Chapter 13:

The Regulatory Framework of Federal Consumer Financial Protection Law and Opportunities for Modernization

Federal consumer financial law is a labyrinthian system Daedalus might admire. It is a patchwork quilt of interwoven laws and regulations that sprung up as piecemeal, uncoordinated responses to a series of financial crises. It is administered by a constellation of executive and independent agencies with varying institutional structures, some with overlapping jurisdiction and purpose. Despite its chaotic look and feel, the t-rue marvel is that this convoluted system of "regulatory jumble[1]" largely works.

In the decade since the Dodd-Frank Act was enacted, the fissures in the financial regulatory regime have revealed faults and inefficiencies in the system. The world has changed. Greater access to technology and information and an emphasis on convenience has upended the way consumers and financial institutions interact. The Consumer Financial Protection Bureau has reshaped the way financial firms work with the government and consumers alike. Most recently, the Covid-19 global pandemic has spotlighted the financial system's clunky design and immobility in the face of changing circumstances.

As the facts of today clash with the past, it is important that the financial regulatory framework adapt. Congress, regulators and policymakers must continually consider ways to improve, modernize, and update the laws. The goal should not be to reach an unattainable state of regulatory nirvana but to build a better, more nimble system that works for more people especially those who are most vulnerable.

This chapter will explore the contours of the regulatory framework underpinning consumer financial law with an analysis of the role of the Bureau, other federal agencies and states. This chapter will also analyze the successes and failures of the current regulatory system and opportunities for improvement.

I. The Federal Financial Regulatory System

Overview of Consumer Financial Protection Bureau and its Jurisdiction

The Consumer Financial Protection Bureau (the Bureau) is one of many financial services industry watchdogs. Congress endowed the agency with expansive authority and jurisdiction to take on the task of coordinating and concentrating consumer financial protection powers previously held by seven other agencies.

As discussed in Chapter 6, the concept of a consumer protection agency appears in the 1972 Report of the National Commission of Consumer Finance, which calls for a new consumer protection "Federal Watchdog Agency" with a specific bureau dedicated to financial services. According to the NCCF Report:

> The Commission's review of supervision and examination of credit grantors by state and Federal agencies charged with those responsibilities has uncovered certain weaknesses in the enforcement of state and Federal consumer credit protection laws. To strengthen protection of the consumer in the credit market the Commission feels that an organizational unit is needed at the Federal level to coordinate activities of supervisory

[1] Elizabeth Warren, *Unsafe at Any Rate: If it's good enough for microwaves, it's good enough for mortgages. Why we need a Financial Product Safety Commission* (2007), *available at* [HYPERLINK "https://democracyjournal.org/magazine/5/unsafe-at-any-rate/"].

> agencies, improve compliance with existing Federal and state consumer credit protection laws, implement certain of the Commission's recommendations and continue certain of the basic consumer credit market research initialed by the Commission. Therefore *the Commission recommends that Congress create within the proposed Consumer Protection Agency a unit to be known as the Bureau of Consumer Credit (BCC) with full statutory authority to issue rules and regulations and supervise all examination and enforcement functions under the Consumer Credit Protection Act, including TIL.* [2]

The NCCF also called for substantial revisions to the regulatory and enforcement policies of various federal and state regulatory and enforcement agencies. As the Commission wrote, "[i]n this connection the Commission notes that state as well as Federal enforcement of laws dealing with consumer credit has been uneven at best, and that definite improvement is called for. Passage of laws ultimately left in desuetude is no help to borrowers or creditors."[3] According to the NCCF, federal banking regulators "charged with supervising deposit-holding institutions," on the other hand, "have evidenced great interest in the solvency of the institutions, much less interest in enforcing Federal consumer credit laws, and virtually no interest in enforcing state consumer credit laws."[4] The Commission stressed the essential role played by the states in enforcement, arguing enforcement was "too broad to assign other than to the states, perhaps with Federal monitoring."[5] But, the Commission added, "Consumers are entitled to much better consumer credit protection law enforcement at the state level than they have been receiving."[6] Despite the NCCF's call for a federal consumer protection watchdog agency to address these deficits, the idea laid dormant for decades as the FTC, states, and prudential regulators stepped in to assume overlapping authority for various elements of the consumer financial protection system.

Scholars generally credit the Bureau's beginning to Senator Elizabeth Warren. In 2007, then-professor Warren advocated for added consumer protection in the financial services industry. Up to that point, regulation, examination and supervision were primarily concerned with ensuring the safety and soundness of financial institutions with consumer protection as an ancillary concern.[7] Further complicating matters, these regulatory functions were distributed among several federal and state agencies with disparate agendas and ideologies. No one agency devoted its time and resources to the specific task of promoting the needs of the average consumer or protecting them in the financial marketplace.

Professor Warren noted that a consumer's financial health could significantly impact his or her overall wellbeing. In recognition of this fact, she envisioned a protection agency modeled after the Consumer Product Safety Commission that would set minimum safety standards and improve consumer confidence in the financial marketplace. Shortly after Professor Warren's proposal was published, the

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[2] Nation Commission on Consumer Finance, Consumer Credit in the United States 58 (Dec. 1972) (italics in original).
[3] *Id.* at 4.
[4] NCCF Report, *supra* note [NOTEREF _Ref56870421 \h * MERGEFORMAT], at 57.
[5] *Id.*
[6] *Id.* at 61.
[7] Some have argued that safety and soundness assessments are primarily focused on ensuring an institution's profitability rather than the prevention of consumer harm. *See* Adam J. Levitin, *The Consumer Financial Protection Bureau: An Introduction*, 32 Rev. Banking & Fin. L. 321, 330–31 (2013). However, federal regulators did undertake examinations to assess compliance with consumer protection laws.

subprime mortgage market collapsed. And her ideas paved the way for augmented consumer rights and checks in the financial services industry through the creation of the Bureau.

Bureau Organizational Structure

In 2010, Congress passed the Dodd-Frank Act which included the Consumer Financial Protection Act (CFPA). The CFPA established the Bureau as an independent, executive agency within the Federal Reserve System.[8] Accordingly, the Federal Reserve System funds the Bureau. Each year or quarterly, the Director determines an amount reasonably necessary, subject to a statutory cap, to carry out the functions of the agency, which the Federal Reserve Board subsequently releases.[9]

Importantly, neither the Bureau's request for funding nor the Bureau's activities, in general, are subject to the Federal Reserve Board's approval.[10] Congress's appropriations committee also lacks the authority to review the Bureau's request for funds.[11] The CFPA requires the Director to provide the Office of Management and Budget (OMB) with a copy of its financial operating plans and forecasts, but the OMB lacks approval authority over the funding as well.[12] And although the Comptroller General conducts annual financial audits of the Bureau, which are ultimately provided to the President and Congress, the CFPA does not provide the Comptroller General, the President or Congress with explicit authority to intervene should an audit suggest the Bureau's budget is unreasonable.[13] In this way, the Bureau maintains a level of independence from the Federal Reserve Board, other members of the executive branch, the President, and Congress.

The purpose of the Bureau is to consistently implement and enforce Federal consumer financial law to ensure that all consumers have access to financial services markets and that those markets are fair, transparent, and competitive.[14] To summarize the provisions of the CFPA, the primary functions of the Bureau are to:

- conduct financial education programs;
- handle consumer complaints;
- publish information identifying risks to consumers and the proper functioning of markets;
- supervise covered persons and undertake appropriate enforcement actions;
- issue rules, orders and guidance regarding federal consumer financial law; and
- perform other activities as necessary to carry out the functions of the Bureau.[15]

To accomplish these functions, the Bureau is statutorily required to maintain specific functional units or offices at the agency. Those statutorily-required offices and units include: a research unit, community affairs unit, a unit dedicated to the collection and tracking of consumer complaints, an office of fair lending, office of financial education, office of service member affairs, and an office of financial

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[8] *See* Section 1011(a) of the Dodd-Frank Act.
[9] *See id.* at Section 1017(a).
[10] *See id.* at Section 1012(c)(2).
[11] *See id.* at Section 1017(a)(2)(C).
[12] *See id.* at Section 1017(a)(4).
[13] *See id.* at Section 1017(a)(5)(A).
[14] *See id.* at Section 1021.
[15] *See id.* at Section 1021(c).

protection for older Americans.[16] In addition, the Bureau has established several other divisions and offices to carry out its duties.

Overview of Bureau Authority & Covered Persons

The CFPA consolidates in the Bureau many of the federal consumer protection powers previously held by seven other regulators.[17] These regulators included the Officer of Comptroller of the Currency (OCC), National Credit Union Administration (NCUA), Board of Governors of the Federal Reserve System (FRB), Federal Deposit Insurance Corporation (FDIC), the former Office of Thrift Supervision (OTS), Federal Trade Commission (FTC), and the Department of Housing and Urban Development (HUD).[18] Unlike the five prudential~~banking~~ regulators, the FTC did not have supervisory authority over nondepositories that fell under FTC jurisdiction. Because state regulators filled that void, supervision standards and procedures were fractured and varied by state.[19]

Generally, the CFPA endowed the Bureau with rulemaking, ~~supervisory and enforcement authority over entities subject to federal consumer financial laws, service providers, and "covered persons."~~ authority over Federal consumer financial law (with some exceptions contained in 1027 and 1029). The Bureau has supervisory authority over covered persons *but also* over service providers in various respects. Finally, the Bureau's enforcement authority extends to any person.

Covered persons subject to the Bureau's supervisory authority include depository institutions with over $10 billion in assets and certain nondepository institutions that offer or provide consumer financial products or services. ~~. The Bureau's regulation of not subject to federal supervision prior to the Bureau's creation.~~[20] The Bureau can supervise nondepositories of all sizes in the residential mortgage, private education lending, and payday lending markets subject to a risk-based prioritization process.[21] Also, the Bureau may supervise [22]nondepositories that are larger participants in markets for consumer financial products or services, as defined by Bureau rulemakings if the Bureau determines they pose a risk to consumers~~and larger participants in markets for consumer financial products or services, as defined by Bureau rulemakings.~~[23]

To date, the Bureau has issued rules defining larger participants in the markets for consumer reporting, debt collection, student loan servicing, international money transfers, and automobile financing and certain automobile leasing activities.[24] Prior to the Dodd-Frank Act, nondepository institutions often competed with banks but were not subject to the same supervision and enforcement. So, the goal for defining larger participants was to capture larger players in each market and obtain a broader view of the issues in those markets. The Bureau also sought to level the playing field between nondepository

[16] *See id.* at Sections 1013(b)-(g).
[17] Congressional Research Service, The Consumer Financial Protection Bureau (CFPB): A Legal Analysis at 2 (2014).
[18] *Id.* at 2.
[19] *Id.* at 3.
~~[20] *Id.* at 2.~~
[21] See [HYPERLINK "https://www.consumerfinance.gov/policy-compliance/rulemaking/final-rules/defining-larger-participants-student-loan-servicing-market/"]; Section 1024(a)(1) of the Dodd-Frank Act; *id.* at 1024(b)(2).
[22] ~~See~~ [HYPERLINK "https://www.consumerfinance.gov/policy-compliance/rulemaking/final-rules/defining-larger-participants-student-loan-servicing-market/"]~~; Section 1024(a)(1) of the Dodd-Frank Act; *id.* at 1024(b)(2).~~
[23] *See id.* at 1024(a)(1)(C); *id.* at 1024(a)(1)(B). *See also* 12 C.F.R. 1090; 12 C.F.R. 1091.
[24] *See* 12 C.F.R. 1090; 12 C.F.R. §1001.

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institutions and depository institutions by making sure both were subject to fair and equal levels of supervision. The Bureau developed larger participant rules by analyzing statistical data and cost-benefit analyses by market. But this data was largely imperfect given there were no requirements for these nondepositories to register with regulators. The Bureau now has the authority to require these entities to register with the Bureau.[25]

Noticeably, the Dodd-Frank Act explicitly excludes auto dealers from the Bureau's authority. This is the case even though some either directly or indirectly facilitate extensions of credit to consumers like other covered entities.[26] The auto dealer exemption does not apply to those that "offer financing, including leases, directly to consumers and do not routinely assign the loan or lease to an unaffiliated third party; provide services related to real property transactions; or offer any other consumer financial product or service not related to the sale or servicing of vehicles or boats, as applicable." But most auto dealers fall outside of this exception, and thus escape Bureau oversight.[27]

<u>Bureau Rulemaking Authority</u>

The Bureau has broad rulemaking powers. Generally, it has the authority to implement, administer and enforce "federal consumer financial law."[28] Federal Consumer financial laws means the CFPA, the laws for which authorities are transferred under subtitles F and H of the CFPA, any Bureau rule or order issued pursuant to the CFPA, and the "enumerated consumer laws."[29] The 18 enumerated consumer laws include:

- the Alternative Mortgage Transaction Parity Act of 1982;
- the Consumer Leasing Act of 1976;
- the Electronic Fund Transfer Act[30];
- the Equal Credit Opportunity Act;
- the Fair Credit Billing Act;
- the Fair Credit Reporting Act[31];
- the Home Owners Protection Act of 1998;

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[25] *See* Section 1022(c)(7) of the Dodd-Frank Act.
[26] *See id*. at Section 1029.
[27] *See* Donald C. Lampe, Ryan J. Richardson, *The Consumer Financial Protection Bureau at Five: A Survey of the Bureau's Activities*, 21 N.C. Banking Inst. 85, 130 (2017).
[28] *See* Section 1022(a) of the Dodd-Frank Act.
[29] *See id*. at 1002(14).
[30] Except for Section 920 of the Electronic Funds Transfer Act, the CFP transferred rulemaking authority for this law from the Federal Reserve to the Bureau. *See id*. at Section 1002(12); *see also* [HYPERLINK "https://www.consumerfinance.gov/policy-compliance/rulemaking/final-rules/electronic-fund-transfers-regulation-e/"].
[31] The CFPA did not transfer to the Bureau authorities under sections 615(e) and 628 of the Fair Credit Reporting Act.

- the Fair Debt Collection Practices Act;
- subsections (b) through (f) of section 43 of the Federal Deposit Insurance Act;
- sections 502 through 509 of the Gramm-Leach- Bliley Act[32];
- the Home Mortgage Disclosure Act of 1975;
- the Home Ownership and Equity Protection Act of 1994;
- the Real Estate Settlement Procedures Act of 1974;
- the S.A.F.E. Mortgage Licensing Act of 2008;
- the Truth in Lending Act;
- the Truth in Savings Act;
- section 626 of the Omnibus Appropriations Act, 2009; and
- the Interstate Land Sales Full Disclosure Act.[33]

Federal regulators have each grappled with the question of how to best implement rules broad enough to cover their respective jurisdictions yet narrowly tailored to prevent over-inclusiveness. Part of this equation is determining whether such rules should be prescriptive, principle-based, or a hybrid of the two.[34] Prescriptive rules provide specific, detailed requirements; whereas principle-based rules describe high-level, broad principles or standards that entities must meet.[35] While prescriptive and principle-based rules both have their merits, there may be circumstances that make one more effective than the other. Given their specificity, prescriptive rules can quickly stale due to changes in circumstance. Principle-based rules are generally thought to be more flexible and adaptive but may lack clarity.[36] The choice between them is discussed in more detail in Chapter 6.

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Most of the enumerated consumer laws are prescriptive in nature. However, the CFPA provides the Bureau with another powerful, principle-based tool for addressing bad conduct – its authority to regulate and enforce against unfair, deceptive, or abusive acts or practices (UDAAP).[37] UDAAP's flexibility gives the agency wide latitude in determining whether certain conduct causes harm to consumers. The law provides criteria for conduct considered "unfair" and "abusive". The Bureau may

[32] The CFPA did not transfer authority under the Safeguards Rule in the Gramm-Leach-Bliley Act. The FTC has authority over this rule. *See* Section 1002(12)(J) of the Dodd-Frank Act.
[33] *See id.* at Section 1002(12).
[34] *See* Heath P. Tarbert, *Rules for Principles and Principles for Rules: Tools for Crafting Sound Financial Regulation*, Harvard Business Law Review, Vol. 10 (2019-2020).
[35] *See id.*
[36] *See* Dan Awrey, Regulation Financial Innovation: A More Principles-Based Proposal?, Brook. J. Corp. Fin. & Com. L., Vol. 5, 274-279 (2011), *available at* [HYPERLINK "https://brooklynworks.brooklaw.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1097&context=bjcfcl"].
[37] *See* Section 1031 of the Dodd-Frank Act.

undertake rulemaking to further define these standards,[38] but need not do so prior to enforcing them.[39] This flexibility has created a level of uncertainty among covered institutions especially with respect to the "abusiveness" standard. Since the FTC has long had the authority to prosecute "unfair" and "deceptive" acts, entities can take their cues from robust precedents in those areas to determine whether their conduct will violate the law. But the FTC does not have authority to prosecute "abusive" conduct.[40] The Bureau has had to wade into unchartered waters when applying this standard.[41] In February 2020, it issued a policy intended to clarify the abusiveness standard, but the uncertainty among covered institutions remains.[42]

In order to support its rulemaking and other functions, the Bureau must monitor risks and trends in the financial marketplace and produce an annual report.[43] The Bureau must consider a rule's potential costs and benefits to consumers and covered persons and the impact on specific covered persons described in Section 1026 of the Dodd-Frank Act and consumers in rural areas .[44] The CFPA also provides the Bureau with the authority to exempt classes of persons or products from a rule or the CFPA.[45] If the Bureau enacts a "significant" rule or order, it is required to assess its effectiveness within the first five years.[46] Beyond this initial assessment, there is no CFPA requirement for the Bureau to continually assess the Legal Comment: This sentence is not supported by the cited authority, which relates to the subject matter of the following sentence.

Note also that the Bureau's market monitoring process serves purposes broader than simply the Bureau's rulemaking function. See 12 USC 5512(c)(1) ("In order to support its rulemaking and other functions…")

effectiveness of a rule.[47]

The Bureau's broad rulemaking authorities are subject to some regulatory and legal oversight. The Financial Stability Oversight Council may set aside Bureau regulation that poses a risk to the safety and

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[38] *See* Section 1031(b) of the Dodd-Frank Act.
[39] *See e.g. Consumer Financial Protection Bureau v. Navient Corporation*, 2017 WL 3380530 (M.S. Pa. 2017). *See also* Section 1031(b) of the Dodd-Frank Act.
[40] *See Section 5 of the FTC Act;* § 8:11.Concurrent Jurisdiction with CFPB, Consumer Protection and the Law § 8:11. The FTC also enforces the Telemarketing Sales Act, which prohibits "abusive" telemarketing practices, but in adopting the National Do Not Call Registry the agency stated that it would identify additional practices as "abusive" "within the purview of its traditional unfairness analysis, as developed in Commission jurisprudence and codified in the FTC Act." *See* Telemarketing Sales Rule, Statement of Basis and Purpose, 68 Fed. Reg. 4580, 4614 (2003).
[41] *See* § 8:11.Concurrent Jurisdiction with CFPB, Consumer Protection and the Law § 8:11.
[42] *See* [HYPERLINK "https://www.federalregister.gov/documents/2020/02/06/2020-01661/statement-of-policy-regarding-prohibition-on-abusive-acts-or-practices"].
[43] *See* Section 1022(c)(1)of the Dodd-Frank Act. Additionally, note that the Bureau can require covered persons and supervised entities to provide information in support of its monitoring requirements.
[44] *See id.* at 1022(b)(2)(A).
[45] *See id.* at Section 1022(b)(2)-(3).
[46] *See* Section 1022(d) of the Dodd-Frank Act.
[47] The Regulatory Flexibility Act also requires the Bureau to conduct a review of rules within 10 years of their enactment. *See* [HYPERLINK "https://www.consumerfinance.gov/about-us/newsroom/bureau-outlines-plan-review-rules-under-regulatory-flexibility-act/"].

soundness of the U.S. banking system or the stability of the U.S. financial system, which acts as a check on the Bureau's rulemaking powers.[48]
In addition to oversight by the Financial Stability Oversight Council, the Bureau's rules are subject to review under the Administrative Procedure Act and the Congressional Review Act.

Bureau Supervisory Authority

The CFPA establishes the Bureau as the foremost financial regulatory agency conducting examinations for compliance with federal consumer financial law.[49] The Bureau examines covered persons subject to its supervisory authority to assess their compliance, obtain information about their activities or internal policies, and detect and assess risks to consumers and the financial services market.[50]

The Bureau's authority to supervise and examine covered non-banks is virtually on par with its authority for depository institutions with over $10 billion in assets. With respect to both non-banks and depository institutions, the Bureau is required to coordinate examinations with other federal and state regulators.[51] But for nondepositories, the Bureau is required to scale examinations based on the risk profile of these entities using factors such as asset size, volume of business, and risk to consumers.[52]

Although limited, the Bureau has some authority over nondepositories with $10 billion or less in assets. Prudential regulators have primary authority to enforce compliance with federal consumer financial law.[53] But the Bureau may require these institutions to provide information to assist in the Bureau's work[54] and may also participate in exams by prudential regulators on a limited basis[55].

Bureau Enforcement Authority

The Bureau is also charged with enforcing federal consumer financial law to protect consumers and ensure the markets for federal consumer financial products or services operate fairly. The CFPA gives the Bureau the power to file a civil lawsuit or initiate an administrative proceeding before an administrative law judge to enforce compliance with federal consumer financial law.[56] The Bureau has a number of civil remedies available to it including: rescission or reformation of contracts; refund of moneys or return of real property; restitution; disgorgement or compensation for unjust enrichment; payment of damages or other monetary relief; limiting the activity of the violator; notifying the public of

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[48] *See* Section 1023(a) of the Dodd-Frank Act. The members of the Financial Stability Oversight Council include voting members: the Secretary of the Treasury, Chairman of the Board of Governors of the Federal Reserve System, Comptroller of the Currency, the Chairman of the SEC, the Chairperson of the Commodity Futures Trading Commission; the Director of the Federal Housing Finance Agency; the Chairman of the NCUA Board, Chairperson of the FDIC, Director of the Bureau, and a presidential appointee; and non-voting members: the Director of the Office of Financial Research, Director of the Federal Insurance Office, a designated state insurance commissioner, a designated state banking supervisor, and a designated state securities commissioner. *See id.* at Section 111.
[49] *See id.* at Section 1024(d), 1025(b).
[50] *See id.* at Section 1024(b)(1), 1025(b)(1).
[51] *See id.* at Section 1024(b)3), 1025(e).
[52] *See id.* at Section 1024(b)(2).
[53] *See id.* at Section 1026(d).
[54] *See id.* at Section 1026(b).
[55] *See id.* at Section 1026(c)(1).
[56] *See* Adam J. Levitin, *The Consumer Financial Protection Bureau: An Introduction*, 32 Rev. Banking & Fin. L. at 357.

the violation and recouping associated fees; and civil money penalties.[57] The Bureau may also recover costs associated with pursuing an action against a violator. However, it cannot recover exemplary or punitive damages.[58]

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The CFPA establishes a three-tiered structure for the assessment of penalties. As of the effective date of the CFPA, a court or administrative body could assess a penalty of up to $5,000 (Tier 1), $25,000 (Tier 2), or $1,000,000 (Tier 3) for each day a violation of law continued.[59] The per-day penalty amount is based on whether the entity violated the law a) without knowledge or recklessness (Tier 1); b) recklessly (Tier 2) or c) knowingly (Tier 3). These amounts are adjusted annually due to inflation pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990.[60] The Bureau has the authority to compromise, modify, or remit any penalty a court or the Bureau assesses.[61] Generally, the Bureau maintains that it determines an appropriate penalty by considering the number of violations of a consumer financial law and the number of consumers harmed by the violation~~.~~, and then applying the mitigating factors.[62]

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The ~~Bureau is required by law to consider~~ six mitigating factors the Bureau is required to consider ~~when calculating penalties~~include:

- Size of financial resources
- Good faith
- Gravity of the violation or failure to pay
- Severity of the risks to or losses of the consumer
- History of previous violations; [and]
- Such other matters as justice may require.[63]

The Bureau's penalty structure has been criticized given its broad discretion to seek penalties and the perceived lack of transparency regarding the Bureau's penalty calculations. The high maximum penalty amounts for each tier can ~~rapidly~~ potentially generate maximum penalties out of proportion to any harm to consumers.[64] The Bureau's power to impose penalties has generated two types of concern.

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With respect to the Bureau's enforcement powers and relationship with the FTC, the Bureau's remedial powers are much greater and easier to use than the FTC's. For example, with respect to unfair or deceptive acts or practices under Section 5 of the FTC Act, the maximum penalty amount the FTC can assess is $43,280 per violation.[65] Conversely, the Bureau can assess penalties of up to $1 million per day

[57] *See* Section 1055(a)(2) of the Dodd-Frank Act.
[58] *See id.* at 1055(a)(3).
[59] *See* Consumer Financial Protection Bureau, Office of Enforcement Policies and Procedures Manual, V. 3.0 (2017).
[60] The current penalties are: Tier 1 - $5,883; Tier 2 - $29,416; and Tier 3 - $1,176,638. *See* 12 C.F.R. 1033.
[61] *See* Section 1055(c) of the Dodd-Frank Act.
[62] *See* Office of Enforcement Policies and Procedures Manual, *supra*, at 125.
[63] *See id. See also* Section 1055(c)(3) of the Dodd-Frank Act.
[64] Although in theory the penalties available are required to be subjected to mitigation review, most enforcement actions are settled, not litigated.

(or per consumer) for a "knowing" violation. As a result, with respect to enforcement actions that could be pursued by either agency, there is a concern that the lack of consistency between these two agencies could lead to two similarly-situated parties receiving different punishments based on the happenstance as to whether a case happens to be brought by the FTC or CFPB. In the alternative, the CFPB and FTC could assign jurisdiction over a dispute to one party or the other depending on their relative ability to obtain differential remedies, instead of their expertise in the matter. To prevent this result, the Taskforce urges Congress to review the remedies available to the CFPB and FTC and, where reasonably possible, increase the consistency of treatment between the two agencies.

With respect to the CFPB's relationship to prudential regulators, the CFPB's possible remedies are thought potentially to be more unpredictable than the prudential regulators for similar acts. Prudential regulators have provided public matrices of factors they will use in determining what remedies to seek in any given case. The CFPB, however, has chosen not to adopt a matrix of factors it will consider when seeking remedies, which leads to the possibility of inconsistent treatment from the CFPB and prudential regulators in any given case. Additionally, neither the Bureau's internal policy nor the CFPA provide concrete rules on how to determine the severity of a violation, i.e., whether the Bureau should seek the maximum per-day penalty or a lesser amount. That determination, is largely within the Bureau's discretion provided it takes into account the statutory mitigating factors. This uncertainty is unnecessary and contrary to the rule of law, leading to a zone of uncertainty that can deter valuable economic activity.

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Express Limitations on the Bureau's Authority

Although the Bureau's authority is vast, it is not unlimited. In addition to the exclusion from the Bureau's authorities with respect to auto dealers described above, section 1027 of the Dodd-Frank Act contains other express limits on the Bureau's authority. The Bureau cannot exercise its authority over any merchant, retailer, or seller of any nonfinancial good or service except to the extent they offer a consumer financial product or service or are subject to consumer financial laws specified in the Act.[66] Additionally, the Bureau generally does not have authority over a merchant, retailer, or seller who extends credit to a consumer (or collects or sells related debt) for the purpose of enabling the purchase of a non- financial product.[67] Both of these limitations are subject to certain restrictions.[68]

Generally, the usual activities of real estate brokers, accountants or accounting firms, and attorneys are outside the Bureau's jurisdiction. Similarly, the Bureau generally does not have authority over agents or brokers of a buyer or seller of a manufactured or modular home or facilitators or negotiators of contracts for those homes. The Bureau also generally does not have authority over persons regulated by a state insurance regulator, a state securities commission, the U.S. Securities and Exchange Commission, the Commodity Futures Trading Commission, or the Farm Credit Administration. Generally, each of the aforementioned limitations apply only in so far as the actor is not engaged in the offering or providing of

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[66] *See* Section 1027(a)(1) of the Dodd-Frank Act.
[67] *See id.* at Section 1027(a)(2).
[68] *See id.* at Section 1027(a)(2)(A).

consumer financial products or services or the actor is not engaged in an activity that is subject to a consumer law for which the Dodd-Frank Act transferred authority to the Bureau.[69]

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Furthermore, the Bureau generally cannot exercise its authority over the solicitation or making of voluntary contributions to certain tax-exempt organizations.[70] And the Bureau generally cannot exercise authority over employee benefit and compensation plans or arrangements and a number of specified plans under the Internal Revenue Code ("specified plans or arrangements").[71] Like other limitations imposed on the Bureau, the exemptions covering tax-exempt contributions and specified plans or arrangements apply only if the activity does not constitute a provision of financial products or services and the activity is not subject to an enumerated consumers law or a consumer law for which the Dodd-Frank Act transferred authority to the Bureau.

In addition to the limitations pertaining to certain activities, the Bureau cannot define insurance as a "financial product or service" ~~under the ruled~~.[72] It also does not have authority to impose a usury limit on an extension of credit.[73]

Bureau Authority Post-*Seila Law*

It is against this regulatory backdrop that we consider the ramifications of the Supreme Court's recent decision in *Seila Law v. Consumer Financial Protection Bureau*.[74] Since its inception, there have been numerous challenges to the Bureau's structure. ~~As of mid-2018, at least six organizations had aired their grievances before courts and administrative bodies.~~[75] ~~If left unaddressed, the~~ The most recent successful challenge to the Bureau's structure in *Seila Law* resolves some questions while leaving others in its wake. The Supreme Court's decision reinforced the Bureau's authority while cementing the Bureau's position as a fixture in the consumer financial services landscape. But the decision also creates small pockets of ~~has the potential to inject~~ confusion that could negatively impact the stability of the financial regulatory space and beyond. ~~and instability into the financial regulatory space and beyond~~.

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In 2017, the Bureau issued a civil investigative demand (CID) to a law firm concerning its debt-related services. The law firm, Seila Law LLC, refused to respond to the CID on the grounds that the Bureau's structure was unconstitutional. The law firm argued that the Bureau's single-director structure violated the Separation of Powers doctrine in the Constitution since the President could only remove the Director for cause. The Bureau brought an action to enforce the CID and the case made its way to the U.S. Supreme Court.

In contrast to lower court rulings in favor of the Bureau, the Supreme Court found that the single-director structure was unconstitutional.[76] The Court noted that the President's removal power is quintessentially executive in nature as it provides the President with the ability to exercise control over

[69] *See id.* at Section 1027.
[70] *See id.* at Section 1027(l).
[71] *See* Sections 220, 223, 401(a), 403(a), 403(b), 408, 408A, 529, or 530 of the Internal Revenue Code of 1986.
[72] *See* Section 1027(m) of the Dodd-Frank Act.
[73] *See id.* at Section 1027(o).
[74] *See Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183 (2020).
[75] § 6:1.Enforcement, Prac. Guide to Consumer Fin. Protection Bureau Regs. § 6:1.
[76] *See id.*

presidential appointees.[77] The Court determined that the President's ability to exercise removal power "is the rule, and not the exception."[78]

The Court identified two recognized exceptions to the President's broad removal powers: "one for multimember expert agencies that do not wield substantial executive power, and one for inferior officers with limited duties and no policymaking or administrative authority.".[79] The first exception comes from the *Humphrey's Executor* case~~, and is for multimember independent agencies that do not exercise significant executive power, as was the case for the FTC at the time *Humphrey's Executor* was decided~~. In that case, the Court upheld a statute protecting FTC Commissioners from removal except in the case of their "inefficiency, negligent of duty, or malfeasance in office." The *Humphrey's Executor* Court believed, "[r]ightly or wrongly[80]", that the FTC acted as a quasi- legislative, quasi-judicial agency that did not exercise any -executive powers at the time the case was decided[81]. In *Seila Law*, Chief Justice Roberts emphasized that the organizational structure in *Humphrey's Executor* differed from the Bureau's in that its leadership was a non-partisan, five-member board of commissioners. Additionally, FTC commissioners were expected to use their combined cumulative expertise rather than politics to direct agency actions.[82] Moreover, *Humphrey's Executor* rested on the conclusion that the FTC exercised no executive authority at the time the case was decided; whereas, the Bureau exercised significant ~~, which is not the case with respect to~~executive authority ~~the Bureau~~.

The second exception to the President's removal powers applies to "inferior officers" of the executive branch with limited duties and no policymaking or administrative authority.[83] In *Morrison v. Olson*, the Court determined an inspector general was an inferior officer because he had limited jurisdiction and tenure and lacked policymaking or significant administrative authority.[84] In contrast to the limited scope of the authority exercised by the independent counsel, the Court found that the Bureau exercises broad authority to issue regulations, investigate potential violations of the law, and to impose potentially substantial penalties on private actors.[85]

With respect to both exceptions, the *Seila Law* Court believed that the central question was whether the restriction on removal impeded the President's ability to perform his or her constitutional duties, which would render the restriction unlawful.[86] The Court found that the Director's for-cause removal

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[77] *See id.* at 2197.
[78] *See id.* at 2190.
[79] *See id.* at 2197.
[80] *See id.* at 2198.
[81] *See id.* at 2198. At the time *Humphrey's Executor* was decided, the FTC's executive powers were scarce, unlike today's FTC, which wields extensive executive power.
[82] *See id.* at 2198-99.
[83] *See U.S. v. Perkins*, 6 S. Ct. 449 (1886); *Morrison v. Olson*, 108 S.Ct. 2597 (1988).
[84] *See Morrison*, 108 S.Ct. 2597.
[85] *Seila Law*, 140 S. Ct. at 2200-01.("It is true that the independent counsel in Morrison was empowered to initiate criminal investigations and prosecutions, and in that respect wielded core executive power. But that power, while significant, was trained inward to high-ranking Governmental actors identified by others, and was confined to a specified matter in which the Department of Justice had a potential conflict of interest. By contrast, the CFPB Director has the authority to bring the coercive power of the state to bear on millions of private citizens and businesses, imposing even billion-dollar penalties through administrative adjudications and civil actions.").
[86] See *id.* at 2199.

restriction impeded the President's ability to perform essential functions contrary to *Humprhrey's Executor* and *Morrision*. The Court also declined to establish a third exception to cover the Bureau's leadership structure. Relying on the Dodd-Frank Act's severability clause, the Court found that the offending for-cause removal provision could be severed from the Act, leaving the law and the Bureau's authority ostensibly intact. The Court reasoned that "Congress would prefer that [the Court] use a scalpel rather than a bulldozer in curing the constitutional defect . . . ."[87]

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For many, the *Seila Law* opinion was somewhat unsatisfying and confusing. One commentator argues that the Court's opinion was doomed to confuse scholars and the public because the Supreme Court's for-cause removal precedent is confusing.[88] For example, although removal restriction precedent has cited the presence of accumulated expertise among agency leadership as a factor weighing in favor of upholding a statutory removal restriction, the link between this expertise and the separation of powers doctrine seems tenuous. Although consistent agency leadership has clear benefits, it is unclear why these benefits affect the question of whether it is appropriate for agency leadership to exercise executive authority. Another commentator argues that the Court's decision worsened rather than repaired alleged structural issues with the Bureau when it eliminated the for-cause removal restriction, effectively transferring Congress's appropriations authority to the President.[89]

~~Ultimately, the decision appears to resolve a constitutional question about the Bureau's structure, while raising other questionss. If left unresolved, these questions have the potential to disrupt the stability of the financial sector given they may put thecreate narrow avenues for challenging the authority of the Bureau and other financial regulators on unsteady footing. The Court's dicta in *Seila Law* may add to uncertainty regarding what constitutes an independent executive agency and when such an agency can exercise executive power. It may create opportunities for litigants to attempt to casts doubt on the Bureau's authority in addition to that of other regulators. It also raises questions about whether the Bureau can carry on the tradition of keeping financial regulation beyond the reach of partisan politics, thereby shielding it from variability. These areas of uncertainty could transform the financial regulatory landscape into unsteady terrain to the disadvantage of regulators, industry and consumers – each of whom share an interest in its dependability.~~

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~~Administrative agencies were created to solve for the country's expanding needs due to the growth of the U.S. economy. That growth led to a larger federal presence, and thus, more federal agencies. The management duties of the President shifted to federal agencies due to necessity and circumstance. "A combination of factors including, but not limited to, the mobilization for the Civil War, industrialization,~~

[87] *Id.* at 2210-2211.
[88] *See* Jerry L. Marshall, *Of Angels, Pins, and For-Cause Removal: A Requiem for the Passive Virtues*, The University of Chicago Law Review Online (2020), *available at* [HYPERLINK "https://lawreviewblog.uchicago.edu/2020/08/27/seila-mashaw/"].
[89] *See* Markham S. Chenoweth & Michael P. DeGrandis, *Out of the Separation of-Powers Frying Pan and into the Nondelegation Fire: How the Court's Decision in Seila Law Makes the CFPB's Unlawful Structure Even Worse*, University of Chicago Law Review Online (2020) ("[B]y eliminating the CFPB director's for-cause removal protections, *Seila Law* effectively transfers Congress's appropriations power from an independent director to the president himself. Thus, after *Seila Law*, the ramifications of Congress divesting its core constitutional powers are worse than ever."), *available at* [HYPERLINK "https://lawreviewblog.uchicago.edu/2020/08/27/seila-chenoweth-degrandis/"].

~~massive immigration, technological change, and widespread pressure to lessen the impacts of economic booms and busts and systemic disruptions to major national systems (transportation, economy, trade) generated [public] pressure for an expanded scope of activities for the national government."[90] The government's increased involvement spawned federal programs and agencies to implement them.[91] Given additional technological advances, globalization, and industry changes, the federal government and, therefore, the president's responsibilities have continued to grow.~~

~~Over the course of our country's existence, we have attempted to sketch a line that separates executive agencies from independent agencies~~[92]~~. Commonly, an executive agency is defined as one under the direct control of the President; whereas, an independent agency is governed by one or more presidential appointees who enjoy a degree of independence from the executive branch. Some have referred to independent agencies as the "fourth branch of government" given they are not directly controlled by the President and sometimes exercise judicial and legislative responsibilities in addition to executive authority.~~[93]

Seila Law does not specifically define what distinguishes an "independent agency" from an "executive agency." Instead, it falls back on the conventional description of a "traditional independent agency headed by a multimember board or commission."[94] The Court noted that the initial legislative proposal that introduced the idea of a new consumer financial protection agency "envisioned a traditional independent agency, run by a multi-member board with a 'diverse set of viewpoints and experiences.'"[95] The Court apparently found it unnecessary to provide an exact definition of an "independent agency" to conclude that CFPB constituted one. Implicitly, however, the Court defined an independent agency as one in which there are limits placed on the President's power to remove officers.[96] The Court concluded that an independent agency led by a single Director and vested with significant executive power was unconstitutional. ~~Although these definitions appear neat at first glance, the reality is that the distinction between an executive agency and an independent agency is less clear.[97] There is no single shared characteristic among all independent agencies. Although some have pointed to removal for-cause restrictions as an indicator of an independent agency, even this characteristic is not shared by all that~~

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[90] *See* Administrative Conference of the United States, *Sourcebook of United States Executive Agencies*, 2d ed., 19 (2018), *available at* [HYPERLINK "https://www.acus.gov/sites/default/files/documents/ACUS%20Sourcebook%20of%20Executive%20Agenices%202d%20ed.%20508%20Compliant.pdf"].
[91] *See id.*
[92] Of note, executive agencies and independent agencies, sometimes referred to as independent executive agencies, both fall under the executive branch.
[93] *See* ~~Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 Cornell L. Rev. 769, 778-79 (2013)~~.
[94] *Seila Law* at 5.
[95] *Seila Law* at 4.
[96] Some scholars have questioned whether in practice limits on the President's power to remove agency officers has been considered to be the defining characteristic of an independent agency. This has led some to reject the idea of executive and independent agencies as falling in discrete binary categories but instead, they fall on a continuum that ranges from agencies directly controlled by the President to those with the most independence. *See* Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 Cornell L. Rev. 769, 7728-79 (2013)
~~[97] *See* Administrative Conference of the United States, *supra*, at 9.~~

~~fall within this category.~~[98] ~~This has led some to argue that executive and independent agencies should not be considered discrete binary categories. Instead, both fall on a continuum that ranges from agencies directly controlled by the President to those with the most independence.~~[99]

~~Congress established the Bureau as an independent agency, and the *Seila Law* opinion does not seem to affect this designation.~~ The Court briefly ~~wades into the discussion of what constitutes an independent agency, as opposed to an executive agency briefly without resolving it.~~ The Court no~~tes that:~~

~~neither *amicus* nor the House explains how the CFPB would be "independent" if its head were required to implement the President's policies upon pain of removal. . . . The Constitution might of course compel the agency to be dependent on the President notwithstanding Congress's contrary intent, but that result cannot fairly be inferred from the statute Congress enacted.~~

~~The Court simply notes that Congress intended to restrict the President's removal authority and continues with its opinion. So,~~ So, the question of whether the Bureau, or any other similarly structured agency, is an independent agency remains. ~~the question of whether the Bureau, or any other similarly structured agency, is an independent agency remains.~~ It is possible that the Court chose not to address the issue because the binary classification of an agency as either an executive or independent agency may not be a useful distinction under the circumstances. Agency "independence" is typically a matter of degree and its characteristics lie upon a continuum, not a binary categorization. The administrative requirements an agency must follow also varies and appears to be a function of whatever Congress requires in the agency's enabling legislation. In other words, there do not appear to be special administrative requirements, such as a requirement to obtain budgetary approval from Congress, that apply to executive agencies but not independent agencies and vice versa. Perhaps an independent agency is simply an agency that has some degree of independence and falls outside of the executive office of the President and executive departments.[100] On the other hand, commenters have argued that the power of the President to remove the head or heads of an agency is the *sine qua non* of an agency's constitutionality, being both necessary and sufficient.[101].

Seila Law potentially leaves open the possibility that the Supreme Court might hold in the future that the President must have the power to remove the leaders of multi-member agencies at will, if they are deemed to exercise significant executive power.~~at least under certain circumstances.~~ ~~The question of when an agency can exercise executive power is similarly unclear.~~ While declining to revisit its decision in *Humphrey's Executor* "today," *Seila Law* noted ~~The Court states~~ that the ability to seek substantial monetary penalties against private parties on behalf of the United States in federal court is a "quintessentially ~~" an~~ executive power not considered ~~.~~in *Humphrey's Executor*.[102] The Court did not address whether a multi-member agency's exercise of that or some other quintessentially executive power might be grounds for distinguishing *Humphrey's Executor*. ~~— Furthermore, the Court notes that its decision in *Humphrey's Executor* did not contemplate the exercise of this kind of power by an independent agency because of the FTC's paucity of executive authority at the time that case was~~

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~~98 *See* Kirti Datla & Richard L. Revesz, *supra*, at 772.~~
99 *See* Kirti Datla & Richard L. Revesz, *supra*, at 773.
100 *See* Administrative Conference of the United States, *supra*, at 42-43.
101 *See* Neomi Rao, *Removal: Necessary and Sufficient for Presidential Control*, 65 Ala. L. Rev. 1205, 1227 (2014).
102 *See Seila Law,* 140 S. Ct. at 2200-01.

~~decided. Pursuant to the Supreme Court's famous characterization of the FTC's powers and responsibilities, "[i]ts duties [were] neither political nor executive, but predominantly *quasi*-judicial and *quasi*-legislative."[103]. In emphasizing the absence of executive authority exercised by the FTC in 1935 at the time of *Humphrey's Executor*, *Seila Law* implies that structuring an agency in the same manner as the FTC in that case may not resolve constitutionally issues arising from a single-leadership structure. Instead, the Court seems to suggest that an agency cannot exercise executive power without also having leadership that is removable by the President for any reason.[104] If this was the Court's intended outcome, it may have inadvertently chipped away at the efficacy of one of the executive office's most important tools – federal regulators. Federal regulatory agencies were created to lighten the President's load, but they may be less effective at doing that if the President is expected to take a primary role in managing their activities.~~

The Court also did~~oes~~ not resolve the question of whether the Director had the authority to issue valid orders or ratify Bureau actions while for-cause removal protection was in place.[105] ~~The Court disagreed with the Petitioner's claim that the Bureau's pre-*Seila Law* structure rendered the "entire agency…unconstitutional and powerless to act."[106] But it does not apply this same logic to assess whether the Director had the authority to issue orders or ratify Bureau actions prior to *Seila Law*. The Court's reluctance to directly address the issue leaves roommay create an opening, albeit a small one, for litigants to question the constitutionality of all actions undertaken by the Bureau's actions since its inception. This unresolved issue may affect not only the Bureau but also the actions of any independent agency with a single-leadership structure.~~

~~For example, in dicta, the Court appears to question whether the Social Security Administration and the Federal Housing Finance Agency are constitutionally structured given their single-leadership structure.[107] Unwinding the actions of agencies such as the Bureau and the Federal Housing Finance Agency would wreak havoc given the countless actions they have undertaken during their relatively short existences. With respect to the Bureau, "[t]his . . . includes major enforcement actions and rulemakings that have reshaped the market for consumer financial products and services over the last nine years."[108] The problem is compounded when you consider the Social Security Administration, which has existed since 1935 and has been considered an independent agency for approximately 25 years of its existence.~~

~~In the case of the Bureau, to resolve any issues regarding the validity of its past actions, the Director has attempted to ratifiedy the Bureau's most actions again now that the Court has stripped removal protections.[109] The Bureau might also attempt to rely on the de facto officer doctrine enunciated in~~

~~[103] *Humphrey's Executor*, 295 U.S. at 624.~~
~~[104] The Court does suggest that Congress might convert the Bureau into a multimember agency to attempt to resolve the constitutionality issues with its single-leadership structure but does not appear to definitively state that this would resolve all constitutional questions. *See Seila Law*, 140 S. Ct. at 2211.~~
[105] *See id*. at 2208.
~~[106] *See id*. at 2208.~~
~~[107] *See id*. at 2202.~~
[108] ~~*See* Scott A. Cammarn, Nihal S. Patel, and Rachael Rodman, *Seila Law LLC v. Consumer Financial Protection Bureau: Has the Supreme Court Tamed or Empowered the CFPB?*, National Law Review, Volume X, Number 184 (2020), available at~~ [HYPERLINK "https://www.natlawreview.com/article/seila-law-llc-v-consumer-financial-protection-bureau-has-supreme-court-tamed-or"]~~.~~
[109] ~~*See*~~ [HYPERLINK "https://files.consumerfinance.gov/f/documents/cfpb_ratification_bureau-actions_2020-07.pdf"]~~. Of note, the Bureau chose not to ratify its rule regarding class action waivers in arbitration clauses (which~~

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Ryder v. United States. That doctrine "confers validity upon acts performed by a person acting under the color of official title even though it is later discovered that the legality of that person's appointment or election to office is deficient."[110] The Although the Bureau disagrees, some have argued that the effectiveness of ratification and the de facto officer doctrine is currently murky.[111] Organizations have attempted to already used this uncertainty to challenge the authority of the Bureau and executive agencies at large. Leaning heavily on the case, the Community Financial Services Association (CFSA) argued the Bureau erred in issuing payday loan rules because it was unconstitutionally structured and only a validly constituted agency could participate in the required rulemaking process.[112] In two consolidated cases before the Supreme Court, Fannie Mae and Freddie Mac shareholders allege the Federal Housing Finance Agency is unconstitutionally structured given *Seila Law* since it is an independent agency led by a single director.[113] The Bureau should expect continual challenges to its authority for issuing past actions, and other independent agencies should expect the same. Thus, a cloud of uncertainty and doubt may continue to hover above independent executive agency actions unless that doubt is resolved by further order of the Supreme Court or an act of Congress.

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The outcome in *Seila Law* also means the tenure of the Bureau's director may depend on the outcome of presidential elections. Some agencies do not fit snuggly into any of the three branches of government to protect them from the politically motivated actions of elected officials.[114] "Typically, financial regulators have a measure of insulation from the political process to provide consistency and certainty in financial markets."[115] These agencies, nevertheless, remain accountable for their actions given they are required to comply with laws and may be subject to government investigations and inquiries. They are also susceptible to public pressure.[116]

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As the Court alludes to in its opinion, it is reasonable for an incoming administration to want to place officials with similar ideologies in top positions to spearhead policy changes.[117] But given the shifting political winds, doing so is not without its risks. One of the hallmarks of health for our financial system is stability. Post-*Seila Law*, the appointment of the Bureau's Director may well become another political pendulum, lessening the likelihood that the Bureau will have stable, consistent leadership or direction and increasing the potential for volatile outcomes in financial markets.[118]

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had been vacated under the Congressional Review Act) and its 2017 small-dollar lending rule, for which the Bureau issued a new final rule instead.

[110] *See* Ryder v. United States, 515 U.S. 177 (1995). *See also* Scott A. Cammarn, Nihal S. Patel, and Rachael Rodman, *Seila Law LLC v. Consumer Financial Protection Bureau: Has the Supreme Court Tamed or Empowered the CFPB?*, National Law Review, Volume X, Number 184 (2020) [HYPERLINK "https://www.natlawreview.com/article/seila-law-llc-v-consumer-financial-protection-bureau-has-supreme-court-tamed-or"].

[111] *See id.*

[112] *See Community Financial Services Association of America, Ltd. et al. v. Consumer Financial Protection Bureau et al.*, No. 1:18-cv-295 (W.D. Tex.).

[113] Brief for Petitioner, *Steven T. Mnuchin, Secretary of the Treasury, et al. v. Patrick J. Collins*, *petition for cert. filed*, No. 19-422 (U.S., Sept. 25, 2019).

[114] *See* Administrative Conference of the United States, *supra* at 10.

[115] Scott A. Cammarn, Nihal S. Patel, and Rachael Rodman, *supra*.

[116] *See* Administrative Conference of the United States, *supra*, at 10.

[117] *See Seila Law*, 140 S. Ct. at 2204.

[118] *See e.g.* Jerry L. Marshall, supra. ("The standard forms of for-cause removal provide that an officer may be removed only for 'inefficiency, neglect of duty, or malfeasance.' Conduct of this sort, of course, interferes with faithful execution of the law. Removal of an officer on these grounds, thus, is consistent with the president's constitutional responsibility. Removal on other grounds, for example, that the officer has angered the president

~~Moreover, the *Seila Law* decision may have created some uncertainty regarding the mechanics of the Director's term limit. It is unclear whether the Director's term limit remains intact or whether the term limit is superfluous given the President's ability to remove the Director at-will. However, a number of agencies with single-leadership structures have agency heads who are terminable at will and have fixed term limits including, among others, the Bureau of the Census, the Internal Revenue Service, the Federal Aviation Administration, the Office of the Comptroller of the Currency.[119]~~

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~~Although the Court answers the question of whether the Bureau is constitutionally constructed,~~ the Court's dicta~~it raises more questions and~~ may have created ~~avenues for~~ continued attempts to ~~repudiate~~ing ~~Bureau actions in the process.~~ ~~Perhaps, more importantly, the decision may create opportunities for uncertainty and instability to seep into the financial market, negatively impacting its overall health. Resolving this uncertainty and reducing the potential for unwanted consequences may require congressional action.~~

Contested Areas of Bureau Jurisdiction

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Apart from *Seila Law*, other uncertainties exist concerning the bounds of the Bureau's jurisdiction. Given the Bureau's relative youth, it is still testing the outlines of its authority in several areas. For example, there has been some debate regarding whether the Bureau has authority over rent-to-own transactions. The uncertainty revolves around whether these transactions constitute installment loans, which are within the Bureau's jurisdiction, or short-term leases, which may not be depending on their duration.[120] In 2011 testimony before Congress, the FTC noted that the Bureau had not made a determination regarding its authority with respect to these transactions although the FTC noted the Bureau has rulemaking authority for laws related to credit and lease transactions.[121] In 2015, Senator Bob Casey sent a letter to the Bureau urging it to investigate consumer protection issues in the rent-to-own industry.[122] The Bureau ultimately decided to push forward with investigating these entities in 2017 and issued a civil investigative demand (CID) to a rent-to-own company Rent-A-Center. Although Rent-A-Center petitioned the Bureau to set aside the CID, the Bureau declined to do so. The Bureau did not find that these companies were necessarily within their jurisdiction. Instead, it argued that the Dodd-Frank Act and case precedent conferred authority to issue a CID to investigate whether Rent-A-Center's

~~because his or her testimony before Congress embarrassed the president or the administration, would seem unconnected to the president's executive authority under the Constitution. To be sure, the president might have that authority of unfettered removal by law").~~

~~119 *See* Administrative Conference of the United States, *supra*, 48-49.~~

120 *See e.g.* [HYPERLINK "https://www.huffpost.com/entry/rent-a-center-cfpb-richard-cordray_n_1250033"]. The Bureau has the authority to regulate leases for real or personal property that are purchase finance agreements if the term of the lease is at least 90 days. *See* Section 1002(15)(A)(ii)(II) of the Dodd-Frank Act.

121 *Prepared Statement of the Federal Trade Commission on Rent-to-Own Transactions: Hearing Before the H. Comm. on Fin. Servs. Financial Institutions and Consumer Credit Subcomm.*, p. 2 (July 26, 2011) (testimony of Charles Howard), *available at* [HYPERLINK "https://www.ftc.gov/sites/default/files/documents/public_statements/prepared-statement-federal-trade-commission-rent-own-transactions/110726renttoowntestimony.pdf"].

122 *See* January 22, 2015 Correspondence, *available at* [HYPERLINK "https://www.casey.senate.gov/newsroom/releases/casey-presses-federal-watchdogs-on-consumer-protections-in-rent-to-own-industry"].

conduct fell within the Bureau's jurisdiction.[123] As it stands, the Bureau has not initiated an enforcement action against the company, and the question of whether rent-to-own companies fall within the Bureau's jurisdiction remains unsettled.

The Bureau has also tested the jurisdictional boundaries with respect to its authority over for-profit education lending matters. In 2014, the Bureau filed a complaint against ITT Educational Services, Inc. ("ITT"), pursuant to its UDAAP and TILA authorities. The Bureau alleged ITT used aggressive tactics to coerce students into taking out private loans despite knowing most students lacked the ability to repay them.[124] ITT moved to dismiss the complaint, arguing that it did not provide consumer financial products and the alleged conduct fell outside the Bureau's jurisdiction since the loans were financed by a third party.[125] In denying ITT's Motion to Dismiss, the Court found that the Bureau sufficiently alleged facts to show that ITT was a "covered person" and "service provider" under the CFPA. The Court noted that ITT's alleged conduct qualified as the provision of "financial advisory services", and ITT was "heavily involved" in operating and maintaining the loan program although it was directly run by third parties. Therefore, the alleged conduct fell within the Bureau's jurisdiction. ITT and the Bureau ultimately settled the action.[126]

Conversely, in an action against the Accrediting Council for Independent Colleges and Schools (ACICS), a federal district court found that the Bureau exceeded its authority by issuing a CID to ACICS given the Bureau's jurisdiction did not extend to the accreditation process. On appeal, the Bureau recognized it lacked statutory authority over the accreditation process but argued it had authority to investigate the lending practices of ACICS-accredited institutions via a CID. The circuit court did not make any findings of fact regarding the authority of the Bureau to investigate accredited institutions' lending practices. Instead, it issued a narrower ruling, finding that the Bureau's CID failed to notify ACICS of the nature of the alleged violations underlying the investigation, and therefore the Bureau's CID exceeded its authority.[127] At least one commenter argues the Court's decision implies that courts believe the Bureau owes more deference to challenges to CIDs from entities that receive a CID but are not alleged to have committed any unfair, deceptive, or abusive acts themselves.[128]

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[123] *See* Bureau's Decision and Order on Petition by Rent-A-Center to Set Aside or Modify Civil Investigative Demand (2017), *available at* [HYPERLINK "https://files.consumerfinance.gov/f/documents/cfpb_petition-to-modify_rent-a-center-inc_decision-and-order.pdf"].

[124] *See* Order on Defendant's Motion to Dismiss, *Consumer Financial Protection Bureau v. ITT Educational Services, Ince.*, pp. 2 and 6 (S.D. Ind. 2015)(No. 1:14-cv-00292), *available at* [HYPERLINK "https://www.govinfo.gov/content/pkg/USCOURTS-insd-1_14-cv-00292/pdf/USCOURTS-insd-1_14-cv-00292-0.pdf"].

[125] *See* ITT's Statement, *available at* [HYPERLINK "http://www.ittesi.com/2014-04-30-ITT-Educational-Services-Inc-Calls-CFPB-Complaint-Unfounded-Asks-Court-To-Dismiss"].

[126] *See* the Bureau's Press Release announcing the settlement, *available at* [HYPERLINK "https://www.consumerfinance.gov/about-us/newsroom/bureau-settles-lawsuit-against-itt-educational-services/"].

[127] *See Consumer Fin. Prot. Bureau v. Accrediting Council for Indep. Colleges & Sch.*, 854 F.3d 683, 692 (D.C. Cir. 2017).

[128] *See* E. S. Kisluk, *"Fishing" for Trouble?: On the Appropriate Limits of a Civil Investigative Demand Issues by the CFPB*, 21 N.C. Banking Inst. 299, 325 (2017), *available at* [HYPERLINK "http://scholarship.law.unc.edu/ncbi/vol21/iss1/16"].

Aside from rent-to-own companies and for-profit educational institutions, the Bureau has also tested its authority over wireless carriers. In 2014 and 2015, the Bureau brought UDAAP actions against wireless carriers Sprint and Verizon, respectively. The complaints alleged Sprint and Verizon operated their billing systems in a way that allowed third parties to "cram" unauthorized charges on customer accounts, such as charges for ringtones and "premium" text messages.[129] The Bureau alleged that Sprint, for example, automatically opted customers into third-party billing without obtaining their consent and failed to adequately address customer billing complaints.[130] Both companies received a 30-40% cut of the gross revenue from these third-party charges to customers.[131]

Although neither Sprint nor Verizon are traditional financial services companies, the Bureau argued the wireless carriers were, nonetheless, "covered persons" under the Dodd-Frank Act because they provided consumer financial products or services by extending credit to and processing payments for goods and services provided by third parties.[132] In a public statement, Sprint lamented the Bureau's decision to use the matter as a "test case" to determine its authority over wireless carriers.[133] Sprint and Verizon settled the action with the Bureau by agreeing to pay $120 million in consumer refunds and additional $38 million in fines.[134]

Most agree that the Bureau's jurisdiction is broad, but there is still some ambiguity and uncertainty about its exact parameters. Some of the uncertainty may be due to ambiguities in the Dodd-Frank Act and court interpretations of the same, but other uncertainty may simply be the result of a relatively young agency trying to chart its own path. ~~Despite the lingering questions regarding the Bureau's jurisdiction, the Bureau consolidated the consumer protection powers of numerous agencies into one, adding critical focus and attention to the important task of mitigating consumer harm~~.

Jurisdiction of Other Federal Agencies and Prudential Regulators

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With the creation of the Bureau, the Dodd-Frank Act consolidated consumer protection functions exercised by seven agencies into one.[135] The Act simultaneously transferred the primary responsibilities for many consumer protection functions to the Bureau while also reinforcing the jurisdiction of preexisting regulators. In doing so, it created additional areas of jurisdictional overlap and the potential for redundancies. Today, multiple federal agencies work independently and together to ensure the

[129] *See* Sprint Complaint, *CFPB v. Sprint Corporation*, No. 0:14-cv-9931 (S.D.N.Y. May 12, 2015), *available at* [HYPERLINK "https://files.consumerfinance.gov/f/201412_cfpb_cfpb-v-sprint-complaint.pdf"]; Verizon Complaint, *CFPB v. Cellco Partnership d/b/a Verizon Wireless*, No. 3:15-cv-03268 (D. N.J. May 12, 2015), *available at* [HYPERLINK "https://files.consumerfinance.gov/f/201505_cfpb-cfpb-v-verizon-complaint.pdf"].
[130] *See* Sprint Complaint, at 20, 24-25.
[131] *See* https://www.consumerfinance.gov/about-us/newsroom/cfpb-takes-action-to-obtain-120-million-in-redress-from-sprint-and-verizon-for-illegal-mobile-cramming/.
[132] *See* Sprint Complaint, at 9; Verizon Complaint, at 10.
[133] *See* [HYPERLINK "https://www.marketwatch.com/story/cfpb-testing-its-reach-in-lawsuit-against-sprint-billing-practices-2014-12-19"].
[134] *See* [HYPERLINK "https://www.consumerfinance.gov/about-us/newsroom/cfpb-takes-action-to-obtain-120-million-in-redress-from-sprint-and-verizon-for-illegal-mobile-cramming/"].
[135] The Dodd-Frank Act dissolved the Office of Thrift Supervision. Additionally, the Dodd-Frank Act transferred HUD's rulemaking authorities for the Real Estate Settlement Procedures Act to the Bureau and reinforced HUD's jurisdiction over the Fair Housing Act. See Section 1027(s) of the Dodd-Frank Act.

strength and safety of the financial market. Overlap occurs in each of the Bureau's jurisdictional areas. **Appendices A and B** provide an overview of the complex federal financial regulatory framework.

There are five main regulatory entities that have overlapping jurisdiction with the Bureau – the Board of Governors of the Federal Reserve System, the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation, the National Credit Union Administration (the "Depository Regulators"), and the Federal Trade Commission.

Board of Governors of the Federal Reserve System (Federal Reserve)

The Federal Reserve System is the nation's central bank.[136] Congress created the Federal Reserve System to foster a financial system that was safer, adaptable and more stable.[137] The Board of Governors is the agency arm of the Federal Reserve System and is made up of seven presidential appointees. The agency oversees bank holding companies and certain subsidiaries, savings and loan holding companies, state-chartered banks that have elected to join the Federal Reserve System, Edge Act and Agreement Corporations, institutions the Financial Stability and Oversight Council has deemed "systemically significant"[138], certain nonbank financial companies, and certain insurance holding companies.[139] The Federal Reserve has rulemaking, supervisory and enforcement authority over regulated entities. Through these processes, it provides safety and soundness, consumer protection, and financial system risk oversight. Aside from regulating institutions, the Federal Reserve conducts U.S. monetary policy, operates and regulates parts of the payment system, and serves as a lender to banks, among other activities.

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Office of the Comptroller of the Currency (OCC)
The OCC is the chartering authority and primary regulator of nationally chartered banks under the National Bank Act, federally chartered thrift institutions under the Home Owners Loan Act[140], and U.S. federal branches of foreign banks[141]. It provides consumer protection and safety and soundness oversight for these entities through its rulemaking, supervisory and enforcement powers.[142] Its enforcement powers include the ability to revoke national charters and issue cease and desist orders.[143]

Federal Deposit Insurance Corporation (FDIC)

Congress created the FDIC in response to the Great Depression to protect consumer assets by insuring deposits at financial institutions. The FDIC has primary supervisory and enforcement authority over state-chartered banks and thrifts that are not members of the Federal Reserve System and FDIC-insured

[136] *See* [HYPERLINK "https://www.federalreserve.gov/aboutthefed/structure-federal-reserve-system.htm"].
[137] *See* [HYPERLINK "https://www.federalreserve.gov/faqs/about_12594.htm" \l ":~:text=Ask%20Us-,What%20is%20the%20purpose%20of%20the%20Federal%20Reserve%20System%3F,stable%20monetary%20and%20financial%20system"].
[138] For example, financial market utilities participating in payment clearance and settlement.
[139] *See* [HYPERLINK "https://www.federalreserve.gov/aboutthefed/files/pf_5.pdf"].
[140] *See* [HYPERLINK "https://www.occ.treas.gov/about/what-we-do/index-what-we-do.html"].
[141] Congressional Research Service, *Who Regulates Whom? An Overview of the U.S. Financial Regulatory Framework title*, R44918, at 8, (2020), *available at* [HYPERLINK "https://fas.org/sgp/crs/misc/R44918.pdf"].
[142] *See* [HYPERLINK "https://www.occ.treas.gov/about/what-we-do/index-what-we-do.html"].
[143] *See* CRS Report R44918, *supra*, at 14.

branches of foreign banks.[144] The FDIC may also exercise regulatory authority over almost all federally insured institutions by issuing rules and examining them for potential risks.[145] The Dodd-Frank Act also gave the FDIC authority to remedy issues with failing or troubled covered financial companies, brokers and dealers.[146] Similar to the Federal Reserve, the FDIC examines regulated entities for safety and soundness, consumer protection compliance, and risks to the financial system.

National Credit Union Administration (NCUA)

The NCUA insures, regulates and charters federally insured credit unions. These credit unions can include both federally and state-chartered credit unions, the latter of which may elect to become federally insured. Like the Bureau, the NCUA has rulemaking, supervisory and enforcement powers. NCUA examines credit unions for safety and soundness but also consumer protection compliance.

The Depository Regulators and the Bureau both exercise jurisdiction over insured depository institutions with over $10 billion in assets ("Larger Depository Institutions"), insured depository institutions with $10 billion or less in total assets that are affiliates of Larger Depository Institutions, and other affiliates of Larger Depository Institutions.[147]

Federal Trade Commission (FTC)

The Federal Trade Commission ~~oversees~~regulates nondepository institutions that provide consumer financial products or services in addition to other entities. Consumer protection is one of the agency's central missions. It can exercise rulemaking, investigative, and enforcement authority to that end. Unlike the Depository Regulators and the Bureau, the FTC lacks supervisory authority.[148]

The FTC and the Bureau ~~both~~ have shared jurisdiction over certain nondepositories although the Bureau's authority is much broader, including rulemaking and supervision. The Consumer Financial Protection Act transferred enforcement authority for the enumerated consumer financial laws to the Bureau, but the FTC retained the power to enforce violations of these laws and its unfair and deceptive acts and practices enforcement authority.[149] ~~.~~The FTC and the Bureau also have shared authority ~~jurisdiction~~ over other laws including the Military Lending Act, which both the FTC and the Bureau can enforce.[150] The FTC enforces a number of consumer protection and antitrust laws and has the authority to seek civil penalties for violations of some of those laws.[151]

Coordination

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[144] *See 12 U.S.C. 1820(b); see also CRS Report* R44918, *supra*, at 14.
[145] *See* [HYPERLINK "https://www.fdic.gov/about/strategic-plans/strategic/supervision.html"].
[146] *See* CRS Report R44918, *supra*, at 14.
[147] *See* Joint Memorandum of Understanding on Supervisory Coordination (2012), *available at* [HYPERLINK "https://files.consumerfinance.gov/f/201206_CFPB_MOU_Supervisory_Coordination.pdf"].
[148] *See* [HYPERLINK "https://www.ftc.gov/about-ftc/what-we-do/enforcement-authority"].
[149] *See* Section 1061(b)(5) of the Dodd-Frank Act; Section 5 of the FTC Act.
[150] *See e.g.* [HYPERLINK "https://www.ftc.gov/news-events/media-resources/consumer-finance"]. Additionally, note that the Department of Defense has rulemaking authority for the Military Lending Act.
[151] *See* [HYPERLINK "https://www.ftc.gov/about-ftc/what-we-do/enforcement-authority"].

The CFPA and financial regulators have tried to resolve potential confusion and uncertainty caused by jurisdictional overlap in various ways. First, the law attempts to carve out the parameters of each regulators' jurisdiction. With respect to institutions with $10 billion in assets or less, the CFPA provides that prudential regulators have primary examination authority and exclusive enforcement authority for violations of the laws under the Bureau's jurisdiction.[152] The Bureau has exclusive supervisory authority for assessing compliance with Federal consumer financial laws at depository institutions with more than $10 billion in assets, as well as their affiliates.

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The CFPA also encourages coordination among federal regulators and prudential regulators. The Act includes a general requirement for the Bureau to coordinate its activities with prudentials, other federal regulators, and state regulators to the extent possible.[153] In addition to the general coordination requirement, the law explicitly requires the Bureau to consult with prudential regulators and other relevant agencies prior to proposing a rule and during the rule's comment period.[154] Although other regulator's do not have the authority to veto a proposed rule, the Bureau is required to publish a regulator's objection at the time it issues its final rule. Additionally, the Financial Stability Oversight Council (FSOC), composed of representatives from various financial regulatory agencies, has the authority to set aside any rule that poses a risk to the safety and soundness of the U.S. banking system or the stability of the U.S. financial system.[155]

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The Bureau is also required to coordinate its supervisory activities. The CFPA requires the Bureau to coordinate exam schedules, conduct simultaneous exams if possible, and share draft examination reports with prudential regulators.[156] The Bureau is also required to use preexisting information a depository institution has provided to a federal or state regulator to complete its supervisory functions to the extent possible.[157] With respect to nondepositories, the Bureau is required to coordinate its supervisory activities with the prudential regulators and relevant State agencies.[158]

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Agencies also coordinate on enforcement matters. One of the most apparent areas of regulatory overlap is in enforcement actions against unfair and deceptive acts. For example, pPrior to the Bureau, the FDIC, FTC, OCC and Federal Reserve enforced the FTC's rule prohibiting unfair and deceptive credit practices.[159] Although the FTC's rule did not directly apply to banks, credit unions, and thrifts given they are outside of its jurisdiction, financial regulators adopted rules substantially similar to that of the FTC. The Dodd-Frank Act effectively transferred rulemaking authority for deceptive and unfair acts from these financial regulators to the Bureau. To resolve potential confusion, the Bureau, FTC, FDIC, OCC, Federal Reserve Board and NCUA issued joint guidance clarifying their roles in prosecuting unfair and

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[152] *See* Section 1026(d)(1) of the Dodd-Frank Act.
[153] *See e.g. id.* at Section 1015.
[154] *See id.* at Section 1022(b)(2)(B).
[155] *See id.* at Section 1023 (a).
[156] *See id.* at Section 1025(e)(1). *See also id.* at Section 1024 (b)(3).
[157] *See id.* at Section 1025(a)(3).
[158] *See id.* at Section 1024(b)(3).
[159] *See* Interagency Guidance regarding Unfair or Deceptive Credit Practices (Aug. 2014) [HYPERLINK "https://www.fdic.gov/news/financial-institution-letters/2014/fil14044a.pdf"]; Catherine M. Sharkey, *Agency Coordination in Consumer Protection*, 2013 U. Chi. Legal F. 329 (2013).

deceptive practices. Additionally, the agencies cautioned that the new prohibitions against unfair and deceptive practices in the CFPA encompassed conduct similar to what is outlawed in the FTC Act.[160]

Memorandums of Understanding (MOU) are yet another tool that financial regulators use to mitigate jurisdictional conflicts. An MOU is an unenforceable written agreement in which each party agrees to conduct itself in a certain way pursuant to a framework that is usually detailed in the document. An MOU is used to encourage coordination and cooperation between the Bureau and an external party, i.e. generally, a federal or state agency or an organization with a shared mission or interest. That shared mission or interest might take the form of, among other things, an investigation into alleged misconduct, the establishment of policies for financial institutions, tracking financial literacy data, or a general commitment to protect American consumers[161]. For example, the CFPA requires the Bureau and the Federal Trade Commission to establish an MOU given their overlapping jurisdiction. The Bureau and the Federal Trade Commission established at least four MOUs aimed at coordinating their activities.[162] In a 2019 MOU, the Bureau and the FTC agree to share information regarding targets of investigations, proposed or final rulemakings, and planned enforcement actions. The Agreement also provides that the FTC and Bureau will not initiate separate enforcement actions against a covered person at the same time. Additionally, the Bureau agrees to share its exam schedule, and upon request, its exam reports.

The process of establishing an MOU can take time and protracted negotiations between parties. Each party comes to the table desiring to craft an agreement that meets its own organizational needs and standards, and each party may approach the negotiations with a different understanding of what that means. But generally, federal regulators view the process of establishing an MOU as a positive step toward cooperation, and therefore worthwhile.

Benefits and Drawbacks of Jurisdictional Overlay

Overlapping jurisdiction adds additional levels of oversight to the consumer financial markets. It affords regulators several "bites at the apple" to uncover noncompliance and potentially harmful conduct, which ultimately benefits consumers. It also gives financial firms more than one opportunity to "present their case" before a regulator, potentially increasing the odds of unbiased outcomes.[163] Additionally, jurisdictional intersections provide agencies with an opportunity to benefit from each other's respective expertise. The Federal Trade Commission, for example, was created almost 100 years prior to the Bureau. Over the course of its existence, the FTC has developed expertise with investigating and prosecuting consumer protection issues including data breach cases. While both the FTC and Bureau have authority over nondepositories, including credit reporting agencies, the FTC used its expertise to take a lead role investigating the most recent data breaches. This ultimately advantages regulators, regulated entities, and consumers alike – all of whom benefit from a uniform understanding of the law and consistent enforcement.

[160] *See* Interagency Guidance regarding Unfair or Deceptive Credit Practices, *supra*, at note 157.
[161] *See* Memorandum of Understanding between the Consumer Financial Protection Bureau and the Federal Trade Commission (2019).
[162] *See id*.
[163] *See e.g.* Government Accountability Office, *Financial Regulation Complex and Fragmented Structure Could be Streamlined to Improve Effectiveness*, GAO-16-175 (2016), *available at* [HYPERLINK "https://www.gao.gov/assets/680/675400.pdf"].

Despite best efforts to coordinate functions, the overlapping jurisdiction creates opportunities for redundancy and waste. It increases the risk that no one regulator has a complete picture of an institution, resulting in compliance concerns slipping through the cracks. Additionally, it forces institutions to expend resources preparing for multiple exams by multiple regulators and raises the likelihood that a regulated entity receives conflicting feedback. These drawbacks are to the detriment of consumers who may pay the price for regulators' mishandling of compliance issues or the actual cost of regulatory compliance if an institution increases the price of products or services or implements fees to cover compliance costs.

Overall, the jurisdictional intersections among financial regulators may benefit regulators, consumers, and financial institutions. But regulators may need to continue considering ways to streamline their efforts to prevent unwanted redundancy and confusion.

Federalism

States also play a role in the financial regulatory landscape. But the extent to which they should is an ever-growing subject of debate. State preemption has generally been reserved for state laws that conflict with federal authorities. However, innovative technologies and changing consumer tastes have altered the way we bank. Financial products and services are delivered to diverse customers in various states, blurring the lines between what we have traditionally thought of as interstate and intrastate commerce.

The United States banking framework is a dual banking system in which national and state banks coexist and operate within their own spheres. National banks are chartered under federal law and generally subject to federal oversight; whereas state banks are subject to some federal oversight but also state-chartered and overseen.[164] This dual system was created by Congress's passage of the National Currency Act in 1863 and the National Bank Act in 1864. Those acts provided banks with the opportunity to receive a federal charter to operate nationally, conditioned on the satisfaction of certain requirements.[165] Because national banks operate within states, federal preemption is used to eliminate confusion and overlap while reinforcing the overarching authority of the federal government to protect national institutions and enact laws intended to have a national impact. Naturally, federal preemption, which is essentially the supplanting of state legislation with federal regulation, causes tension and friction between federal actors and states.

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The American system of competitive federalism provides a model of flexibility in constructing consumer- and competition-friendly financial services policy. Competitive federalism can do this in two ways: by creating an interstate common market through "vertical federalism," and by promoting competition and cooperation among states through the system of "horizontal federalism." Understanding the value of competitive federalism within the financial regulatory system, however, first requires understanding the role of federalism within the American constitutional system.

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[164] *See* Christine Daleiden, *Financial Reform for Consumers: An Overview of the Dodd-Frank Act and the Consumer Protection Bureau*, Haw. B.J. (April 2011).
[165] *See* Congressional Research Service, *Federal Preemption in the Dual Banking System: An Overview and Issues for the 116th Congress*, R45726 (2019).

Two important purposes of the United States Constitution are: to protect individual liberty and to prevent political "factions" (what today are called "interest groups") from commandeering the power of government to advance their narrow special interests at the expense of the public interest. As James Madison commented in *Federalist* Number 51, "[i]t is of great importance in a republic, not only to guard the society against the oppression of its rulers; but to guard one part of the society against the injustice of the other part."[166] In order to accomplish these goals, the Constitution rests first on the consent of the governed but also constructs a system of "auxiliary precautions" such as the separation of powers, checks and balances, and federalism. These structural provisions of the Constitution reinforce each other – "[i]n the compound republic of America, the power surrendered by the people, is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other; at the same time that each will be controlled by itself."

At the federal level, the tripartite system of separation of powers and checks and balances among the three branches of the federal government is designed to fragment and divide "factious majorities" who seek to use the power of the government to oppress minorities and whose designs are contrary to "justice and the general good." By selecting the members of each of the branches of the federal government and the bicameral legislature and giving them distinct but also overlapping powers, the Framers believed that the different branches would check each other, thereby preserving liberty and resisting the influence of factions as a by-product.

Federalism is designed, in part, to perform the same function of preserving liberty and frustrating interest-group influence by enabling the state and federal governments to check each other. As then-professor Antonin Scalia memorably observed in 1982, federalism "is a stick that can be used to beat either dog"[167] and keep either in line if it seeks to expand its power excessively. As Madison observed in *Federalist* Number 45, a strong central government is "essential to guard [the people] against those violent and oppressive factions, which imbitter the blessings of liberty," when local interest groups operating at the state level seek advantage by protecting themselves from interstate competition. A primary rationale for the Constitution itself was to eliminate internal barriers to commerce and to allow the free flow of goods and services in interstate commerce, a right that was recognized for both buyers and sellers as essential to the welfare and prosperity of the nation.[168] Of particular concern was the centrifugal force of state governments, which often led to disunity and rivalry among the states as each sought to protect its own power and further the influence of entrenched, local special interests.[169] The Framers considered it imperative to protect the "commercial part of America" from these parochial interests that would attempt to close their markets to outsiders and protect themselves from competition.[170] The role of the federal government is to prevent this fragmentation and preserve the

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[166] Federalist No. 51.
[167] *See* Antonin Scalia, *The Two Faces of Federalism*, 6 Harv. J. of L. & Pub. Pol'y 19 (1982-1983).
[168] Federalist No. 11.
[169] *See* Federalist No. 7 (expressing the concern that if left unchecked by the federal government, political incentives would lead to favoritism toward in-state interests resulting in "regulations of trade, by which particular states might endeavour to secure exclusive benefits to their own citizens").
[170] *See* Michael S. Greve, The Upside-Down Constitution 19-22 (2012).

opportunity of sellers and buyers to transact in interstate markets undistorted by unnecessary and partial regulations.

The historical development of the dual banking system reflects this "duality of meaning" with respect to federalism.[171] Banking has inherently interstate characteristics with respect to payments, lending, and other financial services and has long been understood as an appropriate industry for regulation by the national government. Because of this reality, today's dual-banking system is starting to show some wear. As our national economy grows, so too does the need for greater federal oversight and presence in some areas. Innovation and the rise of technology, for example, have illuminated the redundancies of state involvement in the increasingly interstate and global activity of banking. Commerce is increasingly interstate due in large part to the internet. Fintechs, like peer-to-peer payment services, have capitalized on weaknesses in traditional methods of banking and digitally offer streamlined bank-like services using convenient payment platforms. These platforms generally work by accessing a consumer's traditional bank account, which allows these fintechs to avoid regulations governing accepting and holding deposits. Nondepository institutions like these fintechs have traditionally been chartered by state authorities, subjecting them to various state laws, including those imposing usury limits.[172]

The growth of fintech threatens the influence of two entrenched interest groups who have often resisted fintech's disruptive influence: "(1) financial regulators; and (2) incumbents within the regulated industries."[173] Of course, these groups have been always been ready to resist entry from innovative and vibrant competitors, from the opposition of traditional banks and alternative financial services providers to WalMart's efforts a decade ago to obtain an industrial loan corporation bank charter to fintech innovators and Facebook's efforts to provide financial services.[174] State regulators stand to lose both power and billions of dollars in licensing fees.[175] As the chartering agency for banks, controversy has arisen over the OCC's plan to charter fintechs. An OCC charter would largely remove states from the regulatory equation for national and international entities and require fintechs to satisfy uniform national banking standards, including consumer protection laws. Fintech holds the potential to circumvent many of the barriers that today suppress competition and innovation to the detriment of consumers. At the same time, the creation of the Bureau created a muscular federal consumer

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[171] Scalia, *supra* note [NOTEREF _Ref56628505 \h * MERGEFORMAT], at 19.
[172] *See* Maria T. Vullo, *The New York State Department of Financial Services Wins Big Against Office of the Comptroller of the Currency Over the Ability to Preempt the States in Chartering "Fintech" Non-Depository Companies* (2019), *available at* [HYPERLINK "https://wp.nyu.edu/compliance_enforcement/2019/05/08/the-new-york-state-department-of-financial-services-wins-big-against-office-of-the-comptroller-of-the-currency-over-the-ability-to-preempt-the-states-in-chartering-fintech-non-deposi/"].
[173] Jeremy Kidd, *Fintech: Antitdote to Rent-Seeking?*, 93 Chicago-Kent L. Rev. 165, 165 (2018).
[174] *See* Bernard Wysocki Jr., *How Broad Coalition Stymied Wal-Mart's Bid to Own a Bank*, Wall St. J. (Oct. 23, 2006) ("Wal-Mart's effort to open a bank has galvanized a broad coalition of opponents: large banks, small banks, the Federal Reserve, unions, grocers, real-estate agents and congressmen of both parties."), *available at* [HYPERLINK "https://www.wsj.com/articles/SB116118495912296504"].
[175] *See* Brian P. Brooks and Charles W. Calomiris, *Fintech Can Come out of the Shadows* (Sept. 9, 2020) ("In 2019, New York alone oversaw 113 state-licensed money transmitters, 18 nonbank lending companies, 92 sales finance companies, and other companies, some of which might qualify as national banks. Regulatory assessments alone [HYPERLINK "https://www.dfs.ny.gov/system/files/documents/2020/07/dfs_annualrpt_2019.pdf" \t "_blank"]Albany more than $100 million."), *available at* [HYPERLINK "https://www.wsj.com/articles/fintech-can-come-out-of-the-shadows-11599693184"].

protection regulator and enforcer that can protect consumers from unfair, deceptive, and abusive behavior by bad actors. Although state authorities play a vital and important role in enforcing consumer protection laws against local bad actors, with respect to national and global service providers, it is difficult to identify the benefits of regulation by 50 state authorities rather than a consistent and efficient regulatory framework.[176]

So far, the OCC's efforts to charter fintech institutions have been stymied in the courts. Under the National Banking Act, as part of issuing a charter, the OCC is required to make a determination that an institution can "commence the business of banking."[177] Ruling on a lawsuit brought by state banking officials, a New York federal district court held that the "the business of banking unambiguously requires receiving deposits as an aspect of the business", and therefore, did not include activities like those of nondepository fintechs.[178] However, the ruling did not end the fintech quest for chartering. The OCC issued its first full-service charter, rather than its controversial fintech charter, to the first fintech in 2020.[179] The charter was issued to Varo Bank, N.A., a full-service digital bank that offers checking and savings accounts through its mobile application.[180] Additionally, the Acting Comptroller announced that the OCC plans to introduce a payments charter that would preempt state payments licensing requirements.[181]

Given the rise and popularity of fintechs, questions concerning where they fit in the banking ecosystem will continue. It may be time to consider creating a new chartering system to accommodate fintech activities, lessen redundancies caused by state oversight, and bring fintechs into the financial regulatory fold.

The current regulatory environment for non-depositories like fintechs is an example of individual-state oversight (hereinafter referred to as "50-state oversight"). In a 50-state oversight regime, each state develops and enforces its own laws governing certain activities within that state. Where there is no federal law preemption, state laws apply to entities operating outside the state. Additional examples of 50-state oversight can be seen in data breach notification laws, which vary by state, and substantive data privacy laws such as the California Consumer Privacy Act. State data breach notification and data privacy laws regulate conduct as it applies to consumers located within certain states. Therefore, banks

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[176] *See* Brooks and Calomiris, *supra* note 175.
[177] *See* 12 U.S.C. 27; *See* Maria T. Vullo, *supra* note 172.
[178] *See Vullo v. Office of Comptroller of Currency*, 378 F. Supp. 3d 271, 292 (S.D.N.Y. 2019)(dismissing the OCC'S Motion to Dismiss); *Lacewell v. Office of Comptroller of Currency*, 2019 WL 6334895 (S.D.N.Y. Oct. 21, 2019) (issuing a stipulated final judgment in favor of the New York State Department of Financial Services and setting aside the OCC fintech regulation as to all applicants for a national banking charter that do not accept deposits).
[179] *See* [HYPERLINK "https://www.occ.treas.gov/news-issuances/news-releases/2020/nr-occ-2020-99.html"].
[180] *See* [HYPERLINK "https://www.bloomberg.com/news/articles/2020-07-31/varo-becomes-first-consumer-fintech-to-land-a-national-charter"].
[181] *See* Judith E. Rinearson and Mehreen Ahmed, *It's Ba-ack! OCC Planning A New Fintech Charter: "Payments Charter 1.0"*, National Law Review, Volume X, Number 188 (2020), *available at* [HYPERLINK "https://www.natlawreview.com/article/it-s-ba-ack-occ-planning-new-fintech-charter-payments-charter-10"].

and non-banks generally must comply with the data breach and privacy laws in the states in which their consumers reside.[182]

Alternatively, states may choose to recognize the laws of other states. In this scenario, an entity can comply with foreign state law by complying with the law of the state in which the entity is headquartered. The most recent example of this principle in a non-banking context can be seen in the effort to treat Covid-19 patients. To combat healthcare worker shortages caused by the pandemic, some states have recognized healthcare licenses issued by other states – thereby allowing healthcare workers to provide services outside their licensing state.[183] ~~In a banking context, an example of this principle can be seen in *Marquette National Bank of Minneapolis v. First of Omaha Service Corp* ("Marquette").[184]~~

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The Taskforce believes the regulatory regime for credit cards that evolved in the aftermath of the Supreme Court's decision in *Marquette* provides an excellent model for Fintech regulation.[185] As discussed in chapter 10, that regulatory regime empowered consumers to choose their preferred regulatory framework for credit cards. In that case, the Marquette National Bank brought suit against First Omaha, a national bank headquartered in Nebraska, alleging that its credit card interest rates violated Minnesota-state usury laws. The Supreme Court found that First Omaha could charge Minnesota customers interest rates permitted in First Omaha's home state of Nebraska. This was because the National Bank Act allowed national banks to charge interest rates based on the laws of the state in which the bank was located. Under the specific facts of the case, the Supreme Court's ruling essentially created two different credit card options: the "Minnesota card" model under which the consumer was "protected" by a maximum state usury ceiling of 12 percent APR but also had to pay an annual fee of $10 or $15 to have a card; or the "Nebraska card" which had a higher usury ceiling of 18% APR but no annual fee (the "*Marquette* approach"). As noted in the oral argument of the case, residents of Minnesota were flocking to the "Nebraska card", but there was minimal traffic in the other direction, which suggested that the card with more flexible pricing terms was preferred by consumers.[186] By enabling consumers to avail themselves of different state's regulatory rules regardless of their state of residence, there was a competition among the different state's regulatory rules and the way those rules influenced the terms and availability of credit cards. Moreover, as admitted in the oral argument by Minnesota's attorney general, one of the major purposes of the state's law was to protect in-state banks from competition, even if that resulted in Minnesotans paying higher prices and gaining less access to credit than they otherwise would.

A regime similar to the *Marquette* approach could be adopted on a state-level through interstate reciprocity agreements or the enactment of federal laws with provisions similar to the home-state rule provision in the National Bank Act. Such a regime would eliminate redundancies caused by 50-state

[182] Of note, the Gramm-Leach-Bliley Act (the "GLBA") is a federal data privacy law that applies to financial institutions, but Congress chose not to preempt all state privacy laws when it passed the law. The GLBA does not preempt state laws as long as they are not inconsistent with GLBA requirements. States may also enact laws that are more stringent than the GLBA. *See* 15 U.S.C. 6807(a).

[183] *See* [HYPERLINK "https://www.natlawreview.com/article/covid-19-states-waive-state-licensing-requirements-health-care-providers"].

~~[184] *Marquette National Bank of Minneapolis v. First of Omaha Service Corp.*, 439 U.S. 299 (1978).~~

[185]

[186] *See* discussion in chapter 10; *see also* NCCF Report, *supra* note 2, at 207.

oversight and increase competition among states to offer chartering options that fit the needs of financial service companies and their consumers. The State of Delaware's success with attracting corporations is illustrative of this potential. Delaware has established itself as the "Bergdorf Goodman or Tiffany[187]" among states hoping to woo businesses and encourage incorporation within their borders. Delaware has done this by enacting laws that offer corporations flexible options for running their businesses which are supported by a business-savvy judicial system. States could replicate Delaware's success on the banking front by employing the same methodology.

Competitive federalism recognizes the opportunity for state governments to experiment with their own policies and to cooperate to adopt policies that break down barriers to interstate competition, advance the goal of a more robust internal free market, and increase consumer choice by making it easier for them to shop across state lines. The federal government can also play a role in facilitating these cooperative arrangements. In this vein, the CFPB's announcement in September 2019 of the creation of the "American Consumer Financial Innovation Network" (ACFIN) provides a model for an additional way forward.[188] Initially launched with seven participating states, ACFIN establishes a mechanism for states to harmonize their rules regarding Fintech and to create a system of reciprocal licensing with member states, thereby creating a sort of internal free trade zone among the member states. As of November 2019, the number of states participating in ACFIN had grown to 13.

The NCCF called out for special criticism the "anachronistic notions" of some state legislatures with respect to the maintenance of laws such as usury ceilings and barriers to entry that resulted in the citizens of their state "suffer[ing] deprivations of credit afforded others of equal standing" who simply happened to reside a state with more enlightened policies regarding the regulation of credit.[189] The NCCF "urge[d] as its first choice the adoption of state laws designed both to assure fair treatment of all consumers and to give all credit grantors equal opportunity to compete." But it also noted, "Failing this, the Commission's second choice is to urge Federal legislation to accomplish this goal."

Not all state laws are "anachronistic," of course, and state authorities play an essential role in protecting consumers, especially in enforcement against local bad actors. Within the American economy, commentators have argued that consumers are protected by a three-legged stool of consumer protection with market competition, common law institutions of contracts, tort and property and consumer protection law, comprising the three legs of the stool. But others have argued that the stool is actually a sturdy table supported by a fourth leg - jurisdictional competition between regulators, which has been the most impactful in the realm of financial regulation.[190] Jurisdictional competition has allowed regulators to learn from their own successes and failures and those of other regulators. In the financial sector, jurisdictional competition among states, between the federal government and states,

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[187] *See* [HYPERLINK "https://corplaw.delaware.gov/why-businesses-choose-delaware/"].
[188] *See* Consumer Financial Protection Bureau, *CFPB and State Regulators Launch American Consumer Financial Innovation Network* (Sept. 10, 2019), *available at* [HYPERLINK "https://www.consumerfinance.gov/about-us/newsroom/bureau-state-regulators-launch-american-consumer-financial-innovation-network/"].
[189] NCCF Report, *supra* note 2.
[190] *See* G. Marcus Cole commentary, *available at* [HYPERLINK "https://www.consumerfinance.gov/about-us/events/archive-past-events/taskforce-public-hearing/"]

and within the federal government creates a feedback loop that affords each group to further hone its understanding of the financial market and the regulations it enacts to protect it.[191]

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But the Taskforce shares the NCCF's concern about the adverse effects on consumers, especially traditionally excluded consumers, and competitors from "anachronistic" state laws such as usury ceilings and regulatory-created barriers to entry. The Taskforce does not advocate for national preemption of state laws. Instead, we share the NCCF's admonition about the adverse effects of certain state laws and urge the states to evaluate their existing usury ceilings, barriers to entry, and other laws that limit access to credit and reduce competition, especially competition by out-of-state providers. The Taskforce also has the benefit of the 40-year experiment with the *Marquette* approach for credit card regulation, which the NCCF did not. As we will discuss in greater detail below, the Dodd-Frank Act carved a path for states to act in the financial services landscape. But as more and more financial services become multistate, states should continually consider their value-add in the modern financial marketplace. The view of the Taskforce is that approach of dual federal chartering and home-state regulation strikes an appropriate and effective balance between the powers of federal and state governments while facilitating consumer choice, access, and competition.

The preemption regime in the Dodd-Frank Act attempts to a strike a similar balance between recognizing a state's right to protect its consumers, on the one hand, and standardizing the application of national law while creating a floor for consumer protection standards, on the other. It redrew the boundaries of the preemption standard, narrowing the scope of federal government preemption of state laws and enforcement powers and increasing the permissible scope of authority of state regulators. It also attempts to clarify the state of current preemption standards for banking laws. At the outset, the Supreme Court has recognized three bases for preemption: 1) express or implied preemption; 2) field or implied preemption; and 3) conflict preemption.[192] The Dodd-Frank Act embraces a conflict preemption standard. [193] Conflict preemption generally applies when there is an "irreconcilable conflict" between federal and state law, meaning it would be virtually impossible to comply with both.[194] Under the Dodd-Frank Act, a state law is not preempted unless it is "inconsistent" or in conflict with the Act.[195] The law specifies that a State affording consumers more protection than the Dodd-Frank Act confers does not constitute a conflict.[196]

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The Dodd-Frank Act provides that state consumer financial laws governing national banks will be preempted in only one of three instances: 1) the state law has a discriminatory effect on national banks; 2) a court or the OCC determines the law "prevents or significantly interferes" with a national bank's exercise of its powers; or 3) the law is preempted by another federal law. The first scenario addresses instances of overt and latent discrimination. A state law that discriminates against a national bank might be one in which the national bank is required to pay a fee that state banks are not. But it might also

191 *See id.*
192 *See Baptista v. JPMorgan Chase Bank, N.A.*, 640 F.3d 1194 at 1197(2011).
193 *See* Section 1041(a)(1) of the Dodd-Frank Act.
194 *See* Dori K. Bailey, *Preemption Principles: Weighing the Impact of Dodd-Frank*, Banking & Fin. Services Pol'y Rep. at 2 (July 2015).
195 *See* Section 1041(a)(2) of the Dodd-Frank Act.
196 *See id.*

encompass a situation where a national bank is required to pay both a national and state fee; whereas a state bank might only be required to pay state fees.[197]

The Dodd-Frank Act's second preemption scenario codifies the court's ruling in *Barnett Bank of Marion County, N.A. v. Nelson*.[198] In *Barnett*, the State of Florida attempted to prohibit a Bank from selling insurance although it was permitted to do so under federal law. The Court found that states cannot forbid or significantly impair powers Congress has granted to national banks.[199] A state law that impairs a national bank's power to conduct an activity that is integral to its business would likely "significantly impair" powers granted to a national bank. [200] The facts in *Baptista v. JPMorgan Chase Bank, N.A.* illustrate this concept. In another Florida case, the state attempted to prohibit a national bank from imposing check-cashing fees. The Court found that Florida's law created a "clear conflict" between the Dodd-Frank Act and the Bank's federal authorization and, thus, was preempted.[201] *Baptista* also highlights that a state's good intentions when enacting a conflicting law is not relevant to the Court's determination of whether a state law is preempted.[202] Along the same lines, the Dodd-Frank Act also reinforces that Dodd-Frank's limits on preemption shall not be construed as altering or otherwise affect the established rule under *Marquette* that permits national banks to charge interest at the rate allowed by the state in which it is located.~~federal preemption of state usury laws given federal authorities~~.[203]

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On the other end of the spectrum, the Dodd-Frank Act bolsters states' rights by clarifying that state laws apply to bank subsidiaries. Prior to Act, the Supreme Court in the *Watters* case established the preemption standard as to subsidiaries of national banks.[204] In *Watters*, the court considered whether a state could impose licensing, visitorial and reporting requirements on a national bank subsidiary. The Court found that because federal law authorized national banks to conduct activities through their subsidiaries, states could not impair or impede this right by imposing additional requirements on subsidiaries to operate in a state. The Court also found that a state could not impose its laws on a bank domiciled outside the state. The Dodd-Frank Act overturned the *Watters* decision and clarified that national bank subsidiaries and affiliates are subject to state consumer financial laws (unless the subsidiary or affiliate is a national bank).[205] It also included a savings clause clarifying that the National Bank Act did not preempt the applicability of other state law to subsidiaries and affiliates.[206]

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Apart from national banks and federal savings associations, the Dodd-Frank Act also provides state attorneys general, or a state regulatory agency depending on the circumstance, with the authority to bring an action for violations of the CFPA or rules issued thereunder. [207] Additionally, the law authorizes

[197] *See* Dori K. Bailey, *supra* note 191.
[198] *See* Section 1044 of the Dodd-Frank Act.
[199] *See Barnett Bank of Marion Cnty., N.A. v. Nelson*, 517 U.S. 25 (1996).
[200] *See* Dori K. Bailey, *supra* note 191.
[201] *See Baptista v. JPMorgan Chase Bank, N.A.*, 640 F.3d 1194 (2011).
[202] *See* Dori K. Bailey, *supra* note 191.
[203] *See* Section 1044 of the Dodd-Frank Act.
[204] *See Watters v. Wachoiva Bank, N.A.*, 551 U.S. 1 (2007).
[205] *See* Section 1044(e) of the Dodd-Frank Act.
[206] *See id.* at 1044(b)(2); 12 U.S.C. 25(b)(b)(2).Of note, the savings clause also states that the Federal Reserve Act does not preempt the applicability of state law with respect to subsidiaries and affiliates.
[207] *See id.* at Section 1042(a)(1).

states to enforce rules promulgated pursuant to the CFPA against a national bank or federal savings association.[208] But states may not enforce the CFPA, itself, against national banks.[209]

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State enforcement of federal consumer financial law creates additional regulatory overlap in the financial system. As with federal stakeholders, the Bureau and states are generally required to coordinate activities with one another. Here too, the Bureau employs the use of memorandums of understanding to establish procedures that will govern their working relationship. These memorandums may be executed to account for coordination on an ongoing basis or to develop a strategy to coordinate on a specific investigation.

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II. Regulatory Modernization

The Director assembled the Taskforce to assess the current state of the U.S. financial regulatory system and imagine a way forward. As is evident from this chapter's description of the various facets of this system, it has successes, benefits, drawbacks, and inefficiencies. Among the successes and benefits are the ability to draw from the financial regulators' respective areas of expertise and the system's flexibility in the face of crises. The drawbacks and inefficiencies ripe for improvement include the jurisdictional status of auto dealers and the uncertainties resulting from the *Seila Law* decision.

Regulatory Effectiveness

The federal financial regulatory regime is a dizzying array of federal and state stakeholders, jurisdictional mishmash, and subsurface tension. But each actor has a role to play. The fact that their roles overlap does not diminish the importance of each. Multiple financial services regulators result in multiple opportunities to prevent misconduct and consumer harm. The prudential regulators have developed expertise with handling matters germane entities within their jurisdiction; whereas the Bureau has developed expertise with financial consumer protection matters.

One of the benefits of shared jurisdiction is the ability to draw from skillsets and expertise. The Dodd-Frank Act established the Bureau as the preeminent expert in consumer financial protection. Congress's decision to create an agency primarily concerned with consumer protection reflects the high priority the financial system places on consumer confidence and safety. The Great Depression, the Great Recession, the global Covid-19 pandemic, and countless other catastrophic events have spotlighted the essential role consumers play in the health and stability of the U.S. financial market and the global economy. They have also highlighted the vital role finances play in consumers' overall quality of life. While each prudential regulator has a view into the intersection of safety and soundness and consumer protection as to the entities they regulate, the Bureau has a broad view and expertise in~~of~~ consumer protection across all consumer finance markets. As such, ~~the Taskforce recommends that~~ regulators ~~should~~ afford the Bureau deference in this area on matters of consumer protection.

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The same can be said of the FTC with respect to data breaches at nondepository institutions. The FTC has developed a skillset for adeptly investigating and prosecuting poor practices that lead to data breaches. The Bureau should rely on this skillset rather than recreating the FTC's well-established expertise. Although establishing formal lines of authority among regulators is not yet necessary, the Bureau should consider negotiating a Memorandum of Understanding with the relevant financial

[208] *See id.* at Section 1042(a).
[209] *See id.* at 1042(a)(2).

regulators stating that the Bureau is the primary consumer compliance examiner and recognizing the FTC as the nation's data breach specialist.

Federal regulators and prudentials should continue to coordinate their activities to eliminate redundancies and take advantage of the benefits of their close working relationships. Opportunities for greater cooperation include increasing the number of joint examinations of supervised entities; and working together to proactively develop a comprehensive incident response plan across the financial market to combat consumer harms related to declared emergencies and other catastrophic or unforeseen events such as the Covid-19 pandemic).

States also serve an important role in the consumer financial law regime. But the value of state actors operating in an increasingly interstate and global financial environment is decreasing. The growth of the national economy has led to both a greater need and greater efficiency case for a federal presence, and thus, preemption. Additionally, the cost of federalism grows with federal dominance. The Bureau is illustrative of this reality. The argument for preemption is stronger in a world where the Bureau exists given it is well-designed to supervise national providers of financial products or services. Congress should continue to consider whether the states' expenditure of resources to regulate these entities makes sense given states' limited view into a national provider's overall business or national impact.

On the other hand, state oversight has advantages. States have a legitimate interest in protecting their consumers, and they are uniquely positioned to understand the needs of consumers in their respective markets. As the nation's "laboratories"[210], state oversight offers a ground-level view of issues that may surface on a national level. In this way, states act as a first-warning system and provide federal regulators with opportunities to course-correct and prevent or mitigate consumer harm on a national scale**.** Enacting the *Marquette* approach would maintain state presence in the consumer protection space while eliminating the redundancies created by 50-state oversight. Some critics argue the *Marquette* approach could result in businesses migrating to states with the least consumer protections and operational restrictions.[211] On the other hand, many have argued that in the field of corporate law, competition among the states pushes toward optimal laws.[212] Moreover, however well-grounded this

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[210]*See New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the nation. It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country. This Court has the power to prevent an experiment. We may strike down the statute which embodies it on the ground that, in our opinion, the measure is arbitrary, capricious, or unreasonable. . . . But, in the exercise of this high power, we must be ever on our guard, lest we erect our prejudices into legal principles. If we would guide by the light of reason, we must let our minds be bold.")

[211] *See e.g.* Robert R. Drury, *The Regulation and Recognition of Foreign Corporations: Responses to the "Delaware Syndrome"*, The Cambridge Law Journal, vol. 57, no. 1, 1998, pp. 165–94. (1998) (Describing the phenomenon in which corporations incorporate in Delaware given the perception that its laws favoring corporations), *available at* [HYPERLINK "http://www.jstor.org/stable/4508425"]; William L. Cary, *Federalism and Corporate Law: Reflections Upon Delaware*, The Yale Law Journal, vol. 83, no. 4, pp. 663-705 (1974)(arguing that corporations incorporate in Delaware due to favorable tax, trust, and corporation laws resulting in the deterioration of corporation standards), *available at* [HYPERLINK "https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=6235&context=ylj)%20"]

[212] Roberta Romoano, *The Genius of American Corporate Law*, American Enterprise Institute (1993), *available at* https://EconPapers.repec.org/RePEc:aei:rpbook:53342.

concern may be, it is far weaker today with the Bureau as a forceful national cop on the beat. Experience with the *Marquette* approach suggests some of these criticisms are unfounded and are outweighed by the benefits to consumers.

Over the course of 2020's turbulent year, what has become more evident is that our financial system's flexibility has allowed the nation to withstand headwinds resulting from shared crises. Financial regulators, including the Bureau, have issued guidance and provided support materials to ease the concerns of consumers and industry. Just as the country prepared to quarantine due to the pandemic, the federal financial regulators and the Conference of State Bank Supervisors, issued a joint statement encouraging financial services providers to work with consumers affected by the pandemic.[213] In April, the Federal Reserve Board, the Federal Deposit Insurance Corporation, and the Comptroller of the Currency issued an interim final rule extending the time period to conduct real-estate appraisals and evaluations to afford institutions the ability to provide financing to creditworthy borrowers quickly.[214] The Federal Housing Finance Agency also implemented loan origination flexibilities which included, among other things, an expansion of requirements intended to make remote closings more efficient.[215] These actions only reflect a handful of the actions financial regulators have taken to protect the financial market and consumers.

Financial regulators cobbled together a response to these challenges using their ingenuity, alacrity, and the discretion afforded to them to enforce laws and regulations and suspend those that may have negative consequences in the midst of crises. While financial regulators' response to the pandemic has been extraordinary, future crises are inevitable. Events like the pandemic have highlighted the need for flexibility in the regulatory system to deal with unanticipated shocks. Financial regulation traditionally has been highly prescriptive in its rule structure, an approach that creates certainty and predictability for consumers and providers but can stifle change and adaptability, especially in crises. But financial regulators' ability to react quickly and decisively in an emergency is a product of legislation that affords them the discretion to do so when circumstances appropriate such a response. Therefore, it is the view of the Taskforce that Congress should create a framework that cements the authority of regulators to use their discretion in the event of an emergency and provides regulators with a greater set of tools to channel that discretion.

A future emergency response framework should include automatic policy responses (or automatic stabilizers) that are triggered by the President's declaration of an emergency. Automatic responses will allow regulators to swiftly react to crises rather than spending valuable time crafting ad hoc solutions. The framework might also include providing federal regulators with authority to suspend state regulations that impede federal efforts to respond to emergencies and stabilize the economy.

[213] *See* Joint Statement, *available at* [HYPERLINK "https://www.ncua.gov/newsroom/press-release/2020/agencies-encourage-financial-institutions-meet-financial-needs-customers-and-members-affected"].
[214] *See* Interagency Statement on Appraisals and Evaluations for Real Estate Related Financial Transactions Affected by the Coronavirus, *available at* [HYPERLINK "https://files.consumerfinance.gov/f/documents/cfpb_interagency-statement_real-estate-transactions-covid-19.pdf"].
[215] *See* Federal Housing Finance Agency News Release, *available at* [HYPERLINK "https://www.fhfa.gov/Media/PublicAffairs/Pages/FHFA-Extends-COVID-Related-Loan-Processing-Flexibilities-for-Fannie-Mae-and-Freddie-Mac-Customers-Through-August.aspx"].

Opportunities for Modernization and Greater Coherence

It is incumbent on financial regulators and Congress to continue to find ways to make the financial regulatory system more agile and responsive to the dynamic needs of firms and consumers. Improving the system calls us to take a clear-eyed look at the way the world has changed and imagine a financial system that serves our present and future needs. With this vision, we consider the following to be opportunities to improve the federal financial regulatory landscape.

Auto Dealer Authority

~~Congress should consider revisiting the auto dealer exception to Bureau oversight.~~[216] The high cost of cars means consumers often finance the purchase through credit. As of 2019, the auto loan market was the third largest market behind mortgages and student loans. According to a 2018 study by New York's Federal Reserve Bank, approximately 45% of American consumers had an auto loan or auto loan debt.[217] Consumer demand for used cars has dramatically increased along with the cost of procuring one since the global pandemic due to reduced auto production and concerns about close-quarters on public transportation.[218] Furthermore, in an indirect lending relationship, auto dealers receive compensation for their referrals of consumer credit to lending institutions. This markup is based on the difference between the lender's interest rate and the rate charged to a consumer.[219] So, Auto dealers' profits are directly linked to the cost to consumers. In some~~a number of~~ instances, dealers have been accused of imposing markups that have resulted in consumers of color, e.g. Blacks, Hispanics, and Asian and Pacific Islanders, paying significantly higher dealer markups unrelated to their ability to repay the loan.[220] In perhaps one of the most flagrant instances of discrimination, a dealership in the New York's Bronx borough allegedly instructed its employees to charge higher prices to these consumers specifically.[221]

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216 *See* discussion in Chapter 13, Section I. *See also* Section 1029 of the Dodd-Frank Act.
217 *See* Congressional Research Service, *The Automobile Lending Market and Policy Issues*, IF11192 (April 2019), *available at* [HYPERLINK "https://fas.org/sgp/crs/misc/IF11192.pdf"]-.
218 *See e.g.* [HYPERLINK "https://www.npr.org/2020/10/28/927971920/a-pandemic-sticker-shock-used-car-prices-are-through-the-roof"].
219 *See CRS Report* IF11192, *supra* note 212.
220 *See* e.g. Complaint at 26, Federal Trade Commission v. Liberty Chevrolet Inc., et al., (S.D.N.Y. 2020) (No. 20-CV-3945), [HYPERLINK "https://www.ftc.gov/system/files/documents/cases/bronx_honda_complaint_0.pdf"]); Bureau Press Release announcing settlement with American Honda Finance Corporation, *available at* [HYPERLINK "https://www.consumerfinance.gov/about-us/newsroom/cfpb-and-doj-reach-resolution-with-honda-to-address-discriminatory-auto-loan-pricing/"]. *See generally* Jason Hernandez, Loan Discrimination At the Auto Dealership: Current Cases, Strategies and the Case For Intervention By Attorneys General, Columbia University, *available at* [HYPERLINK "https://web.law.columbia.edu/sites/default/files/microsites/careerservices/Loan%20Discrimination%20At%20The%20Auto%20Dealership.pdf"]; *Examining Discrimination in the Automobile Loan and Insurance Industries: Hearing Before the H. Comm. on Fin. Servs. Subcomm. on Oversight and Investigations* (May 1, 2019) (testimony of Kristen Clarke), *available at* [HYPERLINK "https://lawyerscommittee.org/wp-content/uploads/2019/04/Discrimination-in-Auto-Lending-Statement-of-Kristen-Clarke-FINAL.pdf"].
221 *See* Complaint at 26, Federal Trade Commission v. Liberty Chevrolet Inc., et al., (S.D.N.Y. 2020) (No. 20-CV-3945).

This issue has led some at the FTC to argue for exercising its authority under the Dodd-Frank Act to regulate dealer markups to prevent abuses and discrimination.[222]

Currently, auto financing institutions are overseen by the Bureau and auto dealers are overseen by the FTC, but shared jurisdiction between the FTC and the Bureau over auto dealers is appropriate. First, the Dodd-Frank Act conferred to the Bureau supervisory jurisdiction over nondepositories in markets for payday loans, residential mortgages and private education lending in addition to nondepositories that the Bureau determines pose a risk to consumers and larger participants in markets for consumer financial products or services that the Bureau determines by rulemaking. ~~Auto dealers represent yet another large consumer credit player that is ripe for Bureau supervision.~~ Additionally, the FTC's current jurisdiction includes auto sales, and the Bureau's includes auto financing. As facilitators of consumer credit, auto dealers are inextricably linked to the current auto lending market. Thus, the FTC and the Bureau should share oversight duties to fully cover the scope of activities in the auto lending market.

~~Tying Seila Law's Loose Ends~~

~~In the interest of stability, Congress should consider taking steps to resolve the uncertainty resulting from the Court's *Seila Law* decision. Stability is a hallmark of a healthy financial system. As the lead financial regulator for consumer protection issues, the policies the Bureau implements have a direct impact on financial markets. Those markets, federal and prudential regulators, and consumers would benefit from the ability to rely on Bureau actions. Chief among the concerns raised by the opinion is whether the Bureau's actions prior to *Seila Law* were valid. But Congress should also consider addressing the questions the ruling raises about the constitutionality of other federal regulators including some that play a role in ensuring the health of the financial market.~~

~~Congress could take one of two actions to resolve *Seila Law* uncertainties. It could pass legislation mirroring the outcome in *Seila Law* – that is, a law clarifying that the Bureau is an independent executive agency (or executive agency) led by a single director who is removable at-will by the President. Such a law should also clarify that all acts performed while the Bureau enjoyed for-cause removal protection are valid. Notably, there is precedent for independent executive agencies led by a single director removable by the President. The Office of the Comptroller of the Currency is headed by the Comptroller of the Currency who is appointed by the President for a fixed 5-year term and removable for any reason provided the President communicates that reason to the Senate.[223] Similarly, the Food and Drug Administration is led by the Commissioner of Food and Drug who is removable by the President.~~

~~Of course, codifying the outcome in *Seila Law* would mean the Bureau would be subject to the President's direct influence, could be subjected to partisan squabbles, and frequent changes in leadership and policy direction – each of which have the potential to make the Bureau less effective overall. However, how the Bureau may be treated in the political process remains unclear given the agency's relative youth.~~

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[222] *See* Statement of Commissioner Rebecca Kelly Slaughter *in the Matter of Liberty Chevrolet, Inc. d/b/a Bronx Honda Commission File No. 1623238, (May 2020), available at* [HYPERLINK "https://www.ftc.gov/system/files/documents/public_statements/1576006/bronx_honda_2020-5-27_bx_honda_rks_concurrence_for_publication.pdf"].

[223] ~~*See* 12 U.S.C. § 2.~~

~~Alternatively, Congress could restyle the Bureau as a bipartisan, commission-led independent agency similar to the FTC's leadership structure and reinstate for-cause removal protections. The latter would be in keeping with the tradition of insulating financial regulators from the political process. Also, with the implementation of staggered terms for the commissioners, the Bureau would benefit from the continuation of organizational policies and consistent, focused direction. This structure would also afford the Bureau the opportunity to benefit from the commissioners' collective expertise and acquired institutional knowledge. Finally, the structure would be a stronger defense against continued efforts to challenge the Bureau's constitutionality. Restructuring the leadership structure would not be without risk. *Seila Law* raises new questions about the constitutionality of allowing independent agencies to exercise any degree of executive power. Additionally, a multi-commissioner structure may result in a Bureau that is less responsive to immediate threats or issues requiring immediate attention given decisions would need to be made by majority agreements consensus among the commissioners.~~[224]

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III. Cost-Benefit and Bureau Activity Analysis

Tradeoffs are inevitable in life, markets, and regulation. For example, as has been stressed throughout this report, policymakers can either have price controls on consumer credit or broad inclusion, but they cannot have both. Stricter usury ceilings can suppress prices for those who can get credit but will reduce access to credit for those who are priced out of the market, forcing them to rely on more-expensive and less-desired products. All regulation, therefore, has both benefits and costs, and effective regulation is that for which the overall benefits are greater than the costs.

Cost-benefit analysis (CBA) is simply an accounting of the positive and negative impacts of the choices available when making a decision. As such, CBA is ubiquitous in everyday life. In fact, is difficult to imagine a careful decision without a consideration of both the positive and negative impacts the various choices would have on our lives. These decisions can be as consequential and complex as choosing where to live, or as simple as choosing a cereal at a grocery store. The former decision involves considering housing costs, size, and amenities; transportation options and costs; as well as geographical amenities of the community like schools, restaurants, and recreation. Housing choices will vary along these qualities, and making a decision involves weighing tradeoffs associated with each choice. Likewise, choosing a cereal may involve considerations of nutrition, price, brand-recognition, and even box size may play a role for storage-space constrained consumers.

These two examples are instructive. For instance, the decision between cereals is minor and unlikely to have large consequences for a consumer's lifetime well-being. Of course, the vitamins and minerals offered by the cereal options will impact the consumer's health, but the incremental contribution of a single cereal decision to lifetime well-being is very small. Because of this, some consumers may not spend much time deciding – and may choose based on the artwork on the box or some other trivial consideration. But for others, some care will go into the decision and those thoughts will invariably be some form of weighing the advantages and disadvantages of each option.

[224] ~~*See e.g.* Martin J. Gatens, *Five-to-Four: The Case for a Defensive Redesign of the CFPB*, 98 TEX. L. REV. 1115, 1130 (2020) (arguing that the Consumer Product Safety Commission is "one of the least politically independent and influential agencies in government" due to its "lack of stability, high turnover, squabbles among commissioners, and delays in decision-making [which are] largely attributable to its multimember structure").~~

On the other hand, housing decisions are highly consequential choices that impact household wealth and happiness; the amount of time spent with their family; and even the opportunities available to children. Prospective homebuyers might consider making a list of the advantages and disadvantages of their housing options to help them make their choice. Some homebuyers may even research housing price growth in the various neighborhoods to approximate the impact of their choices on their net worth. Still others may make a spreadsheet to estimate the amount of equity they may have in their home after five or ten years. Surely, many people evaluate the monthly cost of the home and how much of their budget would remain for other pursuits. The particularly enterprising buyers may even factor in the impact of their decision on their children's future earnings.[225] Very few people are likely to think that these analyses are unwarranted, irresponsible, or overly time-consuming for such a consequential decision.

The examples highlight that CBA is a common tool people use to make decisions, and that the level of care and analysis we do to inform our decisions varies by how important the decision is. Not only does this explain why we may do more analysis on a housing decision than a cereal decision, it is why corporations have entire finance departments to evaluate the merits of proposed projects. CBA is deployed in the private sector to inform decisions on projects ranging from capital investment to new product offerings. Government regulator's use of cost-benefit analysis as a tool to assist in making and supporting decisions that impact *every* mortgage or *all* firms in an industry reflects the prudence and care we put into decisions we make in our personal and professional lives. The formal cost-benefit analysis done by government agencies in support of regulatory decisions mimics these decision-making processes that we all use every day. Furthermore, it lends credibility, accountability, and transparency to decisions that are often made by career or appointed civil servants that involve how we allocate our society's valuable and scarce resources.

History of Cost-Benefit Analysis in Agency Rulemaking

CBA of the informal variety referenced in the previous section has likely been a part of human decision-making for a very long time. For instance, Boardman et al. open their textbook on CBA with an extended quotation from a letter written by Benjamin Franklin to Joseph Priestly where Franklin describes his approach to making important decisions by making a list of pros and cons, and then striking through those pros and cons he believes cancel out.[226] Franklin says that the reason for this is that each of the "pro and con are not present of mind at the same time" and he says of the results, "I think I can judge better, and am less liable to make a rash step... ."[227]

The formal variety of CBA that has become ubiquitous at executive agencies and has been a cornerstone in regulatory decisions spanning four decades and six Presidential administrations began to

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[225] Raj Chetty~~Chetty, Raj~~, Nathaniel Hendren, and Lawrence Katz, ~~. 2016.~~ ~~"~~*[HYPERLINK "https://scholar.harvard.edu/hendren/publications/effects-exposure-better-neighborhoods-children-new-evidence-moving-opportunity"]*, ~~."~~ AMERICAN ECONOMIC REVIEW, 106 (4) (2016). Accessed at [HYPERLINK "https://scholar.harvard.edu/hendren/publications/effects-exposure-better-neighborhoods-children-new-evidence-moving-opportunity"]

[226] BOARDMAN, A. E., GREENBERG, D. H., VINING, A. R., & WEIMER, D. L. ~~(2018)~~ COST-BENEFIT ANALYSIS; CONCEPTS AND PRACTICE~~e, Cambridge University Press~~(2018).

[227] Letter from Benjamin Franklin to Joseph Priestly (1772)~~Franklin, Benjamin (1772) "Letter to Joseph Priestly,"~~ in Boardman et. al.

take shape in the 1930s. The Flood Control Act of 1936 required the Army Corps of Engineers to conduct CBAs on planned flood and harbor projects. This requirement resulted in the further refinement of the practice and principles of cost-benefit analysis in water resource decisions in the following decades, ultimately culminating in the Bureau of the Budget's 1952 Circular A-47 outlining the principles of CBA in guidance for agencies making water resource decisions.[228]

While CBA in on-budget resource decisions began to flourish earlier in the 1930s and 1940s, nascent obligations resembling CBA began to appear in the regulatory space in the 1970s.[229] The first real obligation to conduct CBA in support of regulation as we know it today was established by President Reagan in 1981 with his EO 12291, which required that agencies conduct a regulatory impact analysis of all major regulations, including an assessment of benefits, costs, and net benefits. The order also established centralized review and coordination of agency rulemaking and associated regulatory impact analyses within the Office of Management and Budget (OMB).

In part due to procedural criticisms of OMB review, President Clinton replaced EO 12291 with EO 12866, which reaffirmed the practice and principles of regulatory CBA, but limited OMB review to "significant" regulations.[230] This reform substantially reduced the number of rules that OMB reviewed.[231] Nevertheless, EO 12866 has proven to have staying power, as every President since has reaffirmed its principles and the practice of CBA – and it remains in force to this date.

Between 1993 and today, many memos, circulars, and orders have been issued to enhance and further solidify the practice of conducting CBA in the rulemaking process for executive Agencies. OMB Circular A-4 was published in 2003 providing technical guidance for agencies on matters ranging from valuing reductions in mortality risks to the discount rates agencies should use for future benefits and costs to reflect social time preference.[232] President Obama issued EO 13563 in 2011, which required agencies to conduct retrospective analyses of prior rulemakings and remove outdated regulations. EO 13563 also built upon 12866's principles of considering impacts that are difficult to quantify by adding human dignity and fairness considerations, in addition to equity and potential distributive impacts of regulation.[233] President Trump's EO 13771 reaffirmed both EOs 13563 and 12866 and introduced an

[228] For more information about the development of CBA in water resource decisions see Hufschmidt, M. "Benefit-Cost Analysis: 1933-1985" Accessed at [HYPERLINK "https://opensiuc.lib.siu.edu/cgi/viewcontent.cgi?article=1196&context=jcwre"]

[229] Shapiro, Stuart (2011) "The Evolution of Cost–Benefit Analysis in US Regulatory Decision-making." [HYPERLINK "https://pdfs.semanticscholar.org/d06b/2183437547e4b32614e798025713c169e685.pdf?_ga=2.267257870.1026816008.1596222479-1635246547.1596222479"]

[230] President Clinton's Executive Order 12866 (1993), "Regulatory Planning and Review," can be accessed at [HYPERLINK "https://www.archives.gov/files/federal-register/executive-orders/pdf/12866.pdf"].

[231]Data from [HYPERLINK "http://www.reginfo.gov"], comparing the period Feb. 19, 1981 through Sept. 30 1993, with the period Oct. 1, 1993 through Sept. 30, 2017.

[232] OMB's M-03-21 Circular A-4 (2003) "Regulatory Analysis" can be accessed at [HYPERLINK "https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/circulars/A4/a-4.pdf"].

[233] President Obama's Executive Order 13563 (2011), "Improving Regulation and Regulatory Review," can be accessed at [HYPERLINK "https://obamawhitehouse.archives.gov/the-press-office/2011/01/18/executive-order-13563-improving-regulation-and-regulatory-review"]

additional constraint on regulatory decision-making in the form of a regulatory cost allowance for every executive regulator.[234]

While CBA has been a cornerstone of regulatory decision-making at executive agencies for decades, its development at independent agencies has been mixed. An ACUS report summarized the statutory authorities of independent regulatory agencies and found that three were statutorily required to do cost-benefit analysis (CPSC, the Fed for electronic funds transfer rules, and FTC), six are obligated to adhere to a weaker standard of "considering" costs and benefits (CFPB, SEC, CFTC, the Fed, OCC, and FDIC), and three have no requirements at all (NRC, FERC, and FCC).[235]

Thus, the ACUS report identifies CFPB in the weaker standard category of having a requirement to merely consider costs and benefits. The specific language of the requirement to consider the costs and benefits of their rules is from Sec. 1022(b)(2) of the Dodd-Frank Act:

> In prescribing a rule under the Federal consumer financial laws—(A) the Bureau shall consider—(i) 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 (ii)the impact of proposed rules on covered persons, as described in section 1026, and the impact on consumers in rural areas… .

Even though the CFPB's statutory requirements adhere to a weaker standard, as identified by ACUS, CFPB does not appear to be constrained to adhere to a lower standard. Instead, the CFPB could conduct complete regulatory CBAs that executive agencies adhere to. To determine the extent of CFPB's implementation of the statutory requirements, this report provides a review of the CFPB implementation of these requirements and compares them with best practices the Taskforce identified in section below.

Purpose of Cost-Benefit Analysis

A formal cost-benefit analysis is a structured approach to organizing the assumptions, information, and knowledge about the advantages and disadvantages of competing approaches to solving a problem. A typical CBA begins with an analysis of the nature and extent of the problem the regulator is trying to solve. Then the analysis proceeds to identify and analyze alternative approaches to solving the problem while also disclosing the information and methods used. Finally, the analysis summarizes the benefits and costs of each alternative and recommends a preferred approach.

The purpose of using CBA in regulatory analysis are as follows:

1. **Improve regulatory decisions:** First and foremost, a rigorous and structured approach to analyzing a problem and evaluating the tradeoffs associated with alternative approaches to solving a problem can reveal new information or present information in valuable new ways that leads to better regulatory decisions.

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[234] President Trump's Executive Order 13771 (2017), "Reducing Regulation and Controlling Regulatory Costs," can be accessed at [HYPERLINK "https://www.govinfo.gov/content/pkg/FR-2017-02-03/pdf/2017-02451.pdf"]
[235] Admin. Conf. of the U.S., Recommendation 2013-2, *Benefit-Cost Analysis at Independent Regulatory Agencies*, [HYPERLINK "https://www.govinfo.gov/content/pkg/FR-2013-07-10/pdf/2013-16541.pdf"] (July 10, 2013). Pg. 56. Report can be accessed at [HYPERLINK "https://www.acus.gov/sites/default/files/documents/Copeland%20Final%20BCA%20Report%204-30-13.pdf"].

2. **Transparency:** The process of conducting a CBA to support a regulatory decision enhances transparency by forcing agencies to identify the sources of information and the methodologies used to analyze a problem and the solutions.
3. **Accountability and credibility:** Federal regulators have numerous stakeholders in the actions they take, including Congress, the President, regulated parties, taxpayers, and voters. Agencies are often given broad authorities by Congress, which often prefers to defer certain regulatory decisions to professionals in agencies. The aforementioned transparency provided by a rigorous CBA also informs those parties that hold an agency accountable of the trade-offs involved in a regulatory decision.

Thus, the purpose of CBA in regulatory analysis is generally a good-governance one. It is not intended to constrain the information to be considered, as some critics suggest. Nor is it intended to reduce the options available to regulatory decision-makers to only those that perform best in the analysis. The true purpose is to better inform decisions, as well as the public, on the advantages and disadvantages of the options available.

Principles and Best Practices of Cost-Benefit Analysis

Identification and implementation of a set of principles or best practices of CBA is a common feature in regulatory programs. In the United States, EO 12866 and OMB Circular A-4 provide guidance on best practices in regulatory CBA. Similar guidance exists in other countries, as well.[236] In some ways, the establishment of principles and best practices is itself a best practice. It standardizes important elements and establishes a set of policies to hold agencies accountable to. The accountability function can be enhanced by an oversight body that reviews regulatory analyses for consistency with the best practices.

To identify principles and best practices of CBA, the Taskforce reviewed several authorities on cost-benefit analysis – in addition to relying on expertise among the Taskforce members and staff. First, and perhaps most important, the Taskforce Reviewed OMB Circular A-4 providing technical guidance to the heads of executive agencies on regulatory analysis. Second, we reviewed another OMB resource - OMB Circular A-94, "Guidelines and Discount Rates for Benefit-Cost Analysis of Federal Programs."[237] Third, we reviewed the United Kingdom's Regulatory Policy Committee guidance on regulatory impact assessments.[238] Fourth, we reviewed the best practices for CBA identified in the Administrative Conference of the United States (ACUS) Recommendation 2013-2, *Benefit-Cost Analysis at Independent*

[236] For more information about the extent of global implementation of CBA guidelines, see the World Bank Group's "Global Indicators of Regulatory Governance: Worldwide Practices of Regulatory Impact Assessments," pgs. 6-7, accessed at [HYPERLINK "http://documents1.worldbank.org/curated/en/905611520284525814/Global-Indicators-of-Regulatory-Governance-Worldwide-Practices-of-Regulatory-Impact-Assessments.pdf"]
[237] OMB Circular A-94 (2012), "Guidelines and Discount Rates for Benefit-Cost Analysis of Federal Programs" [HYPERLINK "https://obamawhitehouse.archives.gov/the-press-office/2011/01/18/executive-order-13563-improving-regulation-and-regulatory-review"]
[238] The Regulatory Policy Committee's "Recommendations Used When Scrutinizing Impact Assessments" can be accessed at [HYPERLINK "https://www.gov.uk/government/publications/how-the-regulatory-policy-committee-scrutinises-impact-assessments/regulatory-policy-committee-recommendations-used-when-scrutinising-impact-assessments"]

Regulatory Agencies.[239] Fifth, we studied the Organisation of Economic Cooperation and Development's (OECD) 2012 *Recommendation of the Council of Regulatory Policy and Governance.*[240] Lastly, the Taskforce consulted *Cost Benefit Analysis; Concepts and Practice* by Boardman et al.[241]

Perhaps unsurprisingly, there is broad agreement across these sources of expertise on the subject regarding the principles and best practices of CBA. Of course, there are differences in presentation, organization, and granularity of detail in the best practices across the resources, but there are very few (if any) contradictions between them. Using these resources and their own expertise, the Taskforce believes it has identified a comprehensive set of best practices for regulatory CBA.

The Taskforce believes that any CBA that fulfills the purposes mentioned above must at least adhere to the following principles and best practices:

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1. **Analysis of the problem.** The agency should analyze the extent and nature of the problem it intends to correct. This analysis should include a discussion of any relevant market failures and present evidence in support of any claims of market failure. The discussion should also include any distributional concerns or problems related to fairness, equity, and human dignity.

2. **Definition of the baseline.** The agency should establish a baseline for comparing the cost and benefits of regulatory alternatives. This is usually more complicated than simply using data on compliance, production, or sales in the past. It usually involves forecasting sales or production into the future, as well as any potential voluntary compliance. The agency should take care to capture that benefits and costs of all existing protections in the baseline of the analysis, and that all benefits and costs attributed to the rule are marginal increases or decreases relative to existing requirements.[242] The agency should use a pre-statutory baseline to capture the full impacts of the regulation, but should also consider presenting the results using a post-statutory baseline to show the impacts flowing from the agency's discretion.

3. **Selection of a time horizon for the analysis.** Selecting a time horizon is an important part of regulatory analysis, and a potential source of bias if not done correctly. Because the timing of the costs and benefits of a regulation are often asymmetric, a time-horizon that is too short will bias the net benefits towards the earlier impacts. Unfortunately,

[239] Admin. Conf. of the U.S., Recommendation 2013-2, *Benefit-Cost Analysis at Independent Regulatory Agencies*, [HYPERLINK "https://www.govinfo.gov/content/pkg/FR-2013-07-10/pdf/2013-16541.pdf"] (July 10, 2013). Pg. 56. Report can be accessed at [HYPERLINK "https://www.acus.gov/sites/default/files/documents/Copeland%20Final%20BCA%20Report%204-30-13.pdf"].

[240] Organisation of Economic Cooperation and Development, *Recommendation of the Council of Regulatory Policy and Governance* (2012). Accessed at [HYPERLINK "https://read.oecd-ilibrary.org/governance/recommendation-of-the-council-on-regulatory-policy-and-governance_9789264209022-en" \l "page1"]

[241] Boardman, A. E., Greenberg, D. H., Vining, A. R., & Weimer, D. L. (2018) *Cost-benefit Analysis; Concepts and Practice,* Cambridge University Press.

[242] Chapter 6 of this report provides an example highlighting the importance of proper baselining, where debt-collection protections implemented the 1970s likely have had benefits exceeding costs. Now that those protections and the associated benefits and costs are in the baseline, the marginal net benefits of proposed new protections may be smaller and possibly negative. See Chapter 6 for more details.

there is no one size fits all approach to time-horizon selection, but generally agencies should strive to select a time-horizon to minimize bias. Product life cycles or refresh/redesign cycles are often instructive. Generally, due to discounting for social time preference, the longer the time-horizon of the analysis the smaller the potential bias.

4. **Identification of alternatives.** Various approaches to solving the problem(s) identified should be identified. These alternatives may include both regulatory and non-regulatory options, such as enforcement actions under existing authorities or use of other non-regulatory incentives to encourage the desired behavior. These alternatives may also consider the role of state and local governments in solving the problem. Commonly, alternative approaches analyzed vary by both regulatory stringency and/or scope of the universe required to comply.

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5. **Analysis of benefits and costs.** The agency should estimate the costs and benefits of each alternative using the best available science and evidence. Cost estimates should reflect the full opportunity cost to society of diverting resources towards compliance with the regulation. Likewise, benefit estimates should consider opportunity costs – or the value of what society is willing to forego to enjoy a benefit. While there are many approaches to valuing benefits and costs, willingness-to-pay approaches that assess a benefit or cost based on revealed valuations in market transactions are particularly compelling.[243] The benefits and costs of *each alternative* should be quantified, aggregated, and monetized to the maximum extent possible. Any assessment of benefits must include an analysis of how effective each alternative would be at addressing the problems identified.

6. **Assessment of unintended consequences.** The analysis should include assessment of potential unintended consequences and include them in the estimates of benefits and costs.

7. **Discounting future benefits and costs.** Agencies should create schedules of benefits and costs and discount them the to present value using an appropriate social discount rate. There are several methods for determining the appropriate discount rate depending on the nature of the rule being analyzed and the time horizon of the analysis. Executive agencies use a range of 3 percent reflecting a risk-free rate of return and 7 percent reflecting the opportunity cost of capital.[244]

8. **Treatment of economic transfers.** An economic transfer occurs when a benefit to one person or group is exactly offset by a cost to another person or group. Common forms of transfers include government payments and welfare transfers between consumers and producers of a product associated with a change in price or change in market

[243] OMB Circular A-4 has an extended discussion of the various approaches to valuing benefits.
[244] Ibid.

efficiency (e.g. reduction in market power results in some increased efficiency, but also a transfer from producers to consumers). These impacts are not comparable to benefits and costs and should not be allowed to influence the estimated net benefits.[245] In some cases, transfers to certain groups may be part of the intent of the rule or statutory requirement. These cases often involve considerations of distributive impacts, fairness, equity, or human dignity – and these are the benefits the analysis should focus on (as opposed to the dollar value of the transfer). If those considerations are unavailable, the agency may consider a cost-effectiveness analysis in lieu of a cost-benefit analysis.

9. **Identification and analysis of uncertainty.** A CBA should identify key sources of uncertainty and discuss the potential impacts of that uncertainty on the results and conclusions of the analysis. For particularly important rulemakings, the agency should conduct sensitivity analyses to estimate the potential impact of that source of uncertainty on the analysis. If uncertainty is such that a determination as to whether the preferred regulatory approach has net benefits is impossible, the agency might consider whether to delay the rulemaking to explore the issue further.

10. **Incremental Analysis.** Many regulations contain multiple provisions that incur costs and generate benefits. For such rules, it is important that the net benefits of one provision aren't used to obscure the net costs of another – as doing so prevents the agency from identifying the alternative with the highest net benefits. The agency should independently assess the marginal contribution of each provision to the benefits and costs of the rule.

11. **Presentation of benefits, costs, transfers, and net benefits.** The aggregated and discounted benefits, costs, transfers, and net benefits should be summarized – usually in tabular form. Usually, this summary information is included in an introduction or executive summary, as well as a final chapter in the analysis.

12. **Policy Recommendation.** The analysis should recommend the alternative that maximizes benefits net of costs – including any non-quantified benefits. Non-quantified benefits may include distributional impacts or improvements in equity, fairness, or human dignity – though the agency should not foreclose the possibility that at least some portion of these benefits could be quantified and monetized. Note that if the agency were to reject the alternative that maximizes net benefits (including non-quantified benefits), the agency would have to explain its justification for doing so.

13. **Analytical transparency.** A CBA must be as transparent and reproducible as possible. It must be clear about the data sources, methodologies, and assumptions used to conduct the analysis. It must identify any limitations of the analysis and discuss the impacts those limitations have on conclusions drawn from it. The analysis should be based on

[245] Note that there are two manners of accomplishing this. One is to account for transfers separately. The other is to include two symmetric entries into the accounting statement – one as a cost to one entity and the other as a benefit to another entity. Both approaches are valid.

the best available science and evidence. Where the evidence supporting an analytical element is mixed, the agency should include a full or representative discussion of the varying sources of evidence and disclose how each source informed the analysis.

14. **Proportionality.** An agency should calibrate the amount of time and resources that go into regulatory analysis according to the importance of the decision they are analyzing. In other words, agencies should consider the costs and benefits of doing a cost-benefit analysis. For instance, executive agencies are not required to comply with OMB Circular A-4 for rules that are not designated economically significant (having an economic impact of greater than $100 million or more in any one year).

Valuing Benefits

On July 29, 2020, CFPB hosted a Symposium on Cost-Benefit Analysis in Consumer Financial Protection Regulation, and one oft-repeated point among the panelists was a claim that the benefits of CFPB's regulations were often difficult to quantify.[246] Some who made this point argued that cost estimates are simpler to estimate than benefits and that the presence of cost estimates and the absence of benefit estimates was a source of bias in agency decision-making. While the Taskforce is unaware of any evidence to substantiate such a bias, it is aware that the benefits of regulation are often more difficult to estimate than the costs.[247] This is partly due to the fact that many sources of regulatory cost are relatively straightforward to estimate– materials, labor and consumer time, technology, etc. These are all resources that are widely transacted in transparent markets with available data. On the other hand, benefits of regulation are often driven by factors that are traded in less transparent markets – or are not traded in markets at all. For instance, the fraud and privacy protections offered by a creditor are a small fraction of the total bundle of services a consumer purchases in a credit transaction. So even if the consumer explicitly shops on these attributes and makes rational consumption choices pertaining to fraud and privacy protection, it can be difficult to determine the consumer's willingness to pay for these items versus the other attributes involved in the purchase.

That said, the economics discipline has developed several tools for assessing the value of the benefits of regulation, and these tools have been applied broadly in CBA conducted by executive agencies. A fulsome discussion of these tools would be too tedious and intricate to go into here, but useful and detailed information about them can be found in OMB Circular A-4, Boardman et al., and Hanley et al.[248] The most obvious example of the application of these tools to estimate sensitive and

[246] Hall, Stephen, "Written Remarks of Better Markets for the CFPB Symposium on Cost-Benefit Analysis in Consumer Financial Protection Regulation." July 29, 2020. [HYPERLINK "https://files.consumerfinance.gov/f/documents/cfpb_hall_written-statement_symposium-cost-benefit-analysis.pdf"]

[247] Worth noting, however, that in the case of the CFPB analyses reviewed by the Taskforce total cost estimates are about as rare as total benefit estimates.

[248] Hanley, N., Shogren, J.F, White, B. (2007) *Environmental Economics In Theory and Practice, 2nd ed.,* Palgrave MacMillan.

difficult-to-measure benefits is the Value of Statistical Life (VSL) used in health, safety, and environmental regulation to value life-saving benefits.[249] In this case, the most popular approach to estimating the VSL is to apply hedonic pricing model – an econometric technique for teasing out the value consumers place on any single attribute in a transaction – to labor markets to see how much additional compensation workers demand for accepting an incremental increase in mortality risk on the job. The resulting value is quite high – at least compared to other measurements of the value of mortality risk (e.g. wrongful death settlements). The value used by the Department of Transportation is over $9 million.[250]

To some the difficultly in estimating benefits is a fatal blow to CBA, but the VSL seems to offer a counterpoint to this view. While the development of the VSL was surely a long a laborious effort on the part of many researchers in Government and the academy, it has been used to justify many costly regulations – many with total costs in the billions of dollars per year.[251] Mark Cohen, another panelist at the symposium, argues a similar point that the justification for Department of Justice's Prison Rape Elimination Act rulemaking was improved by valuing the reduction in the incidence of prison rape.[252] Therefore, while benefit valuation may be difficult, doing the work to develop values may serve to advance the policies preferred by advocates, rather than weaken them.

Cohen's testimony also suggested a framework the CFPB could use if it sought to expand its analysis of benefits in its regulatory analysis program. Cohen argued that, in addition to looking at the monetary damages associated with the consumer harms CFPB regulates, the agency should also value avoided indirect costs of harm, such as time spent remedying the problem and the psychological distress associated with the harm (which can sometimes lead to physical injury or suicide). This is a very important point, and these are very important benefits for the agency to consider as the direct monetary harm may be considered a transfer in some instances. Cohen continues to suggest potential methodologies for assessing the value of avoiding such harms and argues they could be relevant to a wide range of benefits concerning CFPB regulations – including fraud, privacy protection, and even racial discrimination.[253]

Cohen's suggested approach is quite similar to the approach health, safety, and environmental regulators take toward estimating injury, illness, and mortality risk reduction benefits associated with their regulations, which treat health and safety hazards as ex-ante risks which can be reduced by regulation, though rarely eliminated completely. This approach would recognize that there is some risk of consumer harm associated with all financial products and transactions, and that banning, eliminating,

[249] US Department of Transportation (2015), "Guidance on Treatment of the Economic Value of a Statistical Life (VSL) in US Department of Transportation Analyses – 2015 Adjustment" Accessed at [HYPERLINK "https://www.transportation.gov/sites/dot.gov/files/docs/2015%20Revised%20Value%20of%20a%20Statistical%20Life%20Guidance.pdf"]
[250] Ibid.
[251] For example, one rule supported by the VSL is the Department of Transportation's "Electronic Stability Control Systems" Final Rule (72 FR 17235), where the Department estimated the rule would reduce roadway deaths by 1,547 to 2,534 annually. These benefits, when monetized, range from $6 billion to $12 billion annually, which exceed the hefty $985 million annual costs of the rule. See Docket ID: NHTSA-2007-27662-0002.
[252] Cohen, Mark , "CFPB Symposium: Cost-Benefit Analysis in Consumer Financial Protection Regulation." July 29, 2020. [HYPERLINK "https://files.consumerfinance.gov/f/documents/cfpb_cohen_written-statement_symposium-cost-benefit-analysis.pdf"]
[253] Ibid.

or reducing a practice or product may eliminate some harms associated with it, but may expose consumers to harms elsewhere as consumers substitute towards similar products. Therefore, evaluation of the effectiveness of a proposed rule at reducing consumer harm should consider the risks associated with similar products.

~~As such, it would be important to also assess the effectiveness of consumer protection rules at eliminating these non-monetary damages. Banning, eliminating, or reducing a practice or product may eliminate some harms associated with it, but may expose consumers to harms elsewhere. As such, it would be important to also assess the effectiveness of consumer protection rules at eliminating these non-monetary damages.~~

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Jackson and Rothstein (2019) reach similar conclusions, as they also point out that the environmental regulatory arena has been able to develop benefit estimates for use in CBA such as the VSL and the Social Cost of Carbon. They suggest the development of values for avoided bankruptcies, foreclosures, and financial stress. Jackson and Rothstein also acknowledge that some “benefits” of consumer protection regulation are transfers from an economic perspective. They point out that literature on valuing theft reduction and charitable contributions could be a starting point for future research. They also suggest that an estimate could measure the extent to which transfers move consumers away from financial distress could be appropriate, and that the insurance value of risk reduction could be helpful.[254]

The CBA best practices identified in this report emphasize that CBA must accommodate qualitative benefits when making a recommendation as to the most net-beneficial regulatory alternative. This includes benefits that are difficult to quantify related to human dignity, fairness, and distributional issues. However, this doesn’t mean that these matters cannot be quantified or that the agency should refrain from attempting it. Quantification may further refine the agency’s views of an issue – and while it may reveal that a problem is less of an issue than previously thought, it may also show that a problem is much greater than the agency previously thought and that more should be done to address it.

Implementation of CBA

Regulatory CBA best practices are often implemented alongside the creation or establishment of an oversight body that reviews regulatory analyses for quality and compliance. These oversight bodies can play a variety of roles in the development of regulations and regulatory analyses, including providing general guidance on implementing CBA, reviewing regulations and regulatory analyses for consistency with best practices prior to publication, and making public statements about the quality of regulatory analyses.

In 2012, OECD recommended that each of its member nations establish policies and principles of regulatory CBA, as well as “[e]stablish mechanisms and institutions to actively provide oversight of regulatory policy, procedures, and goals, support and implement regulatory policy, and thereby foster

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[254] Jackson, Howell and Rothstein, Paul (2019) “Analysis of Benefits in Consumer Protection Regulation,” Harvard Business Law Review, Pg. 199. Accessed at [HYPERLINK "https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3659474"]

regulatory quality."[255] Since 2012, OECD has been monitoring implementation of its recommendations in member countries and has reported data on where this review function sits in the Government. The most prominent location for oversight and review is the "Center of Government." The second most popular location for these functions is a "non-departmental body" at arms-length from central government. Other popular locations are Finance, Treasury, or Justice departments.[256]

In the United States, the oversight and review functions are played by the Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget (OMB), which functions within the Executive Office of the President (EOP). The location of OIRA within the White House almost certainly lends power and influence to the office, but it also means that OIRA is ultimately controlled by political forces.[257] Depending on your perspective, this could be a democratizing influence on technical decision-making, or it could be viewed as a political intrusion.

OIRA's role in the regulatory process is multifaceted, which is governed by Executive Order 12866.[258] During review, OIRA consults with regulators and provides advice on both the regulatory analysis and the decisions it supports. In addition to serving as a CBA resource and reviewer, OIRA moderates interagency disputes and coordinates the White House review of agency regulations.[259] Typically, OIRA review concludes without any public statement as to the quality of the analysis or the rulemaking generally. On rare occasions when OIRA exercises its authority to return a regulation to an agency for reconsideration, a public return letter is released detailing analytical deficiencies.[260] Importantly, independent regulators, including CFPB, are not required to comply with OIRA guidance and are not subject to OIRA review.

While the US may exemplify the "Center of Government" approach, the United Kingdom's Regulatory Policy Committee (RPC) is an example of an independent, or non-departmental, oversight and review office. In contrast to OIRA, the RPC issues a public opinion of each of the regulatory analyses they review. The analysis is given an overall rating based on whether it was "fit for the purpose," as well as summarizing the analysis and offering critiques. However, the RPC has no impact on regulatory decisions above and beyond the impact of their public and technical opinions.

The differences between the two oversight and review offices are interesting. The OIRA model is powerful and integrated into the decision-making process. But perhaps because of its role in managing the decision-making process, its analytical findings are rarely made public. In contrast, the RPC is highly

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[255] Organisation of Economic Cooperation and Development, *Recommendation of the Council of Regulatory Policy and Governance* (2012). Accessed at [HYPERLINK "https://read.oecd-ilibrary.org/governance/recommendation-of-the-council-on-regulatory-policy-and-governance_9789264209022-en" \l "page1"]
[256] Organisation of Economic Cooperation and Development, (2018), *OECD Regulatory Policy Outlook 2018*, Chapter 3, OECD Publishing, Paris, [HYPERLINK "https://doi.org/10.1787/9789264303072-en"].
[257] Cass Sunstein provides background and an account of his time as Administrator of OIRA in his book *Simpler, The Future of Government.* Sunstein, C., (2013) *Simpler; The Future of Government,* Simon and Shuster Inc.
[258]President Clinton's Executive Order 12866 (1993), "Regulatory Planning and Review," can be accessed at [HYPERLINK "https://www.archives.gov/files/federal-register/executive-orders/pdf/12866.pdf"].
[259] Sunstein, C., (2013) *Simpler; The Future of Government,* Simon and Shuster Inc. Chapter 1, pages 30-31.
[260]OIRA return letters are catalogued at [HYPERLINK "https://www.reginfo.gov/public/do/eoReturnLetters"]

transparent with its findings, and has pointed to the increasing percentage of analyses that receive the "fit for the purpose" grade as an indication that their review is influential.[261]

Scholarship on the impact of regulatory oversight on quality of CBA is limited. However, Howell Jackson and Paul Rothstein conducted a survey of 72 consumer protection regulatory analyses from across the Federal Government that showed that regulations reviewed by OIRA showed a greater degree of quantification than regulations conducted by independent agencies not subject to OIRA review.[262]

Evaluation of CFPB's Regulatory Guidance "Regulatory Analysis Policies and Procedures for Substantive Rulemaking"

The Taskforce reviewed the Bureau's guidance for rulemaking analysis "Regulatory Analysis Policies and Procedures for Substantive Rulemaking" (RAPP) for consistency with the regulatory best practices. The Taskforce found several areas of agreement, but also areas where there is some tension between the Bureau's approach and the Taskforce's best practices. This section summarizes our findings from the review.

The guidance identifies market failures as a potential justification for regulation and provides that the Bureau should consider whether the underlying statute addresses any market failures. The agency also lists privacy and the dignity of consumers as other potential purpose of regulation. The guidance does not provide any direction on the evidentiary support needed to justify a market failure claim.

The RAPP directs Bureau analyses to define a baseline in a manner that is generally consistent with the best practices mentioned above – indicating that it is matter of professional judgment that requires consideration of a broad set of factors and circumstances. The RAPP advises staff to consider discounting future costs and benefits, consistent with CBA best practices.

The guidance provides potentially contradictory direction on selection of the time horizon of the analysis. First it suggests "[a] possible ending point is the date at which staff expects to review a rule." It appears this refers to the five-year retrospective review schedule the agency has in place. This direction is highly unlikely to be an appropriate time horizon for an analysis, as it is likely the rule has asymmetric costs and benefits that continue out beyond five years. However, the RAPP also provides that the Bureau should seek to identify "the pattern in which the benefits, costs, and impacts will occur over time." This latter guidance is entirely consistent with the best practices mentioned above and would not generate any biases toward earlier impacts.

The RAPP does provide that the Bureau should identify alternatives. However, while the guidance is permissive of a quantitative analysis of alternatives, it does not indicate that the Bureau must or should

[261] Regulatory Policy Committee (2012), *Assessing Regulation; An Independent Report on the Evidence and Analysis Supporting Regulatory Proposals, January – August 2012.* Accessed at [HYPERLINK "https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/252697/assessingregulationrpcnov2012report.pdf"]

[262] Jackson, Howell and Rothstein, Paul (2019) "Analysis of Benefits in Consumer Protection Regulation," Harvard Business Law Review, Pg. 199. Accessed at [HYPERLINK "https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3659474"]

analyze alternatives quantitatively. Given the fundamental importance of the inclusion of alternatives in the quantitative assessment, this is a divergence from CBA best practices.

The guidance in the RAPP on quantifying and monetizing benefits are generally consistent with the best practices above, with some exceptions. First, the guidance does not specify that costs and benefits should include opportunity costs. Second, the guidance does not emphasize that benefits and costs should be aggregated, quantified, and monetized to the maximum extent possible.

A charitable read of the RAPP guidance would suggest that unintended consequences are contemplated in the assessment of costs and benefits. But there is no explicit guidance on how the Bureau should analyze and treat unintended consequences. Regulations change behavior by changing the price and choices of goods and services, as well as the quantities available. It is important for regulators to systematically analyze the potential ramifications of regulatory options – both positive and negative. CFPB staff indicate to the Taskforce that identification of potential unintended consequences is a routine aspect of their regulatory development.

The RAPP guidance may have intended to separate transfers from costs and benefits, but this is not explicitly addressed. Identification and qualification of transfers are key elements of CBA, and the absence of guidance on the subject is a divergence from the best practices. For instance, t~~T~~he CFPB's authorities related to competition (RESPA and TILA) and fair lending have significant transfer implications that require careful consideration.

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The guidance is generally consistent with best practices regarding treatment of uncertainty. It indicates that uncertainty around assumptions should be described and advises staff to use sensitivity analyses to "examine how figures would change with plausible changes in assumptions and data."

The RAPP doesn't explicitly direct staff analysts to conduct an incremental assessment of each provision of a rule, though it does advise "it may be appropriate to proceed through the relevant provisions of the regulation, discussing the benefits and costs on each affected group at the end." CFPB staff have indicated to the Taskforce that alternative thresholds are considered as a matter of routine.

The most significant divergence of the guidance from best practices is that it does not provide direction on comparing costs and benefits, summarizing other impacts, and recommending a preferred alternative.

Results of Taskforce Review of CFPB Analyses of Major Rulemakings

The Taskforce reviewed the analyses of every CFPB rulemaking designated as Major under the Congressional Review Act between the years of 2013 and 2018 to better understand how the agency implements cost-benefit analysis.[263] The Taskforce reviewed for consistency with CBA principles and best practices, as well as Sec. 1022 of Dodd-Frank.

[263] For this analysis, the Task Force reviewed the Section 1022 analyses of the following regulations: Home Mortgage Disclosure Act (Regulation C) (RIN: 3170-AA10; 80 FR 66127), Loan Originator Compensation Requirements Under the Truth in Lending Act (RIN: 3170-AA13; 78 FR 11279), Mortgage Servicing Rules Under the Real Estate Settlement Procedures Act (Regulation X) (RIN: 3170-AA14; 78 FR 10695), Integrated Mortgage Disclosures Under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z) (RIN: 3170-AA19; 78 FR 80225), Ability-to-Repay and Qualified Mortgage Standards Under the Truth

~~The Taskforce believes that it is important to stress that its findings are not criticisms of Bureau staff. Indeed, the Taskforce is quite certain that the Bureau is staffed by many able economists and analysts that are up to the task of conducting a quality CBA. Instead, the Taskforce believes the gaps identified owe to insufficient time, priority, and resources allotted to the task. If anything, we hope our findings serve to elevate the work and talents of the Bureau's technical staff by highlighting how critical they are to the policy process.~~

As a new Agency, the Bureau has been required to develop new approaches to regulatory analysis. Where other agencies have had years to develop complicated models and sophisticated estimates of key elements of their regulatory programs, the CFPB is often regulating in spaces where the body of academic and other research available is very small. Thus, CFPB is often in the challenging position of developing new methodological approaches to advance its regulatory analysis program, and~~.~~ the Taskforce has noticed that the quality of the Bureau's regulatory analyses has improved over time. Furthermore, the Taskforce is aware that the CBA principles and best practices identified ~~here~~by the Taskforce in this chapter go above and beyond what is required of the Bureau by Sec 1022 of Dodd-Frank. As such, a ~~retroactive~~ retrospective review for consistency with standards the Bureau was not required to satisfy cannot and should not be viewed as an assessment of performance. No agency perfectly implements the principles set forth above. Instead, these reviews should be seen as a "gap analysis" seeking to understand the difference between current practices and those identified above, where further improvements are possible. ~~.~~

~~TAs is to be expected of a new agency developing new methodological approaches, the Taskforce believes it is important to note that the CFPB is still a nascent agency developing a regulatory program. Where other agencies have had years to develop complicated models and sophisticated estimates of key elements of their regulatory programs, the CFPB is a new agency often regulating in spaces where the body of academic and other research available is very small. The Taskforce has noticed that the quality of the Bureau's regulatory analyses have improved over time. The Taskforce is also aware that no agency perfectly implements the principles set forth above, and if similar analyses were conducted for the most seasoned regulators, surely some gaps would be identified.~~

In some instances, it may appear that the Taskforce is recommending wasteful analysis when fundamental policy decisions are made in statute. In the view of the task force, ~~Importantly, the Taskforce does not believe that the amount of discretion over a regulatory decision provided to the Bureau by Congress can be justification for reducing analytical effort or~~lack of statutory discretion is not justification for excluding key elements of a regulatory analysis. Recall that the purpose of regulatory CBA is to improve regulatory decisions; enhance transparency; and promote accountability and credibility – and each of these purposes are advanced by an analysis of the problem, consideration of alternatives, and every other best practice mentioned above. ~~At first glance, it may seem that a full~~

in Lending Act (Regulation Z) (RIN: 3170-AA17; 12 CFR 1026), Prepaid Accounts Under the Electronic Fund Transfer Act (Regulation E) and the Truth in Lending Act (Regulation Z) (RIN:3170-AA22; 81 FR 83934), Payday, Vehicle Title, and Certain High-Cost Vehicle Installment Loans (3170-AA40; 82 FR 54472), Arbitration (RIN: 3170-AA51; 82 FR 33210), Operations in Rural Areas Under the Truth in Lending Act (Regulation Z) (RIN: 3170-AA59, 81 FR 16074), Amendments to Federal Mortgage Disclosure Requirements Under the Truth in Lending Act (Regulation Z) (RIN: 3170-AA61; 82 FR 37656).

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Commented [RR(198]: I didn't include Todd's line in here about consumer protection rules not being subject to OIRA review and CBA requirements. When I first arrived at OMB, RESPA regulations were subject to OIRA review and were a very high profile topic. I think more accurate to compare the maturity of the academic literature around consumer protection vs., say, environmental standards.

The article Todd references in his latest email is by Jackson and Rothstein, and I actually crafted this language in response to Rothstein's comments on an earlier draft of this chapter – so this should answer the mail here.

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~~analysis of alternatives has limited utility in a situation where a policy decision was made in statute – but this is an incomplete analysis of how regulatory decisions are made. Statutes are codified in the United States Code, not in stone. While the agency is obligated to implement the statutory decision in the timeframe provided by Congress, a CBA showing~~The Bureau's expertise on these matters could reveal to Congress the availability of ~~that there is~~ a more net-beneficial approach to solving a problem that may prompt Congress to revisit the statute. If the implementation time horizon is long enough, the agency may provide technical advice to Congress on the potential to improve regulatory outcomes prior to implementation. Even if Congress is not swayed by the technical expertise of the agency, the CBA would still provide transparency on the estimated impacts of Congressional decisions and invite the public to hold it accountable for those decisions. For similar reasons, EO 12866 requires executive agencies to conduct CBA of significant rules even when Congress has dictated the policy choice by statute.

Conclusions from Taskforce Review of Agency Analyses

Analysis of the Problem

Most of the Bureau's analyses feature some discussion of market failures and/or other problems they are trying to solve. In some circumstances, the Bureau even supports these market failure claims with evidence. For instance, in the 2013 final rule amending mortgage servicing rules under RESPA and TILA, the Bureau provided a summary of the literature on the external costs of foreclosure. Also, the 2017 Payday Lending final rule attempted to justify its market failure claim with an extended discussion and analysis of the evidence concerning consumer expectations of payday lending products.[264] However, the Bureau did not provide evidence to support its claims of market failure in every rule reviewed by the Taskforce. Of the ten analyses reviewed, the Taskforce found evidence to support market failure claims in three of those analyses and found no or very weak evidence to support market failure claims in three analyses.[265]

It is important to note that the analysis of the problem shouldn't involve simply listing every potential market failure that could be potentially relevant.[266] Instead, it should be a careful assessment of the nature of the actual problem(s) for which mitigation is the true purpose of the rule. Furthermore, CBA best practices don't *require* that a market failure be present to justify regulation. For instance, a regulation may improve enforcement of standards in an efficient manner – and thus the net benefits of improved compliance with existing standards become the net benefits of the new rule – and this may be sufficient rationale. The 2013 HMDA rule did identify improved compliance and enforcement with fair lending and other standards as part of the purpose of the rule, and the benefits identified by the

[264] Payday, Vehicle Title, and Certain High-Cost Vehicle Installment Loans (3170-AA40; 82 FR 54472)

[265] Evidentiary support for market failure claims was not germane to the remaining analyses for one reason or another. For instance, rules intended to enhance compliance with existing standards do not rely on claims of market failures. Rules where the Taskforce did not find evidence, the evidence presented was very weak, were Prepaid Accounts Under the Electronic Fund Transfer Act (Regulation E) and the Truth in Lending Act (Regulation Z) (RIN:3170-AA22; 81 FR 83934), Home Mortgage Disclosure Act (Regulation C) (RIN: 3170-AA10; 80 FR 66127), and Loan Originator Compensation Requirements Under the Truth in Lending Act (RIN: 3170-AA13; 78 FR 11279)

[266] Howell Jackson referred to this common phenomenon in consumer protection CBA as having a "throw-in-the-kitchen-sink flavor." Jackson, Howell. "CFPB Symposium: Cost-Benefit Analysis in Consumer Financial Protection Regulation." July 29, 2020. [HYPERLINK "https://files.consumerfinance.gov/f/documents/cfpb_jackson_written-statement_symposium-cost-benefit-analysis.pdf"]

analysis are more connected to this problem than any market failure claim.[267] The analysis (and the decision-making it contributes to) may have been better off if it focused more on this issue, as well as the human dignity issues associated with improved compliance with fair lending rules. Similarly, the Bureau's 2017 Arbitration final rule appropriately identified increased compliance with existing standards in its regulatory analysis.

Estimating Benefits, Costs, and Transfers

Aggregating costs and benefits are essential in CBA, as it makes comparing costs and benefits possible. In two analyses reviewed by the Taskforce, the Bureau presented aggregated cost and/or cost-savings estimates.[268] In the remaining analyses reviewed by the Taskforce, however, the Bureau does not endeavor to generate total cost and benefit estimates, even if unit or ongoing cost and benefit estimates are provided. In many cases, the lack of quantification and monetization owes to insufficient data, information, or literature – but there are other instances when greater quantification and monetization were possible.[269]

Analyzing the effectiveness of each alternative is an important part of benefits estimation. In some instances, the Bureau has conducted robust evaluations of the effectiveness of their preferred option. For example, the 2014 rule integrating the RESPA and TILA mortgage disclosure forms presented evidence that the revised disclosure was easier to understand. In other instances, the assessment of effectiveness is quantitative in nature but incomplete.[270] In the remainder of the analyses reviewed, the Taskforce was unable to locate assessments of effectiveness. While it is possible that the cost of research required to assess the effectiveness of the Bureau's regulations outweigh the benefits of that information, the Taskforce notes that it only reviewed regulations designated as Major under the Congressional Review Act. Given the large impacts of this sample of regulations, the benefits of information on the potential effectiveness of the Bureau's interventions are likely significant.

In those cases where the Bureau estimates benefits or costs over the course of several years, the Bureau does tend to discount those future impacts back to present value, appropriately. However, the

[267] A good rule of thumb is that if the benefits you identify aren't connected to a problem you identify, you have the wrong problem, the wrong benefits, or both.
[268] Integrated Mortgage Disclosures Under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z) (RIN: 3170-AA19; 78 FR 80225) and [ARBITRATION] [No other rule reviewed by the Task Force presented total cost and benefit estimates.
[269] As one example, the Bureau frequently references the benefits associated with reduced foreclosures (Mortgage Servicing Rules Under the Real Estate Settlement Procedures Act (Regulation X) (RIN: 3170-AA14; 78 FR 10695)), but does not attempt to quantify these benefits even when estimates of the external costs of foreclosure have been developed and used by other agencies. The Department of Housing and Urban Development used a cost of foreclosure estimate of $10,339 in its Regulatory Impact Analysis for its Emergency Homeowners Loan Program. [HYPERLINK "https://www.huduser.gov/portal/periodicals/cityscpe/vol13num2/Cityscape_july2011_impact.pdf"]. In another example, the 2017 Payday Lending rule, the Bureau estimates the time cost of training employees, but does not use readily available wage information from BLS to monetize it.
[270] For instance, the analysis of the Payday, Vehicle Title, and Certain High-Cost Vehicle Installment Loans (3170-AA40; 82 FR 54472) final rule includes effectiveness at preventing the subject loans, but not the effectiveness at reducing consumer harm. The rule may prevent some harms by preventing risky loans, but consumers may shift to other risky loan products that expose borrowers to harms.

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This review only included major rulemakings – rules designated by omb to have costs, benefits, or transfers over $100m in any year. I would think these are rules where the CBA on conducting additional information about whether the rulemaking will have the desired effect is most likely positive.

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Commented [BH(204R202]: Good answer.

justification for the selection of the time horizon of the analysis is often missing or non-transparent.[271] The Taskforce also noticed that the Bureau often amortizes upfront costs over a number of years without a clear justification, instead of putting them in the first year of the analysis.[272]

Finally, the Taskforce notes that it did not find a discussion of economic transfers in any of the regulations it reviewed. This may be due to the nature of the requirements under 1022 of the Dodd-Frank Act, which specifically require the Bureau to assess costs and benefits to specific groups, rather than society writ-large. If, owing to the nature of these statutory requirements, the bureau is treating transfers as symmetric costs to some entities that are benefits to others, the Bureau is dealing with transfers appropriately.

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Treatment of Alternatives

The Bureau's treatment of alternatives is a significant divergence from CBA best practices. In four of the ten regulations reviewed by the Taskforce, the Bureau did not identify alternatives to the regulatory option it selected.[273] In those rules where the Bureau identified alternatives, they were generally excluded from the quantified and monetized analysis. The Taskforce identified one exception to this in the 2013 HMDA rule, where the Bureau quantitatively analyzed alternative reporting thresholds for closed-end mortgages – though this was not a fully monetized cost-benefit analysis. Other important level-setting decisions have gone without a quantitative assessment.[274] Generally, when the Bureau identified alternatives, they were considered in a separate section from the primary analysis and did not receive the same level of rigor as the primary alternative. The Taskforce did not identify an analysis where an alternative approach was both quantified, monetized, and then compared with the regulatory option selected.

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Policy Recommendation and Summary Information

None of the analyses reviewed by the Taskforce summarized, tabulated, and compared cost and benefits.[275] Even when costs and benefits are available, ~~N~~net benefits are not presented or calculated and there are no qualitative summary discussions evaluating the tradeoffs. Omitting the presentation of cost and benefits, as well as any form of discussion evaluating the tradeoffs associated with alternative approaches, reduces the probability that the Bureau's CBAs would achieve the purposes of improving decisions, advancing transparency, and enhancing credibility and accountability. The omission also forecloses the possibility that the CBA could recommend a policy alternative. This is an important and

Commented [RR(210R209]: Even when costs and benefits are available, the Bureau has not presented the net numbers.

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[271] This statement applies to all rules reviewed by the task force.
[272] For example, see Integrated Mortgage Disclosures Under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z) (RIN: 3170-AA19; 78 FR 80225)
[273] Operations in Rural Areas Under the Truth in Lending Act (Regulation Z) (RIN: 3170-AA59, 81 FR 16074); Amendments to Federal Mortgage Disclosure Requirements Under the Truth in Lending Act (Regulation Z) (RIN: 3170-AA61; 82 FR 37656); Mortgage Servicing Rules Under the Real Estate Settlement Procedures Act (Regulation X) (RIN: 3170-AA14; 78 FR 10695); and Loan Originator Compensation Requirements Under the Truth in Lending Act (RIN: 3170-AA13; 78 FR 11279)
[274] For instance, the 2017 Payday Lending Rule's maximum loan limit of $500 seems to have been chosen without quantitatively analyzing alternative levels.
[275] Importantly, the Bureau's 2017 Arbitration final rule [RIN] did present a table of a significant portion of the estimated and aggregated costs.

meaningful contrast between the best practices identified above (as well as the purposes of CBA) and CFPB's current practice.

Uncertainty

At times, the Bureau has shown commitment to highlighting uncertainty and dealing with it appropriately. For instance, the 2013 Ability-to-Repay rule conducted an excellent sensitivity analysis for its liability cost estimates in response to comments that legal fees were likely to be higher than estimated at the proposed rule stage and the amount of billable hours were likely to be longer. In another example, the Bureau's 2013 rule on Loan Originator Compensation features a frank discussion of state of the literature on the subject:

> The Bureau, however, notes that the current state of academic research has not provided an unequivocal answer to the question of whether any given profit-based compensation arrangement will produce incentives sufficiently strong for individual loan originators to engage in consumer steering. The Bureau also notes that this research, whether based on theoretical or empirical methods, shows that the potential for any profit-sharing plan to create adverse incentives are acutely sensitive to the specific features of the working environment and the means by which such profits are distributed to the relevant individual loan originators. Finally, the Bureau notes that any potential reduction in the strength of these incentives is almost surely insufficient, under all realistic circumstances, to eliminate them entirely.[276]

Otherwise, the Taskforce's review revealed that uncertainty rarely received quantitative treatment. In its review of ten of Major rulemakings (that is, rules expected to have an annual impact of over $100m), the Taskforce identified one sensitivity analysis.

Consistency with Sec. 1022 of Dodd-Frank

As discussed above, the CBA requirements in Sec. 1022 of the Dodd Frank Act has universe components (e.g. groups of people the analysis should cover), and content components (costs, benefits, and loss of access to financial products). The Taskforce's review finds that the Bureau does very well in addressing the universe components of the Act. In fact, the Bureau organizes their CBA according to the identified groups of people and business identified in the Dodd-Frank Act and explicitly addresses costs and benefits to each group.

The Taskforce's review of CFPB's regulatory analyses revealed that the Bureau does consider the potential reduction in access by consumers to consumer financial products or services. However, these considerations could be explained more transparently. Often, the Bureau provides a statement that it considered issues related to access~~, but summarily dismisses any concerns of reduced access~~ without providing its methodology and without explaining how access was factored into its decision ~~basis for its conclusions~~ – even in cases when the Bureau estimates increased costs that may be passed on to consumers.[277]

[276] Loan Originator Compensation Requirements Under the Truth in Lending Act (RIN: 3170-AA13; 78 FR 11279)
[277] See Home Mortgage Disclosure Act (Regulation C) (RIN: 3170-AA10; 80 FR 66127), Loan Originator Compensation Requirements Under the Truth in Lending Act (RIN: 3170-AA13; 78 FR 11279), Mortgage Servicing Rules Under the Real Estate Settlement Procedures Act (Regulation X) (RIN: 3170-AA14; 78 FR 10695)

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Summary of Findings

The Taskforce's review of CFPB's regulatory analyses identified several gaps between the Bureau's implementation of CBA and the best practices identified above. Notable gaps between the Bureau's approach and best practices include a lack of identification, quantification, and monetization of regulatory alternatives; quantification and monetization of benefits and costs; the presentation of costs, benefits, and net benefits of each alternative considered; and a policy recommendation.

However, the Taskforce did identify some areas of consistency with best practices. For instance, the Bureau did discount future impacts back to present value using an appropriate discount rate when it did endeavor to quantify and monetize a value. Also, the Taskforce believes the Bureau has complied with the universe components of the Dodd-Frank's statutory mandate to consider costs and benefits. The Taskforce does note, however, that the CFPB's implementation of the Dodd-Frank requirement to consider access to financial products could be more transparent.

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~~Furthermore, the Taskforce is aware that the CBA principles and best practices identified here go above and beyond what is required of the Bureau by Sec 1022 of Dodd-Frank. As such, a retroactive review for consistency with standards the Bureau was not required to satisfy cannot and should not be viewed as an assessment of performance. Instead, these reviews should be seen as a "gap analysis" seeking to understand the difference between current practices and those identified above.~~

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~~Conclusions from Taskforce Review of Agency Analyses~~

~~Analysis of the Problem~~

~~Most of the Bureau's analyses feature some discussion of market failures and/or other problems they are trying to solve. In some circumstances, the Bureau even supports these market failure claims with evidence. For instance, in the 2013 final rule amending mortgage servicing rules under RESPA and TILA, the Bureau provided a summary of the literature on the external costs of foreclosure. In other instances, the Bureau provides no evidence to support market failure claims.[279] In one rule reviewed by the Taskforce, the Bureau relied on a single page non-scholarly and qualitative essay that no longer existed at the location cited.[280]~~

~~In those instances where the presence of a market failure or other problem is not supported by evidence, or supported by weak and non-conclusive evidence, the agency can bolster support for its claims with more analysis of its own. This is what the Bureau did in its 2017 Payday Lending final rule. Without regard to the conclusion of this analysis, the 2017 final rule attempted to justify its market failure claim with an extended discussion and analysis of the evidence concerning consumer expectations of payday lending products.[281]~~

~~However, the Bureau did not do such analysis in many instances – potentially causing it to miss some important insights about the nature of the problem the agency was attempting to address. For instance, the 2013 Loan Originator Compensation Requirements final rule claims that compensating loan originators based on terms of the transaction creates a moral hazard market failure. The taskforce agrees that moral hazard is a concern and an important subject to explore. However, the final rule does not go into detail about the degree and nature of the potential problem. It does not assess the extent to which competition and shopping may erode the consequences of the problem, as consumers learn about the costs of other products. It does not describe or quantify the compensation differentials between products that may lead to steering. The final rule accepts as given that some loan products may be more profitable than others and does not analyze whether the observed profits reflect something other than economic profits (such as return on risk) – and it does not quantify the consumer harm arising from this compensation arrangement. While it remains possible that compensation based on terms generates such consumer harm to warrant banning the practice, a more rigorous review may~~

~~[279] For instance, see the following rules: Ability-to-Repay and Qualified Mortgage Standards Under the Truth in Lending Act (Regulation Z) (RIN: 3170-AA17; 12 CFR 1026); Home Mortgage Disclosure Act (Regulation C) (RIN: 3170-AA10; 80 FR 66127).~~

~~[280] Loan Originator Compensation Requirements Under the Truth in Lending Act (RIN: 3170-AA13; 78 FR 11279)~~

~~[281] Payday, Vehicle Title, and Certain High-Cost Vehicle Installment Loans (3170-AA40; 82 FR 54472)~~

[redacted]

Commented [RR(226R225]: Initial thoughts:

- Loan Originators was a major rulemaking under the CRA – odd to claim it wouldn't change society much. Do they think the designation was inappropriate?
- I suppose I'm open to making a distinction between the earlier years and the later ones, though it may involve a significant re-write. But I would oppose any distinction between statutory and discretionary rules. It is important to analyze statutory rules so that Congress can be made aware the costs and benefits of the requirements they impose, and revise as they see fit.

Hope to discuss with [HYPERLINK "mailto Redacted and [HYPERLINK "mailto

~~have revealed critical details about the nature of the problem the agency intended to address – like whether the problem was contained to specific products or segments of the market.[282]~~

~~It is important to note that the analysis of the problem shouldn't involve simply listing every potential market failure that could be potentially relevant.[283] Instead, it should be a careful assessment of the nature of the actual problem(s) for which mitigation is the true purpose of the rule. Furthermore, CBA best practices don't *require* that a market failure be present to justify regulation. For instance, a regulation may improve enforcement of standards in an efficient manner – and thus the net benefits of improved compliance with existing standards become the net benefits of the new rule – and this may be sufficient rationale. The 2013 HMDA rule did identify improved compliance and enforcement with fair lending and other standards as part of the purpose of the rule, and the benefits identified by the analysis are more connected to this problem than any market failure claim.[284] The analysis (and the decision-making it contributes to) may have been better off if it focused more on this issue, as well as the human dignity issues associated with improved compliance with fair lending rules. Similarly, the Bureau's 2017 Arbitration final rule appropriately identified increased compliance with existing standards in its regulatory analysis.~~

~~Treatment of Alternatives~~

~~The Bureau's treatment of alternatives is a significant divergence from CBA best practices. In some instances, the Bureau does not identify alternatives in its analysis, such as its analyses of the 2013 final rule amending mortgage servicing rules under RESPA and TILA and the 2013 final rule on loan originator compensation requirements. The loan originator compensation rule is a particularly important example, which prohibits compensation to a loan originator based on the profitability of the loan products they sell. Generally speaking, incentive pay is a common form of compensation that is intended to reduce employer monitoring costs and align incentives between a firm and its employees – which in any reasonably competitive market should reduce costs to consumers.[285] Outright prohibition of this form of incentive pay is a particularly strident alternative to mitigate consumer harm when other alternatives are available such as disclosure, standards of care akin to the suitability and fiduciary standards in investment adviser regulations, increased enforcement of fraud protections, etc. A CBA that evaluated the advantages and disadvantages of each approach would have been a valuable tool for decision-makers.~~

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Commented [RR(230R229]: Congress can always change their mind if they are made aware of a better alternative.

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[282] ~~For instance, see Loan Originator Compensation Requirements Under the Truth in Lending Act (RIN: 3170-AA13; 78 FR 11279)~~

[283] ~~Howell Jackson referred to this common phenomenon in consumer protection CBA as having a "throw-in-the-kitchen-sink flavor." Jackson, Howell. "CFPB Symposium: Cost-Benefit Analysis in Consumer Financial Protection Regulation." July 29, 2020.~~ [HYPERLINK "https://files.consumerfinance.gov/f/documents/cfpb_jackson_written-statement_symposium-cost-benefit-analysis.pdf"]

[284] ~~A good rule of thumb is that if the benefits you identify aren't connected to a problem you identify, you have the wrong problem, the wrong benefits, or both.~~

[285] ~~For a discussion of Agency Costs, see Jensen, M.C., and Meckling, W.H., (1976), "Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure." Journal of Financial Economics (3) pgs. 305-360. Accessed at~~ [HYPERLINK "https://josephmahoney.web.illinois.edu/BA549_Fall%202012/Session%205/5_Jensen_Meckling%20(1976).pdf"]

~~In all regulations reviewed, alternatives were generally excluded from the quantified and monetized analysis. The Taskforce identified one exception to this in the 2013 HMDA rule, where the Bureau quantitatively analyzed alternative reporting thresholds for closed-end mortgages – though this was not a fully monetized cost-benefit analysis. Other important level-setting decisions have gone without a quantitative assessment, such as the $500 maximum loan limit in the 2017 Payday rule, which doesn't identify or analyze any alternative loan limits.~~

~~Estimating Benefits, Costs, and Transfers~~

~~Aggregating costs and benefits are essential in CBA, as it makes comparing costs and benefits possible. In two analyses reviewed by the Taskforce, the Bureau presented aggregated cost and/or cost-savings estimates.[286] In most cases, however, the Bureau does not endeavor to generate total cost and benefit estimates, even when doing so would have been a simple and straightforward task. Often, the Bureau did not aggregate unit cost estimates, and ongoing and upfront costs are not summed to form a total cost estimate. As one example, the Bureau frequently references the benefits associated with reduced foreclosures,[287] but does not attempt to quantify these benefits even when estimates of the external costs of foreclosure have been developed and used by other agencies.[288] In the 2017 Payday Lending rule, the Bureau estimates the time cost of training employees, but does not use readily available wage information from BLS to monetize it.~~

~~Analyzing the effectiveness of each alternative is an important part of benefits estimation. In some instances, the Bureau has taken the effectiveness of the standard very seriously. For example, the 2014 rule integrating the RESPA and TILA mortgage disclosure forms presented evidence that the revised disclosure was easier to understand. In other instances, the assessment of effectiveness is quantitative in nature but incomplete.[289] Unfortunately, some analyses do not feature an assessment of the effectiveness of the standard. The 2013 rule prohibiting compensation based on the profitability of the loan products they originate did not include an assessment of how effective such a prohibition would be at reducing moral hazard. This would have been an important feature of the analysis, as it seems an employer could raise the base salary of the originators that earn the highest profits. In fact, it seems profitable originators would find themselves a hot commodity with other employers if their current employer didn't raise their base wages commensurate with their contribution.~~

~~In those cases where the Bureau estimates benefits or costs over the course of several years, the Bureau does tend to discount those future impacts back to present value, appropriately. However, the~~

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Commented [RR(232R231]: My review only identified the one quantified analysis.

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Commented [RR(234R233]: I could expand it to assessments if given time. [HYPERLINK "mailto Redacted , [HYPERLINK "mailto

[redacted]

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Commented [RR(238R237]: Poor choice of words. See revisions

[redacted]

Commented [RR(240R239]: These are major rulemakings, only. See response above.

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[286] ~~Integrated Mortgage Disclosures Under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z) (RIN: 3170-AA19; 78 FR 80225) and [ARBITRATION] [No other rule reviewed by the Task Force presented total cost and benefit estimates.~~

[287] ~~Mortgage Servicing Rules Under the Real Estate Settlement Procedures Act (Regulation X) (RIN: 3170-AA14; 78 FR 10695)~~

[288] ~~The Department of Housing and Urban Development used a cost of foreclosure estimate of $10,339 in its Regulatory Impact Analysis for its Emergency Homeowners Loan Program.~~ [HYPERLINK "https://www.huduser.gov/portal/periodicals/cityscpe/vol13num2/Cityscape_july2011_impact.pdf"]

[289] ~~For instance, the analysis of the Payday, Vehicle Title, and Certain High-Cost Vehicle Installment Loans (3170-AA40; 82 FR 54472) final rule includes effectiveness at preventing the subject loans, but not the effectiveness at reducing consumer harm. The rule may prevent some harms by preventing risky loans, but consumers may shift to other risky loan products that expose borrowers to harms.~~

justification for the selection of the time horizon of the analysis is often missing or non-transparent.[290] The Taskforce also noticed that the Bureau often amortizes upfront costs over a number of years without a clear justification, instead of putting them in the first year of the analysis.[291]

Finally, the Taskforce notes that it did not find a discussion of economic transfers in any of the regulations it reviewed. This may be due to the nature of the requirements under 1022 of the Dodd-Frank Act, which specifically require the Bureau to assess costs and benefits to specific groups, rather than society writ large.[292]

Policy Recommendation and Summary Information

None of the analyses reviewed by the Taskforce summarizes, tabulates, and compares cost and benefits.[293] Net benefits are not presented or calculated, and transfers do not appear in CFPB's analyses. Likewise, there are no qualitative discussions evaluating the tradeoffs. Omitting the presentation of cost and benefits, as well as any form of discussion evaluating the tradeoffs associated with alternative approaches, reduces the probability that the Bureau's CBAs would achieve the purposes of improving decisions, advancing transparency, and enhancing credibility and accountability. The omission also forecloses the possibility that the CBA could recommend a policy alternative. This is an important and meaningful contrast between the best practices identified above (as well as the purposes of CBA) and CFPB's current practice.

Uncertainty

At times, the Bureau has shown commitment to highlighting uncertainty and dealing with it appropriately. For instance, the 2013 Ability-to-Repay rule conducted an excellent sensitivity analysis for its liability cost estimates in response to comments that legal fees were likely to be higher than estimated at the proposed rule stage and the amount of billable hours were likely to be longer. In another example, the Bureau's 2013 rule on Loan Originator Compensation features a frank discussion of state of the literature on the subject:

> The Bureau, however, notes that the current state of academic research has not provided an unequivocal answer to the question of whether any given profit-based compensation arrangement will produce incentives sufficiently strong for individual loan originators to engage in consumer steering. The Bureau also notes that this research, whether based on theoretical or empirical methods, shows that the potential for any profit-sharing plan to create adverse incentives are acutely sensitive to the specific features of the working environment and the means by which such profits are distributed to the relevant individual loan originators. Finally, the Bureau notes that any potential reduction in the strength of these incentives is almost surely insufficient, under all realistic circumstances, to eliminate them entirely.[294]

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Commented [RR(245R244]: Even when costs and benefits are available, the Bureau has not presented the net numbers.

[redacted]

Commented [RR(247R246]: I've deleted transfers. The point is more about presenting net benefits and recommending an alternative.

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290 This statement applies to all rules reviewed by the task force.

291 For example, see Integrated Mortgage Disclosures Under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z) (RIN: 3170-AA19; 78 FR 80225)

292 If, owing to the nature of these statutory requirements, the bureau is treating transfers as symmetric costs to some entities that are benefits to others, the Bureau is dealing with transfers appropriately.

293 Importantly, the Bureau's 2017 Arbitration final rule [RIN] did present a table of a significant portion of the estimated and aggregated costs.

294 Loan Originator Compensation Requirements Under the Truth in Lending Act (RIN: 3170-AA13; 78 FR 11279)

~~Otherwise, the Taskforce's review revealed that discussion of uncertainty was generally sparse. In its review of ten of Major rulemakings (that is, rules expected to have an annual impact of over $100m), the Taskforce identified one sensitivity analysis.~~

~~Consistency with Sec. 1022 of Dodd-Frank~~

~~As discussed above, the CBA requirements in Sec. 1022 of the Dodd Frank Act has universe components (e.g. groups of people the analysis should cover), and content components (costs, benefits, and loss of access to financial products). The Taskforce's review finds that the Bureau does very well in addressing the universe components of the Act. In fact, the Bureau organizes their CBA according to the identified groups of people and business identified in the Dodd-Frank Act and explicitly addresses costs and benefits to each group.~~

~~However, the Taskforce's review found that the Bureau rarely deliberates and scrutinizes issues related to access to financial products. Often, the Bureau merely provides a statement that it considered issues related to access, but summarily dismisses any concerns of reduced access without assessing them analytically or quantitatively – even in cases when the Bureau estimates increased costs that may be passed on to consumers.~~[295]

~~Summary of Findings~~

~~The Taskforce's review of CFPB's regulatory analyses identified several gaps between the Bureau's implementation of CBA and the best practices identified above. Several notable gaps between the Bureau's approach and best practices include a lack of identification, quantification, and monetization of regulatory alternatives; quantification and monetization of benefits, costs, and transfers; the presentation of costs, benefits, transfers, and net benefits of each alternative considered; and a policy recommendation. Given these gaps, the analyses reviewed by the taskforce would not fulfill the purposes of CBA of improving regulatory decisions and enhancing transparency, accountability, and credibility.~~

~~However, the Taskforce did identify some areas of consistency with best practices. For instance, the Bureau did discount future impacts back to present value using an appropriate discount rate when it did endeavor to quantify and monetize a value. Also, the Taskforce believes the Bureau has complied with the universe components of the Dodd-Frank's statutory mandate to consider costs and benefits. The Taskforce does note, however, that the CFPB's implementation of the Dodd-Frank requirement to consider access to financial products is rarely done with any quantitative analysis or rigor.~~

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Commented [ZT(252R250]: [HYPERLINK "mailto Redacted have you resolved these questions or you still need to talk? It doesn't look like you've nailed down good language yet, is that right? [HYPERLINK "mailto Redacted

[redacted]

Commented [RR(254R253]: Same response as above.

Commented [ZT(255R253]: Ross: Have you resolved these questions? [HYPERLINK "mailto Redacted [HYPERLINK "mailto

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[295] ~~See Home Mortgage Disclosure Act (Regulation C) (RIN: 3170-AA10; 80 FR 66127), Loan Originator Compensation Requirements Under the Truth in Lending Act (RIN: 3170-AA13; 78 FR 11279), Mortgage Servicing Rules Under the Real Estate Settlement Procedures Act (Regulation X) (RIN: 3170-AA14; 78 FR 10695)~~

Appendix A: Federal Financial Regulators and Who They Supervise[296]

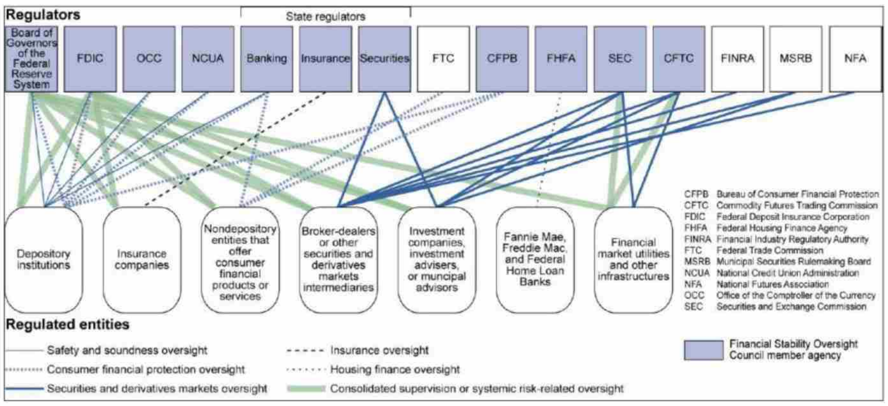
Table 1. Federal Financial Regulators and Who They Supervise

Regulatory Agency	Institutions Regulated	Other Notable Authority
	Depository Regulators	
Federal Reserve	Bank holding companies and certain subsidiaries (e.g., foreign subsidiaries), financial holding companies, securities holding companies, and savings and loan holding companies Primary regulator of state banks that are members of the Federal Reserve System, foreign banking organizations operating in the United States, Edge Corporations, and any firm or payment system designated as systemically significant by the FSOC	Operates discount window ("lender of last resort") for depositories; operates payment system; conducts monetary policy
Office of the Comptroller of the Currency (OCC)	Primary regulator of national banks, U.S. federal branches of foreign banks, and federally chartered thrift institutions	
Federal Deposit Insurance Corporation (FDIC)	Federally insured depository institutions Primary regulator of state banks that are not members of the Federal Reserve System and state-chartered thrift institutions	Operates deposit insurance for banks; resolves failing banks
National Credit Union Administration (NCUA)	Federally chartered or federally insured credit unions	Operates deposit insurance for credit unions; resolves failing credit unions
	Securities Markets Regulators	
Securities and Exchange Commission (SEC)	Securities exchanges; broker-dealers; clearing and settlement agencies; investment funds, including mutual funds; investment advisers, including hedge funds with assets over $150 million; and investment companies Nationally recognized statistical rating organizations Security-based swap (SBS) dealers, major SBS participants, and SBS execution facilities Securities sold to the public	Approves rulemakings by self-regulated organizations
Commodity Futures Trading Commission (CFTC)	Futures exchanges, futures commission merchants, commodity pool operators, commodity trading advisors, derivatives clearing organizations, and designated contract markets Swap dealers, major swap participants, swap execution facilities, and swap data repositories	Approves rulemakings by self-regulated organizations
	Government-Sponsored Enterprise Regulators	
Federal Housing Finance Agency (FHFA)	Fannie Mae, Freddie Mac, and Federal Home Loan Banks	Acting as conservator (since Sept. 2008) for Fannie and Freddie
Farm Credit Administration (FCA)	Farm Credit System, Farmer Mac	
	Consumer Protection Regulator	
Consumer Financial Protection Bureau (CFPB)	Nonbank mortgage-related firms, private student lenders, payday lenders, and larger "consumer financial entities" determined by the CFPB Statutory exemptions for certain markets Rulemaking authority for consumer protection for all banks; supervisory authority for banks with over $10 billion in assets	

[296] Congressional Research Service, *Who Regulates Whom? An Overview of the U.S. Financial Regulatory Framework title*, R44918 (2020).

Appendix B: Regulatory Jurisdiction by Agency and Type of Regulation[297]

Figure 1. Regulatory Jurisdiction by Agency and Type of Regulation



Source: Government Accountability Office (GAO), *Financial Regulation*, GAO-16-175, February 2016, Figure 2.

[297] Congressional Research Service, *Who Regulates Whom? An Overview of the U.S. Financial Regulatory Framework title*, R44918 (2020).