With the advent of the Trump Administration, the CFPB's opponents stepped up attacks on the agency in all three branches of the federal government. In 2017 and 2018, the Republican-controlled Congress filed multiple bills to curtail the Bureau and its rules. Regulated firms went to court to challenge the CFPB's constitutionality. Meanwhile, the Acting Director of the Bureau, Mick Mulvaney, instituted an array of actions directed at paralyzing the central nervous system of the Bureau.

These campaigns, in all three branches, were noteworthy for their strategy. One might expect opponents to focus on abolishing the Bureau outright or on overturning specific consumer financial laws or rules. For the most part, that is not what happened. Apart from two important exceptions—the payday lending rule and the mandatory arbitration rule—opponents did not make serious attempts to overturn CFPB rules *per se* in 2017

107. 12 U.S.C. § 5552(a)(1).

and 2018. Similarly, the Republican leadership did not seek to abolish the Bureau outright.

Instead, after the change in administrations, most attacks on the Bureau sought to undermine the *structure* of the Bureau. Some of these controversies over structure were veiled attacks on discrete substantive initiatives of the Bureau, most notably those involving fair lending and student debt.[108] More often, the structural campaigns were aimed at slowing down the Bureau's operations or disabling them.

This structural strategy offered its proponents two main advantages. For starters, the strategy was technical in nature and thus less likely to turn into a public lightning rod than opposing popular substantive policies or abolishing the CFPB, a political third rail that most opponents avoided.[109] Notably in that regard, no serious attempt at abolition was mounted through 2018 and none was likely to gain steam after the 2018 midterm elections, when the Democrats regained the House of Representatives.

As a second advantage, assaults on the CFPB's foundation, if successful, could halt new consumer financial protection initiatives surreptitiously. Numerous consumer protections are publicly popular[110] and repealing them could endanger a politician's career. Accordingly, the structural approach offered an efficient way of blocking consumer-facing protections across the board while flying under the radar. The earliest campaign to undermine the Bureau's underpinnings took place in Congress, as I now describe.

108. *See infra* Parts III.C.3, III.D.

109. *See* Alan Rappeport, *Bill to Erase Some Dodd-Frank Banking Rules Passes in House,* N.Y. TIMES (June 8, 2017), https://www.nytimes.com/2017/06/08/business/dealbook/house-financial-regulations-dodd-frank.html [hereinafter Rappeport, *Bill to Erase*] (reporting that the Senate was unlikely to vote to repeal the CFPB). For scattered instances to the contrary, see, e.g., S. 370, 115th Cong. (2017) (bill filed by Senator Ted Cruz to abolish the CFPB); H.R. 1031, 115th Cong. (2017) (parallel bill filed by Rep. John Ratcliffe in the House of Representatives).

110. *See, e.g.*, *AFR/CRL: Poll Shows Fifth Year of Strong, Bipartisan Support for Tough Wall Street Reforms*, AM. FOR FIN. REFORM (July 18, 2017), https://ourfinancialsecurity.org/2017/07/afr-statement-take-on-wall-street-agenda-july-19/ (reporting that "[s]eventy-eight percent of likely voters say that tough rules and enforcement are needed to prevent the kinds of practices that led to the financial crisis").

A. Congressional Initiatives Against the CFPB

Starting with the CFPB's establishment in 2011, its congressional opponents regularly filed bills to hamstring the Bureau,[111] including many that were aimed at altering the Bureau's structure.[112] None of these congressional attacks, save one, has succeeded to date.

During the Obama Administration, the opposition bills had scant prospects of passage due to the Presidential veto power. The prospects for success appeared to improve with the election of President Trump, when Republicans gained control of the White House and Congress. After President Trump took office, members of Congress filed renewed bills to change the CFPB's leadership structure from a Director to a bipartisan commission[113] and to convert its funding source to congressional appropriations,[114] among other attempts.

The most serious Trump-era bill through 2018 was a massive piece of legislation named the Financial CHOICE Act of 2017,[115] championed by the Republican Tea Party leadership of

111. *See, e.g.*, Ben Lane, *Bipartisan Push Begins in Congress to Change CFPB Leadership to Commission*, HOUSINGWIRE (Mar. 14, 2018), https://www.housingwire.com/articles/42756-bipartisan-push-begins-in-congress-to-change-cfpb-leadership-to-commission (noting efforts before 2017).

112. *See, e.g.*, S. 3196, 114th Cong. (2016) (proposal to change leadership to board); S. 3318, 114th Cong. (2016) (proposal to change funding to appropriations); S. 1383, 114th Cong. (2015) (same); H.R. 1266, 114th Cong. (2015) (proposal to switch to commission); H.R. 1261, 114th Cong. (2015) (proposal to change funding to appropriations); H.R. 1486, 114th Cong. (2015) (same); S. 2213, 113th Cong. (2014) (proposal to change to a commission structure); H.R. 3193, 113th Cong. (2014) (same and change to funding through appropriations); H.R. 2446, 113th Cong. (2013) (proposal to adopt a commission structure in lieu of a Director); H.R. 2402, 113th Cong. (2013) (same); H.R. 450, 113th Cong. (2013) (proposal to change funding to appropriations); H.R. 3192, 113th Cong. (2013) (same); H.R. 3519, 113th Cong. (2013) (same and related proposals); S. 205, 113th Cong. (2013) (proposal to change to a commission structure and funding through appropriations); H.R. 1121, 112th Cong. (2011) (proposal to replace the CFPB Director with a bipartisan Commission); H.R. 1315, 112th Cong. (2011) (same); H.R. 1640, 112th Cong. (2011) (proposal to change the CFPB's funding mechanism to appropriations); H.R. 1355, 112th Cong. (2011) (proposal to eliminate the independent agency status and independent funding of the Bureau); S. 737, 112th Cong. (2011) (proposal to eliminate the independent agency status and independent funding of the Bureau).

113. *See, e.g.*, H.R. 5266, 115th Cong. (2018); S. 105, 115th Cong. (2017).

114. *See, e.g.*, S. 387, 115th Cong. (2017). Mick Mulvaney later called on Congress to subject the Bureau to the appropriations process. CFPB, SEMI-ANNUAL REPORT OF THE BUREAU OF CONSUMER FINANCIAL PROTECTION 2 (2018) [hereinafter 2018 Semi-Annual Report], https://files.consumerfinance.gov/f/documents/cfpb_semi-annual-report_spring-2018.pdf.

115. H.R. 10, 115th Cong. (2017).

the House Financial Services Committee. The bill proposed drastic changes to the CFPB's structure, including stripping the Bureau of its examination powers,[116] subjecting the agency to the congressional appropriations process,[117] changing the Director's tenure to service at will,[118] reducing employees' pay to the General Schedule pay scale,[119] scaling back the Bureau's enforcement ability,[120] and knocking out its data collection abilities.[121] In addition, the Financial CHOICE Act proposed eliminating the Bureau's power to regulate UDAAPs,[122] payday lending,[123] vehicle-title loans,[124] discriminatory indirect auto lending practices,[125] and mandatory arbitration clauses.[126]

The Financial CHOICE Act sailed through the House of Representatives.[127] But the bill died a quiet death after Senate Majority leader Mitch McConnell expressed doubt, given his slender Republican majority and fierce Democratic opposition, that the bill could win the sixty votes needed in the Senate to overcome a filibuster.[128] Instead, Congress, at the Senate's behest, passed a modest, bipartisan financial reform bill that left the CFPB intact.[129]

Congressional opponents of the CFPB did have one notable success in late 2017, which involved nullifying the CFPB's mandatory arbitration rule.[130] The supporters of the legislation were

116. *Id.* §§ 711, 724, 727.
117. *Id.* § 712.
118. *Id.* § 711.
119. *Id.* § 723.
120. *Id.* §§ 714–715.
121. *Id.* § 731.
122. *Id.* § 735.
123. *Id.* § 733.
124. *Id.*
125. *Id.* § 734.
126. *Id.* § 737.
127. *See, e.g.*, Rappeport, *Bill to Erase*, *supra* note 109 (noting that the bill passed with a vote of 233 to 186).
128. *See* Ben Lane, *McConnell Throws Cold Water on Republican Dodd-Frank Repeal Efforts*, HOUSINGWIRE (May 17, 2017), https://www.housingwire.com/articles/40144-mcconnell-throws-cold-water-on-republican-dodd-frank-repeal-efforts.
129. *See* Economic Growth, Regulatory Relief, and Consumer Protection Act, Pub. L. No. 115-174 (2018).
130. Joint Resolution, Pub. L. No. 115-74, 131 Stat. 1243 (2017). This joint resolution of Congress disapproved the mandatory arbitration rule under the Congressional Review Act, 5 U.S.C. §§ 801 *et seq.* *See* Arbitration Agreements, 82 Fed. Reg. 55,500 (Nov. 22, 2017); Arbitration Agreements, 82 Fed. Reg. 33,210 (July 19, 2017).

able to win Senate passage because approval required only a simple majority.[131] Their attempts to revoke the Bureau's payday lending rule[132] under that same statute failed, however, after the congressional deadline for action expired.[133]

As this history demonstrates, efforts to dismantle the CFPB through congressional legislation have been unsuccessful to date. This outcome was by no means assured, given the Republicans' control of both houses plus the White House in 2017 and 2018. Part of the explanation lies in the filibuster threat, which helped block Senate passage of the Financial CHOICE Act.[134] And part of the explanation involves the optics of passing legislation to harm consumers and the feared effect on re-election prospects, particularly in the Senate. The one bill that the Bureau's opponents were able to pass—which overturned the mandatory arbitration rule—did not pose the same bad optics, because it involved conflict resolution procedures that the public did not generally understand. In contrast, the payday lending rule and the failed congressional effort to rescind it concerned a type of disreputable lending that constituents wanted regulated.[135] At the end of the day, the congressional majority lacked the stomach to countermand that rule or dismantle the Bureau.

Congress also used the Congressional Review Act to nullify the CFPB's 2013 guidance on indirect auto lending. *See* Pub. L. No. 115-172, 132 Stat. 1290 (2018) (overturning CFPB, *Bulletin re: Indirect Auto Lending and Compliance with the Equal Credit Opportunity Act* (Mar. 21, 2013), https://files.consumerfinance.gov/f/201303_cfpb_march_-Auto-Finance-Bulletin.pdf); CHAMBER OF COMMERCE, *supra* note 61, at 4 (protesting that guidance); Rachel Witkowski, *House Repeals CFPB's Controversial Indirect Auto Lending Guidance,* AM. BANKER (May 8, 2018), https://www.americanbanker.com/news/house-repeals-cfpbs-indirect-auto-lending-guidance.

131. *See* Alan S. Kaplinsky, *Deadline Expires for CRA Resolution to Override CFPB Payday Lending Rule*, CONSUMER FIN. MONITOR (May 17, 2018), https://www.consumerfinancemonitor.com/2018/05/17/deadline-expires-for-cra-resolution-to-override-cfpb-payday-lending-rule.

132. Payday, Vehicle Title, and Certain High-Cost Installment Loans, 82 Fed. Reg. 54,472 (Nov. 17, 2017).

133. *See* Kaplinsky, *supra* note 131. For discussion of subsequent efforts to stall implementation of the payday lending rule, see *infra* Part III.B.1.

134. *See* Brena Swanson, *Is the Financial CHOICE Act DOA in the Senate?*, HOUSINGWIRE (June 9, 2017), https://www.housingwire.com/articles/40390-is-the-financial-choice-act-doa-in-the-senate (predicting that the bill's chances of passing the Senate would be hindered by the requirement of a filibuster-proof majority vote).

135. *See, e.g.*, AM. FOR FIN. REFORM, *supra* note 110 (finding that the public "supports key CFPB initiatives: a ban on forced arbitration, the practice of denying consumers their day in court; *regulation of high-interest payday lending*; and rules on debt collection" (emphasis added)).

Instead, they looked to the Bureau's new Acting Director to do so from within.

B. JUDICIAL CHALLENGES TO THE STRUCTURE OF THE CFPB

Judicial challenges to the design of the CFPB took off slowly, but gained steam near the end of the Obama Administration and mounted after the election of President Trump. The most serious line of cases to date raised constitutional objections to the CFPB's single Director structure. This argument found initial success in *PHH Corp. v. Consumer Financial Protection Bureau*, where then-Judge Brett Kavanaugh, writing for a three-judge panel of the U.S. Court of Appeals for the D.C. Circuit, held that the Bureau's single Director structure failed to pass constitutional muster under Article II, Section 1 of the U.S. Constitution due to the president's inability to fire the Director at will.[136] As the remedy, the court severed the for-cause provision protecting the Director from termination for any reason.[137] Subsequently, the D.C. Circuit granted rehearing *en banc* and reversed, holding that protection of agency heads from at-will firing by the President is a longstanding and constitutional mainstay of many federal independent agencies.[138] After the *en banc* court issued its *PHH* decision, it summarily affirmed dismissal of a similar challenge, whereupon the plaintiff in the latter case filed a petition for *certiorari* in the U.S. Supreme Court.[139]

136. PHH Corp. v. CFPB, 839 F.3d 1, 36 (D.C. Cir. 2016), *aff'd in part and rev'd in part,* 881 F.3d 75 (D.C. Cir. 2018) (en banc). The Dodd-Frank Act specifically states that the "President may remove the Director for inefficiency, neglect of duty, or malfeasance in office." 12 U.S.C. § 5491(c)(3) (2012).

137. *PHH Corp.*, 839 F.3d 1. This was not Judge Kavanaugh's first foray into the legality of the CFPB's leadership. In an earlier decision, *State National Bank of Big Spring v. Lew*, he had ruled that a national bank had standing to challenge President Obama's recess appointment of Richard Cordray as the CFPB's first Director. 795 F.3d 48, 53 (D.C. Cir. 2015). Judge Kavanaugh remanded the case to the district court, which ultimately entered judgment against the plaintiff. State Nat'l Bank of Big Spring v. Lew, No. 12-1032 (ESH) (D.D.C. Feb. 16, 2018). After the D.C. Circuit summarily affirmed dismissal in *State National Bank of Big Spring v. Mnuchin*, No. 18-5062 (D.C. Cir. June 8, 2018), the bank petitioned the U.S. Supreme Court for certiorari on grounds that Congress's decision to vest the CFPB's leadership in a single Director was unconstitutional. Petition for a Writ of Certiorari, State Nat'l Bank of Big Spring v. Mnuchin, No. 18-307 (U.S. Sept. 6, 2018). The Supreme Court denied the petition. Denial of Petition for a Writ of Certiorari, State Nat'l Bank of Big Spring v. Mnuchin, No. 18-307 (U.S. Jan. 14, 2019).

138. *PHH Corp.*, 881 F.3d at 102.

139. *See supra* note 137.

Similar constitutional challenges are making their way through other federal circuits. In June 2018, Judge Loretta A. Preska of the U.S. District Court for the Southern District of New York held that the Bureau's single-director leadership and its independent funding through the Federal Reserve were separation of powers violations of the U.S. Constitution.[140] The CFPB under Mr. Mulvaney appealed the decision to the Second Circuit Court of Appeals.[141] In the meantime, the Ninth Circuit has heard oral argument on the constitutional issue[142] and the Fifth Circuit has a similar constitutional claim on its docket.[143]

This litigation strategy stands out for two reasons. First, if and when it succeeds, the ramifications for the Bureau could be drastic. If the Second, Fifth, or Ninth Circuits parts way with the D.C. Circuit and holds the CFPB's Directorship unconstitutional, that would produce a circuit split that the Supreme Court in all likelihood would resolve. Justice Kavanaugh's confirmation is likely to produce a five-justice majority holding a single Director terminable for cause unconstitutional.[144] If the Court so ruled, it could preserve the single-Director structure by severing the good cause termination provision (as then-Judge Kavanaugh did below), but there is no assurance that the Court would do so.

Second, this litigation strategy is marked by internal strife, due to opposition from important conservative bedfellows. The *PHH* case and its progeny produced a rift between the corporate plaintiffs in the constitutional cases and the Republican leaders in Congress plus the CFPB.[145] Once the Trump Administration

140. CFPB v. RD Legal Funding, LLC, 332 F. Supp. 3d 729, 785 (S.D.N.Y. 2018).

141. Notice of Appeal, CFPB v. RD Legal Funding, LLC, Civil Action No. 1:17-cv-00890-LAP (S.D.N.Y. Sept. 14, 2018) (docketed on appeal as CFPB v. RD Legal Funding, LLC, No. 18-2743 (2d Cir. Sept. 17, 2018)); *see also* Evan Weinberger, *CFPB to Take Constitutionality Ruling to Second Circuit*, BLOOMBERG L. (Sept. 17, 2018), http://www.bna.com/cfpb-constitutionality-ruling-n730144826471.

142. CFPB v. Seila Law LLC, No. 17-56324 (9th Cir. Jan. 8, 2019).

143. *See* Brief of Plaintiff-Appellee, CFPB v. All Am. Check Cashing, No. 18-60302 (5th Cir. Sept. 10, 2018).

144. Other authors have speculated on Justice Kavanaugh's future rulings regarding presidential power based on his ruling as to the CFPB. *See, e.g.*, Richard E. Levy, *Presidential Power in the Obama and Trump Administrations*, 87 J. KAN. B. ASS'N 46, 55 (2018).

145. *See* Mara Gawarecki, *Republicans File Brief Supporting Mulvaney*, CFPB J. (Mar. 6, 2018), http://cfpbjournal.com/republicans-file-brief-supporting-mulvaney (quoting a Republican Senator who led the group of legislators in submitting the amicus brief praising Mulvaney as keeping the CFPB "accountable").

gained the power to appoint the CFPB Director, the White House and Congress became loath to attack the constitutionality of the single-Director design. A spectacle ensued as the Trump-era CFPB defended the agency's constitutionality in the Second Circuit case and the congressional leadership supported the single-Director structure.

The Republican majority in Congress found itself in an awkward position with respect to the judicial attack on the CFPB. Even though the majority did not make significant legislative inroads on the Bureau's power, the Republican congressional leaders and the White House were not on board with, and even went so far as to oppose, the pending constitutional court challenges.[146] With Congress mired in gridlock and the judicial strategy gone haywire, Republican leaders pinned their hopes on a third strategy for defanging the CFPB. That strategy involved deploying the White House and the Trump-appointed leadership of the CFPB to erode the Bureau's foundations from within: as it were, through an inside job.

C. WHITE HOUSE ACTIONS TO UNDERMINE CFPB INDEPENDENCE

The single most important step taken by the Trump Administration to render the CFPB impotent was to put the Bureau under direct White House control. President Trump accomplished this step when he appointed John "Mick" Mulvaney, the OMB Director, as the CFPB's Acting Director in November 2017 after Richard Cordray stepped down. Previously, as a South Carolina congressman, Mr. Mulvaney had reportedly called the CFPB "a 'sad, sick' joke,"[147] identifying himself in the process as a determined foe of the Bureau.

Mr. Mulvaney's appointment provoked controversy for a number of reasons, including a statutory conflict about who could properly serve as Acting Director. In a court challenge,[148]

146. *See id.*

147. *OMB Chief Mulvaney Could Be Temporary CFPB Boss*, AM. BANKER (Nov. 16, 2017), https://www.americanbanker.com/articles/omb-chief-mulvaney-could-be-temporary-cfpb-boss; Alan Rappeport, *Mick Mulvaney Calls for 'Humility' from Consumer Financial Protection Bureau,* N.Y. TIMES (Jan. 23, 2018), https://www.nytimes.com/2018/01/23/us/politics/mick-mulvaney-consumer-financial-protection-bureau.html.

148. English v. Trump, 279 F. Supp. 3d 307, 311 (D.D.C. 2018). The District Court denied Ms. English's motion for a preliminary injunction and she appealed the decision to the U.S. Court of Appeals for the District of Columbia Circuit. Plaintiff's Notice of Appeal, English v. Trump, No. 18-5007 (D.C. Cir.

the Bureau's Deputy Director, Leandra English, argued that she was the rightful Acting Director, based on a Dodd-Frank Act directive providing that the Deputy Director of the CFPB "shall . . . serve as acting Director in the absence or unavailability of the Director."[149] President Trump instead invoked the Federal Vacancies Reform Act of 1998 as authority for Mr. Mulvaney's appointment.[150]

Despite the apparent statutory conflict, neither the President nor Mr. Mulvaney asked a court to resolve it. Instead, Mr. Mulvaney seized control of the Bureau's premises by occupying the executive suite and installing himself as Acting Director.[151] It was left to Ms. English to litigate the issue in court.

Mr. Mulvaney's appointment and later conduct as Acting Director were similarly controversial due to his close financial ties to the financial services industry.[152] While Acting Director, he gave remarks to the American Bankers Association (ABA) indicating that he had insisted on "pay to play" while he was a congressman. As he reportedly explained to the ABA, while he served in Congress, the only lobbyists he agreed to meet were ones who contributed money: "If you were a lobbyist who never gave us money, I didn't talk to you. If you were a lobbyist who gave us money, I might talk to you."[153]

But Mr. Mulvaney's appointment put more at stake than industry capture or an interpretive dispute over dry successorship

Jan. 12, 2018). Following oral argument, Ms. English resigned as Deputy Director in the middle of 2018 and voluntarily dismissed her appeal. Order, English v. Trump, No. 18-5007 (D.C. Cir. July 13, 2018), 2018 WL 3526296.

149. 12 U.S.C. § 5491(b)(5) (2012).

150. 5 U.S.C. § 3345(a)(2) (2012).

151. *See* Renae Merle, *Dueling Officials Spend Chaotic Day Vying to Lead Federal Consumer Watchdog*, WASH. POST (Nov. 27, 2017), https://www.washingtonpost.com/business/economy/two-dueling-officials-spend-chaotic-day-vying-to-lead-federal-consumer-watchdog/2017/11/27/381eada2-d39c-11e7-b62d-d9345ced896d_story.html [hereinafter Merle, *Dueling Officials*] (describing the conflict following Mulvaney's appointment).

152. *See generally* June 7 Comment, *supra* note 75, at 27–28.

153. *See* Mick Mulvaney, Acting Dir., CFPB, Remarks at the American Bankers Association Annual Conference 11 (Apr. 24, 2018) [hereinafter April 24, 2018 Remarks] (transcript available at https://www.documentcloud.org/documents/4446622-Transcript-Mulvaney-ABA-Conference-4-24-2018.html). Mr. Mulvaney was quoted as adding: "If you came from back home and sat in my lobby, I talk to you without exception, regardless of the financial contributions." *Id.*

statutes. For when he assumed his duties as CFPB Acting Director, he continued to serve as Director of OMB.[154] In this latter position, he received his paycheck from OMB and was subject to firing at will by the President.[155] His concurrent appointment thus put the CFPB under direct White House control.

The White House was able to engineer this outcome because OMB "is an office in the Executive Office of the President."[156] As OMB Director, Mr. Mulvaney is a White House official. By installing the sitting OMB director as acting Bureau head, the President effectively took command of the CFPB. Indeed, when Mr. Mulvaney took office at the CFPB, he reportedly confirmed as much, boasting to the press: "the Trump Administration is now in charge" of the CFPB.[157] Later, the press reported that while Acting Director, Mr. Mulvaney met with political donors at a closed-door Republican National Committee fundraising event in the run-up to the 2018 midyear congressional elections.[158]

This political interference flouted the spirit if not the letter of the Dodd-Frank Act. In that legislation, Congress issued numerous prohibitions against OMB incursions into CFPB affairs. First and foremost, Congress expressly stated in Dodd-Frank that the CFPB was to be "an independent bureau."[159] Despite this injunction, President Trump put the OMB Director in

154. *See* Merle, *Dueling Officials*, *supra* note 151 (reporting that Mr. Mulvaney said "he plan[ned] to work three days a week at the agency and three days at OMB").

155. STAFF OF SENATE COMM. ON BANKING, HOUS., & URBAN AFFAIRS, 115TH CONG. (SHERROD BROWN, RANKING MEMBER), PUSHING THE ENVELOPE: THE CONSUMER FINANCIAL PROTECTION BUREAU UNDER THE TRUMP ADMINISTRATION 10 (2018) [hereinafter Minority Staff Report], https://www.banking.senate.gov/imo/media/doc/Pushing%20the%20Envelope%20-%20Mick%20Mulvaney%20at%20CFPB%20FINAL.pdf.

156. 31 U.S.C. § 501 (2012).

157. Mick Mulvaney, *Acting CFPB Director Mulvaney News Conference*, C-SPAN (Nov. 27, 2017), http://cs.pn/2AxVT65.

158. *See* Alexander Burns & Kenneth P. Vogel, *Top Trump Adviser Says Ted Cruz Could Lose Texas Senate Race*, N.Y. TIMES (Sept. 8, 2018), https://www.nytimes.com/2018/09/08/us/politics/republicans-midterms-ted-cruz.html. Senator Elizabeth Warren expressed concerns that the RNC meeting not only compromised CFPB independence, but amounted to a violation of the Hatch Act. *Warren Questions Mulvaney About "Closed Door Event" with Campaign Donors, GOP Officials*, ELIZABETH WARREN (Sept. 19, 2018), https://www.warren.senate.gov/imo/media/doc/2018.09.19%20Letter%20to%20Mulvaney%20on%20Meeting%20with%20GOP%20Donors.pdf.

159. 12 U.S.C. § 5491(a) (2012).

charge of the Bureau, under circumstances providing no opportunity for Senate confirmation. Further, Dodd-Frank prohibits OMB from asserting "jurisdiction or oversight over the affairs or operations of the Bureau."[160] Since OMB can only act through human agency, Mr. Mulvaney, as OMB Director, became OMB's single most powerful instrument of CFPB control.

The Dodd-Frank Act contains additional provisions to cordon off the CFPB from OMB, which Mr. Mulvaney's appointment subverted. As concurrent head of the CFPB and OMB, Mr. Mulvaney reviewed and approved any proposed "legislative recommendations, or testimony or comments on legislation" by the CFPB to Congress, contrary to Congress's intent in the Dodd-Frank Act.[161] In the same dual capacity, he gave final approval to the CFPB's financial operating plans, forecasts, and quarterly reports, again raising questions about faithfulness to the Dodd-Frank Act.[162] Indeed, far from walling off the White House's fiscal objectives, Mr. Mulvaney openly tipped his OMB hat when he wrote a letter to the Federal Reserve requesting $0 in funding for the Bureau for second quarter 2018, explaining that this would "reduce the federal deficit[.]"[163] Further, the President's budget for fiscal year 2019, which was prepared under Mr. Mulvaney's aegis, proposed major funding cuts for the Bureau through 2028.[164] Meanwhile, Mr. Mulvaney ordered the Bureau's staff to prepare a report identifying all White House executive orders that the agency could comply with voluntarily.[165]

As simultaneous CFPB chief and OMB Director, Mr. Mulvaney also reviewed and made final decisions on CFPB rulemaking initiatives. This undermined E.O. 12,866, which exempts all

160. *Id.* § 5497(a)(4)(E).

161. *See id.* § 5492(c)(4).

162. *See id.* § 5497(a)(4)(E) (stating that "[t]his subsection may not be construed as implying any obligation on the part of the Director to consult with or obtain the consent or approval of the Director of [OMB] with respect to any report, plan, forecast, or other information referred to in [§ 5497(a)(4)(A)] or any jurisdiction or oversight over the affairs or operations of the Bureau").

163. Letter from Mick Mulvaney, Acting Dir., CFPB, to Janet L. Yellen, Chair, Bd. of Governors of the Fed. Reserve Sys. (Jan. 17, 2018), http://files.consumerfinance.gov/f/documents/cfpb_fy2018_q2_funding-request-letter-to-frb.pdf.

164. *See* OFFICE OF MGMT. & BUDGET, AN AMERICAN BUDGET: MAJOR SAVINGS AND REFORMS 189 (Fiscal Year 2019), https://www.whitehouse.gov/wp-content/uploads/2018/02/msar-fy2019.pdf (proposing budget cuts that would "impose financial discipline, [and] reduce wasteful spending" at the CFPB).

165. *See* Jesse Eisinger, *The CFPB's Declaration of Dependence,* PROPUBLICA (Feb. 15, 2018), https://www.propublica.org/article/consumer-financial-protection-bureau-declaration-of-dependence.

federal banking regulators, including the CFPB, from OIRA review.[166] The concern about E.O. 12,866 arose because OIRA is an office within OMB[167] and reported to Mr. Mulvaney. By virtue of this chain of command, CFPB rulemaking effectively became subject to OIRA sign-off so long as Mr. Mulvaney held his CFPB and OMB posts. In fact, Mr. Mulvaney made no secret of the fact that he measured CFPB rulemaking proposals according to OMB and OIRA standards, reportedly telling the *American Banker*: "You could imagine that the Office of Management and Budget under the Trump administration might look very cautiously, even cynically, against rules that were produced by" Mr. Cordray.[168] This implicit OIRA oversight provided another vehicle for White House control of the Bureau.[169]

If E.O. 12,866 and Dodd-Frank's provisions walling off the CFPB from OMB mean anything, they mean that no OMB Director or employee may simultaneously serve as Acting CFPB Director. By appointing Mr. Mulvaney to lead the CFPB while he continued to head OMB, President Trump put the CFPB under the thumb of the White House. Indeed, in a tweet about the unfolding Wells Fargo consumer protection scandal,[170] President Trump showed that he regarded "Mr. Mulvaney as little more than a typical White House staffer"[171] and thought he could direct CFPB enforcement: "Fines and penalties against Wells Fargo Bank for their bad acts against their customers and others will not be dropped, as has incorrectly been reported, but will be pursued and, if anything, substantially increased. I will cut Regs but make penalties severe when caught cheating!"[172]

166. *See supra* notes 81–84 and accompanying text (discussing the importance of shielding the CFPB from OIRA review in ensuring its neutrality).

167. 31 U.S.C. § 505 (2012).

168. Ian McKendry, *Mulvaney's First Days at CFPB: Payday, Personnel and a Prank,* AM. BANKER (Dec. 4, 2017), https://www.americanbanker.com/news/cfpbs-mulvaney-backs-congressional-repeal-of-payday-lending-rule.

169. *See generally Office of Management and Budget,* WHITE HOUSE, https://www.whitehouse.gov/omb (last visited Apr. 12, 2019) (stating that OMB, which includes OIRA, "serves the President of the United States in overseeing the implementation of his vision across the Executive Branch").

170. Donald J. Trump (@realDonaldTrump), TWITTER (Dec. 8, 2017, 7:18 AM), https://twitter.com/realDonaldTrump/status/939152197090148352.

171. Minority Staff Report, *supra* note 155, at 10.

172. Donald J. Trump (@realDonaldTrump), TWITTER (Dec. 8, 2017, 7:18 AM), https://twitter.com/realDonaldTrump/status/939152197090148352.

Of course, legally, the President lacks statutory authority to dictate whether the CFPB, as an independent agency, takes enforcement actions, imposes fines, or adopts or rescinds rules. Nevertheless, he trumpeted his ability to do just that.

In July 2018, anticipating an eventual end to Mr. Mulvaney's tenure as Acting CFPB Director, President Trump nominated a trusted Mulvaney deputy at OMB, Kathleen Kraninger, as permanent CFPB Director.[173] Ms. Kraninger had no relevant experience in banking regulation or consumer financial protection; her main qualification was as a White House official.[174] In December 2018, the Senate confirmed Ms. Kraninger as Director,[175] sealing the White House's influence over the CFPB long term and raising fears about more CFPB budget cuts to come. In these ways, the White House acted to undermine the agency's statutory independence and to pave the way for an internal assault on the CFPB's structure.

III. EXECUTING THE INSIDE JOB

Once the White House installed Mr. Mulvaney as CFPB chief, he acted immediately to execute the inside job. This included an impressive number of steps to undermine the Bureau's structure and its ability to protect consumers.

A. ACCESS TO DATA

One of Mr. Mulvaney's first targets of the CFPB's structure was the Bureau's access to data and with it, the agency's ability to detect consumer harms and undertake informed decision-making. This offensive was a direct assault on the Bureau's commitment to fact-based policy.

Without the requisite data, CFPB rulemaking, supervision and enforcement could not operate. Presumably aware of that, Mr. Mulvaney placed a freeze on CFPB data gathering as one of his first actions as Acting Director. Specifically, on December 4,

173. *See* Glenn Thrush, *White House Confirms That Mulvaney Deputy Is Pick to Lead Consumer Bureau*, N.Y. TIMES (June 16, 2018), https://www.nytimes.com/2018/06/16/us/politics/kraninger-consumer-financial-bureau.html.

174. *See id.*

175. *See Senate Approves Trump's Nominee for Watchdog Agency*, CNBC (Dec. 6, 2018), https://www.cnbc.com/2018/12/06/senate-approves-trumps-nominee-for-watchdog-agency.html. Mr. Mulvaney then became Acting White House Chief of Staff.

2017, Mr. Mulvaney announced that he was freezing all collection by the Bureau of personal information, including loan level data, citing privacy and information security.[176] In imposing the freeze, Mr. Mulvaney reportedly halted the collection of data that could trace back to *either* consumers or businesses.[177] Approximately six months later, he reversed course and announced that he intended to resume the collection of consumers' personally identifiable information because an outside consultant had determined that the agency's information security systems "appeared to be well-secured."[178]

Although the data freeze was temporary, it had a structural effect by effectively making it impossible for at least three of the CFPB's empirically oriented units—supervision, enforcement, and research—to carry out their responsibilities. The data freeze shuttered the Extranet, which CFPB examiners depended on to upload company data in advance of examinations. This crippled supervision's ability to conduct examinations and analyze trends. Meanwhile, the Bureau's enforcement attorneys were barred from reviewing electronic evidence produced in discovery, which hampered enforcement.[179] The action also stopped the research team from the long-planned onboarding of data that were necessary to carry out the five-year lookback reviews of certain rulemakings mandated by Congress in the Dodd-Frank Act.[180]

Tellingly, Mr. Mulvaney's data freeze did not conform with accepted cybersecurity norms. No other federal agency had halted data onboarding in response to a data breach,[181] and particularly not where its systems "appeared to be well-secured," as

176. *See generally* June 7 Comment, *supra* note 75, at 19–20.

177. *See, e.g.*, Yuka Hayashi, *New CFPB Chief Curbs Data Collection, Citing Cybersecurity Worries,* WALL ST. J. (Dec. 4, 2017), https://www.wsj.com/articles/new-cfpb-chief-curbs-data-collection-citing-cybersecurity-worries-1512429736.

178. Evan Weinberger, *CFPB to Resume Data Collection After Data Security Review,* BLOOMBERG L. (May 31, 2018), https://www.bna.com/cfpb-resume-data-n57982093111.

179. *See* Eisinger, *supra* note 165; James Kim & Bowen "Bo" Ranney, *CFPB Data Collection Freeze Impacting CFPB Examinations*, CONSUMER FIN. MONITOR (Ballard Spahr, PA) (Dec. 15, 2017), https://www.consumerfinancemonitor.com/2017/12/15/cfpb-data-collection-freeze-impacting-cfpb-examinations; Letter from Sen. Elizabeth Warren to Leandra English, Acting Dir., & Mick Mulvaney, Dir., CFPB, 2–4 (Jan. 4, 2018) [hereinafter Warren Letter], https://www.housingwire.com/ext/resources/files/Editorial/2018_01_04_Letter_to_English_and_Mulvaney_on_CFPB_Data_Collection.pdf.

180. 12 U.S.C. § 5512(d) (2012).

181. Nor had the Bureau's Inspector General (IG) so advised. Starting in May 2017, the IG issued several reports on data security at the Bureau. *See* June 7 Comment, *supra* note 75, at 20 n.90. In the most important of these

was the case with the Bureau.[182] Instead, if a data breach occurs, federal agencies typically plug the leak as quickly as possible while resuming data collection.[183] The failure to observe this protocol raised questions whether the real purpose of the data freeze was to impede the core functions of the Bureau.

Mr. Mulvaney's inroads on the Bureau's evidence-based regulation did not stop there. He also announced plans[184] to roll back amendments[185] to the rule implementing the Home Mortgage Disclosure Act (HMDA) under his predecessor, Mr. Cordray. The HMDA dataset is a vital, publicly available source for analyzing developments in the home mortgage origination market and the effects of mortgage trends by race and ethnicity. Under Mr. Cordray, the amendments to the HMDA rule fixed troubling gaps in HMDA data by adding new data points[186] that were needed to accurately gauge mortgage market risks. Some of those data points were mandated by Dodd-Frank[187] and the Bureau added more data points using its discretionary authority

reports, the IG found that the Bureau's information security program was operating at a level-3 maturity (consistently implemented), on a scale of 1 to 5, and that several of the program's activities were operating at a higher level-4 maturity. Despite room to improve, the CFPB's cybersecurity readiness exceeded that of the Federal Reserve Board of Governors, the Federal Deposit Insurance Corporation, the Securities & Exchange Commission, and the Department of the Treasury, which never stopped data collection. Warren Letter, *supra* note 179, at 4–5. While the IG proposed improvements, consistent with cybersecurity norms, it never recommended a halt to the Bureau's data collection, whether for personally identifiable information (PII) or otherwise.

182. *See* Weinberger, *supra* note 178, at *2.

183. Kate Berry, *Mulvaney Response to CFPB Data Security Gaps Baffles Cyber Experts,* AM. BANKER (Apr. 23, 2018), https://www.americanbanker.com/news/mulvaney-response-to-cfpb-data-security-gaps-baffles-cyber-experts; Warren Letter, *supra* note 179, at 2–4.

184. Kate Berry, *CFPB's Mulvaney Plots HMDA Rollback, but It May Not Matter*, AM. BANKER (May 29, 2018), https://www.americanbanker.com/news/cfpbs-mulvaney-plots-hmda-rollback-but-it-may-not-matter [hereinafter Berry, *CFPB's Mulvaney*].

185. Home Mortgage Disclosure (Regulation C), 80 Fed. Reg. 66,128 (Oct. 28, 2015) [hereinafter HMDA Amendments], *amended by* Home Mortgage Disclosure (Regulation C), 82 Fed. Reg. 43,088 (Sept. 13, 2017) (to be codified at 12 C.F.R. pt. 1003).

186. These data points include age, pricing information, loan term, interest rate, teaser rate period, non-amortizing features, loan types, automated underwriting results, and certain unique identifiers, plus yardsticks for credit scores and debt-to-income ratios. *See* HMDA Amendments, *supra* note 185, at 66, 128–29.

187. Dodd-Frank Act, Pub. L. No. 111-203, § 1094, 124 Stat. 1376 (2010).

under Dodd-Frank.[188] Had these data points been available before 2008, the deterioration of the home mortgage market would have been apparent.

With the HMDA rule amendments due to take effect on January 1, 2018, opponents mobilized to take action. First, they convinced Congress to enact a regulatory relief provision exempting eighty-five percent of banks from having to report the new data points mandated by Dodd-Frank.[189] Then, Mr. Mulvaney reportedly announced that he planned to rescind the other, new discretionary data points in a speech to the National Association of Realtors in May 2018.[190] He accomplished this by issuing an interpretive and procedural rule in August 2018, excusing most of the same eighty-five percent of mortgage lenders from reporting the added discretionary data points.[191] Despite the drastic nature of this measure, he failed to provide notice or opportunity for public comment and made the new rule immediately effective upon *Federal Register* publication.[192]

While Mr. Mulvaney's HMDA rollback was plainly a substantive reform, it was simultaneously structural in nature. It had damaging structural impact by limiting the Bureau's mortgage analytical capabilities, with negative repercussions for rulemaking, supervision, and enforcement. Worse, it did grave harm to fair lending enforcement, because HMDA is the only nationwide data set that tracks mortgage outcomes by race and ethnicity.

Bottom line, the Bureau's evidence-based approach and the proper functioning of its divisions depend on robust data sources. By hampering the Bureau's access to data, Mr. Mulvaney impaired the Bureau's capability to detect emerging harms and to build an evidentiary foundation for needed future actions. Tar-

188. *Id.*; *see also* Berry, *CFPB's Mulvaney*, *supra* note 184.

189. Economic Growth, Regulatory Relief, and Consumer Protection Act, Pub. L. No. 115-174, § 104(a)(2) (2018) [hereinafter EGRRCPA]; *see* Berry, *CFPB's Mulvaney*, *supra* note 184. Specifically, this act granted an exemption to all insured depository institutions and credit unions that originated less than 500 closed-end home mortgages per year for two successive years. EGRRCPA, *supra*, § 104(a)(2).

190. Berry, *CFPB's Mulvaney*, *supra* note 184.

191. Partial Exemptions From the Requirements of the Home Mortgage Disclosure Act Under the Economic Growth, Regulatory Relief, and Consumer Protection Act (Regulation C), 83 Fed. Reg. 45,325, 45,328–29 (Sept. 7, 2018) (to be codified at 12 C.F.R. pt. 1003) [hereinafter CFPB, Partial HMDA Exemptions].

192. *Id.* at 45,331, 45,333 ("The Bureau therefore finds that there is good cause to make this rule effective on September 7, 2018.").

geting data was an especially clever way of immobilizing the Bureau, moreover, because obstacles to data access are not publicly salient.

B. RULEMAKING

Another pillar of the CFPB's structure, the rulemaking process, operates under strict procedural requirements to provide opportunity for public comment and cost-benefit analysis. Early in his tenure, Mr. Mulvaney took three key steps to undermine the procedures surrounding CFPB rulemaking. First, in a gambit with little chance of passage, he asked Congress to require congressional approval of all major CFPB rules.[193] Second, he circumvented APA notice-and-comment requirements by blocking some of the Cordray-era final rules from taking effect. While this latter action sought to reverse substantive policies, it also had major structural ramifications. Finally, Mr. Mulvaney seized control of the Bureau's process for cost-benefit analysis, which is expected to tilt future rulemakings in favor of industry.

1. Circumventing APA Requirements

When an agency undergoes a leadership change, the new head does not have the freedom to vacate the agency's existing rules by fiat or to render them a dead letter through lack of implementation. Instead, with limited exceptions, the APA requires a new notice-and-comment rulemaking to undo an agency's final rules.[194] Nevertheless, Mr. Mulvaney undertook an end run around that statutory requirement shortly after his arrival at the Bureau.

He started by placing a thirty-day freeze on all new CFPB rules, regulations, and guidance.[195] Soon, that freeze ripened into something more permanent, after Mr. Mulvaney delayed or halted implementation of three of the last major final rules—the

193. Mick Mulvaney, *Written Testimony of Mick Mulvaney Acting Director, Bureau of Consumer Financial Protection, Before the Senate Committee on Banking, Housing and Urban Affairs*, CFPB (Apr. 12, 2018), https://www.consumerfinance.gov/about-us/newsroom/written-testimony-mick-mulvaney-acting-director-before-senate-committee-banking-housing-urban-affairs; *see also* 2018 Semi-Annual Report, *supra* note 114, at 2.

194. *See, e.g.*, Util. Solid Waste Activities Grp. v. EPA, 236 F.3d 749 (D.C. Cir. 2001).

195. *See, e.g.*, *Acting CFPB Director Mick Mulvaney News Conference*, C-SPAN (Nov. 27, 2017), https://www.c-span.org/video/?437841-1/acting-cfpb-director-mick-mulvaney-speaks-reporters.

payday loan rule, the prepaid card rule, and the HMDA reporting rule—that Richard Cordray had approved before his departure.[196] The CFPB had issued all three rules in final form but had not yet implemented them when Mr. Mulvaney took office.

His attempt to override the APA by obstructing implementation was quickly met with judicial disapproval. After Congress passed up the opportunity to overturn the payday rule under the Congressional Review Act,[197] a federal district court in Texas effectively reprimanded Mr. Mulvaney for freezing the payday rule and ordered the CFPB to put that rule into effect.[198] After that, Mr. Mulvaney relented and announced plans to issue a proposed rulemaking to revise the payday rule.[199] He also announced his

196. *See* CFPB, Partial HMDA Exemptions, *supra* note 191, at 45,326 (summarizing slowdown of expanded HMDA reporting); *CFPB Finalizes Changes to Prepaid Accounts Rule,* CFPB (Jan. 25, 2018), https://www.consumerfinance.gov/about-us/newsroom/cfpb-finalizes-changes-prepaid-accounts-rule/; Renae Merle, *Consumer Protection Bureau Changes Direction, Will Reconsider Rule that Sets Stricter Limits on Payday Lending*, WASH. POST (Jan. 16, 2018), https://www.washingtonpost.com/news/business/wp/2018/01/16/cfpb-changes-direction-will-reconsider-rule-that-sets-stricter-limits-on-payday-lending/; Evan Weinberger, *CFPB Gives Cos. More Time To Comply With Prepaid Rule*, LAW360 (Jan. 25, 2018), https://www.law360.com/articles/1005638/cfpb-gives-cos-more-time-to-comply-with-prepaid-rule. *See generally* Hayashi, *supra* note 177.

The payday loan rule freeze gained special notoriety because Mr. Mulvaney had previously accepted political contributions from payday lender groups while he was a congressman. *See, e.g.*, *Payday Lenders: Money to Congress*, CTR. FOR RESPONSIBLE POL., https://www.opensecrets.org/industries/summary.php?ind=F1420&cycle=All&recipdetail=H&mem=Y (last updated Feb. 1, 2019); *cf.* Minority Staff Report, *supra* note 155, at 8 ("Mr. Mulvaney's record demonstrates he doesn't believe in federal oversight of payday lending.").

Meanwhile, reportedly eight of the ten financial companies that received the most complaints in the Bureau's consumer complaint database had contributed to Mr. Mulvaney when he served in Congress. *See Companies with the Most Complaints in CFPB Database were Mulvaney Donors,* PUB. CITIZEN (May 8, 2018), https://www.citizen.org/media/press-releases/companies-most-complaints-cfpb-database-were-mulvaney-donors.

197. *See* Kaplinsky, *supra* note 131.

198. *See* Kate Berry, *Federal Judge Rejects CFPB's Effort to Halt Payday Rule*, AM. BANKER (June 13, 2018), https://www.americanbanker.com/news/judge-rejects-mick-mulvaneys-effort-to-halt-cfpbs-payday-rule; Minority Staff Report, *supra* note 155, at 15.

199. *Public Statement Regarding Payday Rule Reconsideration and Delay of Compliance Date*, CFPB (Oct. 26, 2018), https://www.consumerfinance.gov/about-us/newsroom/public-statement-regarding-payday-rule-reconsideration-and-delay-compliance-date. Subsequently, the judge in the Texas federal district court proceeding allowed the CFPB to suspend implementation of the ability-to-repay provisions of the payday rule, pending the anticipated new rulemaking. Order at 2, Cmty. Fin. Servs. Ass'n of Am. v. CFPB, No. 18-CV-00295-LY (W.D. Tex. Nov. 6, 2018); *see* Evan Weinberger, *CFPB's Payday Lender Rule*

intention to put his HMDA data point reporting exemptions through a later notice-and-comment rulemaking.[200]

At the end of the day, Mr. Mulvaney's attempt to shut down implementation of major CFPB rules by skirting the APA failed. It took a court decision, however, before he backed down and agreed to initiate lengthy APA rulemaking proceedings, with opportunity for public comment, for each of the major Cordray-period rules he sought to prevent from going into effect. His blatant disregard of the APA's requirements raised the disturbing question whether Mr. Mulvaney was willing to violate the law to undermine a key structural function of the Bureau.[201]

Rewrite Justifies Implementation Delay, BLOOMBERG L. (Nov. 7, 2018), https://news.bloomberglaw.com/banking-law/cfpbs-payday-lender-rule-rewrite-justifies-implementation-delay-2. Mr. Mulvaney's successor, Director Kathy Kraninger, unveiled the new proposed payday rule in February 2019. Payday, Vehicle Title, and Certain High-Cost Installment Loans, 84 Fed. Reg. 4252 (proposed Feb. 14, 2019) (to be codified at 12 C.F.R. pt. 1041).

200. *CFPB Statement on Payday Rule*, CFPB (Jan. 16, 2018), https://www.consumerfinance.gov/about-us/newsroom/cfpb-statement-payday-rule [hereinafter CFPB Statement] ("The Bureau intends to engage in a rulemaking process so that the Bureau may reconsider the Payday Rule."); Barbara S. Mishkin, *CFPB Fall 2018 Rulemaking Agenda Confirms Plans to Consider Rulemaking on "Abusiveness" Standard*, CONSUMER FIN. MONITOR (Ballard Spahr, PA) (Oct. 17, 2018), https://www.consumerfinancemonitor.com/2018/10/17/cfpb-fall-2018-rulemaking-agenda-confirms-plans-to-consider-rulemaking-on-abusiveness-standard.

201. The CFPB issued other public notices that obscured leadership's inroads on CFPB rulemaking. For example, a Spring 2018 regulatory agenda omitted any mention of the pending rulemaking proceedings on overdraft protection, checking accounts, and student loan servicing, implicitly sending a signal that they would not go forward. *See* Kate Berry, *From Overdrafts to HMDA, Rulemaking Has New Look at Mulvaney's CFPB*, AM. BANKER (May 16, 2018), https://www.americanbanker.com/list/from-overdraft-to-hmda-rulemaking-has-new-look-at-mick-mulvaneys-cfpb [hereinafter Berry, *From Overdrafts*]; CFPB Statement, *supra* note 200; Letter from Sen. Brown et al. to Leandra English, Acting Dir., & Mick Mulvaney, Dir., CFPB, 1 (May 18, 2018) [hereinafter Brown Letter], https://www.banking.senate.gov/imo/media/doc/Letter%20to%20English%20and%20Mulvaney%20re%20Office%20for%20Students.pdf; Kelly Cochran, *Spring 2018 Rulemaking Agenda*, CFPB (May 10, 2018), https://www.consumerfinance.gov/about-us/blog/spring-2018-rulemaking-agenda.

The most egregious example consisted of a request for information by Mr. Mulvaney on the CFPB's so-called "adopted" rules in March 2018. Request for Information Regarding the Bureau's Adopted Regulations and New Rulemaking Authorities, 83 Fed. Reg. 12,286 (Mar. 21, 2018) [hereinafter Adopted Regulations Request]. This vague second request, which was sweeping in scope, sought comment on whether the Bureau should amend virtually *all* of the rules Mr. Cordray had approved under the federal consumer financial laws. *See generally* Prof. Patricia A. McCoy, et al., Comment of Financial Regulation and Consumer Protection Scholars on Docket No. CFPB-2018-0011 (June 19, 2018), https://lawdigitalcommons.bc.edu/cfpb-comments/7. Even though the request

2. Cost-Benefit Analyses

Meanwhile, in anticipation of the day when the Bureau would resume major new rulemakings, Mr. Mulvaney instituted changes to manipulate the Bureau's cost-benefit analysis process. These changes had the effect of subverting the integrity of CFPB rulemaking by rigging future rulemaking proceedings in favor of industry.

Cost-benefit analyses are required by statute in major CFPB rulemakings.[202] When the CFPB promulgates rules under the federal consumer financial laws, the Dodd-Frank Act directs it to base those proceedings on impact analyses. Section 1022(b)(2) of Dodd-Frank mandates the principal impact analysis, known as the "Section 1022(b)(2) Analysis," and describes the cost-benefit analysis that the Bureau shall conduct:[203]

> In prescribing a rule under the Federal consumer financial laws—
>
> the Bureau shall consider—
>
> the potential benefits and costs to consumers and covered persons, including the potential reduction of access by consumers to consumer financial products or services resulting from such rule; and
>
> the impact of proposed rules on covered persons, as described in section 5516 of [12 U.S.C.],[204] and the impact on consumers in rural areas . . . .

In addition, the Regulatory Flexibility Act[205] requires the CFPB to consider whether its proposed and final rules would have a

covered multiple major rules, it did not list the rules affected. Instead, the request referred readers to a description of final rules on the CFPB's website. Adopted Regulations Request, *supra*, at 12,287–88 n.11. Readers were left to assemble the list of adopted rules by themselves. Likewise, there was no discussion of any particular issues with specific rules on which Mr. Mulvaney sought input. Without that information, ordinary consumers—the people the CFPB is charged with protecting—could not be expected to comment meaningfully on the request. Instead, the request raised fears that Mr. Mulvaney was using the request for information process as a fig leaf for efforts already underway behind closed doors to overturn CFPB rules. *Cf.* Evan Weinberger, *CFPB Didn't Disclose Mulvaney Meeting With GOP Group in Advance*, BLOOMBERG L. (Sept. 20, 2018), https://news.bloomberglaw.com/banking-law/cfpb-didnt-disclose-mulvaney-meeting-with-gop-group-in-advance (reporting that Mr. Mulvaney secretly had met with a group of Republican state attorneys general who opposed the payday rule).

202. This discussion is an expanded version of remarks in the June 7 Comment, *supra* note 75.

203. 12 U.S.C. § 5512(b)(2) (2012). This provision requires the Bureau to "consider" potential benefits and costs, but does not require the Bureau to calculate net benefit. *Id.*

204. This refers to depository institutions and credit unions with $10 billion or less in total assets. *Id.* § 5516.

205. 5 U.S.C. §§ 601–612 (2012).

significant economic impact on a substantial number of small entities.

Mr. Mulvaney intervened in CFPB cost-benefit analyses soon upon his arrival. Under Mr. Cordray, the Bureau's rulemakings had gone to lengths to conduct robust impact analyses based on voluminous data.[206] But in an email to CFPB staff, Mr. Mulvaney demanded even more quantitative cost-benefit analysis of proposed agency rules than the Bureau already provided.[207] In light of the Bureau's track record of thorough impact analyses under Mr. Cordray, this demand prompted the minority members of the Senate Banking Committee to label "Mr. Mulvaney's claims that he intend[ed] to ramp up the CFPB's objective, evidence-based approach to rulemaking" as a "suspicious" bait-and-switch.[208] Mr. Mulvaney similarly questioned the relevance of qualitative information in the Bureau's cost-benefit analyses.[209] Even more alarmingly, he created an Office of Cost Benefit Analysis and housed it within the Director's office,[210]

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206. *See* Minority Staff Report, *supra* note 155, at 21.

207. E-mail from Mick Mulvaney, Acting Dir., CFPB, Mick@cfpb.gov, to _DL_CFPB_AllHands@cfpb.gov (Jan. 23, 2018, 12:59 CST), https://www.documentcloud.org/documents/4357880-Mulvaney-Memo.html.

208. Minority Staff Report, *supra* note 155, at 21, 24–25. The Minority Staff Report further observed that Mr. Mulvaney did not publicly release any quantitative cost-benefit analyses when the CFPB published notices offering waivers from compliance with the payday lender registration requirements and declining to penalize lenders for data reporting errors under the Home Mortgage Disclosure Act. *Id.* at 24.

209. *See supra* note 207, at 2. In the email, Mr. Mulvaney said this about the Bureau's impact analyses:

> Speaking of data: the Dodd Frank Act requires us to "consider the potential costs and benefits to consumers and covered persons." To me, that means quantitative analysis. And while qualitative analysis certainly can play a role, it should not be to the exclusion of measurable "costs and benefits." In other words: there is a lot more math in our future.

To the extent that Mr. Mulvaney contemplated applying OIRA standards to CFPB impact analyses by fiat, that would violate the spirit of E.O. 12,866 and Congress's intent to keep the CFPB independent of OMB in the Dodd-Frank Act. E.O. 12,866 means that OIRA standards for impact analyses *do not* apply and may not be lawfully imposed on CFPB rulemakings.

210. Memorandum from Mick Mulvaney, Acting Dir., CFPB, to DL CFPB All_Hands, A Note on Staffing and Bureau Organization (May 9, 2018), https://www.documentcloud.org/documents/4454936-CFPB-Memo.html; Evan Weinberger, *Mulvaney Brings More Political Oversight in CFPB Restructuring*, BLOOMBERG L. BANKING DAILY (May 9, 2018), https://www.bna.com/Mulvaney-brings-political-n73014475065; *see also Bureau Structure,* CFPB, https://www.consumerfinance.gov/about-us/the-bureau/bureau-structure.

In another action in the spring of 2018, Mr. Mulvaney re-opened the question of the methodology and the process for the CFPB's cost-benefit analyses in thereby allowing the Director to rig the subjective assumptions underlying impact analyses.[211]

Because Mr. Mulvaney sat at the helm, moving impact analysis out of research and into the Director's office effectively placed it under White House control. This, combined with Mr. Mulvaney's steps to impair the CFPB's access to data, raised serious concerns about possible plans to rig future impact analyses to favor industry. His efforts to hamper the Bureau's data collection made the cost-benefit analysis he advocated even harder by eclipsing the Bureau's ability to gather data on consumer benefits. If that ability were compromised, in all likelihood CFPB impact analyses would be artificially heavy on costs while understating benefits.

There are important reasons why Congress exempted impact analyses by federal banking regulators, including the CFPB, from OIRA and OMB oversight. In financial regulation, it is generally harder to quantify benefits in the form of harms avoided than it is to quantify costs. The Bureau and other federal banking regulators must make numerous rulemaking decisions under conditions of incomplete data and uncertainty. Requiring the CFPB and other federal banking regulators to monetize all harms avoided—which might prove impossible—would dangerously tilt rulemaking analyses toward inaction and the status quo. In addition, the exemption in E.O. 12,866 insulates the Bureau, its fellow federal banking regulators, and the health of the larger economy from interference for political gain by OMB and the White House.

Nevertheless, Mr. Mulvaney effectively put CFPB rulemakings under the thumb of OMB and OIRA. The decision to move the cost-benefit analysis unit into the Director's office and

a request for information. Bureau of Consumer Fin. Prot., Request for Information Regarding Bureau Rulemaking Processes, 83 Fed. Reg. 10,437, 10,439–40 (Mar. 9, 2018). In the request, Mr. Mulvaney held his cards close to his chest regarding any concerns he had with the CFPB's impact analyses. The request did not inform the public of the methodologies the CFPB used for its impact studies, including the types of qualitative and quantitative analyses that the Bureau used or any issues with those approaches or the underlying data. Nor did the request air any possible new approaches to the Bureau's impact analyses going forward. Without that information, the public was in the dark about any changes the Bureau might be contemplating to its impact studies, leaving it to speculate on possible modifications. Meanwhile, Mr. Mulvaney moved the cost-benefit operation into his office while the request remained open for public comment, raising suspicions that the request was nothing more than cover for what Mr. Mulvaney was intent on doing anyway.

211. Minority Staff Report, *supra* note 155, at 11, 25.

to ultimately report to Mr. Mulvaney was the culmination of that campaign and a serious affront to the agency's independence mandated by Congress. And it raised further concerns about his willingness to evade the spirit and letter of the law in order to exert White House control.

C. SUPERVISION

Supervision is pivotal to the CFPB's design and Mr. Mulvaney trained his sights on that as well. Slow-walking the Bureau's supervision is easier to hide than it is for rulemaking because the APA rulemaking process demands transparency and lack of implementation can be detected. In contrast, the CFPB's supervision process is strictly confidential, as with supervision by all federal banking regulators.[212] The Bureau's examination reports are barred from public disclosure and the Bureau does not publicize the date or frequency of examinations for any given entity.[213] This secrecy makes it harder to know whether CFPB examinations are slowing down and how.

Nevertheless, Mr. Mulvaney telegraphed his intentions to dismantle CFPB supervision through three techniques. First, he floated a proposal to cede CFPB examinations to the Bureau's fellow regulators. Second, he narrowed the scope of CFPB examinations in important respects. Finally, he stripped two important CFPB offices of their supervisory powers.

1. Ceding CFPB Supervisory Jurisdiction to Other Regulators

Mr. Mulvaney's most audacious idea for disabling CFPB supervision—and one that was plainly illegal—was to pass off the CFPB's supervisory responsibilities to other regulators. In March 2018, he reportedly told the U.S. Chamber of Commerce that he was considering giving the federal prudential banking regulators the lead on consumer compliance examinations for banks and thrifts.[214] In the case of large banks, however, that would violate the Dodd-Frank Act, because the Act bestows "ex-

212. The only exception involves the public portion of CRA examination reports by the federal prudential banking regulators, *see* 12 U.S.C. § 2906(b) (2012).

213. *See* Confidential Information, 81 Fed. Reg. 58,309 (proposed Aug. 24, 2016) (to be codified at 12 C.F.R. pt. 1070.40–.48).

214. *See* Kate Berry, *CFPB Should Take Back Seat to Bank Regulators on Supervision: Mulvaney*, AM. BANKER (Mar. 1, 2018), http://www.americanbanker.com/news/cfpbs-mulvaney-suggests-effort-to-streamline-bank-exams.

clusive authority" on the CFPB to supervise depository institutions with over $10 billion in total assets and their affiliates for consumer compliance.[215] Congress intentionally took supervisory authority over large banks and thrifts for market conduct compliance away from the federal prudential banking regulators due to their disastrous track record in the lead-up to the 2008 financial crisis. Accordingly, if Mr. Mulvaney commanded the CFPB to wash its hands of large institution examinations for consumer compliance, no other federal regulator could legally perform them.

Similarly, if Mr. Mulvaney had attempted to shift supervision of nonbank providers to the states, that would run afoul of the Dodd-Frank Act, which states that the Bureau "*shall require* reports and conduct examinations" of covered nonbank entities.[216] The CFPB has a statutory duty to examine nonbank providers of consumer financial services and products that it cannot legally abdicate. Furthermore, even if the CFPB had the legal authority to pass the buck to the states, many nonbank providers lack supervision in at least some states and a few nonbank providers escape supervision in *every* state.[217] To boot, there is no federal substitute for CFPB supervision, because the FTC lacks regular examination power over nonbanks.[218]

It is hard to know the extent to which Mr. Mulvaney foisted CFPB's supervisory activities off on other federal regulators or the states. What his proposal made apparent, however, was his openness to contravening Dodd-Frank's express commands regarding the Bureau's supervisory responsibilities.

2. Narrowing the Scope of CFPB Examinations

Another way that Mr. Mulvaney reined in supervision was by reducing the scope of CFPB examinations. For instance, financial industry lawyers reportedly told the press that the Bureau was strictly conducting examinations "by the book" and placing less emphasis on potential UDAAP violations.[219] In another step, Mr. Mulvaney reportedly announced that he planned

215. 12 U.S.C. § 5515(b)(1).

216. *Id.* § 5514(b)(1) (emphasis added).

217. *See* Am. for Fin. Reform et al., Request for Information Regarding the Bureau's Supervision Program 6, 10, 22 (May 21, 2018) [hereinafter AFR Comments], https://www.nclc.org/images/pdf/legislation/natl-group-detailed-comments-cfpb-superv.pdf.

218. *See* CARPENTER, *supra* note 18, at 3.

219. *See* Evan Weinberger, *Trump CFPB Seen as Shifting to By-the-Book Supervision*, BLOOMBERG L. BANKING DAILY (Apr. 24, 2018), https://www.bna

to stop examining lenders for violations of the Military Lending Act (MLA),[220] and would rely solely on customer complaints as the basis for any enforcement actions.[221] Meanwhile, Seth Frotman, when he resigned as CFPB Assistant Director and Student Loan Ombudsman, alleged that the new leadership had given in to Department of Education pressure to pare back examinations of student loan companies. According to Mr. Frotman: "[W]hen the Education Department unilaterally shut the door to routine CFPB oversight of the largest student loan companies, the Bureau's current leadership folded to political pressure."[222]

Mr. Mulvaney took additional steps to stop the expansion of CFPB examinations to nonbank providers who were not yet supervised. Specifically, in a move supported by industry, he cancelled a pending rulemaking on the definition of "major participants" that was designed to expand CFPB supervision to a larger

.com/trump-cfpb-seen-n57982091482. *But see* Ori Lev, Stephanie Robinson, Tori Shinohara, Anjali Garg & Christa Bieker, *A Look Back At Mulvaney's CFPB, and What's Ahead in 2019*, LAW360 (Dec. 7, 2018), https://www.law360.com/articles/1108671/a-look-back-at-mulvaney-s-cfpb-and-what-s-ahead-in-2019 (stating that Mr. Mulvaney had "continued the bureau's practice of examining . . . for UDAAP concerns").

220. *See* 10 U.S.C. § 987 (2012).

221. *See* Glenn Thrush, *Mulvaney Looks to Weaken Oversight of Military Lending,* N.Y. TIMES (Aug. 20, 2018), https://www.nytimes.com/2018/08/10/us/politics/mulvaney-militarylending.html. The MLA protects members of the armed services and their families from financial abuse, *id.*, and confers express enforcement authority on the CFPB. 10 U.S.C. § 987(f)(6); 15 U.S.C. § 1607(a)(6) (2012); CHRISTOPHER L. PETERSON, MISSING IN ACTION? CONSUMER FINANCIAL PROTECTION BUREAU SUPERVISION AND THE MILITARY LENDING ACT, CONSUMER FED'N AM. 4 & n.5 (2018), https://consumerfed.org/wp-content/uploads/2018/11/missing-in-action-cfpb-supervision-and-the-military-lending-act.pdf. Nevertheless, Mr. Mulvaney reportedly opined that the Bureau lacked the statutory authority to oversee MLA compliance through supervisory examinations. Minority Staff Report, *supra* note 155, at 6 n.9; PETERSON, *supra*, at 2, 12; Thrush, *supra*. A legal analysis by the Consumer Federation of America concluded that the Bureau does have jurisdiction under the Consumer Financial Protection Act, Dodd-Frank Act title X, and the MLA to examine servicemember loans for MLA violations. *See* PETERSON, *supra,* at 2, 17–30; *see also* Letter from Thirty-Three State Attorneys General to Mick Mulvaney, Acting Dir. (Oct. 23, 2018), https://ag.ny.gov/sites/default/files/mla_letter_to_cfpb.pdf; Minority Staff Report, *supra* note 155, at 6 & n.12. The Department of Defense separately wrote Senator Bill Nelson urging supervisory examinations for MLA violations. *See id.* App. B (Letter from Stephanie Barna, Dep't of Def., to Sen. Bill Nelson (Sept. 7, 2018)).

222. Letter from Seth Frotman, Assistant Dir. & Student Loan Ombudsman, CFPB, to Mick Mulvaney, Acting Dir. (Aug. 27, 2018) [hereinafter Frotman Letter], https://www.wsj.com/public/resources/documents/frotman.pdf; *see also* Brown Letter, *supra* note 201, at 1–2.

set of nonbanks that currently lack federal supervision.[223] Combined with his actions to constrict the scope of examinations, this action capped the decision to pull back CFPB supervision.

3. Removing Supervisory Authority from the Fair Lending and Student Debt Offices

In a further blow to supervision, Mr. Mulvaney relieved two of the CFPB's most outspoken and effective offices of their supervisory duties. First, he sent shock waves through the civil rights community by unveiling plans to move the CFPB's Office of Fair Lending and Equal Opportunity from SEFL to the Office of the Director, thereby stripping it of its supervisory function and placing it under his control.[224] He gave that order even though Dodd-Frank specifically requires OFLEO to conduct "oversight and enforcement" of the federal fair lending laws within the CFPB's jurisdiction.[225] Although fair lending supervision remains housed inside SEFL,[226] knowledgeable observers predicted that the reorganization would "likely . . . lead to a significant decrease in the number of fair lending examinations, investigations and enforcement actions brought" by the Bureau.[227]

The CFPB's Office for Students and Young Consumers, which supported the work of the Student Loan Ombudsman Seth Frotman, suffered a similar fate.[228] In May 2018, the press reported that Mr. Mulvaney had exiled that office from SEFL to the Consumer Education and Engagement Division, confined its activities to consumer education, and barred it from any further

223. *See* Berry, *From Overdrafts*, *supra* note 201; *supra* note 27 and accompanying text.

224. *See* Minority Staff Report, *supra* note 155, at 8–9; David Dayen, *After Boasting About Lowering Black Unemployment, Donald Trump Undermines the Federal Unit Defending Against Housing Discrimination*, INTERCEPT (Feb. 1, 2018), https://theintercept.com/2018/02/01/cfpb-mick-mulvaney-lending-housing-discrimination. Patrice Ficklin, the Assistant Director of OFLEO, unsuccessfully fought the transfer. *See Bureau Structure,* CFPB, https://www.consumerfinance.gov/about-us/the-bureau/bureau-structure (last visited Apr. 12, 2019).

225. 12 U.S.C. § 5493(c)(2)(A) (2012); *see* Minority Staff Report, *supra* note 155, at 8; Letter from Sherrod Brown, Senator, et al., to Leandra English & Mick Mulvaney (Feb. 16, 2018), https://www.brown.senate.gov/download/banking-21618 (noting this requirement).

226. Lev et al., *supra* note 219.

227. Melanie Brody et al., *An Uncertain Future for Fair Lending Enforcement at CFPB*, LAW360 (Mar. 1, 2018), https://www.law360.com/banking/articles/1016676.

228. *See* Minority Staff Report, *supra* note 155, at 9–10.

involvement in examinations.[229] Eventually Mr. Frotman resigned in protest, in part due to that action.[230]

Together, Mr. Mulvaney's actions to sabotage CFPB supervision were aimed at toppling one of the key pillars of the Bureau. To exacerbate matters, a number of those actions were of questionable legality. His decision to strip the fair lending office of its supervisory duties countermanded Dodd-Frank's provision charging OFLEO with oversight of the nation's fair lending laws.[231] His order to scrap supervisory examinations for Military Lending Act violations proceeded based on a dubious legal analysis. Meanwhile, Mr. Mulvaney's proposal to cede CFPB supervision powers to federal regulators blatantly violated the Dodd-Frank Act. Together, these actions exacerbate concerns that Mr. Mulvaney was prepared to undermine the Bureau, even if it meant defying the law.

D. Enforcement

Supervision and regulation were not the only structural footings that Mr. Mulvaney besieged. In addition, he wasted no time decimating enforcement. Days after he took office, he convened a meeting to review the CFPB's most pressing enforcement matters, according to the press.[232] After ordering an internal review of supervision and enforcement, he reportedly instructed staff to survey financial firms about the burdens to them from CFPB investigations.[233] Meanwhile, he broadcast his intentions as to enforcement in a memorandum to CFPB staff in January 2018, declaring that the CFPB would no longer "push the envelope" or look for "excuses to bring lawsuits."[234] Instead, Mr. Mulvaney planned on "less regulation by enforcement," and only in cases of "quantifiable and unavoidable harm to the consumer."[235] Later, in a speech to state attorneys general, Mr. Mulvaney intimated that the CFPB would refrain from enforcement

229. *See* Kate Berry, *Mulvaney Guts CFPB's Student Lending Office*, AM. BANKER (May 9, 2018), https://www.americanbanker.com/news/mulvaney-guts-cfpbs-student-lending-office.

230. *See* Frotman Letter, *supra* note 222.

231. *See* 12 U.S.C. § 5493(c)(2) (2012).

232. *See* Eisinger, *supra* note 165.

233. *See id.*

234. E-mail from Mick Mulvaney, Dir., CFPB, to _DL_CFPB_AllHands (Jan. 23, 2018, 12:59 CST), https://www.documentcloud.org/documents/4357880-Mulvaney-Memo.html.

235. *Id.*

where state officials did not "think it's against the law" or "think it's in [their] state's best interest."[236]

In reality, Mr. Mulvaney went even further, by attempting to shut down enforcement one part at a time. He used several techniques to reduce enforcement to an empty husk. First, according to a press account, in a play borrowed from the supervision book, he threatened to relegate more enforcement to the states.[237] Second, he brought enforcement to a halt for a period.[238] Third, when he later resumed bringing enforcement cases, he narrowed the grounds and relief in the cases he did bring.[239] Finally, he relieved OFLEO and the Student Loan Ombudsman of their enforcement responsibilities. Together, these actions sought to disable enforcement from carrying out its responsibilities for policing major industry sectors and for enforcing important bodies of law.

1. Halt to New Enforcement Cases

The most drastic way to undermine enforcement is to bring it to a halt. That is what happened once Mr. Mulvaney took over the Bureau's helm.

Mr. Mulvaney's initial data freeze had the immediate effect of "freezing enforcement."[240] After that, CFPB enforcement collapsed. Between November 2017, when Mr. Mulvaney took office, and April 2018, the Bureau announced only *one* new public

236. Minority Staff Report, *supra* note 155, at 6 (quoting Mick Mulvaney, Remarks before the National Association of Attorneys General (Feb. 28, 2018), https://www.c-span.org/video/?441853-4/consumer-financial-protection-bureau-acting-director-mick-mulvaney). Mulvaney suggested that the CFPB would stay its hand even if more states supported CFPB enforcement action than opposed it. *See id.* at 7.

237. *See* Evan Weinberger, *States Face Limits in Stepping Up as CFPB Retreats*, BLOOMBERG NEWS (Apr. 30, 2018), https://www.bna.com/states-face-limits-n57982091672.

238. *See infra* Part III.D.1.

239. In addition, Mr. Mulvaney solicited public comment on whether to change the CFPB's investigation procedures, with the effect of making investigations more difficult. *See, e.g.*, Prentiss Cox, Christopher L. Peterson & Fin. Regulation & Consumer Prot. Scholars & Former Regulators, Response Regarding Bureau Civil Investigative Demands and Associated Processes (Docket No. CFPB-2018-0001) (Apr. 25, 2018), https://lawdigitalcommons.bc.edu/cfpb-comments/1 (arguing that the CFPB should not change its Civil Investigative Demand (CID) processes); May 14, 2018 Comments, *supra* note 62 (commenting that the CFPB needs a strong and independent enforcement program). The U.S. Chamber of Commerce publicly called for those sorts of changes. *See* CHAMBER OF COMMERCE, *supra* note 61, at 6, 18–19.

240. *See* Eisinger, *supra* note 165.

enforcement case.[241] In contrast, under Mr. Cordray, CFPB enforcement had brought an impressive 3.2 new cases on average a month between July 2012 and October 2017.[242] Adding to the standstill, the CFPB under Mr. Mulvaney reportedly cancelled other investigations that were underway.[243]

The only case that Mr. Mulvaney rolled out in spring 2018 was against Wells Fargo (for violations involving mortgage rate locks and force-placed auto insurance).[244] Mr. Mulvaney could hardly ignore Wells Fargo's latest consumer abuses, because President Trump had issued a tweet demanding sanctions against the company.[245] Far from showing that CFPB enforcement remained vigorous under Mr. Mulvaney, the Wells Fargo outlier intensified concerns that the White House was calling the shots for CFPB enforcement.

2. Narrower Grounds and Relief in Eventual Enforcement Cases

In spring 2018, the breakdown in enforcement under Mr. Mulvaney was so complete that observers aired statistics documenting the extent of that collapse.[246] Evidently that shamed

241. *See* May 14, 2018 Comments, *supra* note 62, at 8; *see also* Cox et al., *supra* note 56, at 80 (discussing an empirical study of CFPB enforcement cases in 2014). In addition, at least one CFPB investigation was terminated and a CFPB lawsuit was withdrawn soon after Mr. Mulvaney assumed control, under circumstances raising concerns about conflicts of interest. *See* Eisinger, *supra* note 165. The agency halted an investigation into an installment lender that had given him political contributions when he was a congressman. *See id.*; Renae Merle, *'The Fish Rots from the Head Down'; Former Consumer Protection Bureau Chief Fires Back at Trump Successor*, WASH. POST (Jan. 24, 2018), https://www.washingtonpost.com/news/business/wp/2018/01/24/the-fish-rots-from-the-head-down-former-consumer-protection-bureau-chief-fires-back-at-trump-successor. Meanwhile, CFPB attorneys withdrew a pending enforcement action against payday lenders for no stated reason, after Mr. Mulvaney's reported intervention. Notice of Voluntary Dismissal Pursuant to F.R.C.P. 41(a)(1)(A)(i), CFPB v. Golden Valley Lending, Inc., No. 2:17-cv-02521-JAR-JPO (D. Kan. Jan. 18, 2018); *see* Eisinger, *supra* note 165.

242. *See* May 14, 2018 Comments, *supra* note 62, at 8.

243. *See, e.g.*, Minority Staff Report, *supra* note 155, at 7. *But see* Lev et al., *supra* note 219 (discussing signs of newly initiated CFPB investigations).

244. *Bureau of Consumer Financial Protection Announces Settlement with Wells Fargo for Auto-Loan Administration and Mortgage Practices*, CFPB (Apr. 20, 2018), https://www.consumerfinance.gov/about-us/newsroom/bureau-consumer-financial-protection-announces-settlement-wells-fargo-auto-loan-administration-and-mortgage-practices.

245. Donald J. Trump (@realDonaldTrump), TWITTER (Dec. 8, 2017, 7:18 AM), https://twitter.com/realDonaldTrump/status/939152197090148352.

246. *See, e.g.*, May 14, 2018 Comments, *supra* note 62.

the Bureau into bringing a few new enforcement actions soon afterwards. From May 2018 through October 2018, the CFPB announced nine new enforcement actions.[247] However, the terms and conditions in those consent orders were suggestive of a rush to settle[248] and were noticeably weaker than the typical terms and conditions in the Bureau's enforcement orders under Mr. Cordray.[249]

For example, in the Wells Fargo consent order under Mr. Mulvaney, the Bureau allowed Wells Fargo to determine how much restitution it would pay and which consumers would be eligible for payments, subject to the Bureau's review.[250] The Mulvaney consent order further allowed Wells Fargo to restrict relief to "economic and cognizable harm."[251]

An industry newsletter later applauded the CFPB's consent orders in mid-2018 for their "minimal financial penalties."[252] Reportedly, CFPB staff referred to these disappointing penalties as the "Mulvaney Discount."[253] In a payday lending case against the Hydra Group, for instance, the CFPB only assessed a $1 civil money penalty and suspended a $69 million jury award for consumer redress, supposedly due to the respondents' limited ability to pay.[254] (The payday industry was the same industry that

247. Compilation by author of enforcement statistics from the CFPB website. CFPB, https://www.consumerfinance.gov (last visited Apr. 12, 2019). According to a former CFPB enforcement attorney, most or all of the actions were carryovers from the Cordray period.

248. *See* Eisinger, *supra* note 165.

249. *See* May 14, 2018 Comments, *supra* note 62, at 12 n.25 (comparing consent order terms imposed under Mr. Cordray with those imposed under Mr. Mulvaney).

250. *See In re* Wells Fargo Bank, N.A. ¶¶ 49–58, CFPB No. 2018-BCFP-0001 (consent order) (Apr. 20, 2018) [hereinafter Wells Fargo Consent Order], https://files.consumerfinance.gov/f/documents/cfpb_wells-fargo-bank-na_consent-order_2018-04.pdf; May 14, 2018 Comments, *supra* note 62, at 12–13.

251. *See* Wells Fargo Consent Order, *supra* note 250, at ¶¶ 51, 56.

252. Richard E. Gottlieb & Charles E. Washburn, Jr., *CFPB News: New Innovations Office, 'Gentler' Consent Orders*, LEXOLOGY (Aug. 2, 2018), https://www.lexology.com/library/detail.aspx?g=d974e5a9-af89-45b7-8ff5-be80686d27a6.

253. Robert O'Harrow, Jr. et al., *How Trump Appointees Curbed a Consumer Protection Agency Loathed by the GOP*, WASH. POST (Dec. 4, 2018), https://www.washingtonpost.com/investigations/how-trump-appointees-curbed-a-consumer-protection-agency-loathed-by-the-gop/2018/12/04/3cb6cd56-de20-11e8-aa33-53bad9a881e8_story.html.

254. *See Bureau of Consumer Financial Protection Settles with Defendants in Hydra Group Payday Lending Case*, CFPB (Aug. 10, 2018), https://www.consumerfinance.gov/about-us/newsroom/bureau-consumer-financial-protection-settles-defendants-hydra-group-payday-lending-case.

had contributed to Mr. Mulvaney as congressman).[255] Another CFPB settlement suspended a $1,522,298 judgment against the auto title lender Triton Management Group on the condition that it pay $500,000 to injured consumers.[256] A third CFPB order, this one involving debt collectors National Credit Adjusters, LLC and Bradley Hochstein, slashed the total civil money penalties against the respondents from $6 million to $800,000 on condition of payment.[257] On another occasion, the CFPB under Mr. Mulvaney declined to levy a civil money penalty in a consent order requiring Citibank, N.A., to pay $335 million in restitution to consumers for not properly evaluating adjustments to annual percentage rates on credit card accounts.[258] The opposite pattern appeared in a settlement with debt collectors Security Group, Inc., and Security Finance Corporation, which assessed a civil money penalty but ordered no financial relief to affected consumers, even though the respondents had physically blocked some of those consumers from leaving their homes.[259] Some of the 2018 enforcement cases did find UDAAP violations,[260] but the majority of those cases limited their UDAAP theories to the term "deceptive" and did not cite respondents for unfair or abusive acts or practices.[261] Meanwhile, as of this writing, the CFPB still has

255. *See supra* note 241 and accompanying text.

256. *See Bureau of Consumer Financial Protection Settles with Triton Management Group*, CFPB (July 19, 2018), https://www.consumerfinance.gov/about-us/newsroom/bureau-consumer-financial-protection-settles-triton-management-group.

257. *See Bureau Settles with National Credit Adjusters, LLC and Bradley Hochstein*, CFPB (July 13, 2018), https://www.consumerfinance.gov/about-us/newsroom/bureau-settles-national-credit-adjusters-llc-and-bradley-hochstein. Originally, the CFPB's enforcement attorneys had sought $60 million in consumer relief in the *National Credit Adjusters* case. *See* O'Harrow, *supra* note 253.

258. *See Bureau of Consumer Financial Protection Settles with Citibank, N.A.*, CFPB (June 29, 2018), https://www.consumerfinance.gov/about-us/newsroom/bureau-consumer-financial-protection-settles-citibank-na.

259. *See Bureau of Consumer Financial Protection Settles with Security Group, Inc.*, CFPB (June 13, 2018), https://www.consumerfinance.gov/about-us/newsroom/bureau-consumer-financial-protection-settles-security-group-inc.

260. One set of observers remarked that under Mr. Mulvaney, "UDAAP claims . . . continued to be the bread and butter of enforcement." Lev et al., *supra* note 219. Of the nine cases brought by Mr. Mulvaney, eight included UDAAP claims, and five rested solely on UDAAP.

261. Analysis by author. One exception was the *Security Group* case, which did find specific debt collection practices "unfair." *See In re* Sec. Grp., Inc. ¶¶ 13, 23, 32, 40, CFPB No. 2018-BCFP-0002 (consent order) (June 12, 2018). In another debt collection case, the Bureau found the alleged practices "deceptive" and "abusive." *See In re* Cash Express, LLC ¶¶ 18, 24, 38, CFPB No. 2018-BCFP-0007 (consent order) (Oct. 23, 2018). Finally, in *Bluestem Brands, Inc.*,

not taken enforcement action against Equifax for the data security breach that exposed the personal information of 143 million consumers.[262]

3. Excising the Fair Lending and Student Loan Offices from Enforcement

Mr. Mulvaney's decisions to transfer the fair lending and student loan offices out of SEFL had another detrimental effect, by stripping both offices of their enforcement powers.[263] The move left enforcement in both areas in shambles.[264] According to Seth Frotman, the former CFPB Assistant Director and Student Loan Ombudsman, Mr. Mulvaney "[u]ndercut[] enforcement of the law" guarding student borrowers, while "protect[ing] the interests of the biggest financial companies in America."[265] Mr. Frotman further charged Mr. Mulvaney with "political interference" in a CFPB investigation of Navient, the biggest U.S. student loan servicer.[266] Meanwhile, under Mr. Mulvaney, the Bureau announced a broadside attack on fair lending enforcement in the form of plans to revisit the disparate impact theory used to prove Equal Credit Opportunity Act (ECOA) lending discrimination cases.[267]

In sum, in a now familiar pattern, Mr. Mulvaney bogged down CFPB enforcement any way he could. He froze personally identifiable information needed for CFPB enforcement attorneys

the Bureau termed the alleged debt collection and debt sales practices "unfair." *In re* Bluestem Brands, Inc. ¶ 27, CFPB No. 2018-BCFP-0006 (consent order) (Oct. 2, 2018). See Lev et al., *supra* note 219, for a discussion of enforcement trends under Mr. Mulvaney.

262. *See* Eisinger, *supra* note 165.

263. *See supra* Part III.C.3.

264. Brody et al., *supra* note 227.

265. Frotman Letter, *supra* note 222, at 2.

266. Glenn Thrush, *After Scaling Back Student Loan Regulations, Administration Tries to Stop State Efforts*, N.Y. TIMES (Sept. 6, 2018), https://www.nytimes.com/2018/09/06/us/politics/devos-student-loans.html; *see also* Stacy Cowley, *How a Potential $1 Billion Student Loan Settlement Collapsed After Trump Won*, N.Y. TIMES (Oct. 7, 2018), https://www.nytimes.com/2018/10/07/business/student-loans-navient.html (explaining how the CFPB's settlement talks with Navient broke down); Eisinger, *supra* note 165.

267. *See* Berry, *CFPB's Mulvaney*, *supra* note 184; Kelly Cochran, *Fall 2018 Rulemaking Agenda*, CFPB (Oct. 17, 2018), https://www.consumerfinance.gov/about-us/blog/fall-2018-rulemaking-agenda; Evan Weinberger, *CFPB to Review Use of Disparate Impact in Fair Lending Cases*, BLOOMBERG NEWS (May 21, 2018), https://www.bna.com/cfpb-review-disparate-n57982092803. The U.S. Chamber of Commerce specifically had urged Mr. Mulvaney to abolish the disparate impact theory. *See* CHAMBER OF COMMERCE, *supra* note 61, at 4.

to prove their cases. He stopped new enforcement actions altogether for a while, then rushed a handful of investigations to seemingly hasty settlements with light or non-existent monetary relief. He cut enforcement for unfair or abusive acts or practices. He restructured the agency to strip the fair lending and student loan offices of enforcement authority.[268] To boot, disparate impact analysis for ECOA discrimination cases is now on the chopping block.

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With the advent of the Trump Administration, the constantly embattled CFPB became the target of open warfare. That war was waged on all three fronts, in the legislative, judicial, and executive branches. The immediate goal of that campaign was less to repeal specific policies than to bring down the structure that had made the Bureau under Richard Cordray so effective.

In 2017 and 2018, Congress made no significant headway in that structural attack. The judicial challenges are more of a threat, but the Bureau under Mr. Mulvaney opposed one such challenge and the outcome remains to be seen. Due to their lack of success in the courts and in Congress, the CFPB's opponents then turned to the White House and its appointee, OMB Director Mick Mulvaney, to debilitate the Bureau from within.

Mr. Mulvaney proceeded to sabotage the core functions of the Bureau, sometimes in diabolically clever ways. By blocking the Bureau's use of qualitative data and disabling it from analyzing consumer issues using large data sets due to supposed privacy or data security concerns, he immobilized rulemaking, supervision and enforcement and deprived the Bureau of the evidentiary basis to redress serious consumer harms.[269] Impairing the Bureau's access to qualitative and quantitative data also created a Catch-22 by preventing the Bureau from performing the kind of cost-benefit studies that Mr. Mulvaney demanded. When data flows resumed, he blocked the expansion of HMDA data and rigged the cost-benefit analysis process in other ways to shift rulemaking outcomes to favor industry.[270] Meanwhile, he refused to implement some of Mr. Cordray's final rules.

Mr. Mulvaney defanged supervision and enforcement in additional ways. He watered down or eliminated consumer compliance examinations for MLA and UDAAP violations.[271] Initially,

268. *See also supra* Part III.C.3.
269. *See supra* Part III.A.
270. *See supra* Part III.A–B.
271. *See supra* notes 219–21 and accompanying text.

he halted enforcement, but later issued a handful of enforcement decisions with minimal monetary relief after encountering criticism.[272] Meanwhile, Mr. Mulvaney acted aggressively to flat line supervision and enforcement for fair lending and student debt.

The good news is that the CFPB is still in operation. The bad news is that the Bureau has sustained damage, some of it serious, from the Trump Administration's unending attacks on its foundation. Without a doubt, the experience under the Trump Administration and Mr. Mulvaney put the CFPB's structure to the ultimate test.

IV. WILL THE STRUCTURE HOLD UP?

The events of 2017 and 2018 raise the questions: Will the CFPB's structure survive? Will consumer financial protection live to fight another day? Or will the attacks on the structure of the Bureau permanently hobble market conduct regulation of consumer finance?

In a democracy, periodic swings between pro-regulatory and deregulatory forces are inevitable. Elections have consequences and Presidents appoint CFPB Directors. Changes in Administrations will periodically consign the Bureau to inaction and reversal of at least some of its prior substantive policies.

Nevertheless, so far it appears that most of the effects of the Bureau's current retrenchment will be temporary. To be sure, consumers who suffer harm from financial products or services during this period will not be able to look to the CFPB for redress.[273] And some Cordray-era policies, if they are reversed, will take longer to reinstate than others.[274] However, the Bureau's core statutory authorities remain untouched and are available to reactivate when the electoral pendulum swings back.[275] In the interim, there are alternative sources of consumer financial protection that can partly fill the gap left by the Bureau's immobilization. Bottom line, the Bureau's structure, while bloodied, will probably survive the onslaught of the last two years.

Three caveats, however, are in order regarding the long-term health of consumer financial protection. First, if any of the

272. *See supra* notes 240–62 and accompanying text.

273. *See, e.g.*, Minority Staff Report, *supra* note 155, at 7 (stating that "[d]espite numerous investigations . . . the CFPB brought only ten enforcement actions . . . with multiple investigations reportedly being dropped").

274. *See infra* Part IV.B.

275. *See infra id.*

pending constitutional challenges[276] is ultimately successful, it could deal a lethal blow to the Bureau's effectiveness. Second, this analysis assumes that the CFPB's mortgage rules and oversight under Trump appointees remain strong enough to avoid a repeat of the 2008 financial crisis.[277] If that assumption proves wrong, the repercussions of another global financial meltdown could be devastating to consumers. Finally, this analysis assumes that transgressions of the laws protecting the CFPB by Mr. Mulvaney or his successor will be rebuffed. If, on the other hand, the laws underpinning the CFPB's edifice are undermined, then the Bureau's structure will be jeopardized.

In the remainder of this Section, I examine the effects of the current structural assault on key elements of the CFPB's architecture, starting with the leadership model of the Bureau.

A. SINGLE-DIRECTOR MODEL

The single-Director structure, combined with for-cause protection from firing, is the most controversial aspect of the CFPB's design. The first seven years of the Bureau's existence highlighted the advantages and disadvantages of that design choice, in comparison to a bipartisan commission model.

This debate joined issue in the *PHH* case, where critics argued that the CFPB Director, as a single agency head, wields excessive and arbitrary power.[278] This criticism is badly exaggerated. It ignores the fact that other federal independent agencies are led by a single head.[279] Further, the argument mistakenly asserts that the Director answers to no one. In fact, the Director and the agency at large are politically accountable to Congress

276. *See supra* Part II.B.

277. Residential mortgages are the one product overseen the by CFPB that poses systemic risk. *See* Patricia A. McCoy, *Countercyclical Regulation and Its Challenges*, 47 ARIZ. ST. L.J. 1181, 1185–86 (2015) (discussing the "boom-and-bust cycle" of mortgage lenders and how regulation counteracts the cycle).

278. *See* Opening Brief for Petitioners at 45, PHH Corp. v. CFPB, No. 15-1177 (D.C. Cir. June 19, 2015) ("The CFPB places sweeping legislative, executive, and judicial power all 'in the same hands' of a *single person*[, the Director,] who is entirely unaccountable to the democratic process . . . [which is] 'the very definition of tyranny.'").

279. *See* Brief on Rehearing En Banc of *Amici Curiae* Financial Regulation Scholars in Support of Respondent 3, No. 15-1177 (D.C. Cir. Mar. 31, 2017) ("Some agencies are headed by a single director, while others are led by multimember boards or commissions. Examples of the former include not only the CFPB, but also the Federal Housing Finance Agency (FHFA), the Social Security Administration (SSA), and the Office of the Comptroller of the Currency (OCC).").

and the public in myriad ways. Under Dodd-Frank, the Director must submit semi-annual reports to the House and Senate banking committees and testify before those committees at least twice a year.[280] In reality, the Director and senior CFPB officials testify before Congress much more frequently than that.[281] The Director and the Bureau's employees also respond to document requests by congressional committees on a regular basis and can face congressional subpoenas. On the fiscal side, Congress capped the Bureau's budget in Dodd-Frank[282] and inflation is likely to cause the real value of the CFPB's budget to shrink over time.[283]

Congress is not the only body with purview of the Bureau. The Inspector General of the Federal Reserve System oversees the Bureau[284] and the Comptroller General audits it annually.[285] The General Accountability Office has issued numerous oversight reports evaluating the CFPB's policy decisions and operations.[286] In another check, members of the public and the press regularly obtain and publicize internal documents from the Bureau using Freedom of Information Act requests.[287]

Similarly, the Bureau's rulemaking is held in check in numerous ways. As already discussed,[288] CFPB rules are subject to substantial public input and transparency under the notice-and-comment protections of the APA. Unusually, rulemakings by the Bureau must also undergo OMB reviews under the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA)

280. *See* 12 U.S.C. § 5496 (2012).

281. *See Newsroom*, CFPB, https://www.consumerfinance.gov/about-us/newsroom (based on author search filtered by "Testimony" on Oct. 19, 2018).

282. *See supra* note 13 and accompanying text.

283. *See* Levitin, *supra* note 1, at 340–41 (stating "inflation adjustment measure[s] often lag[] real inflation," and, therefore, "the CFPB's budget . . . will likely diminish depending on inflation").

284. *See Inspector General*, BOARD GOVERNORS FED. RES. SYS., https://www.federalreserve.gov/aboutthefed/contact-inspector-general.htm (last updated Nov. 21, 2016).

285. *See* 12 U.S.C. § 5496a(b).

286. *See, e.g.*, U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-16-62, CONSUMER FINANCIAL PROTECTION BUREAU: ADDITIONAL ACTIONS NEEDED TO SUPPORT A FAIR AND INCLUSIVE WORKPLACE (2016); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-14-551, CONSUMER FINANCIAL PROTECTION BUREAU: OPPORTUNITY EXISTS TO IMPROVE TRANSPARENCY OF CIVIL PENALTY FUND ACTIVITIES (2014).

287. *See, e.g.*, *EPIC FOIA: CFPB Raise Further Questions About Equifax Investigation*, ELECTRONIC PRIVACY INFO. CTR. (Mar. 26, 2018), https://epic.org/2018/03/epic-foia-cfpb-raise-further-q.html (illustrating how individuals can obtain CFPB documents through Freedom of Information Act requests).

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

(one of only three agencies that must submit to those reviews).[289] Once they are promulgated, the Bureau's rules are subject to judicial review.[290] In an unprecedented provision, Congress also gave the Financial Stability Oversight Council the power to veto any CFPB rule that would jeopardize the financial stability of the United States.[291] Separately, Congress can overturn CFPB rules by repealing them outright or nullifying them under the Congressional Review Act.[292]

In sum, there are ample checks and balances on the Director's exercise of authority. Some of those checks and balances are extraordinary in nature. Accordingly, the real drawback of the single Director structure is not its power. Rather, it is that a turnover in Directors after the White House changes parties can result in more drastic policy swings compared to a bipartisan commission. This volatility is a problem not just for consumers, but also for industry participants that have invested substantial sums in implementation.

Yet the volatility of the single Director format is also its strength. A single Director can generate more momentum for change and accomplish more in a given time period than a bipartisan commission. In all likelihood, this is why both parties ended up embracing the single Director format. From 2012 through 2017, when the pro-consumer Director Cordray was in office, the CFPB was able to institute an impressive number of strong consumer protections, probably more than a bipartisan commission would have accomplished. Assuming that those safeguards survive, they will lay the foundation for a healthy retail financial services market for years to come, as I now discuss.

B. THE TRIAD OF REGULATION, SUPERVISION AND ENFORCEMENT

In the Financial CHOICE Act bill, the Republican leadership proposed taking away the CFPB's supervision powers and reducing the Bureau to an enforcement agency. With that bill's

289. *See* Small Business Regulatory Enforcement Fairness Act of 1966, Pub. L. No. 104-121, 110 Stat. 857 (1996); *see also* Patricia A. McCoy, *Public Engagement in Rulemaking: The Consumer Financial Protection Bureau's New Approach*, 7 BROOK. J. CORP. FIN. & COM. L. 1, 18–20 (2012) (discussing the SBREFA's review process of the CFPB).

290. *See* 5 U.S.C. § 706 (2012).

291. *See* 12 U.S.C. § 5513(a) (2012) ("[T]he Council may set aside a final regulation prescribed by the Bureau.").

292. *See* 5 U.S.C. § 801(b)(1) ("A[n] [agency's] rule shall not take effect (or continue), if the Congress enacts a joint resolution of disapproval.").

demise, however, the Bureau retained all three of its core regulatory powers: regulation, supervision, and enforcement. Now that the Democrats took back the House of Representatives in the mid-year 2018 elections, Congress is unlikely to take those powers away.

Similarly, the vast bulk of the CFPB's statutory mandates remain in force, with any amendments requiring an act of Congress. Even during 2017 and 2018, when the Republican party controlled both houses of Congress and the White House, Congress was not able to amend any of the federal consumer financial laws or the Bureau's organic powers, except around the edges,[293] due to the filibuster threat. All of the financial consumer financial laws are still on the books, the ability-to-repay rule for mortgages remains intact, and the Bureau's UDAAP powers survived repeal.

As a result, any dilution of the Bureau's statutory powers or its substantive mandates will most likely be the product of administrative action at the Bureau. The Bureau can implement substantive policies through regulation, supervision, or enforcement, but some policies will be easier to reverse than others, depending on which channel is used.[294] In that respect, there is an inverse relationship between the ease of change and the permanence of any changes. The harder a policy is to reverse, the more long-lasting that change may be. Conversely, the faster the change, the more easily a successor Director can reverse a policy shift.

In particular, the Cordray-era rulemakings will be slow and cumbersome to reverse. Even a fast rulemaking takes a year or more, due to the notice-and-comment requirements of the APA, the SBREFA review panel process, and the need for a cost-benefit analysis. After the judiciary forced Mr. Mulvaney to initiate those procedures for any major rulemakings he wished to amend, his rulemaking initiatives slowed down.[295]

Other rulemaking dynamics, some mandated by statute, also slow down radical amendments. The transparency of rulemaking procedures allows public opposition to coalesce against

293. In the Economic Growth, Regulatory Relief, and Consumer Protection Act, Pub. L. No. 115-174 (2018), Congress did amend some of these statutes, but the modifications were sufficiently narrow to win bipartisan support.

294. For a discussion of the relationship among the CFPB's three most significant powers, see *supra* Part I.E.

295. *See supra* Part III.B.1.

the most extreme of proposed changes.[296] And regulated firms may have their own reasons to oppose wholesale changes to existing rules. Now that industry has invested substantial amounts of sunk costs in implementing the older, pre-2016 rules, it may not welcome costly changes. (This may partly explain Mr. Mulvaney's focus on rules that had not yet been implemented.) Reputable providers may also benefit from a fairer marketplace where dishonest firms are unable to out-compete them. Meanwhile, efforts to overhaul rules that were statutorily mandated by Congress offer fewer payoffs, since those rules cannot be reversed in their entirety without repealing the underlying statutes.

The cost-benefit analysis requirement also complicates efforts at reversal. Under Richard Cordray, the CFPB conducted voluminous, time-consuming studies that provided empirical support for the cost-benefit analyses in its later rules. As a result, the Cordray-era rulemakings were based on a deep evidentiary foundation. The Bureau assembled such a strong factual record for those rules that not one of those rules was successfully challenged in court for lack of evidence.

Despite Mr. Mulvaney's attempt to slant the cost-benefit analysis process, he still faced a major hurdle. Given the extensive empirical evidence justifying the original rules, the Bureau would face an uphill struggle if it sought to overturn any of those rules as unfounded in fact. To succeed, the Bureau would have to refute its own prior cost-benefit analysis with even stronger empirical evidence. Given the lack of evidence of changed circumstances and the rules' success to date in safeguarding consumers, that would not be easy.

Any drastic revisions to the existing rules would invite a court challenge to the rulemakings as arbitrary and capricious.[297] In that litigation, the Bureau would find itself in the uncomfortable position of defending a 180-degree turnabout on the facts when the rule in question had only been in effect for five years or less. Accordingly, we may see scenarios such as the latest proposed amendment to the payday rule, where the Bureau is still considering intervening in the payday loan market,

296. The notice and comment requirement, under the APA, requires an agency to "give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments." 5 U.S.C. § 553(c).

297. Section 706(2)(A) of the APA states that courts may reverse agency rules where they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . ." 5 U.S.C. § 706(2)(A).

but paring back the type of intervention from an ability-to-repay test to lesser consumer protections.[298] This would enable new leadership to relax payday regulation while relying on the Bureau's earlier cost-benefit analysis.

In short, the Bureau's rulemakings will be slow and difficult to reverse. However, to the extent that rules *are* amended, those changes will be cumbersome for a later Director to overturn.

Supervision is a different beast altogether. In comparison with rulemaking, it is easier for new leadership to slow-walk supervision at the Bureau without being fully detected.[299] However, any supervisory slowdown will be easy to reverse once a more proactive Director takes office.

Like supervision, rollbacks to enforcement are easy to institute and easy to change. Unlike supervision, downturns in enforcement are easier to detect. Some combination of the GAO and the Inspector General, plus researchers,[300] advocates, and the press, may hold the CFPB accountable for the slow pace of CFPB enforcement and the weakness of enforcement orders' terms. Some consumer finance scandals, such as Wells Fargo, are so egregious that they demand a response. Accordingly, it is possible to generate public pushback against a cessation of CFPB enforcement, which is harder to do for supervision.

Together, the dynamics I just described militate against a permanent collapse of consumer financial protection. In the interim, however, make no mistake, there is real and lasting harm to today's consumers from the CFPB's slowdown and pandering to industry interests. Thankfully, the CFPB does not have a stranglehold on consumer financial protection because Congress

298. *See* Public Statement Regarding Payday Rule Reconsideration and Delay of Compliance Date, *supra* note 199; Lev et al., *supra* note 219.

299. Even so, there are limits on how far that leadership can go in curtailing supervision. Because the CFPB has a statutory duty to supervise, it cannot abdicate its supervisory powers or give them away to the federal prudential banking regulators or to the states. Any sustained attempt to do that or to bring CFPB examinations to a halt would eventually attract the attention of GAO, the Inspector General, and, through them, the press and general public. *See, e.g.*, BD. OF GOVERNORS OF THE FED. RESERVE SYS., OFFICE OF INSPECTOR GEN., 2013-AE-C-201, THE CFPB SHOULD REASSESS ITS APPROACH TO INTEGRATING ENFORCEMENT ATTORNEYS INTO EXAMINATIONS AND ENHANCE ASSOCIATED SAFEGUARDS (2013), https://oig.federalreserve.gov/reports/CFPB_Enforcement_Attorneys_Examinations_full_Dec2013.pdf; U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-16-278, NONBANK MORTGAGE SERVICERS: EXISTING REGULATORY OVERSIGHT COULD BE STRENGTHENED (2016), https://www.gao.gov/assets/680/675747.pdf.

300. *See, e.g.*, PETERSON, *supra* note 221, at 2–5 (criticizing Mr. Mulvaney's refusal to authorize examinations for violations of the Military Lending Act).

built redundancy into the system. There are other potential avenues of consumer relief if the CFPB goes dark.[301]

C. Redundant Design

When Congress revamped federal consumer financial protection in 2010, it incorporated a number of fail-safes and preserved others in case the CFPB became moribund. These redundant design features supplement each of the three core regulatory functions of the CFPB—rulemaking, supervision, and enforcement—in case any of those functions shuts down.

1. Rulemaking

If the CFPB stops issuing new rules that are needed to prevent consumer harms, there are three alternative sources of law—one state and two federal—that can step into the breach.

Dodd-Frank's provision preserving the authority of the states to enact consumer financial laws that exceed federal protections (so long as those laws are consistent)[302] provides one important safeguard for consumers if CFPB rulemaking recedes. This state power has maximum effect when it comes to nonbank financial services providers, because three doctrines limit state power over depository institutions. First, federal preemption continues to allow national banks and federal savings associations to escape many state consumer safeguards in real estate lending.[303] Second, the *Marquette* holding allows national banks to export any higher usury caps in the states where they are located to borrowers living in other states.[304] Finally, wild card statutes in nearly every state extend the benefits of federal

301. From a broader perspective, the CFPB's recent retrenchment naturally raises questions about the wisdom of consolidating lead responsibility for market conduct risk in the Bureau, similar to a twin peaks model. If the CFPB abdicates its responsibilities—as happened under Mr. Mulvaney's leadership—we need to ask whether consumer financial protection will fall into a regulatory void. The federalist model of consumer financial protection helps guard against that. *See supra* notes 102–07 and accompanying text. Meanwhile, the twin peaks structure continues to alleviate other harmful pressures that have exacerbated imprudent deregulation in the past. The twin peaks model takes previous built-in conflicts, such as bank solvency regulation, off of the CFPB's plate. *See supra* notes 30–53 and accompanying text. It also relieves the Bureau from pressure to relax regulation even further, because the agency does not have to compete for charters. *See supra* Part I.B.

302. *See supra* Part I.F.

303. *See supra* note 104 and accompanying text.

304. Marquette Nat'l Bank of Minneapolis v. First of Omaha Serv. Corp., 439 U.S. 299, 308 (1978); *see* McCoy & Renuart, *supra* note 17, at 114.

preemption to state-chartered depository institutions in order to give them parity with federally chartered institutions.[305]

As a result of these carve outs for depository institutions, nonbank providers are the most frequent objects of state consumer financial laws. Even in the case of nonbank providers, however, state laws do not offer nationwide protection because some states have weaker laws than others. Nonbank providers doing business in states with strong consumer protections, however, have to observe those laws. On top of that, all states prohibit unfair or deceptive acts or practices in consumer credit,[306] which provides another layer of protection.

At the federal level, there are two potential stopgaps to a cutback in CFPB rulemaking. To some extent, the federal prudential banking regulators can address consumer finance abuses that jeopardize the solvency of insured depository institutions and their subsidiaries[307] through safety-and-soundness rules or guidances, if they so choose. The OCC, for example, issued several guidances addressing consumer protection issues that might threaten bank safety and soundness in the past few years.[308] Whether the prudential regulators will do more along those lines in the current deregulatory climate is unclear, particularly given their history of regulatory laxity during the years preceding the 2008 financial crisis. Still, those powers are on the books and can be used.

More importantly, the FTC can proscribe unfair and deceptive acts and practices (UDAPs) through enforcement and potentially through rulemaking in order to combat consumer harms that otherwise might have been addressed by CFPB rules.[309] The

305. *See, e.g.*, Carl Felsenfeld & Genci Bilali, *Is There a Dual Banking System?*, 2 J. BUS. ENTREPRENEURSHIP & L. 30, 34, 64–71 (2008); Christian Johnson, *Wild Card Statutes, Parity, and National Banks—The Renascence of State Banking Powers*, 26 LOY. U. CHI. L.J. 351, 368 (1995).

306. *See* NAT'L CONSUMER LAW CTR., CONSUMER PROTECTION IN THE STATES 9 (2018), http://www.nclc.org/images/pdf/udap/udap-report.pdf. This report documented substantial variation, however, in the strength of these state laws. *Id.* at 1.

307. In addition, the Federal Reserve Board exercises oversight of bank holding companies and their subsidiaries—including nonbank consumer finance affiliates—for safety and soundness. *See* 12 U.S.C. § 1844(c)(1)–(c)(2) (2012) (authorizing the Board's supervision of bank holding companies and their subsidiaries).

308. *See* Thomas J. Curry, Comptroller, OCC, Remarks at the Consumer Federation of America's Financial Services Conference 17–19 (Dec. 6, 2013) [hereinafter Curry Remarks], https://www2.occ.gov/news-issuances/speeches/2013/pub-speech-2013-185.pdf.

309. The FTC has authority to prohibit UDAPs under the Federal Trade

federal prudential regulators also play a role in UDAP oversight. While they no longer have rulemaking authority to define UDAPs,[310] the prudential regulators issued an interagency guidance in 2014 stating that practices by depository institutions that were prohibited by the regulators' previous credit practices rules might violate the prohibition against UDAPs in the Federal Trade Commission Act and the Dodd-Frank Act.[311] Together, the FTC and the prudential regulators cover virtually all bank and nonbank providers nationwide, which makes their UDAP powers an important potential antidote to rulemaking paralysis at the Bureau.

In sum, state consumer financial laws, federal safety-and-soundness rules for depository institutions, and UDAP laws at the state and federal levels provide a back-up if CFPB rulemaking grinds to a halt. Those laws vary in strength, purpose, and coverage, meaning that the back-up is only partial. Nevertheless, some states and agencies are already invoking those laws to address consumer violations,[312] protecting consumers in the process and applying pressure to the CFPB as well.

Commission Act. 15 U.S.C. § 45(a)(1) (2012); *see id.* § 57a; FED. TRADE COMM'N, A BRIEF OVERVIEW OF THE FEDERAL TRADE COMMISSION'S INVESTIGATIVE AND LAW ENFORCEMENT AUTHORITY (2008), https://www.ftc.gov/about-ftc/what-we-do/enforcement-authority. As a practical matter, due to the strictures in the Magnuson-Moss Warranty Act, the Commission has developed its UDAP doctrine through enforcement and not through rules. *See supra* notes 86–91 and accompanying text.

310. In Section 1092(2) of the Dodd-Frank Act (amending 15 U.S.C. § 57a(f)), Congress repealed their authority to write rules implementing the UDAP provisions in the Federal Trade Commission Act. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203, § 1092(2), 124 Stat. 1376, 2095. The FTC does have that rulemaking power but does not use it as a practical matter. *See supra* note 309 and accompanying text.

311. OCC, OCC BULL. NO. 2014-42, CREDIT PRACTICE RULES (2014), https://www2.occ.gov/news-issuances/bulletins/2014/bulletin-2014-42.html.

312. *See, e.g.*, Press Release, Office of Mass. Attorney Gen. Maura Healey, Federal Judge Denies Motion from For-profit School Industry to Delay Critical Protections for Student Loan Borrowers (Oct. 16, 2018), https://www.mass.gov/news/federal-judge-denies-motion-from-for-profit-school-industry-to-delay-critical-protections-for; Press Release, Bd. of Governors of the Fed. Reserve Sys., Responding to Widespread Consumer Abuses and Compliance Breakdowns by Wells Fargo, Federal Reserve Restricts Wells' Growth Until Firm Improves Governance and Controls. Concurrent with Fed Action, Wells to Replace Three Directors by April, One by Year End (Feb. 2, 2018), https://www.federalreserve.gov/newsevents/pressreleases/enforcement20180202a.htm.

2. Supervision

To some degree, Congress also built redundancy into supervision for consumer compliance. This is most noticeable in the case of depository institutions. The federal prudential banking regulators and, where appropriate, state banking regulators examine consumer practices by banks, thrifts, and credit unions for safety-and-soundness concerns.[313] The federal prudential regulators also examine depository institutions for federal UDAP violations and compliance with certain other consumer protection laws, including the Fair Housing Act, the Servicemembers Civil Relief Act and the Community Reinvestment Act.[314]

The prudential regulators' overlapping supervision is especially important when it comes to banks, thrifts, and credit unions with more than $10 billion in assets, because the Bureau has exclusive supervisory power over those institutions for compliance with the federal consumer financial laws.[315] While parallel examinations by the Federal Reserve, the FDIC, the OCC, and the NCUA do not look at the identical issues as CFPB examinations, there is meaningful overlap. Meanwhile, the federal prudential banking regulators continue to serve as the primary supervisors of smaller depository institutions and credit unions

313. *See, e.g.*, Curry Remarks, *supra* note 308, at 15 ("In reality, there is no neat dividing line between consumer compliance and safety and soundness issues."); *cf.* 12 U.S.C. § 5515(b)(2)–(b)(3), (e) (2012) (requiring the CFPB to coordinate with safety and soundness examinations and to use reports from those examinations where relevant). State banking regulators also examine state-chartered banks, thrifts, and credit unions for consumer compliance.

314. *See* OFFICES OF INSPECTOR GEN., FDIC OIG REP. NO. EVAL-15-004, VARIOUS FEDERAL AGENCIES, COORDINATION OF RESPONSIBILITIES AMONG THE CONSUMER FINANCIAL PROTECTION BUREAU AND THE PRUDENTIAL REGULATORS—LIMITED SCOPE REVIEW 2–3, 13–15 (2015), https://www.fdicoig.gov/sites/default/files/publications/15-004EV.pdf; Curry Remarks, *supra* note 308, at 14–15.

315. In reality, the CFPB's exclusive supervisory jurisdiction is larger than this. Under Dodd-Frank and a 2012 Memorandum of Understanding among the CFPB and the federal prudential banking regulators, the CFPB also supervises insured depository institutions with $10 billion or less in total assets for compliance with the federal consumer financial laws any time those institutions are affiliates of an insured depository institution with total assets exceeding $10 billion. *See* Memorandum of Understanding on Supervisory Coordination Between the CFPB and Prudential Regulators 3 n.4 (May 16, 2012), https://www.consumerfinance.gov/policy-compliance/guidance/implementation-guidance/mou-supervisory-coordination; *see also* 12 U.S.C. § 5515(a) (authorizing the CFPB to supervise depository institutions with more than $10 billion in assets as well as those institutions' affiliates).

for consumer compliance, so any lapse in CFPB oversight does not affect them.[316]

Any abdication by the CFPB of its exclusive federal supervisory responsibilities for nonbanks would be more problematic. Because the FTC lacks routine examination power over nonbanks, there is no federal agency other than the CFPB that examines nonbanks for consumer compliance. However, there *are* pockets of other supervisory authority over nonbank financial firms.

For example, each appropriate federal prudential banking regulator conducts safety and soundness examinations of the nonbank subsidiaries of insured depository institutions under its watch.[317] Similarly, the Federal Reserve Board examines nonbank subsidiaries of bank holding companies for safety and soundness.[318] At the state level, some independent nonbank financial providers undergo consumer compliance examinations, depending on the state.[319] State jurisdiction over independent nonbank providers is spotty, so some nonbank firms elude examination entirely. Nevertheless, the existing pockets of supervision could partly close the gap if CFPB supervision of nonbanks faltered.

In sum, if the CFPB defaults, there is a partial safety net for the entire banking industry because federal and state prudential banking regulators examine all depository institutions, credit unions, and their affiliates for solvency and sometimes consumer protection. Supervisory jurisdiction over nonbanks is less complete, but other agencies bring supervisory scrutiny to bear on those providers in many cases.

3. Enforcement

Dodd-Frank's redundant design is most apparent when it comes to CFPB enforcement. Under Dodd-Frank, state attorneys general can sue bank and nonbank providers alike to enforce Title X of Dodd-Frank and accompanying CFPB rules.[320] Obviously, the strength of state enforcement will depend on a given

316. *See* 12 U.S.C. § 5516(a)–(c).
317. *See* McCoy & Renuart, *supra* note 17, at 128 tbl.4-1.
318. *See id.* at 128 tbl.4-1.
319. *See id.*
320. 12 U.S.C. § 5552(a)(1). The one exception is in the case of national banks and federal savings associations, which state attorneys general may only sue to enforce CFPB rules implementing Title X. *Id.* § 5552(a)(2). Meanwhile, Dodd-Frank also empowered state regulators to "bring a civil action or other appro-

state's attorney general and his or her enforcement philosophy, priorities, and willingness to litigate in federal court. Nevertheless, vigorous enforcement by one state can protect that state's citizens while pressuring the CFPB to act. On top of this, state attorneys general and state banking regulators retain their customary authority to enforce state consumer financial laws.

There is also substantial overlap in federal enforcement. In 2012, the FTC and the CFPB signed a memorandum of understanding (MOU) governing enforcement actions against independent nonbanks concerning the offering or provision of consumer financial products or services.[321] As a result of that MOU and the FTC's independent authority for enforcing the UDAP provisions in Section 5 of the Federal Trade Commission Act, the Commission remains a potent enforcement authority against freestanding nonbank providers. Separately, the federal prudential banking regulators retain consumer compliance enforcement authority against the overwhelming bulk of banks, thrifts, and credit unions (those with total assets of $10 billion or less).[322] The prudential regulators also have ample authority to bring other types of enforcement actions against insured depository institutions and their affiliates of any size. These include actions for safety-and-soundness violations involving consumer products or services as well as for UDAP violations and infractions of the other consumer laws that they administer.[323] Admittedly, the jurisdiction of the federal prudential banking regulators, like that of the FTC,[324] is not perfectly congruent with the CFPB's substantive authority over the federal consumer financial laws. Still, some sort of back-up federal enforcement authority is possible if the Bureau fails to discharge its enforcement responsibilities adequately.

Finally, the federal consumer financial laws provide a number of express private rights of action to consumers who have suffered harm.[325] While mandatory arbitration clauses, growing

priate proceeding" against state-chartered entities to enforce Title X and its implementing rules. *Id.* § 5552(a)(1).

321. *See id.* § 5514(c)(3) (requiring the two agencies to negotiate that agreement); CFPB-FTC Memorandum of Understanding, *supra* note 27.

322. 12 U.S.C. § 5516(d)(1).

323. *See* Curry Remarks, *supra* note 308, at 16; *cf. supra* notes 315–16 and accompanying text (describing supervisory jurisdiction).

324. For a list of the laws that the FTC enforces, see FED. TRADE COMM'N, STATUTES ENFORCED OR ADMINISTERED BY THE COMMISSION, https://www.ftc.gov/enforcement/statutes.

325. *See, e.g.*, 12 U.S.C. § 2605(f)(1)–(3); 15 U.S.C. §§ 1640(a), 1681n, 1681o

hurdles to class action certification, and prohibitive litigation costs discourage individual actions, these causes of action bolster enforcement on the margin.

Bottom line, banks and nonbanks alike face other types of potential state and federal enforcement plus possible private lawsuits if enforcement lapses at the Bureau. Like the redundancies surrounding CFPB rulemaking and supervision, the overlap between CFPB enforcement and other state and federal enforcement provides a possible alternative safeguard for consumers if the CFPB continues down the path of deregulation.

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To conclude, the Bureau's structural safeguards will probably survive the Trump Administration intact. Subject to the caveats mentioned above,[326] it is unlikely that the CFPB will be compromised permanently, allowing it to eventually resume vigorous protection of consumers once another sympathetic Director takes office. In the short term, however, consumers will suffer real harm due to the Bureau's inaction. Other state and federal actors may take up some of the slack, but those protections will be piecemeal and invocation is not guaranteed.

CONCLUSION

The inside job at the Consumer Financial Protection Bureau is striking for its emphasis on structure. More importantly, this story has larger significance for the rule of law. Mr. Mulvaney accomplished certain objectives, and floated proposals to accomplish others, by ignoring or circumventing legal protections that Congress put in place to protect the CFPB's independence and the integrity of the agency's decisions. Indeed, perhaps to deflect criticism on that score, Mr. Mulvaney sought to clothe his own actions in the guise of the rule of law, telling Congress: "By structuring the bureau the way it has, Congress established an agency primed to ignore due process and abandon the rule of law in favor of bureaucratic fiat and administrative absolutism."[327]

(2012); B. Rush Smith III, Thad H. Westbrook & Sarah Nielsen, *Litigation Implications of the Dodd-Frank Financial Reform Act*, BUS. L. TODAY 1 (2010), https://www.americanbar.org/content/dam/aba/publications/blt/2010/09/litigation-implications-dodd-frank-201009.pdf.

326. *See supra* note 277 and accompanying text.

327. Alan Rappeport, *Mick Mulvaney, Consumer Bureau's Chief, Urges Congress to Cripple Agency*, N.Y. TIMES (Apr. 2, 2018), https://www.nytimes.com/2018/04/02/us/politics/cfpb-mick-mulvaney.html; *cf.* Minority Staff Report, *supra* note 155, at 5 ("Mr. Mulvaney has repeatedly claimed that he will hew closely to the law . . . .").

Yet Mr. Mulvaney himself was willing to disregard congressional statutes and intent when observing them would impede his policy objectives.

Rule of law concerns set in on day one, when Mr. Mulvaney assumed leadership of the Bureau. His decision to stay on as OMB Director while running the CFPB called into question at least four Dodd-Frank requirements, including the one creating the Bureau as an independent agency and those prohibiting OMB from overseeing CFPB affairs or operations, from reviewing or approving CFPB legislative recommendations and testimony, and from approving CFPB financial plans or quarterly reports.[328] In addition, his actions, as simultaneous head of OMB and the CFPB, in giving final approval to CFPB rulemaking decisions raised questions about adherence with the spirit and the letter of E.O. 12,866.[329]

Mr. Mulvaney's rulemaking actions resulted in additional legal incursions. He disregarded the APA by refusing to implement final new rules promulgated under Mr. Cordray, earning the disapproval of one federal court.[330] Similarly, he lifted an important new provision of the new HMDA rule without affording opportunity for public comment.[331]

Mr. Mulvaney did not restrict his contempt for law to the rulemaking process. He contemplated transferring the CFPB's supervisory authority over large depository institutions to the federal prudential banking regulators, in violation of the Dodd-Frank Act.[332] He stripped OFLEO of supervisory and enforcement powers, overriding another provision of Dodd-Frank.[333] And he caved in to White House and executive branch pressure regarding enforcement in the Navient student loan and Wells Fargo cases.[334]

328. *See supra* notes 81–84 and 159–69 and accompanying text. These issues and those involving Executive Order 12,866 were briefed and argued to the D.C. Circuit in *English v. Trump*. *See* Brief for Consumer Financial Regulation Scholars as Amici Curiae Supporting Plaintiff-Appellant Leandra English at 7, 11–13, 23–28, English v. Trump, No. 18-5007 (D.C. Cir. 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3119202. Ms. English withdrew her appeal before the court issued a ruling. *See* English v. Trump, No. 18-5007 (D.C. Cir. Jul. 13, 2018), *appeal dismissed* (per curiam).

329. *See supra* notes 81–84 and 166–69 and accompanying text.

330. *See supra* notes 196–98 and accompanying text.

331. *See supra* notes 190–92 and 196 and accompanying text.

332. *See supra* notes 214–15 and accompanying text.

333. *See supra* notes 224–27 and 263–64 and accompanying text.

334. *See supra* notes 170–72, 244–45, 250–51, and 266 and accompanying text.

A structure is only as strong as the laws that create it. Mr. Mulvaney's attack on the CFPB's functions through disregard for law was the most serious threat of all to the structure of the Bureau.